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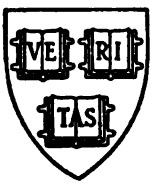


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WITH KEY-NUMBER ANNOTATIONS

## VOLUME 84

PERMANENT EDITION

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST VIRGINIA
THE SUPREME COURTS OF NORTH CAROLINA AND SOUTH
CAROLINA, AND THE SUPREME COURT AND
COURT OF APPEALS OF GEORGIA

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# JUDGES

OF THE

# COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

## GEORGIA—Supreme Court.

WILLIAM H. FISH, CHIEF JUSTICE.
BEVERLY D. EVANS, PRESIDING JUSTICE.

ASSOCIATE JUSTICES.

J. H. LUMPKIN.
MARCUS W. BECK.
SAMUEL C. ATKINSON.
H. W. HILL.

### Court of Appeals.

RICHARD B. RUSSELL, CHIEF JUDGE.

JUDGES.

L. S. ROAN.[1]
P. L. WADE.
N. R. BROYLES.[2]

## NORTH CAROLINA—Supreme Court.

WALTER CLARK, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

PLATT D. WALKER.
GEORGE H. BROWN.
WILLIAM A. HOKE.
WM. R. ALLEN.

## SOUTH CAROLINA—Supreme Court.

EUGENE B. GARY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

DANIEL E. HYDRICK.
R. C. WATTS.
T. B. FRASER.
G. W. GAGE.

## VIRGINIA—Supreme Court of Appeals.

JAMES KEITH, PRESIDENT.

JUDGES.

RICHARD H. CARDWELL.
JOHN A. BUCHANAN.[3]
GEORGE M. HARRISON.
STAFFORD G. WHITTLE.
JOSEPH L. KELLY.[4]

## WEST VIRGINIA—Supreme Court of Appeals.

WILLIAM N. MILLER, PRESIDENT.[5]
IRA E. ROBINSON, PRESIDENT.[6]

JUDGES.

GEORGE POFFENBARGER.
IRA E. ROBINSON.[6]
WILLIAM N. MILLER.[5]
L. JUDSON WILLIAMS.
CHARLES W. LYNCH.

[1] Term expired November 14, 1914.
[2] Qualified November 14, 1914.
[3] Term expired February 1, 1915.
[4] Elected February 1, 1915, to succeed John A. Buchanan.
[5] Ceased to be President and became Judge January 13, 1915.
[6] Became President January 13, 1915.



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# COURT RULES

## SUPREME COURT OF APPEALS OF WEST VIRGINIA

### In Effect After May 15, 1915

#### PRELIMINARY.

#### Bills of Exceptions.

1. Office and Contents. It is the office of a bill of exceptions to point out errors committed by the court during the progress of the trial. The bill or bills should contain only a concise statement of the facts necessary to present the points intended to be relied on as grounds of error, or only so much of the evidence as may appear necessary to present fairly the rulings of the court to which exception is taken. No bill of exceptions should contain matter irrelevant or unnecessary to the presentation of the question intended to be raised.

2. Points Must be Clearly Stated. It is the duty of the exceptor to see that the points and objections on which he relies are correctly and clearly stated, so as to show plainly that an erroneous ruling was made to his prejudice, and he should not leave that fact to appear merely by inference or conjecture.

3. Rulings on Evidence or Instructions. An exception to the admission or rejection of evidence or to the granting or refusal of instructions to the jury, should state only so much of the evidence or facts proven as may be necessary to show the relevancy or irrelevancy of such evidence or the pertinency or impertinency of such instruction. The judge of the trial court should require all unnecessary matter to be stricken out before signing a bill of exceptions.

#### RULE I.

#### Petitions.

1. **Must Assign Errors—Not Argue the Case.** A petition for an appeal or writ of error may briefly state the case and must assign errors, naming the particular decrees or judgments complained of and the date of their rendition, and in the prayer of the petition it should be stated whether or not a supersedeas is desired; but the case is not to be argued in the petition. A separate note of argument, setting forth the points and authorities relied on, *shall* be submitted with the petition, and will be considered by the court, but such note is not to be considered as a part of the petition or to be printed with it. A note of argument may be filed in opposition to such petition.

2. Certificate of Counsel. The petition must be accompanied by the certificate of some attorney duly qualified to practice in this court that in his opinion the decree or judgment complained of ought to be reviewed.

3. Names of Parties to be Summoned. It is also recommended to counsel presenting petitions, that they furnish to the clerk a memorandum of the names of parties to be summoned to answer the appeal or writ of error.

4. Status of Question or Questions Certified. No question or questions shall be certified under the provisions of section one of chapter one hundred and thirty-five of the Code, as amended by chapter sixty-nine of the Acts of the Legislature of 1915, until after decision thereof by the trial court, and such decision shall be certified with the question or questions.

5. Form of Certificate for Cases Certified. The certificate of all questions arising upon the sufficiency of a summons, or return of service, or as to the sufficiency of a pleading, certified pursuant to section one of chapter one hundred and thirty-five of the Code, as amended by chapter sixty-nine of the Acts of the Legislature of 1915, shall be in form or effect following:

In the Circuit Court of —— County. A. B. v. C. D. In Assumpsit (Debt, etc., or In Equity, as the case may be).

To the Supreme Court of Appeals of West Virginia:

The circuit court of said County, of its own motion (or on the joint application of the parties to said suit, as the fact may be), hereby certifies to the said Supreme Court of Appeals, that on the summons (return thereon, or on the declaration, plea, bill, answer, or other pleading, as the case may be) of the plaintiff —— (or the defendant ——, as the case may be), the following points of law or fact have been made: (Here set forth by number the several grounds of any motion to quash, correct, amend, strike out, exclude, or grounds of demurrer, etc., that may have been interposed to such summons, return or pleading.)

A certified copy of said summons (return, or pleadings, as the case may be, or so much thereof as may be necessary to present the point made against it), and of the affidavits, documents, etc., filed in support thereof (if any), on which the judgment of your honors is desired, together with a copy of the court's decision upon such question or questions, is (or are) herewith presented.

Given under my hand this —— day of ——, 19—.

——————, Judge of Said Circuit Court.

## RULE II.

### Docketing and Process.

1. Notice to Court Below and Summons. When an appeal or writ of error has been awarded, it shall be the duty of the clerk to notify the clerk of the court below of the fact of such allowance and of the penalty of the bond necessary to give effect to such appeal or writ of error when such bond is required, and the clerk of this court shall thereupon docket the case and issue process in accordance with the order of the court, summoning all parties other than the petitioner or petitioners.

2. Non-Resident Parties. Whenever it is necessary that a non-resident party should be summoned to answer an appeal or writ of error, or have notice for any other purpose, order of publication may be had in the manner prescribed by law, which order shall be published once a week for four successive weeks in some newspaper published at the seat of government.

## RULE III.

### Printing the Record.

1. Dismissal for Failure to Print. If the appellant or plaintiff in error, except in cases of felony, shall fail to deposit with the clerk of this court within six months after the case has been docketed herein, a sum sufficient to pay for printing the transcript of the record, or shall fail to have the transcript of the record printed and eighteen copies thereof filed in the clerk's office within six months after the case has been docketed in this court, the appeal or writ of error shall be dismissed.

2. How Procured. To procure such dismissal, the appellee or defendant in error must serve upon the opposite party, within reasonable time, a written notice that he will, on a day specified, move the court to dismiss the case, and set forth in such notice the grounds of the said motion. The motion may be made on any day when the court is open whether in regular or special term.

3. Costs. But if, when the motion is made, the record has been already printed or the cost of such printing deposited with the clerk and no actual delay in the hearing of the cause has resulted from the failure to print the record or make such deposit within the six months allowed by law the dismissal will be without costs, otherwise costs will be awarded against the party in default.

4. Renewal. An appeal or writ of error dismissed in accordance with this rule may be renewed upon presenting a new petition reciting the fact of the former petition and allowance and dismissal and referring to the assignments of error contained in the former petition, if the same be presented within one year from the date of the decree or judgment appealed from and new process will be ordered and a new bond must be given.

## RULE IV.

### Argument Docket.

1. How Arranged. Sixty days before the first day of each regular term, or of any special term at which an argument docket may be ordered, the clerk shall prepare a list of the cases then ready and ordered to be heard, and distribute the printed lists to counsel of record in each case.

2. Docketing of Cases Certified. At the time of preparing the docket of any regular or of any special term, the clerk shall also make a docket of all cases certified for decision pursuant to section one, of chapter one hundred and thirty-five of the Code, as amended by chapter sixty-nine of the Acts of the Legislature of 1915, and as to which notice has been given, as prescribed by the next section, which shall be given precedence over all other cases, and next after cases upon original jurisdiction begun in the Supreme Court of Appeals.

3. When Notice is Necessary. In all cases (except those of felony, and cases certified pursuant to section one of chapter one hundred and thirty-five of the Code) when the record has been printed since the last preceding regular term of court, the party desiring a hearing must give notice to the opposite party of his intention to insist upon a hearing at the next regular term, at least sixty days before the first day of such term, and no case will be placed on the argument list and deemed ready for hearing until the second term after the record has been printed unless the notice above mentioned has been given and returned to the clerk's office sixty days before the term.

4. Copy of Bond. No case in which an appeal or supersedeas bond is required shall be placed upon the argument docket until the clerk shall have received a duly attested copy of such bond.

5. Appellee may Expedite Hearing. An appellee or defendant in error desiring to expedite the hearing of his case may have the record printed at his own expense and give the notice required by section three of this rule, and the cost of such printing will, when the case is decided, be taxed among the costs incurred by such appellee or defendant in error, provided the appellant or plaintiff in error does not dismiss his appeal before hearing.

6. Felony Cases. When a writ of error has been allowed in the case of a party convicted of a felony, the clerk shall cause the record to be printed with all convenient dispatch, and the case will be called for hearing at the next regular term of court, wherever it may be held, without notice or consent being required, provided the record has been printed sixty days before the hearing.

7. Cases Certified. The record of cases certified for decision pursuant to section one of chapter one hundred and thirty-five of the Code, need not be printed, unless by order of the court; and without further notice the cases will be called for hearing at the next regular or special term for which they are docketed pursuant to section two hereof.

8. Postponement of Docket. The court will postpone, on its own motion, any docket or portion thereof to a day or days later in the term than that or those for which it has been set for hearing, or to a later term, regular or special, whenever, in its opinion, the public interests require such action; and, in such case, the clerk will give notice of the postponement to the attorneys of record of all parties interested.

## RULE V.

### Briefs.

1. Time of Filing. In any case on appeal or writ of error, the counsel for the appellant or plaintiff in error, at least thirty days, and counsel for the appellee or defendant in error, at least ten days, before a case is called for hearing, shall file with the clerk of this court not less than ten copies of a printed brief, one of which copies shall, upon request, be furnished to each of the counsel engaged upon the opposite side. All reply and supplemental briefs shall be filed at least five days before a case is called for hearing, and no brief shall be filed later unless by consent of counsel. It is also desired by the court that counsel upon each side will furnish promptly to counsel on the opposing side their respective briefs as soon as printed, but their doing so will not obviate the requirement of this rule as to filing copies in the office of the clerk, and it is recommended that the printed brief shall correspond in size of page with the printed record, and bear the same docket number.

2. Form and Contents of Appellant's Brief. The brief of appellant shall contain a short and clear statement disclosing:

First. The kind of action or suit, and a closely condensed statement, without argument or quotation of evidence, of all facts necessary to determination of the points in controversy.

Second. What the issues were and how raised.

Third. How the issues were decided, and what the judgment or decree was.

Fourth. The errors relied upon for reversal.

Fifth. A concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages of the record. If the insufficiency of the evidence to sustain the verdict or finding, in fact or law, is assigned, the statement shall contain a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely. The statement will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party in his brief shall make the necessary corrections or additions.

Following this statement, the brief shall contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them; and in citing cases, the names of parties must be given, with the book and page where reported. No alleged error or point, not contained in this statement of points, shall be raised afterwards, either by reply brief, or in oral or printed argument, or on petition for rehearing, but the court, at its option, may notice a plain error not assigned or specified.

3. Form and Contents of Appellee's Brief. The brief of appellee on the assignment of errors shall point out any omissions or inaccuracies in appellant's statement of the record, and shall contain a short and clear statement of the propositions by which counsel seek to meet the alleged errors and sustain the judgment or decree, or by which such errors are obviated. Following this statement, the brief shall contain the points and authorities relied on in like manner as required in the appellant's brief. The brief of appellee on cross-errors shall be prepared in the manner required in the case of appellant's brief. The brief of appellant, in answer to the cross-assignment of errors, shall be prepared in the manner required of appellees in answer to the assignment of errors. Reply briefs shall be prepared in like manner to answer briefs.

4. Argument. The briefs of any party may be followed by an argument in support of such briefs, which shall be distinct therefrom, but shall be bound with the same. The argument shall be confined to discussion and elaboration of the points contained in the briefs. The names of counsel shall be affixed to all briefs filed by them.

5. Non-Compliance, Effect of. The court on its own motion may refuse to allow submission of any case, until the briefs of the party demanding it, complying with this rule in respect to form and contents, shall have been filed, and may also strike out on submission, briefs not complying therewith.

6. Control of Case. Either party whose brief has been filed in compliance with the rule may insist upon a hearing when the case is regularly called although no brief shall have been filed by the opposite party, and when one party has complied with the rule and the other has not, the party complying with the rule may have the case either submitted or continued at his option. If one of the parties omits to file such brief at or before the hearing, he cannot be heard,

but the case may be submitted or heard ex-parte upon the argument of one counsel only for the party by whom the brief has been duly filed.

7. Continuance for Non-Compliance—No Briefs After Submission. If no printed brief has been filed by either party within the time prescribed by this rule, the case will be continued when called, unless both parties are present in court, by counsel, with their respective briefs, and consent to submit the case with or without oral argument, or file an agreement in writing to submit, but in no case can briefs be filed after the case is submitted.

8. Submission in Absence of Counsel. It is not always necessary for counsel to appear in court in person in order to have a case submitted for judgment by the court; when the party desiring the submission of a case has filed his brief in compliance with the rule, he may by written request addressed to the court or to the clerk have his case submitted when called.

9. Cases Certified—Motions to Dismiss, etc.—How Submitted. All cases certified for decision pursuant to the last paragraph of section one of chapter one hundred and thirty-five of the Code, as amended by chapter sixty-nine of the Acts of the Legislature of 1915, shall, in the first instance, be submitted on typewritten or printed briefs, or arguments, filed in the clerk's office at least five days before the case is set for hearing; and in no case, unless the court so order, will counsel be heard orally thereon. And this rule as to briefs and oral arguments shall apply to all motions to dismiss, affirm, modify or reverse, made pursuant to section twenty-six of said chapter one hundred and thirty-five of the Code, as amended by said chapter sixty-nine of the Acts of the Legislature of 1915.

## RULE VI.

### Calling the Docket.

1. When Commenced. On the second day of each regular term the court will commence to call the cases then ready for hearing in the order in which they stand upon the printed list, and will proceed from day to day in the same order until all of the cases have been called.

2. How Many Cases to be Called. Not more than ten cases shall be considered liable to be called on any one day, including the one, if any, that may be under argument. No case shall be taken up out of the order of the docket except when briefs have been filed on both sides and the parties consent to submit the case without oral argument.

3. Set for Hearing. No case shall be set for hearing on any other day than those assigned to the circuit from which the case comes, unless it be such as from its peculiar character or the mandate of the law may be regarded as a privileged case.

4. Exceptional Cases. Cases of general public interest or of peculiar hardship may be heard at a special term according to the provisions of section 13 of chapter 156, Acts of 1882, under such conditions and regulations as may be consented to by the parties or as the court may prescribe.

5. Agreement of Counsel. All agreements of counsel in regard to any case or matter pending in court shall be reduced to writing, signed by counsel and delivered to the clerk.

6. Re-Argument. Whenever the court desires further argument in any case which has been argued and submitted, it will fix a day therefor, and cause notice of the time and place, as well as of the subject or branch of the case, on which argument is desired, to be given to counsel.

## RULE VII.

### Certiorari.

1. How Obtained. No certiorari for diminution of the record shall be awarded unless a motion therefor shall be made in writing, stating the facts on which the motion is founded, and all motions for such certiorari should be made at the earliest period possible after the diminution is discovered either in regular or special term.

2. When to be Printed. If the necessity for such certiorari is caused by the failure of the appellant or plaintiff in error to have enough of the record brought up to present fairly both sides of all errors complained of by him, it shall be his duty to have the additional record printed, or in default thereof, his appeal or writ of error may be dismissed; otherwise such additional record shall be printed at the expense of the party asking for the certiorari, but when, in either case, the additional record brought up does not exceed ten pages of manuscript, it need not be printed unless so ordered by the court.

## RULE VIII.

### Motions and Affidavits.

1. Must be in Writing. All motions, except motions of course, made to the court, shall be reduced to writing and shall contain a brief statement of the facts and objects of the motion. A motion to dismiss, affirm, modify or reverse, made pursuant to section one of chapter one hundred and thirty-five of the Code, as amended by chapter sixty-nine of the Acts of the Legislature of 1915, shall state the points on which it is based, and notice thereof stating such grounds shall be served on the opposite party or parties and returned to the clerk's office at least thirty days before the day to which the notice is returnable.

2. Notice to be Given. No affidavits shall be read in support of or in opposition to any motion hereafter made to the court unless reasonable notice be given to the opposite

party or his attorney of the time and place of taking the same, or good cause be shown why such notice has not been given and every motion which is not a motion of course, shall be supported by affidavit.

## RULE IX.

### Oral Argument.

1. How Many may be Heard. Only two counsel shall be heard on each side in the argument of any case unless by special leave of court, and the counsel for the appellant or the plaintiff in error shall be entitled to open and conclude the argument.

2. Time Allowed. Forty-Five minutes only shall be allowed to the appellant or plaintiff in error for the opening and conclusion, and thirty minutes to the appellee or defendant in error for his reply, but by special leave of the court granted before the argument begins, a longer time may be allowed to each side. The time allowed may be apportioned between the counsel on the same side at their discretion. But in all cases a fair opening of the case shall be made by the party entitled to the opening and concluding argument.

3. Who to be Deemed Counsel. The attorneys of the respective parties in the court below shall be deemed to be the attorneys of the same parties in this court until others have been retained and have notified the clerk of this court of that fact.

4. Record. In no case is it proper or necessary to consume the time allowed for argument by reading the record to the court, but counsel may refer thereto and state what they consider as proven by any exhibit or deposition on which they rely.

5. Commissioner's Report. No oral argument will be permitted upon exceptions to a commissioner's report except upon pure questions of law and without reference to details of evidence.

## RULE X.

### Cross Assignment of Error.

1. When to be Considered. In any appeal or writ of error, if error is perceived against the appellee or defendant in error, the court will consider the whole record as being before it, and will reverse the proceedings, either in whole or in part, and in the same manner as it would were the appellee or defendant in error to assign errors and bring the case before the court, unless such error be waived by the party prejudiced thereby, which waiver shall be considered as a release of all error committed against him. It is, however, advisable for the appellee or defendant in error, if he is of opinion that there is error in the record to his prejudice, to call attention to the same by a formal counter-assignment of error, filed at the hearing of the case, or by pointing out and complaining of the same in his brief.

## RULE XI.

### Abandoned Cases.

1. When to be Dismissed. When a case has been called for argument at four successive regular terms, and upon the call at the fourth term neither party is prepared to argue the same, the case shall be considered as abandoned and shall be dismissed at the costs of the appellant or plaintiff in error unless sufficient cause be shown for further continuance.

2. Reinstatement. No appeal or writ of error which shall have been dismissed or abated by the court, shall be reinstated or revived after the close of the next regular term after such dismission or abatement.

## RULE XII.

### Rehearing.

1. How Obtained. All petitions for rehearing must be filed not later than thirty days from the date of the decision complained of therein, and no petition for a rehearing will be entertained by the court in any case unless the reasons therefor are printed and filed with the petition. No oral arguments will be permitted upon any application for a rehearing. When a rehearing is allowed, the court may fix the time for re-argument and re-submission, notice of which shall be given by the clerk to the attorneys of record, but, in case it fails to fix such time the clerk shall enter the case upon the docket as if it had never been heard.

## RULE XIII.

### Index to Records.

1. Must be Indexed. In making transcripts of records for appeals and writs of error, the clerks of any court making such transcript, shall annex thereto, a complete index, giving pages of the record on which its chief component parts are to be found, including the pages where the deposition of each witness appears in such record.

## RULE XIV.

### Officers of Court.

1. Accounts. The officers attending this court and receiving an allowance per diem therefor, shall, at the end of each term, furnish an account of the number of days so employed, verifying their accounts by affidavit, and orders of allowance will then be made by the court and certified to the Auditor of State, but such accounts will not be considered or allowed before the close of the term.

## RULE XV.

### Reports.

1. Arguments to be Omitted. In publishing the opinions of this court, the reporter

shall not publish the arguments of counsel, but he shall report the names of counsel on each side, and when the counsel on the side adverse to the decision of the court shall furnish to him the points and authorities relied on, clearly and briefly stated, he may publish in the report such points and authorities; but in no case shall such points and authorities occupy more than one page of the printed report unless express authority therefor be given by the court.

## RULE XVI.

### Original Papers.

1. Not to be Withdrawn. No transcript of record, petition or other original paper or opinion of the court, shall be withdrawn from the custody of the clerk of this court unless upon motion made in court for this purpose and upon order of court permitting such withdrawal, except as provided in section 19, chapter 157, Acts of 1882.

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THE

# SOUTHEASTERN REPORTER

## VOLUME 84

(117 Va. 85)

### NEY et al. v. WRENN et al.

(Supreme Court of Appeals of Virginia. Jan. 12, 1915. Rehearing Denied Jan. 27, 1915.)

1. SALES ⟸52 — CONTRACTS — PAROL EVIDENCE.

Where a contract of sale was signed only by the buyer, but the oral agreement was proved by the testimony of the seller, the admission of evidence of personal interviews and negotiations which led up to and resulted in the sale and delivery of the goods to the buyer was not erroneous; there being no written contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118–144, 1045; Dec. Dig. ⟸52.]

2. SALES ⟸282 — WARRANTY — BREACH — RIGHT TO RELY ON.

Where machinery did not work to the satisfaction of the buyer, as warranted by the seller, who failed to make good his warranty, the buyer could rely on breach of warranty, though he could not arbitrarily or capriciously discard the machinery for breach of warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 797, 798; Dec. Dig. ⟸282.]

3. SALES ⟸288 — WARRANTY — MISCONDUCT OF BUYER.

A buyer of machinery, warranted to do satisfactory work for the purpose for which it was bought, does not lose his right to rely on the warranty by discarding an antequated appliance, and substituting in its stead a modern and more efficient appliance at the request of the seller's agent who installed the machinery, in the absence of any evidence that the use of the appliance caused the machinery not to work satisfactorily.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 817–823; Dec. Dig. ⟸288.]

4. SALES ⟸442—CONTRACT—WARRANTY—REPAIRS.

Where a buyer of machinery, when sued for the price, set up only a claim for damages for breach of warranty, and proved that the machinery was worthless, while the warranty was that it would do satisfactory work, and if not that the seller would make it do it, and that the seller, though frequently called on, failed to make good his warranty, the seller could as a matter of law not limit the buyer's offset to the extent an expert witness said the cost would have been in making repairs necessary to put the machinery in satisfactory working condition.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284–1301; Dec. Dig. ⟸442.]

5. SALES ⟸286—CONTRACTS — WARRANTY — BREACH.

Where defects in machinery sold under a warranty to work satisfactorily were of an inconsequential character, the buyer must notify the seller, and, if he does not make the repairs, he must make them himself and charge them to the seller, while if the defects were serious, or the machinery unsuited to the purpose for which it was purchased, the buyer must notify the seller to remedy it, failing which he may set the machinery aside and recover damages for breach of warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 809; Dec. Dig. ⟸286.]

6. SALES ⟸284—BREACH OF WARRANTY—EVIDENCE—ADMISSIBILITY.

A buyer of machinery warranted by the seller to be modern, up-to-date, and strictly first class, may, in support of his claim of breach of warranty, show that the machinery was secondhand when obtained by the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 803–805; Dec. Dig. ⟸284.]

7. SALES ⟸440—BREACH OF WARRANTY—ACTIONS—EVIDENCE.

Where a seller of warranted machinery asserted that the buyer could not rely on the warranty because he had not used an appliance but had substituted another one, evidence that the agent of the seller to install the machinery had advised the use of the other appliance was admissible to show the condition of the appliance and to explain why it was not used.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1261–1276; Dec. Dig. ⟸440.]

8. APPEAL AND ERROR ⟸1050—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

Where the failure of machinery to operate satisfactorily was not attributable to the substitution of one appliance for another, evidence that the substitution was made at the suggestion of the agent of the seller was not prejudicial to the seller suing for the price.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. ⟸1050.]

9. SALES ⟸446—ACTIONS—BREACH OF WARRANTY—EVIDENCE—INSTRUCTIONS.

In an action for the price of machinery wherein the buyer pleaded the general issue and special pleas of set-off, setting up a breach of warranty, misrepresentations, and failure of consideration, instructions *held* to fairly and fully submit the issues.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1309–1317; Dec. Dig. ⟸446.]

10. TRIAL ⟸260 — INSTRUCTIONS — REFUSAL OF REQUESTED INSTRUCTIONS.

Where the court fairly and fully submitted the issues to the jury, it was not error to refuse requested instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⟸260.]

11. TRIAL ⟸295—INSTRUCTIONS—CONSTRUCTION.

The instructions must be read as a whole, and, if when so read they did not mislead the

jury, the verdict will not be disturbed, though one or more of them may be defective.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703–717; Dec. Dig. ⊂⊃295.]

12. SALES ⊂⊃441 — ACTIONS FOR PRICE — BREACH OF WARRANTY—EVIDENCE.

In an action for the price of machinery warranted to work satisfactorily, evidence *held* to justify a finding of breach of warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277–1283; Dec. Dig. ⊂⊃441.]

Error to Circuit Court, Augusta County.

Action by Isaac Ney and another against M. F. Wrenn and others. There was a judgment for defendants, and plaintiffs bring error. Affirmed.

The instructions given are as follows:

(1) The court instructs the jury that, inasmuch as there is no dispute that the chattels mentioned in the declaration were in fact delivered to and received by the defendants, under no circumstances are the defendants entitled to abatement of purchase money or recoupment by reason of any alleged breach of warranty or misrepresentation other than in the particular specified in their pleas; and that the burden of proof rests on the defendants to show affirmatively by the preponderance of the evidence to the satisfaction of the jury that the machinery did not measure up to the required standard in these particulars.

(2) The court instructs the jury that no special form of words is necessary to create a warranty. Any affirmation of quality by the seller at the time of the sale, intended as an assurance of fact and relied on by the buyer constitutes a warranty.

(3) The court instructs the jury that if they believe from the evidence in this case that the plaintiffs, at the time they sold the machinery, apparatus, and equipment in the declaration mentioned to the defendants, distinctly affirmed that said machinery, apparatus, and equipment were modern, up-to-date, in strictly first-class working condition, and would do satisfactory work, and that they, the said plaintiffs, would make the same do satisfactory work, and that this affirmation was intended by the plaintiffs as an assurance to the defendants of the truth of the facts affirmed, and as an inducement to them to make the purchase, and further believe that said affirmation was received and relied on and acted upon by the defendants, then such affirmation constituted in law an express warranty for the breach of which the plaintiffs are liable in damages to the defendants.

(4) The court instructs the jury that if they believe from the evidence in this case that the plaintiff, Ney, warranted to the defendants, when making sale of the machinery, apparatus, and equipment in the declaration mentioned, that the said machinery, apparatus, and equipment were modern, up-to-date, in strictly first-class working condition, and would do satisfactory work, and further believe from the evidence that the said machinery, apparatus, and equipment were not as warranted, then they should find for the defendants such damages as have resulted naturally from the breach of said warranty.

(4a) The court instructs the jury that if they believe from the evidence in this case that the defendants are entitled to recover damages from the plaintiffs by reason of the breach of any warranty under which the machinery, apparatus, and equipment were sold by the plaintiffs to the defendants, and that the damages shown by the evidence to have naturally resulted from the breach of said warranty exceed the plaintiffs' demand, they should find a verdict in favor of the defendants against the plaintiff for such excess.

(5) The court instructs the jury that, before a contract can exist, the parties to it must agree to the same thing at the same time, and the assent of each party must be to the precise terms offered.

(6) If the jury believe from the evidence that the machinery, etc., was defective, but that said defects were of an inconsequential or minor character and such as one not a skilled mechanic could readily see and remedy, then the defendants should have notified plaintiffs, and they should have been remedied by the plaintiffs upon receipt of notice thereof, and in the event of plaintiffs' failure to discharge this duty then it was the defendants' duty to make said repairs themselves and charge the same to plaintiffs. On the other hand, if you believe from the evidence that the defects were serious, or that the machinery, etc., was unsuited for the purposes for which it was designed, or that said defects, though not in fact serious, were such that one not a skilled mechanic could not readily locate or repair, it was the defendants' duty to notify the plaintiffs. When such notice was given, it was plaintiffs' duty to do what was necessary to put the same in condition for successful operation. If plaintiffs failed to do this, then the defendants had the right to set this machinery aside, procure other machines, and recover of plaintiffs damages suffered.

(7) If you believe from the evidence that the defendants did not install, as part of the machinery purchased, the gasometer because it was inconvenient to do so or for any other reason, and that failure to do this prevented the plant from working satisfactorily or was one of the reasons that prevented it doing such work, then defendants are entitled to no relief from damages due to this cause. On the other hand, if you believe from the evidence that a gas regulator was substituted for the gasometer, and that such substituted device was in all respects equal to the gasometer, and that the operation of the plant was not adversely affected by said substitution, then in that event plaintiffs cannot complain of the substitution. The burden is on the defendants to show that the damages for which relief is claimed did not follow from such substitution. Not until this is done are they entitled to relief for damages so suffered.

(8) The burden is on plaintiff to prove his case, but by a preponderance of the evidence to the satisfaction of the jury—not beyond a reasonable doubt. If independent matters are set up by defendants by way of defense to plaintiffs' demand, the burden is on them to establish such facts by such a preponderance of the evidence, but not beyond a reasonable doubt. As to what were the warranties or representations under which the sale was made, you are to determine this from the evidence adduced before you. You can give judgment for the plaintiff for all of his claim or any part thereof. Also, as to defendants' claim, you may allow it in whole or in part. That is to say, if you find his damages to be ten cents, you may allow plaintiffs' demand less ten cents. If you find it to be $500, you are to allow plaintiffs' claim less that amount. If you find it to be in excess of plaintiffs' demand, you are to give judgment in favor of defendants for such excess.

Rudolph Bumgardner, of Staunton, and D. O. Dechert, of Harrisonburg, for plaintiffs in error. Timberlake & Nelson, of Staunton, for defendants in error.

CARDWELL, J. Isaac Ney and M. Wurzburger, his partner, were the owners of a "soft drink plant" at Harrisonburg, Va.; the equipment thereof consisting of machinery,

bottles, and crates, which machinery had been operated by them for two seasons, 1909 and 1910, and a part of 1911, in the business conducted by them at Harrisonburg under the style of Harrisonburg Bottling Works. Wurzburger had charge of the operation of the plant, and Ney had attended to the office work, bookkeeping, and correspondence. Early in 1911 the calls upon Wurzburger for attention to a store conducted by him, also in the town of Harrisonburg, were such that he could not give his personal attention to the bottling business, and it was discontinued. The machinery and equipment of the plant then remained idle for about one year, when upon learning that M. F. Wrenn, L. L. Koontz, T. M. Wise, Wood Harshbarger, J. F. Pirkey, and J. F. Shaver, residing at or near the village of Weyer's Cave, Augusta county, had organized a bottling company under the name of the Weyer's Cave Lithia Bottling Works, and were on the market for a bottling apparatus, Ney wrote one of Wrenn's associates a letter on February 25, 1912, calling his attention to the fact that the machinery and equipment of his bottling plant at Harrisonburg was for sale. Letters were exchanged, and later both Wrenn and Shaver visited Harrisonburg to see the machinery and to discuss terms of purchase with Ney and Wurzburger, and after interviews with their associates and Ney a purchase of the machinery and equipment constituting the bottling plant at Harrisonburg, exclusive of "any machinery for the generation of power, or any buildings," was agreed upon by Wrenn and associates, at the price of $1,350, of which $50 was paid in cash, $625 was to be paid June 1, 1912, and $675 on May 1, 1913, and the apparatus was to be shipped to Weyer's Cave and installed by the sellers thereof.

After this purchase had been agreed upon and the cash payment of $50 made, Ney suggested that the terms of the contract be reduced to writing, and stated that he would have this done and send the agreement to Shaver, who was acting for his company. A short time afterwards Ney had a contract drawn and sent it, together with the bonds evidencing the deferred installments of purchase money, to the representatives of the company at Weyer's Cave, but when this agreement, which had not been signed by either Ney or Wurzburger, was received, the representatives of the company at Weyer's Cave found that it wholly omitted the warranty upon which the bottling apparatus had been sold to them, and they accordingly wrote out the warranty on a slip of paper and attached it to the agreement, then signed and acknowledged it, and returned it to Ney and Wurzburger. Ney received the paper with the slip attached, put it in his safe, neither he nor his partner, Wurzburger, signing it, and, as he states, forgot all about it; so that the agreement between the parties as to the sale of the apparatus in question was never reduced to writing.

The apparatus was shipped to Weyer's Cave, and it was installed under the direction of a man sent from Harrisonburg by Ney for the purpose; but, shortly after the apparatus had been put into operation under a skilled man, it was discovered that it was wholly unsatisfactory, and that, in spite of all efforts on the part of Wrenn and his associates and on the part of a skilled operator whom they had employed, it could not be made to do satisfactory work, and, when they found that the apparatus would not perform the work for which it was intended and sold, they repeatedly endeavored to get Ney to send some one to Weyer's Cave to examine it and, if possible, to put it in working condition; but Ney, though often promising to comply with these requests, wholly failed to do anything. Wrenn and associates, after using, as they claim, every effort in their power to make the apparatus work, making such repairs thereto as they could, and becoming satisfied that Ney and Wurzburger were not going to pay any attention to their complaints and repeated requests to come or send some one up to see about the apparatus and to make it work satisfactorily, notified Ney and Wurzburger that the apparatus would be taken out and stored subject to the order of Ney and Wurzburger, and payment of the deferred installments of the purchase money refused. Some time after this, Ney and Wurzburger brought this suit against Wrenn and his associates in the purchase of said apparatus to recover the purchase price agreed on therefor.

The defendants pleaded the general issue and filed two special pleas of set-off under the statute—section 3299 of the Code—setting up a breach of warranty, misrepresentation, and failure of consideration, in that the apparatus in question was wholly worthless; that it was old, secondhand machinery when plaintiffs bought it, and which they warranted would do satisfactorily the work for which defendants agreed to buy it; and that they (the defendants), in addition to the loss of time and the loss of business, had suffered other damage due to the removal of the apparatus from their place of business and storage of it elsewhere.

Upon the issues thus made, the jury found for the defendants outright, and upon their pleas of set-off assessed their damages against the plaintiffs at $250. Whereupon, the court being of opinion that the defendants could not upon their pleas of offset recover any damages for loss of profits in their business, but could only recover for the $50 payment they had made and for the actual money expended by them in taking down and storing the apparatus, put the defendants on terms to reduce their recovery to $65, to which defendants assented, and judgment was thereupon entered in their favor for

this amount and costs. This judgment we are asked to review and reverse.

At the trial of the cause below, plaintiffs took a number of bills of exception to rulings of the court in the progress of the trial, and these exceptions are made the basis of numerous assignments of error in the petition for this writ of error; but we deem it only necessary to consider certain propositions of law submitted and argued in the petition as applicable to the case and as requiring a reversal of the judgment complained of.

[1] The first of these propositions is that the contract of sale of the bottling apparatus to defendants in error was in writing, and therefore the trial court erred in admitting evidence of personal interviews and other negotiations between the parties with respect to and resulting in the sale of the apparatus in question.

We have already pointed out that there was no written contract between these parties, and Ney's own testimony given in the case on behalf of himself and his coplaintiff conclusively shows that there was a consummated and complete sale of the apparatus orally in Harrisonburg, and upon certain definite and admitted warranties that this machinery, apparatus, and equipment would do satisfactory work, Ney stating, as he admits, that "it was strictly up-to-date in every respect and in first-class working condition"; that it would do satisfactory work; and that he (Ney) and his associate, Wurzburger, would make it do satisfactory work; that he made these statements intending that defendants in error should accept them as true and rely on them. In these circumstances, the admission of evidence of personal interviews and negotiations between the parties or their representatives, which led up to and resulted in a consummated sale and delivery of the machinery, etc., to defendants, was clearly not erroneous.

[2] The next proposition of law urged as applicable to the case is that the machinery or apparatus in question could not be discarded by defendants in error for arbitrary or capricious reasons, or because it would not do efficient work in inefficient hands.

This proposition of law, in the abstract, is unquestionably sound; but it has no application to this case, in which the evidence shows conclusively that the machinery would not do satisfactory work in the uses for which it was purchased and which the sellers warranted that it would do, but failed or refused to make good their warranty. There was no evidence that in the effort to operate the apparatus satisfactorily it was intrusted to inefficient hands.

[3] The next proposition of law contended for is, in effect, that by reason of defendants having discarded the gasometer, which was one of the three essential parts of the apparatus in question, and substituted in its stead another device known as a "regulator," "they thereby changed the identity of the chattel, so that the subject-matter of the suit is not the same as the subject-matter of the sale," and therefore defendants should not have been heard to make the defense that the apparatus did not and could not be made to do satisfactory work as plaintiffs admitted that they had agreed that it should do.

The evidence in the case shows that the gasometer was discarded and the "regulator" substituted in its stead because the first named was an antiquated device, while the latter was a modern and efficient device, and this change was made upon the advice of H. S. Butler, witness for plaintiffs in this suit and their agent and representative who was sent by them to install and put in operation this apparatus; Butler saying that the gasometer was utterly worthless. Not only so, but Mosely, the expert witness introduced by plaintiffs, testified that the "regulator" was the modern and efficient device and the one which he himself used in his own plant, and, further, that this particular regulator, which defendants used in place of the gasometer, was the best that could be obtained, and that no unsatisfactory operation of the plant could possibly be charged to its use. It further appears in evidence that, when defendants in error took out the apparatus in question and put in a new one, they continued to use the identical regulator which they had used with the apparatus taken out and it gave perfect satisfaction. It cannot therefore, in the light of these facts, be maintained that the employment of a modern and efficient regulator in the place of an inefficient gasometer occasioned, as is contended, the loss to defendants of their rights under the warranty made them by plaintiffs.

[4] The next contention of plaintiffs in error is also without merit. It is that the alleged inefficiency of this machinery or apparatus was due to the worn condition of certain parts designated as "repairs" easily supplied at small cost from the factory, and at the utmost entitling defendants to a rebate of purchase money by way of damages, to the extent of the small outlay necessary to replace these parts, and by no means justifying a rescinding of their contract of purchase. This contention goes further and makes claim that the court should have, in its instructions, told the jury that they could only allow defendants' offset to the extent that plaintiffs' witness said the cost would have been in making repairs necessary to put the apparatus in question in satisfactory working condition.

In the first place, the defense to this action set up by defendants in their special pleas of set-off, as authorized by the statute, supra, did not involve a rescission of the contract between the parties, but only set up a claim for the damages sustained by them because of plaintiffs' breach of their warranty. Secondly, the evidence tended to prove that

the apparatus in question was wholly worthless, and therefore unsuited to the purposes for which it was bought, while the warranty given by plaintiffs, according to the undisputed facts proven, was that the apparatus would do satisfactory work, and if it did not plaintiffs would make it do it; that defendants called on plaintiffs time and again after it was found that the apparatus would not work properly to make good this part of their warranty, and they wholly failed or refused to do so.

[6] Plaintiffs, as it would seem, relied upon, as supporting their contention that the claim to damages set up by defendants on account of the breach of warranty should have been limited to what their (plaintiffs') expert witness, who had never seen the apparatus, stated it would have cost to make the repairs necessary to put the apparatus in working condition, but, as it appears to us, the court very plainly and correctly stated to the jury the law on this subject in instruction O, which the court gave of its own motion. This instruction told the jury that if the defects in the apparatus in question were of an inconsequential or minor character, such as one who is not a skilled mechanic could readily see and remedy, it was the duty of defendants, under the terms of the warranty, to notify plaintiffs, and, if plaintiffs did not make the repairs, to make them themselves and charge them to the plaintiffs. Thus the jury were enabled to consider all the evidence for plaintiffs on this line, and the instruction then correctly told the jury that if the defects were serious, or the machinery unsuited to the purposes for which it was designed and purchased, or if the defects, though not in fact serious, were such as one not a skilled mechanic could not readily locate or remedy, it was the duty of defendants to notify plaintiffs to remedy it, failing which the defendants had the right to set the machinery aside, buy other machinery, and set up their damages by reason of plaintiffs' breach of warranty.

[6] It is next contended that as a matter of law the court erred in allowing defendants to show that the machinery was secondhand machinery when plaintiffs bought it in Baltimore. Manifestly this evidence was admitted, not for the purpose of showing a warranty against the machinery being secondhand, but to show that fact as tending to corroborate the contention of defendants that it was not "modern, up-to-date, and strictly first-class in every respect," as plaintiffs had warranted it to be.

[7] It is next urged that the trial court erred in allowing the defendants to show that Butler, who was sent by plaintiffs to Weyer's Cave to install the machinery, said that the gasometer was of no value, and that the machinery would work as well without it.

[8] Plaintiffs were urging at the trial, as one of the reasons why defendants could not rely upon their warranty, the fact that they did not use the gasometer, and therefore it was clearly competent for the defendants to prove, among other things, that Butler, the plaintiffs' own agent and representative, who was sent by them to Weyer's Cave for the purpose of installing and putting the machinery in operation, had then and there stated that the gasometer was of no value and advised defendants not to have it put in. Not only was this evidence competent to show the condition of the apparatus, but to explain the reason why the defendants did not install and use the gasometer. But if there was any good reason for contesting the competency of this evidence, its admission could not have materially affected the rights of plaintiffs; for the fact plainly appears from their own evidence that the gas regulator which defendants did use was an infinitely better device than the gasometer discarded upon the advice of Butler, so that none of the failure of the apparatus to operate satisfactorily could possibly have been attributable to the substitution of the regulator for the gasometer.

[9] After the evidence in the case had gone to the jury, the court was asked by the respective parties to give numerous instructions; but, instead of instructing the jury as asked, it gave nine instructions to the jury as to the law of the case, designated in the record as "Nos. 1, 2, 3, 4, 4a, 5, 6, 7, and 8"; the last three being of the court's own volition.

[10] The instructions given (and set out in the official report of this opinion) fairly and fully submitted to the jury the case on every material point involved, applying the law to the facts which the evidence tended to prove as justly and as fairly as the respective parties to the controversy could reasonably have asked. Having thus instructed the jury, it was not, as this court has repeatedly ruled, error to refuse other instructions asked. Among the latest expressions by this court affirming that rule is to be found in Bowman v. First Nat. Bank, 115 Va. 463, 80 S. E. 95; Luck Construction Co. v. Russell, 115 Va. 335, 79 S. E. 393.

[11] Another, and equally as well established rule is that instructions in a case are to be read as a whole, and if, when so read, it can be seen (as in the case here) that the instructions could not have misled the jury, their verdict will not be disturbed, even though one or more of the instructions was defective. C. & O. Ry. Co. v. McCarthy, 114 Va. 181, 76 S. E. 319.

The instructions in this case to which no specific objection is clearly pointed out appear to us so manifestly correct and so fully and fairly covered every fact in the case which the evidence tended to prove as to leave the plaintiffs no just cause for complaint of them.

[12] The remaining question is whether or not the trial court erred in refusing to set aside the verdict of the jury and award the plaintiffs a new trial.

We have already, in discussing other questions, gone quite fully into the facts which the evidence tended to prove, and deem it necessary to add but little here with respect to the sufficiency of the evidence to sustain the verdict of the jury. That the sale of the bottling apparatus by plaintiffs to the defendants was under a warranty given by the former to the latter to the effect that this machinery "was strictly up-to-date in every respect and in first-class working condition," and that these representations were made for the purpose of having defendants rely on them, are facts conceded in the trial of this case. It also very clearly appears in the evidence that, when defendants found that the apparatus would not do the work for which it was intended and sold, Ney, from whom the apparatus had been purchased, was duly notified of its defective condition and asked a number of times to come himself or send some one to Weyer's Cave to examine the apparatus and, if possible, put it in working condition, but neither Ney nor his partner, Wurzburger, though promising to comply with those requests, would do anything towards making the apparatus do the work for which it was intended and which it was warranted by them to do. It further appears, as before stated, that defendants made every effort in their power to make the apparatus work satisfactorily, making such repairs thereto as they could, and it was not until they found that it could not be made to so work, and that Ney and Wurzburger were not going to pay any attention to the complaints made to them of the unsatisfactory work the apparatus was doing, did defendants, after notice to plaintiffs of their purpose to do so, take the apparatus out of their place of business, store it away subject to the order of the plaintiffs, and refuse to pay the balance of the purchase price therefor. According to the evidence of the defendants—and there was little, if any, to the contrary—this entire apparatus and equipment were worthless and fit only for junk.

No good purpose could be subserved by discussing further the evidence in the case. Suffice it to say that the jury would not have been, in our judgment, warranted in finding any other verdict than they did find, to the effect that there had been a warranty of the apparatus in question, as above stated; that there was a total breach of this warranty, and therefore plaintiffs were not entitled to recover of defendants in this action any part of the purchase money for the apparatus sued for.

As observed, the jury found a verdict in excess of offsets in favor of defendants against plaintiffs for $250, which was made up in part by loss of profits or business; but the court, with the assent of defendants, reduced this recovery to $65, which latter sum is made up of the cash payment of $50 they had made to plaintiffs on the purchase price of the bottling apparatus in question and the actual money expended by defendants in taking down and storing the apparatus subject to the order and control of the plaintiffs.

Upon the whole case, we are of opinion that the judgment of the circuit court complained of is right, and therefore it is affirmed.

Affirmed.

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(117 Va. 11)

## CALDWELL et ux. v. TANNEHILL.

(Supreme Court of Appeals of Virginia. Jan. 12, 1915.)

1. BROKERS ⟸49—COMPENSATION—RIGHT TO.
A real estate broker, to recover compensation, must show that he has completed his undertaking according to its terms, or that its completion was prevented by the principal's unauthorized act.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70–72; Dec. Dig. ⟸49.]

2. BROKERS ⟸52 — COMPENSATION — CONTRACTS.
Where a broker's authority to sell property expired, unless the land was sold, or contracted in writing to be sold, on or before a named date, the broker did not become entitled to his commission merely because, within the time fixed, he produced a purchaser ready, able, and willing to buy, where the land was not sold, and no written contract of sale was executed, within the time fixed.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73; Dec. Dig. ⟸52.]

3. BROKERS ⟸63—COMPENSATION—RIGHT TO.
Defendant, who authorized a broker to sell, or contract in writing to sell, his land before a given date, refused to sign an agreement prepared by the customer's counsel, which was not in accordance with the terms on which the land was offered. Thereafter defendant prepared an agreement, which also was not according to terms. The broker did not procure the execution of a written contract for the sale of the land before the expiration of his authority. *Held*, that as the acts of defendant were not unauthorized, and that did not prevent the broker from preparing a contract of sale embodying the terms agreed upon and procuring its execution, the broker is not entitled to commission because of defendant's acts.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94–96; Dec. Dig. ⟸63.]

Error to Corporation Court of Staunton.

Action by J. F. Tannehill, Jr., against C. R. Caldwell and wife. There was a judgment for plaintiff, and defendants bring error. Reversed and remanded.

Fitzhugh Elder and J. M. Perry, both of Staunton, for plaintiffs in error. Timberlake & Nelson, of Staunton, for defendant in error.

BUCHANAN, J. This is a writ of error to a judgment rendered in favor of the defendant in error, Tannehill, against the plain-

tiffs in error, Caldwell and wife, in an action of assumpsit to recover compensation for services as a real estate broker.

The claim sued for is based upon the contention by Mr. Tannehill:

"That he had produced to his principal a customer who was ready, willing, and able to purchase the farm upon the terms fixed by the principal, and that the sale was prevented by the wrongful and arbitrary refusal of the principal to close it on his part."

There is no controversy between the parties as to the amount of compensation, nor as to the customer's ability to purchase the farm. The whole controversy here is, and in the trial court was, whether or not the broker had done all that it was his duty as such broker to do to entitle him to compensation.

By a letter dated November 18, 1913, written by Mr. Caldwell, Mr. Tannehill was authorized to make sale of the farm. That letter, and an indorsement upon it extending the time within which the broker was authorized to sell, is as follows:

"Referring to our conversation of this morning with reference to sale of 'Caldwallen.' This place is not now and has not been on the market, as you know. Some little while ago I gave you a price, however, of $50,000 on the farm, and as a result of some negotiations between you and your customer, I agreed to shade that price to $40,000. We are not anxious to sell it by any means at that figure, but in view of the fact that you have evidently interested yourself in finding a purchaser for the property, and in order to be perfectly fair with you, I will allow that price to remain for the next ten (10) days; that is to say, until you have had the opportunity to complete your negotiations with your present customer, provided, however, that even that shall not carry the date beyond November 28, 1913. Please, however, do not construe this as a general option on the place. I do not care to have it under option, and it is only in a spirit of friendliness that I give you the time above mentioned to conclude, if possible, your present negotiations. You will understand, of course, that unless the place is sold or contracted to be sold in writing on or before November 28, 1913, the whole proposition is withdrawn, and if it comes up again it must come up as new business. In this connection I would be glad if you would not allow the impression to get abroad that this place is upon the market. Such is not the case, and I really do not care to part with the property. While the terms mentioned in this letter are understood to be cash, I would be disposed to make some reasonable concession along that line, if necessary. The above price includes the loose straw and the fodder raised on the place this last year, but does not include the ensilage or any other farm product, or personal property of any description.

"Yours very truly, C. R. Caldwell.
"November 20, 1913.

"I hereby agree to extend the option as stated above until noon, December 3, 1913.
"C. R. Caldwell."

The customer, whom the broker claims to have found as ready, willing, and able to purchase the property upon the terms upon which he was authorized to sell, did not enter into a written agreement to purchase, either with the broker or the owner, and no sale was made.

[1] The general rule is that a real estate broker, to be entitled to compensation, must show that he has completed his undertaking according to its terms, or that its completion was prevented without his fault by his principal at a time or under circumstances when the latter had no right to interfere. 2 Mechem on Agency, § 2427; 2 Skyles & Clark on Agency, § 1770.

That rule is stated as follows in Crockett v. Grayson, 98 Va. 354, 357, 36 S. E. 477, 478:

"A real estate broker, to be entitled to compensation, must complete the sale. He must find a purchaser in a situation ready and willing to complete the purchase upon terms agreed upon before he is entitled to his commissions. When he has found such purchaser, who has entered into a valid contract, his right to compensation cannot be defeated by the fault of the seller, by his misrepresentation, or by his whimsical or unreasonable refusal to comply with his contract."

The rule as thus laid down has been reiterated and approved in other cases, among them in Vaughan v. Pleasonton, 112 Va. 508, 71 S. E. 529, and in Middle Atlantic Co. v. Ardan, 115 Va. 148, 155, 78 S. E. 588.

[2, 3] In the case under consideration the letter quoted, which was the broker's authority to sell, contained special stipulations. It expressly provided, among other things:

"That unless the place is sold or contracted to be sold in writing on or before November 28, 1913, the whole proposition is withdrawn, and if it comes up again it must come up as new business."

The time within which the authority given could be exercised was extended until December 3d following. The letter was not a mere authority to find a purchaser, but in order to comply with his undertaking the farm must be sold or contracted to be sold in writing within the time named. Under such authority the broker does not become entitled to his commissions by merely producing a customer who is ready, willing, and able to purchase unless a sale or contract to sell is actually entered into by the owner of the land.

"A broker," says Mechem on Agency, § 2428, "employed to sell real estate, may be authorized and required by the terms of his undertaking not only to find a purchaser, but even to conclude an actual transfer, or at least to procure from the purchaser a valid written agreement binding him to purchase upon the terms specified; and where this is the undertaking the broker has not earned his commission until he has performed it, or the principal has accepted a less complete performance."

In 2 Clark & Skyles on Agency, § 772, it is said:

"If the broker is specially employed to negotiate for his principal the purchase, sale, or exchange of real estate, at a fixed sum, his services will not be complete until a valid written contract binding on both vendor and purchaser has been entered into to purchase, sell, or exchange on the terms specified, unless this condition is waived by the principal; but until such contract has been made, or waived, the broker has not earned his commissions. Or if it be agreed between the broker and the owner that

such contract of sale shall be in writing, then no commission can be collected until such written contract is furnished."

The statement of these text-writers seems to be sustained by the cases cited in the notes, and in note to Pfanz v. Humburg, 29 L. R. A. (N. S.) 533.

The evidence shows or tends to show that on the 1st of December, within the time named as extended, in which the broker was authorized to sell or procure in writing a contract of sale, he brought to his principal for execution an unsigned agreement prepared by his customer's counsel, whose terms differed from those upon which the broker was authorized to sell, in this: That it provided for the payment of the purchase price upon credits running over a period of five years instead of for cash. The owner declined to sign that paper and informed the broker that he would prepare a paper himself. He did so, but the terms of the paper differed from those upon which he had authorized the broker to sell in several particulars, the most material of which was that he would convey with special warranty, instead of with general warranty. When that paper was carried by the broker to his customer, he declined to sign it, saying that it was not according to the way he understood things, and that he did not intend to have anything to do with it. This was on the morning of the 2d of December. Further efforts were made by the broker to induce his principal and his customer to enter into an agreement for the sale and purchase of the farm. There was evidence tending to show that the principal was anxious to avoid selling the farm, and that, while the customer had made arrangements for money to pay all cash, he did not wish to do so if he could procure a contract which would give time for the payment of a large part of the purchase price, and that the broker informed his principal that, while his customer was anxious to get time on part of the purchase price, he could and would pay all cash. On the other hand, the principal informed the broker that he would convey with general warranty. While both the principal and the customer were in the city of Staunton on the 1st and 2d days of December, they were never brought together, and never saw each other, nor had any communications with each other; but the efforts to bring about an agreement between them were made by the broker alone, except that the customer's attorney saw the principal and sought to induce him to agree to sell the farm partly on credit.

The time within which the broker was authorized to sell expired at noon on the 3d day of December without a sale or contract for sale having been made. What the evidence tended to prove has been sufficiently stated to enable the court to pass upon the propriety of the trial court's action in giving and refusing instructions.

The court, on motion of the plaintiff, gave the following instructions, each of which was objected to by the defendant:

A. "The court instructs the jury that the entire duty of the plaintiff under his contract with the defendants was to find and report to the defendants a person who was ready, willing, and able to purchase their property at the price and upon the terms which they had designated; and if the jury believe from the evidence that the plaintiff performed this duty, they must find a verdict in his favor for the amount of his agreed compensation, viz., $1,500, with interest from December 2, 1913."

B. "The court instructs the jury that when a real estate agent has found and reported to his employer a purchaser in a situation ready, willing, and able to purchase the property upon the terms fixed by the owner, the owner cannot defeat the agent's claim for commission by an arbitrary or whimsical refusal to consummate the sale or by insisting upon terms other than those upon which he authorized the agent to sell."

C. "The court instructs the jury that if they believe from the evidence in this case that the plaintiff found and reported to the defendants a purchaser in the person of Mr. E. A. Dudley who was in a situation ready, willing, and able to purchase the property of the defendants upon the terms fixed by the defendants, and that the purchase of said property by said purchaser was prevented by the defendants insisting upon the injection of new or additional terms of sale into the contract between themselves and said purchaser, the jury must find a verdict in favor of the plaintiff."

E. "The court instructs the jury that, where reference is made in the instructions in this case to the duty of a real estate agent to actually make a sale before being entitled to his commissions, the court means to tell the jury that sale by a real estate agent is actually made as between his employer and himself when he has found and reported to his employer a purchaser who is in a situation ready, willing, and able to buy upon the terms fixed by the owner."

And refused to give the following instruction asked for by the defendants:

"The court instructs the jury that, under the writing of November 18, 1913, extended by notation thereon to December 3, 1913, the plaintiff, Tannehill, before he is entitled to recover anything in this cause, must show, by a preponderance of the evidence, either that he completed a sale of the land herein mentioned, at the price and upon the terms and conditions of said writing, or that he produced to the defendant a party who evidenced his willingness to buy at the price and upon the terms and conditions of said writing, by signing a paper or proposition containing said price and terms and conditions.

"The court instructs the jury that a real estate broker, to be entitled to compensation, must complete the sale. He must find a purchaser in a situation ready and willing to complete the purchase upon the terms agreed upon before he is entitled to his commissions. When he has found such a purchaser, who has entered into a valid contract, his right to compensation cannot be defeated by the fault of the seller, by his misrepresentation, or by his whimsical or unreasonable refusal to comply with his contract."

The said instructions given for the plaintiff ignore the fact that the broker was acting under a special authority, which required him to sell to his customer or to secure a contract in writing from his customer binding him to purchase upon the terms upon which he was authorized to sell. The broker had not performed his undertaking until such sale was made or such written contract for its

sale was procured, unless his principal has waived that requirement, or has prevented the broker from procuring a written contract to purchase from his customer. There is no evidence tending to show that the principal prevented the broker from selling or procuring a contract in writing binding his customer to purchase. If the customer was willing to purchase upon the terms upon which the broker was authorized to sell, all that was necessary for the broker to do to fully perform his undertaking, so as to become entitled to his commissions, was to procure such a contract from his customer, who it is conceded was financially able to make the purchase, and deliver that contract to his principal. The action of the seller in refusing to sign the agreement prepared by the counsel of the broker's customer, and the seller's preparation of a written contract for the broker's customer to consider or to sign (neither of which papers were in accordance with the terms upon which the broker was authorized to sell), did not prevent the broker from securing such a contract of sale as his undertaking required him to secure, nor did the seller's action in reference to such papers (since neither was executed by the other) release the broker from his undertaking to secure such a contract from his customer.

The broker not having sold or procured from his customer a written contract binding him to purchase, and not having been prevented by his principal from securing such contract within the time named or released from so doing, he did not do all that his undertaking required him to do, and was not, therefore, entitled to the commissions sued for; for the broker must show that he has completed his undertaking according to its terms, or that its completion was prevented without his fault by his principal at a time or under circumstances when the latter had no right to interfere. 2 Mechem on Agency (2d Ed.) § 2427; Clark & Skyles on Agency, § 770.

It follows from what has been said that the court erred in giving instructions A, B, C, and E, and in refusing to give the instructions asked for by the defendant as set out in bill of exceptions No. 1.

The judgment complained of must be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

Reversed.

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(117 Va. 46)

## GRANT v. CHESAPEAKE & O. RY. CO. et al.

(Supreme Court of Appeals of Virginia. Jan. 12, 1915. Rehearing Denied Jan. 27, 1915.)

1. NAVIGABLE WATERS ⟸36—RIGHTS BETWEEN STATE AND RIPARIAN PROPRIETORS.

Title to the water of the river above tide and between the termini of the James river and the Kanawha canal is vested in the commonwealth and its grantees, and not in its riparian proprietors.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180–200; Dec. Dig. ⟸36.]

2. NAVIGABLE WATERS ⟸39 — RIPARIAN RIGHTS—LACHES.

Any water power rights of a riparian owner on the James river is lost by laches; he for more than a half century witnessing, without objection, the exclusive appropriation of the water of the river by the state and the transfer of its rights therein to others, and the contracting by a city for its water supply therefrom, and other changes in the condition and relation of the property and the parties as to make it inequitable to permit his claim to be enforced.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239–244; Dec. Dig. ⟸39.]

Appeal from Law and Equity Court of City of Richmond.

Suit by W. E. Grant, Jr., executor, against the Chesapeake & Ohio Railway Company and the City of Richmond. Bill dismissed, and complainant appeals. Affirmed.

Willis B. Smith and S. A. Anderson, both of Richmond, for appellant. Henry Taylor, Jr. and H. R. Pollard, both of Richmond, for appellees.

WHITTLE, J. This is an analogous case to that of Old Dominion Iron & Nail Works Co. v. Chesapeake & Ohio Railway Co. and City of Richmond, an opinion in which, affirming the decree of the law and equity court of the city of Richmond, was handed down at the March term, last, of this court. 81 S. E. 108.

The essential facts upon which the rights asserted in both cases depend in effect are the same. Indeed, the similarity between the two cases is conceded in the petition for appeal in this case, and the truth of that admission is made manifest by an examination of the bills and exhibits in each. Both cases were pending in the law and equity court at the same time, and the bills in both were dismissed on demurrer.

[1] 1. The general question of the alleged right of appellant and others to the water of James river arising purely out of riparian ownership has been dealt with and determined in the Old Dominion Case. There it was held that title to the water of the river above tide and between the termini of the James river and Kanawha canal was vested in the commonwealth and its grantees and not in the riparian proprietors; and we have no disposition to recede from that conclusion.

[2] 2. Concerning the special claim to water power on the south side of James river that the predecessors in title of appellant in time past may have had, we are of opinion that such claim has long since been lost by laches and lapse of time. For more than a

half century they stood by and without objection witnessed the exclusive appropriation of the water of the river by the state, and the transfer of its rights therein successively to the James River Company, the James River & Kanawha Company, the Richmond & Alleghany Railroad Company, and the Chesapeake & Ohio Railway Company. They moreover saw contracts entered into with the city of Richmond for its present water supply, and such other changes in the condition and relation of the property and the parties as would render it inequitable at this time to permit the claim to be enforced, however meritorious it originally may have been. It is now too late, and the consequences would be too grave, to entertain a bill to enjoin the exercise of rights of such vital importance to the public and others, and which have been so notoriously asserted and so long continued without challenge. To such a situation the maxim, "Vigilantibus non dormientibus leges subvenient," applies with full force.

In the Old Dominion suit the controlling questions common to both cases, after full argument and upon careful deliberation, were resolved in favor of the appellee; and it is unnecessary to review in detail the contentions there made and the law applicable thereto. Our only purpose here is to emphasize, in a general way, the fact that there are no such differentiating features between the two cases as should call for a different decision in the present case from that rendered in the former.

The decree appealed from must therefore be affirmed. Affirmed.

KEITH, P., absent.

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(117 Va. 41)

## E. W. FACE & SON v. CHERRY et al.

(Supreme Court of Appeals of Virginia. Jan. 12, 1915. Rehearing Denied Jan. 27, 1915.)

1. NUISANCE ⟸32 — PRIVATE NUISANCE — PUBLIC NUISANCE—PLEADING.

A bill to enjoin the operation of a brick manufacturing plant as a nuisance, injuriously affecting plaintiffs' property and health and the enjoyment of their home, which alleges that the smoke, soot, etc., affects plaintiffs' dwelling and "other property in the neighborhood," complains only of a private nuisance, within the rule that nuisances of a private nature occur in the erection of structures obnoxious or hurtful to buildings used for residence and business purposes, and that a business which imperils the comfort or health of inmates of neighboring dwellings may be enjoined.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 77–83; Dec. Dig. ⟸32.]

2. APPEAL AND ERROR ⟸1062—HARMLESS ERROR—ERRORS NOT AFFECTING RESULT.

The error in directing a trial by jury of the issue, in a suit to restrain a nuisance, was immaterial, where the jury failed to agree, and the court, at the request of both sides, set aside the order for submission and disposed of the controversy on the evidence in the case, including that taken before the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212–4218; Dec. Dig. ⟸1062.]

3. NUISANCE ⟸29 — PRIVATE NUISANCE — ABATEMENT—LACHES.

Where conditions creating a nuisance by the operation of a brick manufacturing plant over a period of many years were gradual and cumulative in their character, and the nuisance was a continuing one, laches did not defeat injunctive relief.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 68; Dec. Dig. ⟸29.]

4. NUISANCE ⟸3—PRIVATE NUISANCE—ACTS CONSTITUTING.

The operation of a brick manufacturing plant, so as to seriously affect the property and health and enjoyment of persons living in the neighborhood by the escape of smoke and soot, creates a nuisance, which equity may perpetually enjoin, by enjoining the burning of any of the kilns in such a way as to cause dense soot or smoke to fall on the neighboring property, or operating the kilns immediately adjoining the neighboring property with any other than smokeless fuel.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 4, 5, 9–25; Dec. Dig. ⟸3.]

Appeal from Circuit Court of City of Norfolk.

Suit by J. F. L. Cherry and another against E. W. Face & Son. From a decree for plaintiffs, defendants appeal. Affirmed.

Thos. W. Shelton, of Norfolk, for appellants. Riddleberger & Roper, of Norfolk, for appellees.

WHITTLE, J. Appellees, who own and occupy, with their family, a residence on River avenue, in the city of Norfolk, filed their bill against appellants, praying for a permanent injunction to restrain the defendants from operating their brick manufacturing plant, located on the same square, on the ground that it constituted a nuisance injuriously affecting their property and health and the enjoyment of their home.

At the final hearing the court decreed that the smoke and soot emitted by defendants' kilns was a nuisance to the plaintiffs, and perpetually enjoined them from the burning of any of their kilns in such a way as to cause dense smoke or dense soot to fall upon the property of the plaintiffs, and, moreover, perpetually enjoined the defendants from operating their new kiln, immediately adjoining the plaintiffs' lot, with any other than smokeless fuel. From that decree this appeal was granted.

[1] 1. The first assignment of error is to the action of the court in overruling the demurrer to the bill.

This assignment proceeds upon the theory that the bill seeks relief against a public nuisance and not a private nuisance, because of the allegation that the smoke, soot, etc., of which complaint is made, affects plaintiffs' dwelling and "other property in the

neighborhood." Plainly the superadded language does not have the effect of converting what is essentially a private nuisance into a public nuisance.

In High on Injunctions, the author, in treating the subject, says:

"The most frequent instance of nuisances of a strictly private nature occurs in the erection of structures obnoxious or hurtful to buildings used for residence and business purposes. The law may be regarded as settled that when a business, although lawful in itself, becomes obnoxious to neighboring dwellings and renders their enjoyment uncomfortable, whether by smoke, cinders, noise, offensive odors, noxious gases, or otherwise, the carrying on of such business is a nuisance which equity will restrain. * * * And the fact that the nuisance is not perpetual, but will only recur occasionally, and then but for a short period, will not avail the defendant if it be an unmistakable nuisance." 1 High on Injunctions (4th Ed.) § 772.

In illustrating the general rule, the author, at section 773, observes:

"When loss of health, destruction of business, and irreparable injury to property will result from the obnoxious erections, equity will not hesitate to interfere. Thus the burning of brick so near a dwelling as to expose the premises to danger from fire and to imperil the health of the inmates, * * * if so near a residence as to imperil the comfort or health of its inmates, will be enjoined. And mere smoke or disagreeable odors, although not noxious, may be sufficient ground for the interference of equity."

Again, at section 777, it is said:

"It is also held that the burning of brick by the use of anthracite coal, by means of which noxious gases are generated adjacent to plaintiffs' residence, resulting in the destruction of plaintiffs' trees and shrubbery, constitutes such a nuisance as to call for relief by injunction. And a defendant may be enjoined from permitting soot to issue from a smokestack upon his premises in a city, to the annoyance of the plaintiff and his family."

The foregoing statement of the law sufficiently shows that the nuisance in question is a private nuisance and not a public nuisance, and that the demurrer to the bill was without merit and rightly overruled.

[2] 2. Complaint is made that the trial court, of its own motion, directed an issue to be tried by a jury to determine the fact whether the defendants' brick kilns threw out smoke and soot, and whether the new kiln threw out smoke and soot and heat in such quantities as to constitute a nuisance to plaintiffs in the ways and manner alleged in the bill.

This assignment is immaterial, in view of the fact that the jury failed to agree upon a verdict, and that the court, at the request of counsel on both sides, set aside the order for an issue and disposed of the controversy upon all the evidence in the case, including that taken ore tenus before the jury.

[3] 3. The next contention is that appellees have lived adjacent to appellants' kilns for 18 years without protest, and therefore should be denied relief on the ground of laches.

We do not think the evidence altogether sustains this contention; but, if it did, the construction of this plant, consisting, as it does, of five separate kilns, was admittedly a gradual process, covering the period from the spring of 1897, hitherto. The first four kilns were not completed until about seven years ago, and the fifth and last kiln, which is the nearest in point of distance, and which constitutes the most serious menace to appellees' dwelling, was not commenced until after the institution of this suit. Indeed, the consideration of the questions arising in relation to that structure were brought within the cognizance of the trial court in the present case only by consent of parties. The first kiln was built on the water front farthest removed from appellees' residence, and the remaining structures, successively erected, approached nearer and nearer until the last, which is located 22.5 feet from the back line of appellees' lot and 81.5 feet from the dwelling. And the tops of the kilns are on a lower level than the second story windows of plaintiffs' residence.

We do not deem it necessary to review the testimony in detail. It is sufficient to say that the evidence sustains the allegations of the bill that the soot and smoke thrown out by appellants' kilns constitute such a nuisance as entitles appellees to injunctive relief.

Nor do we think that appellees' right to relief is barred by laches. The conditions creating the nuisance cover the period from the spring of 1897 to the present time, and have been gradual and cumulative in their character. In fact, the evidence makes out a case of continuing nuisance, to which the doctrine of laches does not apply.

[4] The right to redress against nuisances of the class involved in this case is fully recognized by the decisions of this court. Townsend v. Norfolk Ry. & L. Co., 105 Va. 22, 52 S. E. 970, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842, 8 Ann. Cas. 558; Terrell v. C. & O. Ry. Co., 110 Va. 340, 66 S. E. 55, 32 L. R. A. (N. S.) 371; Southern Ry. Co. v. McMenamin, 113 Va. 121, 73 S. E. 980; Virginia Ry. & P. Co. v. Ferebee, 115 Va. 289, 78 S. E. 556. See, also, B. & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567.

It follows, from what has been said, that there is no error in the decree of the lower court, and it must be affirmed.

This conclusion having been reached, it is unnecessary to notice subordinate assignments to which our attention has been called, since their decision could in no way affect the result. Decree affirmed.

KEITH, P., absent.

(117 Va. 21)

## CARSON v. J. L. MOTT IRON WORKS.

(Supreme Court of Appeals of Virginia. Jan. 12, 1915. Rehearing Denied Jan. 27, 1915.)

1. PARTNERSHIP ⟸217—CONTRACTS OF GUARANTY—EVIDENCE.

Evidence *held* to sustain a finding that a partner expressly authorized a contract of guaranty in the name of the firm so as to bind him.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 419–425; Dec. Dig. ⟸217.]

2. GUARANTY ⟸56—PRINCIPAL AND SURETY ⟸104—DISCHARGE OF SURETY—EXTENSION OF TIME FOR PAYMENT.

A surety for or a guarantor of a debt is discharged, where the time of payment is extended for a definite period, without his consent, by a binding agreement between the creditor and the principal debtor.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 67; Dec. Dig. ⟸56; Principal and Surety, Cent. Dig. §§ 186–190, 193–195, 197–199, 200; Dec. Dig. ⟸104.]

3. GUARANTY ⟸56—DISCHARGE OF GUARANTOR—EXTENSION OF TIME FOR PAYMENT.

A firm guaranteed all accounts a corporation might make with a certain creditor who accepted the guaranty. After the maturity of a debt due from the corporation to the creditor, the corporation gave a note therefor, payable within two months, and on maturity it was reduced by partial payment, and a renewal note due in two months was executed. When the renewal became due, or shortly thereafter, the corporation was insolvent. *Held*, that the firm was discharged from liability as guarantor, unless consent to the extension of time was given.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 67; Dec. Dig. ⟸56.]

4. APPEAL AND ERROR ⟸1010—FINDINGS—CONCLUSIVENESS.

A finding of facts has the effect of a verdict, and cannot be disturbed on appeal, as contrary to evidence, unless it is plainly so, or is without evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982, 4024; Dec. Dig. ⟸1010.]

5. GUARANTY ⟸91—EXTENSION OF TIME OF PAYMENT OF DEBT—CONSENT OF GUARANTOR—EVIDENCE—SUFFICIENCY.

Evidence *held* to sustain a finding that a guarantor consented to an extension of time for the payment of the debt, and hence was not discharged because of the extension.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 104; Dec. Dig. ⟸91.]

6. EVIDENCE ⟸76—PRESUMPTIONS—FAILURE OF DEFENDANT TO TESTIFY.

Failure of defendant to testify as to matters peculiarly within his knowledge, after plaintiff has introduced evidence tending to prove his case, raises a strong suspicion that his testimony, if given, would operate to his prejudice, and may be considered by the court or jury trying the case in determining the facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 96; Dec. Dig. ⟸76.]

7. GUARANTY ⟸91—EXTENSION OF TIME OF PAYMENT—CONSENT—EVIDENCE.

The consent of a guarantor to an extension of time to pay the debt guaranteed may be proved by circumstantial or direct evidence.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 104; Dec. Dig. ⟸91.]

8. APPEAL AND ERROR ⟸762—QUESTIONS REVIEWABLE—REPLY BRIEF.

It is too late, as a general rule, to assign error for the first time in a reply brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3097; Dec. Dig. ⟸762.]

9. NEW TRIAL ⟸102—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

A new trial for newly discovered evidence is properly denied, where the movant's knowledge of the situation was such that, by ordinary diligence in searching for evidence, he would and could have ascertained what the newly discovered witness would have testified to.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210–214; Dec. Dig. ⟸102.]

Error to Law and Equity Court of City of Richmond.

Action by the J. L. Mott Iron Works against J. Preston Carson and another. Judgment for plaintiff, and defendant Carson brings error. Affirmed.

Wm. P. De Saussure and J. Kent Rawley, both of Richmond, for plaintiff in error. C. M. Chichester, of Richmond, for defendant in error.

BUCHANAN, J. J. L. Mott Iron Works, a corporation, instituted its action of assumpsit against J. Preston Carson and J. Graham Davidson, partners trading under the firm name of Graham, Davidson & Co., as guarantors of debts aggregating $1,259.36 due to the plaintiff company for goods furnished the Southern Plumbing & Electric Company, also incorporated. Process was not served upon Mr. Davidson, but the action proceeded against Mr. Carson, who filed a plea of non assumpsit. Upon the trial of the cause, all matters of law and fact being submitted to the court, there was a judgment for the plaintiff company for the amount sued for. To that judgment this writ of error was awarded upon the petition of the defendant.

As stated by the plaintiff in error in his written argument, the questions which the record presents for the decision of this court are:

First. Is the guaranty sued on the contract of the petitioner?

Second. If so, "is the petitioner discharged as guarantor under the contract by the acceptance by the creditor of a note of the principal debtor indorsed by a third party, given after the guaranteed debt was past due, which suspended the creditor's right of action on the guaranteed debt for several months?"

[1] As to the first question, while there is no evidence that the defendant, Carson, expressly authorized the contract of guaranty in the name of the firm, which was made by letters written by the other member of the firm, the circumstances surrounding the transaction and the subsequent conduct of

the defendant were such as to fully justify the court in believing that the contract of guaranty was made with his concurrence or assent. He was interested as a stockholder in the Southern Plumbing & Electric Company, the principal debtor; he was the "moneyed man" of the corporation, as well as of the partnership; both concerns occupied the same office, though each kept separate books; the defendant was in the office almost every day, and sometimes oftener; his partner testified that he generally consulted him in regard to financial matters; and the defendant, after the guaranty had been made, in a business conversation with the secretary of the plaintiff company, after stating that he was very much interested in the Southern Plumbing & Electric Company, said that "the bills that Graham, Davidson & Co. had guaranteed would be paid; that he thought the payment being guaranteed by Graham, Davidson & Co. made the account an excellent one. * * *"

The finding of the trial court on this question is not only sustained by the evidence, but it is difficult to see how, upon the record before us, any other conclusion could have been reached.

[2, 3] The next question to be considered is: Has the defendant been discharged from his liability as such guarantor?

It appears that in the summer of 1909, and after the partnership of Graham, Davidson & Co. had made the said guaranty, it was dissolved, and a corporation created, styled Graham, Davidson & Co., Incorporated, in which both members of the partnership were stockholders, and of which Davidson was president. Soon after that company's incorporation it offered to guarantee all accounts that the Southern Plumbing & Electric Company might thereafter make with the plaintiff company. That offer of guaranty was accepted. On the 3d of January following, after the indebtedness of $1,259.66 guaranteed by the partnership of Graham, Davidson & Co. had become due, the plaintiff company took a note from the principal debtor for $1,745.44, which included the account the payment of which had been guaranteed by the said partnership, payable within two months, and indorsed by "Graham, Davidson & Co., Inc." Upon the maturity of that note it was reduced by payment to $1,500 and a renewal note made, also due in two months, and indorsed by the same corporation. When that note became due, or shortly afterwards, both the maker and the indorser were insolvent.

It is too well settled to need the citation of authorities that the general rule is that when the contract of the surety is for the debt of the principal, if the time of payment is extended for a definite period without the consent of the surety, by a binding agreement between the creditor and the principal, the surety is discharged. The same rule is equally applicable to the guarantor of the debt of another. 1 Brandt on Suretyship & Guaranty (3d Ed.) § 377.

There was some suggestion that the original and renewal notes were accepted by the plaintiff company as collateral, but the evidence fails to show this. The record shows (as we have seen) that the defendants' firm was the guarantor of a debt of $1,259.66 due the plaintiff company, that this sum was included in the note for $1,745.44, that the note and the renewal thereof were binding agreements between the creditor and the principal debtor, and that they each extended the time within which to pay. This extension of time discharged the defendant from liability as guarantor, unless, as the trial court found, he had consented to such extension.

[4] Its finding upon the facts must be given the same weight as if it were the verdict of a jury. Martin v. Richmond, etc., 101 Va. 406, 44 S. E. 695; Hoster, etc., Co. v. Stag Hotel Corp., 111 Va. 223, 68 S. E. 50. The judgment of the court cannot, therefore, be reversed, as contrary to the evidence, unless it is plainly so, or is without evidence to support it.

[5] Mr. Mitchell, the president of the Southern Plumbing & Electric Company, and the officer who made the notes extending the time for the payment of the guaranteed debt, testified that the defendant "was the only moneyed man connected with the Southern Plumbing & Electric Company; that he was active in looking after its financial matters, and that all of them looked to him; * * * that the defendant was familiar with the financial situation of the Southern Plumbing & Electric Company, and was usually in the office of the company every day; and that he was satisfied he must have known of and consented to the giving of all the notes by the Southern Plumbing & Electric Company, as it was his custom to consult Mr. Carson about all such matters in connection with said company." He further testified that he could not recollect any of the details as to the giving or signing of the original note, nor could he say whether or not the defendant was present at that time, or whether he had any specific knowledge about this note, as he did not recall the circumstances, nor did he recollect anything further about the renewal note than that he had signed it as president of the maker company.

Mr. Taylor, the secretary of the Graham, Davidson & Co. corporation, testified that he was connected with the Southern Plumbing & Electric Company as a stockholder and officer from its inception, and had held every office in the corporation except that of president; that he was an officer in Graham, Davidson & Co., Incorporated, and had been from its creation; that the defendant was quite actively interested in financial matters concerning the Southern Plumbing & Electric Company, and was at the office of the company very often, probably every day, and

sometimes twice a day; that he had no recollection of the original note given in January, and only recollected the fact that the renewal note had been brought to him for indorsement; that he had no recollection whether or not the defendant was in the office on that day. He further testified that "in original financial transactions his habit was always to consult Mr. Carson, that in regard to renewal notes he might have signed them without consulting Mr. Carson, but he would not have entered into an original transaction without Mr. Carson's O. K."

Mr. Davidson, of the partnership of Graham, Davidson & Co., and afterwards president of the corporation of that name, testified that he generally consulted with the defendant in regard to financial matters; that in the fall of 1909 he, with Mr. Rourke, a representative of the plaintiff company, called on the defendant at his law office, and that Mr. Rourke had stated that the account of the Southern Plumbing & Electric Company was not in a satisfactory condition, and that he (Rourke) had been instructed to get either the money for that account or a note with a satisfactory indorser; that Mr. Rourke had requested that such note, if given, be indorsed either by the defendant personally or the firm of Graham, Davidson & Co. The witness further testified that he and Mr. Rourke left the defendant's office without getting any note or any agreement from the defendant in connection therewith, and that "the matter was left in suspense." Mr. Rourke's testimony as to this interview with the defendant is substantially the same as that of Mr. Davidson.

Mr. Goebel, the secretary of the plaintiff company, testified that in November, 1909, the defendant had come into his office to see him (the witness) particularly about the Southern Plumbing & Electric Company; that in their conversation at that time the defendant stated that he was much interested in that company; "that the bills that Graham, Davidson & Co. had guaranteed would be paid; that he thought the payment being guaranteed by Graham, Davidson & Co. made the account an excellent one; and that he was interested in the success of that company because he was an indorser at the bank for it to the extent of $25,000, and in consequence he wished the company to prosper and meet all its obligations."

All these witnesses were introduced by the plaintiff company.

The defendant, as stated in the bill of exceptions certifying the evidence, declined to introduce any witness and did not testify himself, although he was present in court during the trial. Upon the testimony of the plaintiff's witnesses, and the presumption which arose from the failure of the defendant to testify under the facts and circumstances disclosed by the record, the court found that the defendant had consented to the extension of time given by the plaintiff to the principal debtor.

[6] The failure of the defendant to go upon the stand himself to testify as to matters which were peculiarly within his knowledge, after the plaintiff had introduced evidence which tended strongly to prove, if, indeed, it was not such as would cause a jury or court naturally and reasonably to believe, that the defendant must have known of and consented to the extension of time to the principal debtor, a corporation in which he was deeply interested and largely controlled, was a fact bearing upon the issue involved, which no court or jury could fail to regard, for it was an existing, material, and probative fact. When evidence has been introduced by one litigant tending strongly, as in this case, to prove the truth of a matter in dispute, and the other party can by his own evidence throw light upon such matter in dispute, necessary to his defense and peculiarly within his knowledge, if the fact exists as he claims it, and he fails to go upon the witness stand, such failure may be considered by the court or jury trying the case along with other facts proved, since his failure to testify raises a strong suspicion that his own testimony, if given, would operate to his prejudice. See Kirby v. Tallmadge, 160 U. S. at page 383, 16 Sup. Ct. 349, 40 L. Ed. 463; Aragon Coffee Co. v. Rogers, 105 Va. 59–61, 52 S. E. 843, 8 Ann. Cas. 623; Copperthite v. Loudoun County, etc., Bank, 111 Va 70, 75, 68 S. E. 392; 1 Wigmore on Ev. §§ 289, 290, subsec. 5.

[7] It was not necessary that the consent of the defendant to the extension of time should be proved by direct evidence. That fact, like most others, may be proved circumstantially, as well as directly.

It seems to us that upon the whole case the trial court did not err in reaching the conclusion that the defendant had consented to the extension of the time for the payment of the debt he was bound for as guarantor, and was therefore not discharged from liability.

[8] In the reply brief the further contention is made by the defendant that, even though the court was right in rendering judgment against him, it erred in not crediting certain sums on the debt guaranteed by the defendant, instead of permitting them to remain as credits upon the other portion of the plaintiff's claim, and upon which that company had, it seems, credited them.

No such question is raised in the petition for the writ of error, and as a general rule it is too late on a writ of error to assign an error for the first time in a reply brief. But the contention, if considered, does not seem to be sustained by the record. The accounts guaranteed amounted to the sum of $1,259.66, bearing interest, as the evidence shows, from October 13, 1909. This sum was reduced by the court, and judgment given for $1,217.62.

It appears that a part of this reduction was for the sum of $20 freight allowance. The other portion was doubtless on account of the item of dividend collected by the plaintiff from the principal debtor in the administration of its assets. It does not satisfactorily appear that the defendant was entitled to any other credits on account of payments made by the debtor. The judgment only bears interest from October 13, 1909, when the positive evidence is that interest ran upon the account from October 13th of that year.

[9] After the court had rendered judgment, a motion was made for a new trial upon the ground of after-discovered evidence. Affidavits for and against granting the motion were filed. Without discussing those affidavits in detail, it is sufficient to say that they show that the defendant's knowledge of the relation of Mr. Rucker (the after-discovered witness) to the principal debtor and Graham, Davidson & Co., Incorporated, and their affairs, was such that by the exercise of ordinary diligence in searching for evidence for his defense the defendant would and could have ascertained what Mr. Rucker knew and had him present at the trial as a witness.

Upon the whole case, the court is of opinion that there is no error in the judgment, and that it should be affirmed. Affirmed.

KEITH, P., absent.

(117 Va. 207)

## HAIRSTON v. HAIRSTON.

(Supreme Court of Appeals of Virginia. Jan. 21, 1915.)

1. APPEAL AND ERROR ⟸780—DISMISSAL OF APPEAL—PAYMENT OF COUNSEL'S FEES.

It is not ground for dismissal of plaintiff's appeal from the decree dismissing his bill for divorce that he has not paid the fee allowed in the decree to defendant's counsel.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3121; Dec. Dig. ⟸780.]

2. JUDGMENT ⟸570—RES JUDICATA—QUESTION DETERMINED.

Decree dismissing a bill or divorce for desertion is not available as res judicata in a second suit on the same ground; neither the record in the first suit nor the evidence in the second showing that the decree was not based solely on the ground that the desertion had not been commenced three years before date of the suit, for which reason the suit had to be dismissed, regardless of willfulness of the desertion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028–1034, 1036–1040, 1042–1045, 1165; Dec. Dig. ⟸570.]

3. DIVORCE ⟸133 — WILLFUL DESERTION — EVIDENCE.

Evidence in divorce *held* to show the desertion was willful—that is without just cause—which must be such conduct of the deserted party as to entitle the deserting party to a divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 446–448; Dec. Dig. ⟸133.]

Appeal from Circuit Court, Henry County.

Suit by John L. Hairston against Martha Hairston. Bill dismissed, and plaintiff appeals. Reversed and remanded.

W. M. Peyton, of Martinsville, and S. A. Anderson, of Richmond, for appellant. John W. Carter, Jr., of Danville, for appellee.

CARDWELL, J. Appellant and appellee intermarried December 26, 1900, and lived together in Henry county, Va., until the year 1907. In January, 1906, appellee went to her father's, in the same county, to be confined by reason of the birth of her first child. The child was born on March 10, 1906, and in May following appellee and her child were sent for by appellant, and they came at once to appellant's home, where they remained until September, 1907, when appellee returned to her father's home, taking her child with her, and since that time she has not returned to appellant's home, nor have the parties lived together as man and wife, or, as such, had any sort of intercourse or communication with each other.

In March, 1909, appellant filed his bill of complaint against appellee, alleging that she had willfully abandoned and deserted him in March, 1906, with the intent of never returning, and praying a divorce from her a vinculo matrimonii, and for general relief.

Appellee answered the bill fully, and in denial of its charges. Depositions were taken for both parties, and on December 10, 1910, the cause was heard on the pleadings and the depositions taken and filed; whereupon the court entered its decree, which, omitting the formal parts, is as follows:

"On consideration whereof, the court, being of opinion that the plaintiff is not entitled to a divorce as prayed for in his bill, doth so decide and declare, and doth adjudge, order, and decree that the bill in this cause be dismissed at the plaintiff's costs."

At the first August rules, 1911, appellant filed his second bill of complaint against appellee, alleging that she had abandoned and illegally deserted him, having "left him about four or five years ago, and has never returned"; the prayer of this bill being also for a divorce a vinculo matrimonii. This second bill, it may be said, is practically in the language of the first, and the grounds upon which the divorce is asked are the same—that is, abandonment and desertion of the complainant on the part of the defendant. Both bills call upon the defendant to answer, but waive oath thereto.

Appellee, the defendant below, answered the bill in this cause, denying each and every allegation, and pleading res adjudicata, filing with her answer and plea as a part thereof, the bill, answer, depositions of witnesses, and the final decree in the first suit, but neither testified herself nor took the deposition of any other person to prove any of the very many statements contained in her answer, or to contradict the evidence given by the appellant and his witnesses.

Appellant gave his own deposition and took and filed the depositions of other witnesses to prove the willful desertion of him by ap-

pellee for a period of more than three years, as charged in his bill, and at the April term of the court, 1912, the decree from which this appeal is taken was entered, dismissing the bill at appellant's cost, and, upon his counsel indicating their intention to appeal from the decree, an additional fee of $50 was allowed to appellee's attorney, to be paid by appellant, and judgment entered therefor, and for which the attorney was given leave to issue execution. The decree sustains appellee's plea of res adjudicata, but proceeds further to say:

"Even though it be conceded, which it is not, that the plea of res adjudicata has not been sustained, yet the court is further of opinion that the plaintiff has wholly failed to sustain his bill for desertion by such proof as would entitle him to the relief sought and that his bill should be dismissed."

[1] Upon the calling of the case for hearing in this court, appellee, by her counsel, submitted a motion to dismiss it from the docket or to deny appellant a hearing thereon, on the ground that the fee of $50 allowed appellee's attorney in the decree appealed from had not been paid. In support of this motion no authority has been cited by counsel, and we know of none supporting it. The remedy, if any, that the attorney for appellee has for the collection of the fee allowed him in the decree, and for which a judgment was entered, lies in the right to enforce, either by execution or other proceeding against appellant provided by law, and not by a denial of appellant's constitutional and statutory right to a hearing of the appeal allowed him by this court, and which brings under review here the entire decree.

[2] The first contention of appellant upon the appeal is that appellee's plea of res adjudicata should have been rejected. In the opinion of the learned judge of the circuit court, in writing and made a part of the record, giving his reasons for the decree appealed from, he says:

"The defense of res adjudicata made by the answer in this case is sufficiently supported by the production of the record of the former suit between the same parties, touching the same matter, and showing a final decree therein on the merits"—citing Miller v. Miller, 92 Va. 196, 23 S. E. 232.

In this view we are unable to concur, as the case cited does not support it, being wholly different in its facts vouched by the record filed in support of the plea of res adjudicata from the case here. In that case the record in the prior suit and the final decree disposing of it left no room to question that this final disposition of the first case was upon its merits, including every question presented by the pleadings in the record, except as to the charge of adultery in the bill, in support of which there was no proof whatever; while in the case in judgment the decree in the prior case could not have been upon the merits thereof the same as in this second suit, but could only have been that the plaintiff was not entitled to the divorce a vinculo matrimonii upon the ground of desertion, for the reason that the proof showed that the desertion had not continued for the statutory period of three years, for in that case the preponderance of the proof was that appellee had, and without sufficient or reasonable cause, deserted appellant; there being nothing in the record of the first, nor any evidence in the second, of these suits between the parties which shows that the decree in the first suit was not based solely on the ground that three years had not elapsed from the date of the desertion and abandonment of the home of appellant by appellee to the date of the suit.

The opinion by Burks, J., in Chrisman's Adm'x v. Harman et al., 29 Grat. (70 Va.) 494, 26 Am. Rep. 387, quotes from the opinion of the Supreme Court of the United States in Russell v. Place, 94 U. S. 606, 24 L. Ed. 214, as follows:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole subject-matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible. * * * According to Coke, an estoppel must be 'certain to every intent'; and if, upon the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence."

It is there further said by Burks, J.:

"It does not appear by record upon what grounds the bill was dismissed, whether upon the merits or upon some of the special causes of demurrer not involving the merits; and, as no extrinsic evidence was furnished in the subsequent suit, if, indeed, any could be in such a case, showing the precise point involved and decided in the former suit, according to the authority of Russell v. Place, supra, 'the whole subject-matter of the action was at large and open to a new contention.'"

See, also, Ches. & O. Ry. Co. v. Rison, 99 Va. 32, 37 S. E. 320.

It appears that appellant in his bill in his first suit made an error as to the time that appellee abandoned his home, he having fixed the date by that of the birth of their child, appellee having left appellant when her child was about one year old, and it turned out in the proof taken in the case that the child was born in March, 1906, instead of in March, 1905, while the suit was brought in March, 1909; so that the desertion charged in the bill as the ground for a divorce a vinculo had not been for a period of three years, and therefore the bill had to be dismissed, no mat-

ter what proof there was as to willful desertion. There is nothing in the record to discredit appellant's statement that in his first suit he made an honest mistake as to the date of appellee's abandonment of his home, and there is nothing in the record of the first suit, nor any extrinsic evidence in the present, which shows that the decree in the first suit was not based solely on the ground that three years had not expired from the date of the abandonment of the home of appellant by the appellee to the date of the institution of the suit. This being the state of the record, the case comes directly within the doctrine laid down in the authorities cited above, and therefore the circuit court erred in sustaining appellee's plea of res adjudicata.

[3] In our view of the case, the only remaining question requiring consideration is whether or not the circuit court, upon the evidence in the record, erred in denying appellant a divorce a vinculo and dismissing his bill.

The learned judge of the circuit court, in a written opinion made a part of the record, says that "he (appellant) testifies to facts, which, if true, would fully warrant the court in granting him the relief he seeks," but the opinion then undertakes to show from the evidence in the first suit that his (appellant's) testimony is not worthy of belief.

In this view of the record we cannot concur. It is true that appellant in his first suit charged in his bill and testified that appellee abandoned him in 1905, about one year before she did, in fact abandon him, but, as we have stated, there is nothing in the record to prove that this was not an honest mistake. There is not the least question made in this present case that appellee had been away continuously from appellant's home for a period of more than three years prior to the institution of the suit, and the only question for consideration is whether it is sufficiently proven that this desertion or abandonment is willful—that is, without just cause.

The bills of complaint in both suits expressly waive answer under oath, but appellee saw fit to make oath to the last answer, and the oath thereto is certified as having been made in the city of Chicago, Ill. In her said answer she admits her marriage to appellant in December, 1900, but denies that "he made her a faithful and dutiful husband for five years," and this denial is made notwithstanding statements to the contrary made in the depositions given by her in the first suit. She was asked, when giving her deposition:

"Were the marriage relations between you and John L. Hairston pleasant, and, if not, about what time did they become unpleasant? Ans. They were very pleasant until, in 1905, he began to mistreat me."

When called on to relate the mistreatment she had received, her reply was:

"Well, his first mistreatment, he tried to force me to take the school ten miles from home, down near Axton, in the fall of 1905."



These facts are recited merely to show that for certainly five years and up to the latter part of 1905 appellee had no cause whatever for complaint of appellant's treatment of her. In May, 1906, and after the birth of her child in the preceding March, appellee, with her child, upon being sent for by appellant, returned to his home, where she remained, except when away visiting friends or relatives, until September, 1907, at which time she left, and, as she admits, has never returned to appellant's home, but, instead, brought a suit against him for a divorce a mensa et thoro, in which she failed.

The charges made by appellee against appellant of mistreatment of her, consisting of cruelty, neglect, nonsupport, and general personal abuse, are unsupported by any evidence for her in this or the former suit, except the testimony given by herself in the first suit. Living in a town, she, of course, had near neighbors, and had also a sister living in the same town, with whom she spent a good deal of her time; yet no one beside herself was placed on the witness stand to prove one of her charges against appellant or to testify against his good character. Reid Pannill, father of appellee, was on the witness stand in the first suit to testify as to when appellee's child was born, but he neither said nor was he asked anything about appellant's ill treatment of his daughter, nor did he say anything against the good character of appellant.

On the other hand, appellant testifies that he gave appellee no cause to leave him or to desert his home; that he fed and clothed her and her child, furnishing them with whatever appellee asked for, and that he was true to his marital vow, etc. He denies emphatically that he ever drove appellee away from his home, and says that she left without just reason therefor, and has never made any effort or offer to return to him. He further alleges in his bill, as evidencing appellee's intent to leave his home and not to return, that she, without his consent or knowledge, had obtained a key to the drawer in which he kept his private papers, and taken therefrom an interest-bearing certificate of deposit for $200 in a bank at Martinsville, belonging to him, which she afterwards changed or had some one else to change by prefixing the word "Mrs." to "John L. Hairston," and collected the money thereon at the bank in the absence of the cashier, a fact not known to appellant till after she had left his home. This latter allegation is testified to by not only the appellant, but by the cashier of the bank. Appellee in her answer admits that she got the money on the certificate of deposit, but claims that it was her own money. There is, however, no proof offered in her behalf to sustain this claim, while it is proven by the books of the bank and by the cashier of the bank, not only that at the date of the certificate of deposit in question this money belong-

ed to appellant, but that appellee did not have an interest-bearing certificate issued by the bank for $200, nor is there any proof in the record that appellant ever deposited to his own credit in bank any money belonging to appellee.

In support of the allegation of appellant's bill that he gave appellee no cause to leave him or to desert her home, several witnesses who resided in the town of Martinsville and had known the parties to this controversy rather intimately for a number of years prior to their separation have testified. Tilden Hairston states that appellee deserted appellant's home more than three years prior to the giving of his testimony, and has never returned. Letitia Mitchell states that appellee left her home in 1907, "moved her things away; she has never been back again that I have seen." Witness was asked how far she lived from appellant's home, and whether or not she had ever heard of his driving his wife from home. Answer: "I lived very near them, and I never heard of his driving her away from home, or saying anything unkind to her in my life." W. L. Reynolds, who lived 2½ squares from appellant's home, bears witness to appellee's having left her home more than three years, and says that he never heard of appellant's "fussing or quarreling with his wife or driving her away from home." Other witnesses testify as to appellee's habit of frequently going from home and staying at times as long as a month or more, and that from the time that she left the last time it had been more than three years.

The charges made by appellee against appellant in her answer, if true, would doubtless have entitled her to a divorce a mensa et thoro, but by her own showing she brought a suit against appellant after leaving him praying for a divorce from him, and it was denied her.

"Desertion by one consort of the other can only be justified by showing such conduct on the part of the deserted party as would entitle the other to a divorce a mensa. Nothing short of this will justify a willful desertion, or a continuance of it."

"Desertion is a breach of matrimonial duty, and consists of the actual breaking off of the matrimonial cohabitation, coupled with intent to desert in the mind of the offender." Crounse v. Crounse, 108 Va. 108, 60 S. E. 627.

In this case it is proven beyond question—in fact, it is not denied—that more than three years had elapsed from the time the appellee deserted the appellant to the time that this suit was instituted. That appellee had in mind an intent to desert and never to return to the home of the appellant is clearly shown, we think, by the facts proven and above adverted to, and which appellee has made no effort whatever to disprove or to discredit. When she made oath to her answer in this suit she was, as above mentioned, in the city of Chicago, Ill., and witnesses testifying for appellant, and who reside in the town of Martinsville, say that they had no knowledge of her return from Chicago, and that she has certainly not been back to the home of appellant for more than three years.

It follows that we are of opinion that appellant is entitled to a divorce a vinculo matrimonii from appellee, in accordance with the prayer of his bill, and therefore the decree of the circuit court must be reversed, and the cause remanded for a decree to be entered therein in conformity with this opinion.

Reversed.

KEITH, P., absent.

(168 N. C. 75)

## PATTERSON et al. v. FRANKLIN et al. (No. 595)

(Supreme Court of North Carolina. Jan. 13, 1915.)

1. HUSBAND AND WIFE ⊂⊃126—WIFE'S SEPARATE ESTATE—EARNINGS OF WIFE.

A husband is entitled to his wife's earnings, where they are living together as man and wife; but the husband may confer upon her the right to such earnings, and, when he has done so, they are her separate estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 459–464; Dec. Dig. ⊂⊃126.]

2. HUSBAND AND WIFE ⊂⊃221—ACTIONS—NECESSARY PARTIES.

Under Revisal 1905, § 408, subsec. 1, providing that when a married woman is a party to an action her husband must be joined with her except that when the action concerns her separate property she may sue alone, where a husband conferred upon his wife the right to her earnings under a contract, she could sue therefor in her own name, and he was not a necessary party.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 707, 802–806, 968, 973, 976½; Dec. Dig. ⊂⊃221]

3. ARBITRATION AND AWARD ⊂⊃82—JUDGMENT ⊂⊃693—CONCLUSIVENESS—PARTIES CONCLUDED.

A husband's joinder as a nominal party to an action by the wife concerning her separate estate did not render judgments or arbitration proceedings affecting him alone available in bar of her right to recover.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 440–450; Dec. Dig. ⊂⊃82; Judgment, Cent. Dig. § 1216; Dec. Dig. ⊂⊃693.]

4. WORK AND LABOR ⊂⊃7—SERVICES BETWEEN PARTIES IN FAMILY RELATIONSHIP—PRESUMPTIONS.

While services rendered by an adult child for a parent or by a parent for such a child when living together as members of the same family are presumed to be gratuitous, the presumption is rebuttable and is overcome by proper proof that they were given and received in expectation of pay, and the presumption was rebutted when it was shown that a daughter provided and cared for her aged father for six years with the understanding that he was to leave her all of his property, which he had disabled himself from doing by conveying substantial portions of the property to other parties.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 11½–22; Dec. Dig. ⊂⊃7.]

5. ARBITRATION AND AWARD ⊂⊃82—CONCLUSIVENESS OF ADJUDICATION—PARTIES CONCLUDED.

A married woman boarded and lodged her father and provided and cared for him under

an agreement by him that he would leave her all of his property and under an agreement by the husband that the compensation for such services was to belong to the wife. While the father was being so cared for, the husband was appointed as his guardian, and subsequently, the father having left his daughter's home, a dispute arose as to a settlement of the guardianship matters, which by agreement were referred to arbitrators. Before the arbitrators the husband presented a bill against him as guardian in favor of his wife for $1,117.50 on which he had paid her $586.52. The arbitrators allowed him by reason of this claim $196.65, and the wife repaid to the husband the amount which he had paid her in excess of the amount so allowed. The wife testified as a witness on the hearing before the arbitrators. *Held*, that the arbitration proceedings did not bar the wife's right of action against her father or his executors for her services, as she was not a party to such proceedings and neither submitted her claim to arbitration nor authorized any one to submit them for her: but the amount received by her from the husband as guardian should be deducted as a payment to her on account.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 440–450; Dec. Dig. ⟸ 82.]

Appeal from Superior Court, Swain County; Justice, Judge.

Action by A. J. Patterson and husband against A. J. Franklin and another, executors of F. M. Jenkins. Judgment for defendants, and plaintiffs appeal. Reversed.

Civil action to recover for services rendered F. M. Jenkins, now deceased, and for board and lodging him for 6 years, 4 months, and 19 days. The action was originally instituted by A. J. Patterson against F. M. Jenkins, who was her father. Afterwards, and over protest of plaintiff and also of himself, J. D. Patterson, the husband, was made party coplaintiff. F. M. Jenkins having died, his executors were made parties, and the action proceeded with against them, as executors. The suit was for services rendered and board and lodging of F. M. Jenkins for six years and over, at about $20 per month, and there was evidence of plaintiff tending to show that on January 14, 1906, F. M. Jenkins, having tried some of his other children, came to the house of feme plaintiff, who was his daughter, and they made arrangement that if she would give him a home and care and provide for him, he would leave her all of his property; that the husband assented, and it was a part of the agreement that the compensation was to belong to the wife; that, under the agreement, F. M. Jenkins stayed at plaintiff's home for 6 years, 4 months, and 19 days, when he became dissatisfied and left, living thereafter with some of the others until he died, not long thereafter, a year or more; that the father, F. M. Jenkins, was an old man, needing much attention, and, for the last year and more of his stay, was almost helpless and that an average charge of $20 per month was very reasonable; that, some time after leaving plaintiff's house, F. M. Jenkins conveyed a portion of his real estate to his wife, and, later, had given about one-third of the money he then had to some other relation and, in his will had left the bulk of his property to others, giving only a nominal amount to plaintiff A. J. Patterson; that, during the very latest part of his stay with plaintiff, J. D. Patterson, the husband, in consultation with some of the other near relatives and heirs at law, had qualified and acted as guardian of F. M. Jenkins; that said Patterson was removed a short while after Jenkins left and, there being a dispute as to a proper settlement of the guardianship matters, J. D. Patterson and F. M. Jenkins referred the matters in dispute between them to three arbitrators, who heard evidence and made an award, in effect, that Patterson owed and should pay to F. M. Jenkins $389.87, as a settlement of guardian accounts, and should turn over to said Jenkins a certain deed of trust which was a subject of difference between them. In the hearing before the arbitrators, J. D. Patterson presented a bill for board and lodging which his wife had claimed of him as guardian, to the amount of $1,117.50, and on which he had paid her $586.52 leaving a balance due her on account of $530.98. The arbitrators allowed J. D. Patterson credit by reason of the claim of $196.65 and made the award as heretofore stated. That, when the award was announced, Mrs. Patterson paid back to her husband all of the money paid to her by him, except the $196.65, for which he had been allowed credit. It appeared that Mrs. Patterson had been examined as a witness before the arbitrators, but all the evidence tended to show that she was not a party to said proceedings, nor had she appeared therein nor authorized any one to appear for her or submit her claim to the action to the board of arbitrators. At the close of the evidence or during the trial, the court having intimated an opinion adverse to plaintiffs, they submitted to a nonsuit and appealed.

Frye, Gantt & Frye, of Bryson City, for appellants. A. J. Franklin and Alley & Leatherwood, all of Bryson City, for appellees.

HOKE, J. (after stating the facts as above). [1-3] Under the law as it has heretofore prevailed in this state, a husband is entitled to his wife's earnings, the proceeds of her labor, where they are living together as man and wife and we are not called on to determine whether the principle is altered or in any way affected by our recent legislation on the rights and capacities of married women, notably, the statute known as the Martin Act (Laws 1911, c. 109), by which married women are practically constituted free traders as to all their ordinary dealings, as all the authorities here and elsewhere agree that the husband may confer upon the wife the right to her earnings, and, when he has

done so, these earnings are then properly regarded as her separate estate which she is entitled to recover by action in her own name. Price v. Railroad, 160 N. C. 450, 76 S. E. 502; Syme v. Riddle, 88 N. C. 463; Hinckley v. Phelps, 84 Mass. (2 Allen) 77; Bowman v. Ash, 143 Ill. 649, 32 N. E. 486; 21 Cyc. pp. 1385–1395. There was no necessity therefore that the husband should appear as a party, the evidence tending to show that he had conferred upon the wife, in this instance, the right to earnings, acquired under the contract with her father. Rev. § 408, subsec. 1. The matter, however, is of no especial moment, as the husband, in any event, is only a nominal party, and neither judgments nor arbitration proceedings with parties affecting him alone should be allowed to interfere with her right to recover if she has a good cause of action in her own name. Walker v. Philadelphia, 195 Pa. 168, 45 Atl. 657, 78 Am. St. Rep. 801; Beronio v. Lumber Co., 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118; Kelly v. Hancock, 75 Ala. 229; 23 Cyc. 1242; Womach v. St. Joseph, 201 Mo. 467, 100 S. W. 443, reported, also, in 10 L. R. A. (N. S.) 140–146.

[4, 5] Again, while services rendered by an adult child for a parent or a parent for such a child, when living together as members of the same family, are presumed to be gratuitous, the presumption is a rebuttable one and is overcome by proper proof that they were given and received in expectation of pay (Winkler v. Killian, 141 N. C. 575, 578, 54 S. E. 540, 115 Am. St. Rep. 694), and such proof has been recognized as sufficient, when the services are "performed by one person for another under an express or implied promise that compensation is to be provided for in the last will and testament of the recipient," and no such provision is made (Whetstine v. Wilson, 104 N. C. 385, 10 S. E. 471; Miller v. Lash, 85 N. C. 52, 39 Am. Rep. 678). And the same principle should prevail where, as in this case, the evidence tends to show that the child provided and cared for an aged father for six years, with the understanding that he was to leave her all of his property, and, before death, he has disabled himself from performance by conveying to others substantial portions of it. In either case, the facts in evidence tend to show that the services were given and received in expectation of pay, and, the specific compensation agreed upon having become impossible by the voluntary act of the father a right of action presently accrues and the child may recover for the reasonable value of the service rendered. Clark on Contracts (2d Ed.) p. 448. And we are unable to see that the arbitration proceedings should conclude the feme plaintiff or, in any way, affect her rights. That was a proceeding entirely between her husband and her father, growing out of her husband's accounts and obligations as guardian of the father. According to the evidence, she was not a party to that investigation, and had neither submitted her claims to this arbitration nor authorized any one to submit them for her. It is well recognized that her being a witness before the arbitrators does not have such effect. Le Roy v. Steamboat Co., 165 N. C. 109, 80 S. E. 984; Freeman on Judgments, § 189; Bigelow on Estoppel (5th Ed.) p. 135. She is not therefore directly affected, and we do not find anything in her speech or conduct which calls for or permits the application of the principle of an estoppel in pais. The estate has not been damaged, nor have its representatives been, in any way, misled to their pecuniary injury by anything she has said or done in the matter. Le Roy v. Steamboat Co., supra; Boddie v. Bond, 154 N. C. 359, 70 S. E. 824; Id., 158 N. C. 204, 206, 73 S. E. 988.

From a perusal of the proceedings, it will appear that, on the hearing before the arbitrators, the husband represented that his wife had made a claim of him as guardian, for $1,117.50, for services rendered the father, of which he had paid $586.52, and asked that this amount be allowed him as a voucher on his account as guardian. The arbitrators heard the testimony and only allowed him $196.65, and his wife returned to the husband the balance of the payment. This account should be deducted from her present claim, not because she is barred by the action of the arbitrators, but because she has received that much on account. In addition, there is no mutuality of stake or obligation between the real party in interest in this action, the feme plaintiff, and the defendants in reference to this award. Not being a party, if the arbitrators had allowed her claim, she could not have enforced it, and no more should she be concluded. It is perhaps the controlling feature in the law of estoppel, and, on the facts in evidence as they now appear, we are of opinion that the interests of feme plaintiff are not affected by the action of the arbitrators, and she is entitled to have her claim submitted to the jury.

Reversed.

CLARK, C. J. (concurring). The General Assembly has by express enactment recognized and prescribed that married women are entitled to their own earnings. Laws 1913, c. 13, provides:

"The earnings of a married woman by virtue of any contract for her personal service, and any damages for personal injuries, or other torts sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried."

This seems to have been clearly provided by the Constitution, art. 10, § 6, which provides:

"The real and personal property of any female in this state acquired before marriage and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female."

But it being thought that Price v. Electric Co, 160 N. C. 450, 76 S. E. 502, filed November 20, 1912, threw some doubt upon the proposition, the General Assembly very promptly after it convened passed as one of its first statutes chapter 13, Laws 1913, above set out, thus placing the matter beyond controversy.

(168 N. C. 16)

S. LOWMAN & CO. v. BALLARD. (No. 409.)

(Supreme Court of North Carolina. Jan. 13, 1915.)

1. JUSTICES OF THE PEACE ⟸122—DEFAULT JUDGMENT—INSUFFICIENT SERVICE—REMEDY—MOTION.

Where judgment is rendered by a justice of the peace on insufficient service, defendant's remedy is by motion to vacate before the justice who tried the case.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 382-388; Dec. Dig. ⟸ 122.]

2. PROCESS ⟸64—SERVICE BY TELEPHONE.

Under Revisal 1905, § 439, providing that summons shall be served by the sheriff or other officer reading the same to the party or parties named as defendant and such reading shall be a legal and sufficient service, service cannot be made by the officer reading the summons to the defendant over the telephone, though the officer may recognize defendant's voice and know he is talking to the proper person.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 55, 56, 76-82; Dec. Dig. ⟸64.]

Clark, C. J., and Allen, J., dissenting.

Appeal from Superior Court, Anson County; Shaw, Judge.

Action by S. Lowman & Co. against T. J. Ballard. Judgment having been rendered against defendant by default before a justice of the peace, and an order denying a motion to set it aside having been affirmed on appeal to the superior court, defendant appeals. Reversed.

On the hearing, it appeared that in 1911 plaintiff instituted an action on account against defendant, before a justice of the peace in said county, and on March 16, 1911, recovered judgment for $173.75, defendant not appealing at this time; that defendant instituted a civil action against plaintiff to set aside said judgment, claiming that he owed plaintiff nothing, and that he had never been served with summons in said cause, and for many months after its rendition he had no notice or knowledge of the existence of the judgment or of any suit against him by plaintiff. Judgment in that cause was entered in favor of the present plaintiff, and on appeal judgment was affirmed, the court being of opinion that, on the facts presented in that record, defendant could only proceed by motion before the justice to set aside the judgment. See Ballard v. Lowry, 163 N. C. 487, 79 S. E. 966. Pursuant to that intimation, defendant, on notice duly served, made the present motion to set aside the judgment before the justice, J. H. Benton, Esq., and on the ground, among others, that the summons in the action had been originally served by telephone, the sheriff being at Wadesboro and defendant at Morven, nine miles distant. On the hearing the justice found that the sheriff had "read the summons by telephone to defendant and, recognizing that it was defendant by conversation had between them at the time, he had made the return on the process served," etc. The justice, being of opinion that there had been a valid service, refused to set aside the judgment, and on appeal to superior court, this ruling was affirmed, the material portion of his honor's judgment being as follows:

"The court finds as a fact that J. T. Short was a deputy sheriff of Anson county on the 27th day of February, 1911, and read the summons issued in said cause by said justice of the peace to the defendant, T. J. Ballard, over the telephone line connecting Wadesboro and Morven, and that the said deputy sheriff was well acquainted with said defendant, and recognized his voice over the telephone in the conversation between them at said time, whereupon said deputy sheriff made the return and indorsement upon the summons. Upon these facts the court finds that, as a matter of law, said service and reading of said summons over the telephone was a legal and valid service of said summons, and the court so holds. From this judgment, the defendant excepts and appeals to the Supreme Court."

Lockhart & Dunlap, of Wadesboro, for appellant. Gulledge & Boggan, of Wadesboro, for appellee.

HOKE, J. [1] On the facts appearing of record, and in like case whenever the remedy is available to him, the procedure open to defendant is by motion before the justice who tried the cause. This was virtually held on a former appeal between the parties (163 N. C. 487, 79 S. E. 966), and the position is in accord with our decisions on the subject (Thompson v. Notion Co., 160 N. C. 519, 76 S. E. 470; Clark v. Mfg. Co., 110 N. C. 111, 14 S. E. 518; Whitehurst v. Transportation Co., 109 N. C. 342, 13 S. E. 937; McKee v. Angel, 90 N. C. 60).

In Thompson v. Notion Co., supra, that being a case where service had been regularly made by publication and defendant had neither appeared nor answered, the decision was made to rest on section 1491 of Revisal, which allowed an appeal to be taken in such cases within 15 days after personal notice of the rendition of the judgment, but Associate Justice Allen, in his well-considered opinion, is careful to note that, in case of "defective process, or where there is the appearance of service when in fact there was none, the remedy by motion before the justice is properly available." Both in the superior and justice's courts the statutory limits, as to time within which motion of this character shall be made are cases where the proceedings are, in all respects, regular and do not apply in cases when there is defective service of process or an entire absence of

it. Massie v. Hainey, 165 N. C. 174, 81 S. E. 135; McKee v. Angel, 90 N. C. 60, supra. Authority here is also to the effect that, where a statute provides for service of summons or notices in the progress of a cause by certain persons or by designated methods, the specified requirements must be complied with or there is no valid service. Martin v. Buffaloe, 128 N. C. 305, 38 S. E. 902, 83 Am. St. Rep. 679; Smith v. Smith, 119 N. C. 314, 25 S. E. 878; Allen v. Strickland, 100 N. C. 225, 6 S. E. 780; McKee v. Angel, supra.

[2] This, then, being proper procedure, and the only service of the original process in this cause having been by means of the telephone, "the sheriff being at Wadesboro and defendant at Morven, nine miles distant," the question chiefly and directly presented by this appeal is whether, in this jurisdiction, there can be a valid service of original process by means of the telephone. Our statute on the subject (Revisal, § 439) provides that the summons "shall be served, in all cases except as hereinafter provided, by the sheriff or other officer reading the same to the party or parties named as defendant, and such reading shall be a legal and sufficient service." This method of serving process was established by the Legislature of 1876 and 1877, and at the time the telephone as a general system of communication was not in existence. An interesting account of its origin and development will be found in 126 U. S. Reports (8 Sup. Ct. 778, 31 L. Ed. 863), the volume being devoted to a proper report of the telephone cases, from which it appears that the patents were applied for in 1876; that the litigation concerning them was continued for something over 11 years, and it was not until 1887 that decision was made declaring the rights in dispute to be in Prof. Bell and his associates, and although the active development of the system was immediately and successfully entered upon, the telephone, as now operated, did not come into very general use and application until about the beginning of the present century, or a short period preceding that date.

At the time, therefore, when this legislation was enacted, the only method of service contemplated or provided for was by reading the summons in the personal presence of the party, and we are of opinion that this is and should continue to be the correct interpretation of the statute, as it is now written. This service of original process by which courts of justice acquire jurisdiction over the rights of person and of property of the citizen has always been, and properly, regulated with circumspect care. In the Code of 1868, it could only be done by leaving a copy of the summons under the court seal; later, in 1876 and 1877, the seal was omitted when the process ran to the county of the officer who issued it, and at the same session a service by reading by the sheriff or some officer was established; both of these changes, it will be noted, being by legislative enactment. And this method of service, by reading in the personal presence of the party, affording as it does to the sheriff a more satisfactory and certain means of identifying the person on whom the service is made and giving assurance to the litigant of the true import of the act by present exhibition of the process, giving him better opportunity, too, to ascertain the position and authority of the officer and being the method contemplated and described by the statute at the time it was passed, and the only one recognized and pursued for 20 years thereafter, should not be altered, if at all, save by express provision of the statute law.

The only valid objection to be made to this position is that it may, at times, make for inconvenience of the officer, but even as to him the proposed change is of doubtful benefit. We know that a sheriff, or other officer having a process of this character in charge, is properly held to a strict account as to the verity of the service. If he makes a false return, he and his bondsmen may be subjected to serious penalties, and, looked at only from the officer's point of view, there is grave question if in the effort to perform this important duty he should be subjected to the additional uncertainties, sure to arise by recognizing the proposed manner of service.

On authority the question does not seem to have been very much discussed in the courts. The nearest case we have been able to find on the subject is in Ex parte Terrell, Court of Criminal Appeals of Texas, reported in 95 S. W. 536. That case was an attachment for contempt against a defaulting witness, their statute requiring service of subpœna by "reading same in the hearing of the witness," and it was held that service by telephone was no valid service, and the position derives some support in a New York case of Gilpin v. Savage, 201 N. Y. 167, 94 N. E. 656, 34 L. R. A. (N. S.) 417, Ann. Cas. 1912A, 861, to the effect that presentment of a note and demand for payment must be by actual exhibit of the instrument, and that a demand made by telephone was insufficient. We are aware that, in a number of cases, it has been held that, under regulations requiring service of notices to be in writing, service by means of a telegram, written out by the agent and delivered, has been upheld, but these were generally in instances where the parties had voluntarily adopted that method of communication. And where the principle has been approved in reference to court process, the statute did not require that service be made by any particular or designated person; and, the party being charged with the duty of having the notice served, the court has held that such party could make the company his agent to write the notice, within the meaning of the law. Such was the case presented in Western

Union v. Bailey, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933, a case to which we were cited. On service of writs of certiorari, the statute required that the applicant should cause written notice of its proper sanction to be served on his opponent, and service by telegram was upheld on the ground that, as the statute required the party to cause notice to be served and did not designate by whom, the plaintiff could designate the company as his agent, and the notice so written out would be considered a sufficient compliance with the law. Even in that aspect, the case seems to have caused the court much perplexity, and one of the judges dissented.

Again, there are cases in which notices of injunction were served by telegram and the service was sustained, but these decisions were in application of the principle declared by the English Chancellors, to the effect that, under certain circumstances, if a party in an injunction proceeding knew of the existence of the order and intentionally violated it or knowingly or intentionally acted so as to render the same of noneffect, he could be held for contempt. Vansandan v. Rose, 2 Jac. & Walker, 264; Osborne v. Tenant, 14 Ves. 136; Rulings by Lord Chancellor Elden, the first referred to in Cape May R. R. v. Johnson, 35 N. J. Eq. 422–425, and the second in Davis v. Fiber Co., 150 N. C. 87, 63 S. E. 178, erroneously printed in this last citation as Lord Erskine. But, while this ruling may be upheld in proceedings of that character, the exigency of the case at times requiring the recognition of such a principle, it should not be allowed to prevail in reference to the service of original process where, as in this case, the statute, as heretofore stated, at the time it was enacted, contemplated and provided for a service by reading the writ in the personal presence of the party, and involving, too, the necessary exhibition of the process to the litigant. On the facts in evidence, we are of opinion and so hold that there has been no valid service of process shown and this will be certified that the judgment of the justice court be set aside and defendant allowed to answer.

Reversed.

CLARK, C. J. (dissenting). Revisal 439 provides that the summons shall be served by the officer "reading the same to the defendant, and such reading shall be a legal and sufficient service." *All this has been done in this case.* Unless the court shall legislate by putting into the statute what the Legislature has not yet thought proper to put therein, this is "a legal and sufficient service." The summons, it is found as a fact, was read by the sheriff to this defendant, and indeed there is no question as to that fact, or as to his being sheriff, or as to the identity of the defendant. What more can be necessary? Whether or not there might be greater or less certainty as to the identity of the defendant, in service by phone, when he is brought to the phone by an agent of the sheriff, or the sheriff recognizes him, is a matter for the Legislature if that body should find that the law needs amendment.

As to the identity of the sheriff, that is a matter for the court on the service of every process, which is authenticated by his signature. As to the identity of the defendant, the officer takes that risk whether he sees him (for he may not know him personally except by information) or phones him. The sheriff is under the highest obligations to be certain as to the identity of the defendant, for he is acting under the oath of his office and is also liable under a heavy penalty for making a false return.

The law does not require that the sheriff shall "leave a copy" with the defendant. That was long since dispensed with. Nor has it ever required that he should see the defendant. There can be no question that a near-sighted sheriff or deputy could serve process, the identity of the defendant being in all cases a matter of which the officer must assure himself under liability to a penalty. If there is a mistake as to identity of the defendant, he can avail himself of it equally whether the sheriff is immediately present or is blind, or speaks over the phone. In the Trojan War, Stentor made his summons to surrender to the enemy on the walls of Troy at a good distance, out of the reach of arrows, and the service was sufficient. In fact in former days the heralds of opposing armies served their summons at a good distance by trumpet.

There is no statute, and no decision, that requires that the defendant shall see the paper or read it himself, or that he shall know the identity of the officer. The court knows its own officers, and the defendant takes the risk if he does not recognize the officer's authority. The officer takes the risk under his oath, and under a penalty, if he mistakes the identity of the defendant. Whether the service is on a defendant who was personally present or who is at the end of a phone, these principles apply.

In this day there is an urgent demand that courts shall reduce the time and expense of proceedings. Why should an officer ride all night over bad roads and in bad weather, at great expense, to read a summons or a subpœna to a party who is needed in court next morning, when he can read the paper as intelligently to the party over the phone and with as much certainty of his identity as if he went to the locality and hunted him up. Indeed when the service is made by phone the officer will take even greater precautions, because he cannot reach the party in that way unless he is brought to the phone, at his request by some agent of the sheriff, or voluntarily remains at the phone till the reading is completed.

It is suggested that "service by phone is not safe," contracts for millions of dollars are made every day over the phone, often at a long distance, between parties who do not see each other, but who are satisfied of each other's identity, by taking proper precautions. The great transportation systems of the country find it safe to use the telephone in controlling the movements of trains on which depend the safety of thousands of lives and millions of property daily. Great armies on whose movements depend the destiny of nations and the lives of thousands of men are risked, every day, on the use of the telephone. Over the phone doctors give prescriptions on which the lives of patients depend and lawyers give advice on which rest the disposal of transfer of property. Yet we are asked to say that it is unsafe for this officer to notify this defendant to appear before a magistrate in a small action involving a few dollars, when it is found as a fact that this defendant was the proper party, that the officer was duly authorized, and that he fully read this summons to this defendant as required by the statute.

Why should the courts alone be deprived of the advantage of modern improvements, and retain every antiquated method as to service or as to pleadings, on the plea that it was not "thus done under the Saxon heptarchy"? It is a great saving of useless expense and of time to use this method of summoning jurors and witnesses and parties over the phone, of which bank officials, business men, railroad officers, and everybody else avail themselves. Indeed there is less risk of imposition as to identity in the service of a summons or subpœna than in any of the other businesses of life, for the reason that the officer, being under a penalty for making an erroneous return, will take extra care in that regard. Besides the party who is served can rarely, if ever, have any motive to assume to be the defendant when he is not. Moreover, he waives any other service, as this defendant did, by remaining at the phone until the entire summons is read to him.

If an officer should read a summons to a man on the other side of a screen, or of a curtain, or in another room, and his identity is certain, as found in this case, and his hearing it is not denied, this surely would be sufficient. The invention of the phone has merely extended the range of the voice of the officer and of the hearing of the defendant.

The statute does not require that the officer should return that he "saw the defendant and read the summons to him." But it only requires "reading the same to defendant and such *reading* shall be a legal and sufficient service." For the court to add the requirement that the officer "saw the defendant" is legislation by the court, and will make a very considerable addition of trouble and expense to the officers, which the Legislature has not placed upon them.

Whether the officer sees, or does not see, the defendant, it is a defense that he was not an officer, or that there was a mistake of identity as to the defendant, or that the summons was not read to him. These defenses are in no wise affected by the circumstance that the summons was read over the phone, or at a distance, or to one in another room. The statute does not require the immediate presence of the defendant.

A captive with the Indians who received a letter told the chief its contents and from whom it came. The chieftain took the letter. He looked at it and saw nothing on it to that purport. He put it to his ears and heard nothing. He smelt of it and perceived nothing. He said that his captive was either a liar or a witch, and in either event he ought to be burned and burned he was. The chief did not understand such means of communication.

When the invention of the telescope vastly extended human vision, Galileo, gauging the starry depths, announced that the world revolved around the sun, and not the sun around the world. The ignorant priests condemned him to be burned, and he only escaped by taking it back.

The most ignorant man in North Carolina now knows that by the invention of the telephone the range of the human voice and of human hearing has been lengthened. When this summons was read to the defendant by the officer over the phone (all of which are found as facts), it was the officer's voice, and not a substitute—as in the case of a telegram or letter—which the defendant heard, and the officer truly reported, as is found, that he had "read" the summons to him. The statute requires nothing more, and there is no reason that it should. A few years ago it might have been asserted that thus reading a summons to a man seven miles off was a physical impossibility, and therefore on its face untrue. But modern invention has made it an ordinary occurrence. A conversation over the phone is competent in evidence why not the "reading" of a summons, when the identity of the party is found as a fact?

This system of serving summonses and subpœnas is a great saving of expense and of time. It has been much resorted to in the courts, and now to hold it illegal may jeopardize the validity of many legal proceedings which have been based upon such service. In a practical age there is no reason why the courts should not avail themselves of the same conveniences which business men, and indeed all others, customarily use and have found to be safe and reliable as well as convenient. No statute forbids it, and the courts in actual practice have recognized and used it.

ALLEN, J., concurs.

NOTE.—The General Assembly, being in session, at once passed an act authorizing the service over the phone of subpœnas for witnesses and in summoning jurors, leaving without legislation only service of summons for defendants, which, however, is probably only about one-twentieth of the business, as witnesses and jurors are thus notified in both criminal and civil cases.

(168 N. C. 4)

BROWN et al. v. BROWN et al. (No. 63.)

(Supreme Court of North Carolina. Jan. 13, 1915.)

1. DEEDS ⟸95—CONSTRUCTION—GIVING EFFECT TO WHOLE INSTRUMENT.

All parts of a deed should be given due effect, and words deliberately put in a deed are not to be lightly considered or arbitrarily thrust aside.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 238, 241–254; Dec. Dig. ⟸95.]

2. DEEDS ⟸93—CONSTRUCTION—ASCERTAINING INTENT.

The main object in construing a deed is to discover and execute the intention of the parties, without regard to technical inaccuracies or the position in the deed of the formal divisions thereof.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. ⟸93.]

3. DEEDS ⟸26—VALIDITY—SUFFICIENCY OF LANGUAGE USED.

Where a deed is so uncertain or repugnant that its meaning cannot be ascertained by any fair rule of construction, or where, by reason of ambiguity, the purpose, subject-matter, the estate conveyed, or other matter essential to its validity cannot be understood, the instrument of necessity must fail.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 50–52; Dec. Dig. ⟸26.]

4. DEEDS ⟸129—CONSTRUCTION—ESTATES CREATED.

A grantor conveyed land to his two sons G. and J., the habendum clause containing a reservation to the grantor of an estate therein for his life and the lives of his four daughters; it being recited that it was the intention and understanding that the daughters might live on the land during their lives as members of the grantor's family and of the families of the grantees after the grantor's death. The sons partitioned the land by deeds also reciting that an estate had been reserved for the life of the grantor and that of the daughters. J. subsequently conveyed his part of the land to G. by a deed which recited such reservation, and that the parties had divided the land and ascertained the part to which "each is to be entitled after the falling in of the life estates." For over 30 years after this conveyance, J. and those claiming under him remained in possession of J.'s part of the land. The daughters lived on the land without asserting any title, except the right of occupancy; the last of them dying in 1912. *Held*, that the daughters had a life estate after the death of their father, as the deed, if it did not reserve such estate directly to them, reserved it to their father as their trustee, and under Revisal 1905, § 1556, rule 11 (Rev. Code, c. 38, rule 12; Code, § 1281, rule 11), providing that every estate for the life of another not devised shall be deemed an inheritance of the deceased owner, his title as trustee descended to his heirs and was vested in the daughters by the statute of uses, as the law implied such an estate in the father as was sufficient to support the use or such as was commensurate with the probable exigencies of the trust.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 351, 360–365, 416–430, 434, 435; Dec. Dig. ⟸129.]

5. ADVERSE POSSESSION ⟸60—REQUISITES—EXCLUSIVE CHARACTER OF POSSESSION.

The possession of J. and those claiming under him was not adverse to the daughters, as they were in possession themselves during the whole period of their lives.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282–312, 323, 328; Dec. Dig. ⟸60.]

6. ADVERSE POSSESSION ⟸60—HOSTILE CHARACTER OF POSSESSION—REMAINDERMEN.

If the possession of J. and those claiming under him was adverse to the daughters, such possession barred only the daughters' life estate, and did not bar the rights of G., as he had no right of entry during the lives of the daughters.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282–312, 323, 328; Dec. Dig. ⟸60.]

7. ADVERSE POSSESSION ⟸63—HOSTILE CHARACTER OF POSSESSION—POSSESSION BY VENDOR.

Even though the deed from the father merely gave the daughters a home on the land and not a life interest in the land, adverse possession did not run in favor of J. and those claiming under him as against G. until the death of the daughters, as the deed from J. to G. expressly provided that the estate conveyed should not take effect until after the falling in of the life estates and until that time withheld from G. any right of entry.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 333–357; Dec. Dig. ⟸63.]

Appeal from Superior Court, Edgecombe County; Bond, Judge.

Action by Harriett Brown and others against Martha A. Brown and others. Judgment for defendants, and plaintiffs appeal. Reversed, and judgment directed for plaintiffs.

This is an action to recover the possession of land, and depends for its decision upon the construction of certain deeds and the evidence as to the possession of defendants and those under whom they claim, the nature of which will fully appear by reference to the verdict and charge of the court, which are herein set out.

On March 9, 1869, Littleberry Brown, common ancestor of plaintiffs and defendants, made a deed to his two sons, Gray L. and Joseph H., by which he conveyed a tract of land, of which the land in controversy is a part. The conveyance to them was as tenants in common of equal interests. In this deed, which is set out in the record, the grantor, in the habendum clause, makes a reservation in the following language, to wit:

"Reserving and retaining, however, to the said Littleberry Brown an estate in the said land during the life of the said Littleberry and the lives of his four daughters, Rebecca, Martha, Mary, and Lydia; it being the intention and understanding of the said Littleberry Brown and Joseph H. Brown and Gray L. Brown that the said daughters shall and may live on the said land during their lives as members of the family of the said Littleberry Brown during his life and, after his death, of the family or families of the said Joseph H. Brown and Gray L. Brown."

This deed was at once recorded in the registry of Edgecombe county. A few days later, and during the same month, Joseph and

Gray, having agreed upon the parts of the tract that each was to have, executed, respectively, deeds of release, or partition, by which Joseph released to Gray all his interest in one-half of the land, describing it by metes and bounds, and Gray released to Joseph all his interest in the other one-half of the land, likewise describing it by metes and bounds. These deeds were promptly recorded, and in each of them the same reservation is made as in the original deed from their father, Littleberry Brown, and is adopted as part of each deed, as follows:

"Whereas Littleberry Brown of said county has conveyed to his two sons, Joseph H. Brown and Gray L. Brown, a tract of land, situated in said county, containing 210 acres, more or less, reserving an estate for his own life and that of his four daughters, and the said Joseph H. Brown and Gray L. Brown have agreed upon a division of the said land and have ascertained by metes and bounds the part thereof to which each is to be respectively entitled: Now, therefore, this indenture," etc.

Then follow the usual words of conveyance.

On June 30, 1876, Joseph H., who is the ancestor of the defendants, conveyed to Gray L., who is the ancestor of the plaintiffs, his one-half of the tract of land, thereby making Gray L. the owner of the whole; but in this deed there is the same reservation as in Littleberry Brown's original deed, it being expressly referred to and adopted as a part of the instrument, and there is this provision after the said reservation:

"And the said Joseph H. and Gray L. having agreed between themselves upon a division of the said land and having ascertained by metes and bounds the part thereof to which each is to be respectively entitled after the falling in of the life estates and executed deeds of release to each other, and the said Gray L. Brown, being anxious to become the owner of the entire tract, this day purchased the interest of the said Joseph H. for the consideration hereinafter named ($600). Now, therefore, this deed witnesseth," etc.

Then follow the words of conveyance. This deed was likewise at once recorded.

The following were admitted by the parties to be the facts: The plaintiffs, as widow and heirs of Gray L. Brown, claim the original one-half, which was conveyed to him by the deed of Littleberry Brown, as an undivided interest subject to the reservation, and assigned to him in the partition by metes and bounds and released to him by deed of Joseph H. Brown, and the other half by the deed of Joseph H. Brown to Gray L. Brown, under all of which deeds the plaintiffs, Gray L. Brown's heirs, claim all of the land; that piece in dispute being the one-half of the original tract set apart to Joseph H. Brown, when he and Gray L. Brown divided it, which is specifically described in the deed from J. H. Brown to Gray L. Brown. The defendants claim, as the heirs of Joseph H. Brown, that they own all of that piece set apart by the partition deed from Gray L. Brown to Joseph H. Brown, presumably one-half of the original tract, and being the identical land that Joseph H. Brown purported to convey to Gray L. Brown, and the same described in the complaint. Littleberry Brown died in 1870, and the last of his four daughters died in August, 1912, prior to the beginning of this action. It is admitted that the actual rental value of the piece of land in controversy is $125 a year. The plaintiffs do not desire to hold any person, now a party defendant to the action, for any rent except from and after January 1, 1914, as those under whom defendants claim had possession up to January 1, 1914. Mrs. Martha Brown, as the widow and devisee of Joseph H. Brown, was in actual possession of the land in controversy when the action was begun, and the present defendants are heirs at law or devisees, and were made parties as defendants since then. Ever since the making of the second deed by Joseph H. Brown to Gray L. Brown in 1876, said Joseph H. Brown, his widow and heirs at law, have remained continuously in possession of the land in dispute, up to the trial of this action, and are still in possession, regularly using and occupying the same for their own purpose and without paying any rent to any other person. In 1869 J. H. Brown was in the actual possession of that piece of land set apart to him by the partition deed from Gray L. Brown, and continued in possession of it until 1876, and thereafter until his death. Neither Joseph H. Brown nor his widow, nor his heirs at law, defendants, have, by any overt act, recognized any outstanding claim or title to said land since the deed was made by Joseph H. Brown, but have at all times occupied the land continuously and used it for their own purpose, without paying rent to anybody.

"During their respective lives and up to the death of each of the four ladies who are mentioned in the deed of Littleberry Brown, they lived, in accordance with the terms of the deed, on the lands described in his deed, alternately living on the land afterwards set apart to Joseph H. Brown and the piece set apart to Gray L. Brown, asserting no title to the property, except the right of occupancy, if any, spoken of in their behalf in the deed from Littleberry Brown."

The jury returned the following verdict:

"(1) Have the defendants, since deed was made by Joseph H. Brown to Gray L. Brown in 1876, been for more than 20 years prior to the beginning of this action in the actual, open, continuous, notorious possession of the lands in controversy under known and visible lines and boundaries, claiming same as their own and receiving its rents and profits? Answer: Yes.

"(2) Did right of plaintiffs, and those under whom plaintiffs claim the possession of the lands in controversy, arise and accrue more than 20 years before the beginning of this action? Answer: Yes.

"(3) Are the plaintiffs the owners and entitled to the possession of the land sued for? Answer: No."

Plaintiffs requested that the following instructions be given to the jury:

"(1) The plaintiffs pray the court to instruct the jury upon the fact admitted that the possession of the land by the defendants was not

adverse to the plaintiffs until after the death of the last daughter in August, 1912, and that they should answer the first issue, 'No.'

"(2) The jury are instructed to answer the third issue, 'Yes.'"

The court charged the jury:

"If you find from the admissions made, by the greater weight of the evidence, that, for more than 20 years prior to and next preceding the bringing of this action, defendants and those under whom they claim have been in the actual, open, continuous, notorious possession of the land in controversy under known and visible lines and boundaries, claiming same as their own, and receiving and using its rents and profits, they should answer the first isue, 'Yes,' otherwise answer it, 'No.'"

The court further charged the jury that if they should answer the first issue, "Yes," they should also answer the second issue, "Yes," being of the opinion that Gray L. Brown, as soon as he got the first (last) deed from Joseph H. Brown, had the right to sue for possession so far as Joseph H. was concerned, leaving the ladies to stay on the land as members of the family. Plaintiffs excepted to the refusal to give their prayer for instructions, and also to the several instructions as given.

Judgment was entered upon the verdict for defendants, and the plaintiffs excepted thereto and appealed.

F. S. Spruill, of Rocky Mount, and W. O. Howard, of Tarboro, for appellants. H. A. Gilliam, of Tarboro, Jas. H. Pou, of Raleigh, and J. M. Norfleet, of Tarboro, for appellees.

WALKER, J. (after stating the facts as above). [1, 2] We have well-nigh discarded the technical rule of the common law by which a deed was construed, and under which undue prominence and effect has been given to its formal parts and their position in the instrument, to the sacrifice of the real intention of the grantor, and, further, by which too much importance was attached to the use of technical language, in which the meaning and intention were clothed, all of which resulted in defeating the purpose for which the deed was executed. We have gradually enlarged our view and liberalized our methods, which before were somewhat narrow and contracted, and now we seek after the intention by putting a construction upon the deed as a whole, and not paying too much attention to technical forms of expression, which tended to conceal the true meaning. We turn on all the light, while formerly it was, to some extent, shut out, thereby hiding or obscuring the grantor's meaning and disappointing his intention, which, of course, is thwarting the very object of all legal construction. With the evident purpose of doing justice by revealing and not concealing the truth behind ancient and threadbare forms, we have held that all parts of a deed should be given due force and effect. Words deliberately put in a deed, and inserted there for a distinct purpose, are not to be lightly considered, or arbitrarily thrust aside, the discovery of the intention of the parties being the first and main object in view; and, when it is ascertained, nothing remains to be done but to execute it, without excessive regard for merely technical inaccuracies or formal divisions of the deed. We have adhered to this rule, following the modern English doctrine, from the earliest periods of this court, and continuously to the present time, as will appear from our decisions. Campbell v. McArthur, 9 N. C. 38, 11 Am. Dec. 738; Kea v. Robeson, 40 N. C. 373; Rowland v. Rowland, 93 N. C. 214; Gudger v. White, 141 N. C. 507, 54 S. E. 386; Featherstone v. Merrimon, 148 N. C. 199, 61 S. E. 675; Triplett v. Williams, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514. It was early said by Chief Justice Taylor:

"Words shall always operate according to the intention of the parties, if by law they may; and, if they cannot operate in one form, they shall operate in that which, by law, shall effectuate the intention. This is the more just and rational mode of expounding a deed, for, if the intention cannot be ascertained, the rigorous rule is resorted to, from the necessity of taking the deed most strongly against the grantor." Campbell v. McArthur, supra.

And by Chief Justice Ruffin, at a later period, in Kea v. Robeson, supra:

"Courts are always desirous of giving effect to instruments according to the intention of the parties, as far as the law will allow. It is so just and reasonable that it should be so that it has long grown into a maxim that favorable constructions are to be put on deeds; 'benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat.' Hence words, when it can be seen that the parties have so used them, may be received in a sense different from that which is proper to them; and the different parts of the instrument may be transposed in order to carry out the intent."

We said in Gudger v. White, supra:

"It is not difficult, by reading the deed, to reach a satisfactory conclusion as to what the parties meant, and we are required, by the settled canon of construction, so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention we should reject that interpretation which plainly leads to injustice and adopt that one which conforms more to the presumed meaning because it does not produce unusual and unjust results. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire instrument, 'after looking,' as the phrase is, 'at the four corners of it.'"

See, also, Real Estate Co. v. Bland, 152 N. C. 225, 67 S. E. 483; Puckett v. Morgan, 158 N. C. 344, 74 S. E. 15.

[3] An effort should be made to give some meaning, and the correct one, to the deed, if possible. If the effort is doomed to failure by reason of uncertainty or repugnancy, so that we cannot ascertain the meaning by any fair rule of construction, or by reason of its ambiguity of expression, so that we are unable to understand, from the language of the

deed, who are the parties or what is the subject-matter, or, if they be known, what estate is conveyed, or any other matter essential to its validity, the instrument, of necessity, must fail. Kea v. Robeson, supra.

[4-6] Let us examine these deeds in the light of the foregoing principles. We will first consider the deed from Littleberry Brown to his sons. It is manifest therefrom that the grantor intended to convey to his two sons the fee in the land after a life estate in himself, for his own benefit, and also for the use and benefit of his four daughters during their joint lives and the life of the survivor of them. It makes no difference that this intent is gathered from the habendum clause, while in the premises an estate absolute and in fee is given to the sons, for all parts of the deed must be taken and construed together, as was expressly held in Triplett v. Williams, supra, where the habendum was allowed to cut down the fee conveyed in the premises to an estate for life, although at first glance, and without distinctly regarding the real intention, the two estates, according to the words when separately construed, appeared to be repugnant to each other. The language of this deed is even more explicit than was the deed of John Greenwood to Margaret Greenwood in the Triplett Case. It expressly "reserves and retains" to Littleberry Brown, for his life, an estate for his own life and benefit, and for that of his four daughters, for their use, during their lives. We attach no importance to the use of the technical word "reserves," but will give it the meaning which will subserve the intention, which is that he did not convey to his sons so much of the estate in the lands as was necessary to create a life estate in him, for himself and his daughters, and it is the same as if he had first conveyed such a life estate with remainder in fee to his said sons, for the deed must operate according to the intention, giving, of course, due regard to words when apparently used in a technical sense. Again, it may be said that the deed expressly, and not by mere implication, excepts from its operation the life estates of the grantor and his daughters. The statement in the deed of the object in making it, or the motive for the gift to his daughters, is not material to a proper construction of it, and should not change its evident meaning, when ascertained by unambiguous language, which is plainly sufficient to create a life estate in them. It merely shows that they were the objects of his first concern, and that he was making provision of a home for them. The best way to safeguard the execution of this purpose was to invest them with the title, legal or equitable, for their lives, and not rely solely upon the covenant of the sons, who might or might not be faithful or loyal to his injunction, that the daughters should live with them, singly, jointly, or alternately on the land. This construction is greatly strengthened by the meaning which the parties have attached to the deed, in their subsequent conveyances for the purpose of partition, and in the deed of his several interest by Joseph H. Brown to Gray L. Brown. All of them recite that Littleberry Brown, by his deed, had reserved an estate to himself for his own life, and the lives of his daughters. The expression is substantially this: Whereas Littleberry Brown has conveyed to Joseph H. and Gray L. Brown a tract of land containing 210 acres, more or less, "reserving an estate for his life and that of his four daughters." They then proceed to make partition by the deeds, conveying a several portion, by metes and bounds, each to the other. The deed of Joseph H. Brown, for his share, to Gray L. Brown, is even more explicit in this respect, for it not only contains the above recital as to the life estates reserved, but adds these most significant words:

"And the said Joseph H. and Gray L. Brown, having agreed between themselves upon a division of the said land, and having ascertained, by metes and bounds, the part thereof to which each is to be entitled, after the falling in of the life estates," etc.

We do not think it makes any difference whether we consider the life estate for the daughters as reserved directly to them or indirectly, through their father, as their trustee; they having the use or equitable estate. If the latter is the correct interpretation, and the trust is not a simple one which the statute does not execute by transferring to the use the legal estate, the latter, at the death of Littleberry Brown, descended to his heirs for the benefit of the said daughters; they holding it in the same plight as their father did. If, in answer to this, it be said that the reservation was to Littleberry Brown only for his life, and the legal estate did not therefore descend, our reply is that the law implies such an estate in Littleberry Brown as is sufficient to support the use, or as is commensurate with the probable exigencies of the trust, and that, in this case, would be a fee, even without express words of inheritance annexed to the grant, as it was not only probable, but actually necessary, to extend the limitation beyond the life of Littleberry Brown. This rule will always be operative in practice when the trust is active and the person entitled to the use, or the cestui que vie, does or may survive the trustee or him who holds the legal estate, as in this case. Smith v. Proctor, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172; Kirkman v. Holland, 139 N. C. 185, 51 S. E. 856; Haywood v. Trust Co., 149 N. C. 208, 219, 62 S. E. 915; Haywood v. Wright, 152 N. C. 421, 434, 435, 67 S. E. 982. As there is only a simple declaration of a trust in the deed of Littleberry Brown, there is no reason why, after his death, the legal estate and the use should not be merged in his unmarried daughters for their lives, or, in other words, why the

statute of uses should not execute the unnecessary portion of his estate, whether the same rule would apply before his death or not, so as to make it, in the first instance, an estate, first, for his life, then for their lives, and finally with remainder in fee to the sons. Cameron v. Hicks, 141 N. C. at page 27, 53 S. E. 728, 7 L. R. A. (N. S.) 407; Smith v. Proctor, supra, 139 N. C. at page 323, 51 S. E. 889, 2 L. R. A. (N. S.) 172. The defendants reply to all this by contending that the estate for the lives of the daughters was a chattel interest, prior to the enactment of Revisal, § 1556, rule 11, and would pass to Littleberry Brown's personal representative, and, that being so, the possession of defendants and those under whom they claim could be adverse to such representative or to the heirs if the legal estate descended to them, as they had a right of entry during the 42 years of such possession since the death of Littleberry Brown, and failed to avail themselves of it, but we cannot agree to this view. Revisal, § 1556, rule 11, was brought forward from Revised Code, c. 38, rule 12, of the Code of 1883, § 1281, rule 11, in identical language, as follows:

"Every estate for the life of another, not devised, shall be deemed an inheritance of the deceased owner, within the meaning and operation of this chapter."

So that in 1870 the same rule was in force as before and since that time. This was a departure from the English law, as settled by 29 Charles II, which enacts (according to the ancient rule of law) that where there is no special occupant, in whom the estate may vest, the tenant pur autre vie may devise it by will, or it shall go to the executors or administrators, and be assets in their hands for payment of debts; and the other, that of 14 Geo. 11, c. 20, which enacts that the surplus of such estate pur autre vie, after payment of debts, shall go in a course of distribution like a chattel interest. 2 Blackstone, star pp. 259, 260 (vol. 1 of Cooley's 3d Ed. top p. 259). Under our statute, the estate pur autre vie is descendible to the heirs of its owner. But we are not dealing with such an estate, in the strict sense, but with an estate in trust for the lives of the daughters, where the legal estate descended to the heirs of Littleberry Brown charged with the trust, and as the separation of the two estates, the legal estate and the use, was no longer necessary, the statute executed the unnecessary portion of the legal estate in the daughters. The possession of defendants could not be adverse to them, as they were in possession themselves during the whole period of their lives. Fowle v. Whitley, at this term, 82 S. E. 841. But if the legal estate which descended to the heirs of Littleberry Brown was not executed by the statute, but remained in them, and the possession was adverse to them, it could only bar the daughters' life estate, as the trust ceased at the end of their lives, and did not extend to the sons. Consequently only the life interest of the daughters could be acquired by adverse possession, and there was none as against them. There being no right of entry in Gray L. Brown, during their lives, he was not barred. Harris v. Bennett, 160 N. C. 339, 347, 76 S. E. 217, and cases there cited.

[7] But there is another view of the matter. The deed of Joseph H. Brown to his brother, Gray L. Brown, expressly provides that the estate thereby conveyed shall not take effect "until after the falling in of the life estates" of the daughters, and also recognizes the existence of such life estates, as do the partition deeds executed between them. This being so, whatever the true construction of the Littleberry Brown deed may be, and even if it only provided for them a home and did not convey to them a life interest, the recitals and agreement in the deeds above mentioned would prevent the estate from taking effect until the death of the daughters. While the agreement might not alter the construction of the former deed, or create any new estate for life in them by way of conveyance, it would, at least, suspend the vesting of the estate, under the Joseph H. Brown deed, until their deaths. It was so held substantially in the case of In re Dixon, 156 N. C. 26, 28, 72 S. E. 71, where R. A. L. Carr conveyed land to his daughter, "reserving a life interest to himself and wife," and the reservation was held to be valid, and the estate did not vest in the daughter until after his own death and that of his wife, "although the exception in favor of the grantor's wife did not operate as a conveyance to her." See, also, Sasser v. Blyth, 2 N. C. 259; Baggett v. Jackson, 160 N. C. 31, 76 S. E. 86; Thomas v. Bunch, 158 N. C. 175, 73 S. E. 899; Jones v. Whichard, 163 N. C. 241, 79 S. E. 503; Jones v. Sandlin, 160 N. C. 150, 75 S. E. 1075.

But, taking a still broader view of the case, the heirs of Joseph H. Brown will not be heard to assert that his and their possession was adverse to Gray L. Brown and his heirs in the face of the express recitals and stipulations in the deeds. To say the least, it would be unjust and inequitable to permit such an advantage to be taken of the possession, even though long-continued and accompanied by the receipt of rents and profits, when Gray L. Brown's right of action was not to accrue until the death of the last surviving daughter of Littleberry Brown. The terms of the deeds were sufficient to lull him and his heirs into a sense of security against any such claim. If the daughters did not acquire an estate during their lives, but merely the right of a home, and Gray and Joseph remained tenants in common until their deaths, the adverse possession, if it existed, could only bar this joint interest, and the right of Gray and his representatives to an account and payment of his share of the rents and profits received by Joseph, but as

to the several interest of Joseph, which he conveyed to Gray, there could be no bar, as it was not to take effect in possession until the surviving daughter's death. The whole case shows that the possession of Joseph was merely permissive, and it was not contemplated that it should operate as a bar to his brother's right in the land. How could Gray L. Brown have recovered this several interest before the death of the last daughter? If he had sued his brother, who was in possession of the land, he would have been met by the terms of the deed to him, which withheld his right of entry until the happening of that event. It is very true that a party who has conveyed land to another may revest the title in himself, as against his vendee, by his possession, unexplained, continued for 20 years, or by color of title and adverse possession thereunder for 7 years. Wilson v. Brown, 134 N. C. 400, 46 S. E. 762; Johnson v. Farlow, 35 N. C. 84; Scarboro v. Scarboro, 122 N. C. 234, 29 S. E. 352. It was said in Chatham v. Lansford, 149 N. C. at page 365, 63 S. E. 82, 25 L. R. A. (N. S.) 129:

"Though the mere continued possession of the vendor of land after conveyance executed is not adverse to his vendee, or one claiming under him, yet there is nothing in their relations which will prevent the vendor from acquiring title again by adverse possession. He may disseise his grantee, and by adverse possession for the necessary time bar the latter's entry"—citing authorities.

It is afterwards said that the same principle applies to a grantor, who afterwards takes a deed for the land from a third party, enters thereon, and continues his possession, under the color, for the requisite time, as he is presumed to have entered and taken possession under such title as he then held. Some of the cases hold that the possession of a grantor, continued after the execution of his deed to the grantee, is not adverse to the latter until its hostile character is plainly indicated to the grantee, or brought home to him in some way, as he is presumed to hold it in trust for him until that is done (Connor v. Bell, 152 Pa. 444, 25 Atl. 802; Paldi v. Paldi, 84 Mich. 346, 47 N. W. 510; Brinkman v. Jones, 44 Wis. 498); but the authorities are conflicting, upon this question, as to what will be necessary to constitute adverse possession under such circumstances, and when the possession has not been transferred by the grantor to his grantee, but simply continued by him after the making of his deed, and we need not enter upon its discussion with a view of deciding it. In Brinkman v. Jones, supra, it was held that "the possession of a grantor is presumably adverse to the grantee, where it has continued for a long time after the grant, and is inconsistent in its nature with the grantee's rights by the terms of his deed," which principle is stated in the eleventh headnote of that case. We have already shown that Joseph H. Brown's possession was not inconsistent with the terms of his deed to Gray L. Brown, but entirely consistent therewith.

In no view of the facts, as they appear in the record, can we sustain the judgment. The single question being whether, upon the admitted facts, the defendants have acquired the title by adverse possession, and being of the opinion that they have not, the court should have entered judgment for the plaintiff, upon the facts agreed, for there was nothing for the jury to decide. The plaintiffs excepted to the judgment, which was erroneous. The verdict and judgment will be set aside, and judgment entered in the court below in behalf of the plaintiffs, for the land, and also for the rents and profits from January 15, 1914, to be ascertained by a jury, unless the parties can agree upon the amount. This meets fully the legal merits of the case.

It would be idle to order a new trial, when there is nothing to be tried; the parties having agreed upon facts sufficient to entitle the plaintiffs to judgment as above set forth.

Error.

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(168 N. C. 62)

## McCRACKIN et al. v. GREENSBORO, N. & A. R. CO. et al. (No. 325.)

(Supreme Court of North Carolina. Jan. 13, 1915.)

COUNTIES ⊂⇒154—COUNTY AID TO RAILROAD—CONDITIONS—EXTENSION OF TIME.

Defendant county, having been authorized to purchase preferred stock in aid of defendant railroad company, by Pub. Loc. Laws 1911, c. 770, and an affirmative vote of the electors pursuant thereto, contracted to issue the bonds subject to the condition that they should not be delivered to the railroad company or to any one for it, unless the railway was constructed and in operation within three years. *Held*, that such limitation was not merely a condition subsequent, but was rather in the nature of a condition precedent, and that the county commissioners had no power to extend the time.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 228–240; Dec. Dig. ⊂⇒154.]

Appeal from Superior Court, Alamance County; Rountree, Judge.

Action by J. M. McCrackin and others, taxpayers, etc., against the Greensboro, Northern & Atlantic Railway Company and the Board of Commissioners of Alamance County, to restrain the issuance of county bonds in payment of a subscription to the defendant railroad company's preferred stock. A demurrer to the complaint was sustained, and complainants appeal. Reversed.

The following is the statement of facts taken from one of the briefs:

"On the 5th day of August, 1912, a petition was presented to the board of commissioners of Alamance county on the part of each of those townships of said county named in paragraph 2 (Record, p. 4) of the complaint in this action; said petitions praying orders for elections to be held in each of said townships on the question of subscribing to the preferred capital stock of the Greensboro, Northern & Atlantic Railway Company, as provided for in

chapter 770 of the Public Local Laws of 1911 and the laws amendatory thereof. The elections were duly ordered and held, the aforesaid townships each voted in favor of a subscription; and bonds, bearing date of 8th of October, 1912, were issued by the county commissioners, as provided by the aforesaid chapter of the Public Local Laws of North Carolina.

"Subsequent to the 5th day of August, 1912, the date of the orders for the elections, but prior to the 17th day of September, 1912, the date on which the elections were held, viz., on the 8th day of August, 1912, an agreement, set forth in the sixth paragraph of the complaint herein (Record, pp. 11–16), was voluntarily entered into between the railway company and the Greensboro Loan & Trust Company. This agreement provides, among other things, that, in consideration of the qualified voters of these several townships voting in favor of a subscription, the railway company agrees that the bonds therefor, when issued, shall be delivered to the trust company to be held in trust upon the condition that said bonds shall not be delivered to the railway company, or to any one else for it, until a railway from Greensboro, N. C., through Alamance county, to some connecting point on the Seaboard Air Line Railway, or the Norfolk & Southern Railway, or both, is completed by this company or its successors, and there are in operation over such line of railway trains for the transportation of passengers and freight, and upon the further condition that, unless a railway is so constructed and in operation within three years of the issuance of said bonds, the trust company shall deliver the bonds to the commissioners to be destroyed, and all the rights and equities of the railway company in said bonds shall cease. This agreement was widely published prior to the election in all the election districts. The bonds themselves contain no reference to the agreement, but, when issued, they were delivered to the trust company by the commissioners and are now held by it.

"After the lapse of about 20 months of the 36 months' time limited in said agreement for the completion of said railway, the railway company presented to the commissioners a petition, as set forth in the seventh paragraph of the complaint (Record, pp. 16–20), alleging that it would be impossible to complete the railway within the time limited, and praying that the said time be enlarged by an additional two years. This petition was granted. Thereupon plaintiff brought this action and alleged that the commissioners were without authority to grant such an extension of time, and asked that the order to that effect be declared void, and that the trust company be enjoined from making any other disposition of said bonds than might be made under the aforesaid agreement between it and the railway company. Defendant railway company demurred to the complaint. Demurrer sustained, and judgment accordingly. Plaintiff excepted and appealed."

W. S. Coulter and J. R. Hoffman, both of Burlington, for appellants. Long & Long, of Graham, and King & Kimball, of Greensboro, for appellees.

HOKE, J. From a perusal of the facts stated in the complaint, it clearly appears that this question of subscription was submitted to the voters of these townships and approved by them as a conditional proposition, and, in order to make the same definite and put it in a form that would render it enforceable, the railroad, some time prior to the election, and in reference thereto, entered into an agreement with the Greensboro Loan & Trust Company, "as trustees for the various townships," among other things, that, if subscriptions should be approved at the approaching election, the bonds should be prepared and left with the trust company. Among other stipulations, on condition:

"First. That the said bonds shall not be delivered to the Greensboro, Northern & Atlantic Railway Company, or any one else for it, unless and until there is constructed by it, or by its successor or successors, or its assigns, so much of its projected or proposed lines of railway as shall constitute and include a line from a point within the city of Greensboro, N. C., in an easterly direction through the county of Guilford, to the Alamance county line, and thence through the county of Alamance to a point necessary to connect, and which does connect, with the Seaboard Air Line Railway Company and the Norfolk & Southern Railway Company's line or lines, or either of them, or with the subsidiary line or lines of said corporations, or either of them.

"Second. That in the event the said portions of the lines of railway of the party of the first part is not constructed by it or its successor or successors or assigns within three years from the date of the issuance of said bonds as indicated and set forth in condition first, as above set out and numbered, then in that event it is agreed by the party of the first part that the party of the second part (the Greensboro Loan & Trust Company) shall, and it agrees that it will, in that event, deliver all of said bonds so issued by the county of Alamance for the several townships of said county, to the board of commissioners of Alamance county in order that they may all be destroyed, and it is further agreed by the party of the first part that, in the event of the failure to construct the aforesaid lines of railway within three years from said date of the issuance of said bonds, all rights and equities which the party of the first part may have in said bonds shall cease.

"Third. That said bonds shall not be delivered by the party of the second part to the party of the first part, or to any one for it, unless and until the party of the first part, its successor, successors or assigns, construct said lines of railroad as agreed in condition No. 1 (first), as above set forth, and has in operation over said line of railway, within three years, trains for the transportation of passengers and freight."

And the complaint further states:

"That said contract was duly and widely published in all of the aforesaid townships before the date of said election."

And, on these facts, we are of opinion that the board of county commissioners is without power to alter the contract and grant defendant company the two years' additional time. It is true that, under section 16 of the act incorporating the company (chapter 770, Public Local Laws 1911), all the counties, townships, cities, and towns along the line of the proposed road are authorized to subscribe to the undertaking, on approval of a majority of the qualified voters, etc., and that the board of county commissioners are declared to be the corporate agents of the townships, for the purposes of the act, etc., and we incline to the opinion that the act intended, as to these townships, to vest in the county commissioners the ordinary powers of governmental agents in the premises, but under our Constitution, and by the express provisions of

the statute, this subscription is only valid on approval of the qualified voters of the respective municipal bodies specified, and the question having been submitted and approved by them in a conditional form, definitely set out in a contract and formally assented to by the railroad company, it must, as between the parties thereto, be taken as a binding agreement, and the county commissioners, even though acting as corporate and governmental agents, are without power to alter the proposition, as submitted and approved, in any substantial particular. The position as presented has not been directly passed upon in this jurisdiction, but it has been recognized as sound in principle by the Supreme Court of the United States in Quinlan v. Green Co., 205 U. S. 410, 27 Sup. Ct. 505, 51 L. Ed. 860, Citizens' Savings & Loan Association v. Perry Co., 156 U. S. 692, 15 Sup. Ct. 547, 39 L. Ed. 585, and other cases, and seems to have been directly approved in West Va. & P. R. R. Co. v. Harrison County, 47 W. Va. 273, 34 S. E. 786, and Clark v. Town of Rosedale, 70 Miss. 542, 12 South. 600, both of them courts of recognized ability, and learning. See, also, Jones on Railroad Securities, §§ 267, 268.

It is urged for defendant that the county commissioners, under their power as corporate agents, have the right to modify the contract made by them when it clearly is promotive of the interests of the community concerned, and several cases were cited where such a modification had been upheld, among others, County of Randolph v. Post, 93 U. S. 502, 23 L. Ed. 957, but an examination of these authorities will disclose, we think, that the agreement is allowed to prevail only when the municipal officers have power of themselves to make the subscriptions, or where, the vote of the municipality being in general terms for the subscription, the corporate officers were intrusted with making the contract designed to carry the vote into effect. But in the case before us, as we have seen, the voters have expressed their approval on a definite proposition, as contained in a contract which they have made through the loan and trust company, as their agents and representatives, for the purpose and which specified that the bonds were not to be delivered till the road was completed, and that, unless same was completed within three years, they were to be returned and canceled and all rights and equities of the road should cease.

County of Randolph v. Post was the case of an executed contract, where the road had been completed and in operation and the county was endeavoring to avoid its obligations on grounds, many of them, highly technical, and where the county authorities, as stated, had been intrusted with the general power of making the contracts in the premises. In that case, too, it appeared that the county officers charged with the duty had declared that the road was completed, had delivered the bonds, and had received the stock of the railroad company in return therefor, and this was held to be an estoppel on the municipality. The case has very little similarity to that presented here. It is further contended that, as the statute contained no provision for submitting the proposition in its conditional form, a stipulation of the kind relied upon should be considered and treated as void.

In many of the decisions, where the vote was for a conditional subscription, the statute or resolution contained provision to that effect, but there is nothing, in itself, illegal in taking the sense of the voters upon the proposition, in that form. There is nothing in the statute that forbids it, and assuredly the railroad company, having signified their assent in definite contract, formally executed, and by which they have obtained the township subscription, will not be heard to assail it on any such ground. They may not accept the benefits and repudiate the burdens of their contract and are estopped to assail the validity of the stipulations. Sprunt v. May, 156 N. C. 388, 72 S. E. 821; Hutchins v. Bank, 128 N. C. 72, 38 S. E. 252. Again, it is insisted that this provision is in the nature of a forfeiture, and that the courts are inclined against the specific performance of such a stipulation, and that the county commissioners, under their power as corporate agents, should be permitted to modify it as to nonessentials, and that, on the facts in evidence, time should be considered a nonessential, within the meaning of the principle.

It is true that our court has frequently expressed its approval of the principle that in ordinary business contracts, in which the consideration has wholly or in part passed, conditions subsequent, which look to the forfeiture of rights and covenants for liquidated damages, which are in their effect but penalties, will be construed with some strictness and, in the exercise of its equitable powers, that it will, at times, relieve against forfeiture in the one case and will adjust the conflicting interests in disregard of the penalty in the other. But the principle does not obtain in the case of conditions precedent, where strict performance may be insisted on. Corinthian Lodge v. Smith, 147 N. C. 244, 61 S. E. 49; 1 Pomeroy, Eq. Jurisdiction (3d Ed.) § 455. This contract, in effect, provides that the bonds shall not be delivered or become binding obligations of the township, unless the road is completed within three years, and, in that aspect, may be regarded as a condition precedent; but whether the one or the other, in contracts of this character, there is high authority for the position that time is of the substance, and that the contract in that respect may not be altered by the commissioners who are only the agents to carry its terms into effect, with power to modify, perhaps, in matters

nonessential. The provision allowing three years seems to be a reasonable one, and if, in the face of this very definite stipulation as to time, it can be extended to two years, at the end of that time it may be changed again, and the voters and residents of the community are, in the meantime, shut off from making effective effort in other directions. Speaking to this question of time, in 47 W. Va. 273, 34 S. E. 786, supra, Judge Brannon, delivering the opinion, said:

"Time is the essence of the contract. If the county had given a few months or a year, we might say it was not so intended; but, giving nearly three years, we may more readily say that both sides so regarded it. Look at the strong language—an express proviso that if the road should not be ready for ties by 1st of January, 1887, the subscription should be forfeited. Time is often nonessential, where no one suffers by delay, as in many purchases of land; but the very nature of this case forces the conclusion that time was all-important to the county, as we cannot suppose that it intended to handcuff itself for an indefinite term against efforts to get elsewhere the benefit it had in view, should this company fail to perform the work. Ballard v. Ballard, 25 W. Va. 470. 'Where the condition requires the railroad to be begun or finished before a certain date, it is held that time is of the essence of the contract, and the subscriber may be discharged from liability by a failure to comply with the condition.' 1 Elliott, R. R. §§ 116, 117. Where a town agreed to issue its bonds on 'performance of certain conditions by a railroad company—as that it should construct its road from a certain point to a certain point within a certain time—if the company does not perform the condition within the time, it cannot, though prevented by floods, compel the issue of the bonds, though it afterwards completes the line.' 1 Wood, R. R. § 119, citing Railway Co. v. Thompson, 24 Kan. 170. Subscription, 'provided the town of F. is made a point, and said road is put under contract in one year from September 1, 1853.' Held, putting the road under contract was a condition precedent to right of company to recover, though the road was finished and running by September 1, 1858; Judge Dillon saying the letting to contract as stipulated might have hastened completion. Railroad Co. v. Boestler, 15 Iowa, 555."

In the present contract, the parties have not only made the express stipulation that, if the road is not completed to a certain point in three years, the bonds will be surrendered and destroyed, and that all rights and equities under the contract shall cease, but have added yet another with regard to time: That the bonds shall not be delivered unless and until the railroad shall construct its lines, as above set forth, and has in operation over said line, within three years, trains for the transportation of passengers and freight. We are not inadvertent to an allegation made by the railroad, in its application for extension, that they have already spent many thousands of dollars in making surveys to ascertain the desirable route. Even if this be accepted as a fact in plaintiff's pleadings, because annexed thereto, as an exhibit, it is a very indefinite statement on which to find an equity by reason of moneys expended. A perusal of the allegation will show that the railroad company, in the 20 months already expired, have not even yet located their line and are not in any attitude to invoke consideration of the court on the ground of diligence or of any defense of large expenditure. On the facts in evidence, we are of opinion that there is error in allowing the county commissioners to extend the time, and the judgment to that effect is reversed.

Reversed.

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(168 N. C. 24)

## HANES v. SHAPIRO & SMITH. (No. 329.)

(Supreme Court of North Carolina. Jan. 13, 1915.)

1. SALES ⟸425—WARRANTY—ELECTION OF REMEDIES.

Where a seller of furniture warranted it, the buyer may, the furniture having proven defective, recover damages under the warranty; but, having elected to allow the seller to make good his warranty by repairing the furniture, the buyer cannot, upon destruction of the article in the seller's hands, change and sue upon the warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1207, 1208; Dec. Dig. ⟸425.]

2. BAILMENT ⟸2—NATURE OF BAILMENTS.

Where a seller who warranted a sideboard was allowed to retake the article to repair it, there being a controversy between the buyer and seller as to whether it was defective, the bailment was a mutual benefit one.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 13–17; Dec. Dig. ⟸2.]

3. BAILMENT ⟸31—ACTIONS—BURDEN OF PROOF.

The bailor has the burden of proving that the bailee's negligence caused the destruction of the article bailed, although proof of destruction alone raises a presumption of negligence requiring the bailee to go forward with evidence.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 124–131; Dec. Dig. ⟸31.]

4. BAILMENT ⟸14—CARE REQUIRED.

In case of a mutual benefit bailment, the bailee is bound to use ordinary care, and is not liable for the destruction of the article by fire ignited without his fault.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 45–55; Dec. Dig. ⟸14.]

5. BAILMENT ⟸18—DESTRUCTION OF ARTICLE—EFFECT.

Where the article bailed is destroyed without negligence of the bailee, the bailee cannot recover for work and labor already performed, and the loss of the article falls on the bailor.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77–79, 81–84; Dec. Dig. ⟸18.]

Appeal from Superior Court, Forsyth County; Harding, Judge.

Action by W. M. Hanes against Shapiro & Smith. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

The plaintiff alleges that he purchased a lot of furniture from the defendants with a warranty for 12 months against defects as to workmanship and material. Among this furniture was a sideboard, for which he paid about $177. The furniture was delivered, and about 30 days after its receipt,

and before the defects appeared, the plaintiff paid the purchase price for all of the furniture. Within a year, however, defects, both as to workmanship and material, did appear in one piece of the furniture purchased, viz., the sideboard. The defendants were notified of these defects, and demand was made upon them to make the sideboard conform with their warranty. The defendants requested the plaintiff to ship the sideboard to their factory at Norfolk, Va., where it could be repaired. In accordance with their request, the sideboard was shipped to them, in order to give them an opportunity to remedy the defects, and, while they were at work on the furniture to remedy the same, their place of business, together with the sideboard, was totally destroyed by fire. The plaintiff then made demand upon them for his property, or that they should pay him back the amount of money which he had paid them for this defective piece of furniture. This demand was refused, and the plaintiff brought this action for money had and received to his use. He contends that this furniture was bought with express warranty as to workmanship and material; that there was a breach of the warranty, in that this sideboard was defective, both as to workmanship and material; that the defendants, upon his notice to them of the defects and the demand of plaintiff that it be repaired, requested that the sideboard be returned to them in order that they might have an opportunity to remedy these defects and make good their warranty, and while it was in their possession it was destroyed by fire. Upon these facts he contends that he had his election to sue in tort, or to waive the tort and sue on contract for money had and received. He elected to sue on the warranty, and alleges that the defendant is indebted to him for money had and received to his use to the amount which he had paid for this sideboard. He says that the contract of warranty was a collateral undertaking on the part of the seller as to the quality of the subject of sale, and upon a breach of this collateral undertaking a cause of action arose to the plaintiff, and when the property was returned to the defendants, in compliance with plaintiff's demand and at their request, in order to permit them to comply with their contract and to make good their warranty, the plaintiff did not in any wise waive his rights to sue on the warranty, or, at his election, to sue for money had and received.

The following issues were tendered by the defendants, as the proper and only ones arising in the case:

"(1) Is the plaintiff damaged by the negligence of the defendant in the loss of the sideboard in controversy? (2) What damage is plaintiff entitled to recover?"

The court declined to submit these issues, and defendants excepted. The jury rendered the following verdict upon the issues submitted by the court, and to which defendants duly excepted:

"(1) Did the defendants warrant the sideboard in question to be of first-class material and constructed in a workmanlike manner, as alleged? Answer: Yes. (2) Was there a breach of said warranty by the defendants? Answer: Yes. (3) What damage, if any, has the plaintiff sustained by reason of such breach? Answer: $177."

Judgment and appeal by defendants.

Alexander, Parrish & Korner, of Winston-Salem, for appellants. P. Frank Hanes and L. M. Swink, both of Winston-Salem, for appellee.

WALKER, J. (after stating the facts as above). [1] The case was tried below upon the wrong theory. When the sideboard was found to be defective in construction and material, the plaintiff could have stood upon his right, under the warranty, and recovered his damages. But it was a question of election, and he chose to waive his right to sue upon the express covenant of warranty, and to allow this defendant to make good his warranty and to satisfy any damages that might have been recovered thereon, by repairing or restoring the sideboard so as to make it correspond with the thing warranted. It is such a manifest principle of justice and right, that a man, even in the ordinary affairs of life, should not be allowed to blow hot and cold in the same breath and to avail himself of inconsistent rights, that the attempt to establish the truth of the proposition would be worse than useless. To use a very suggestive phrase of Herbert: "Wouldst thou both eat thy cake and have it?" You cannot take two chances, hoping that if you lose the one you may gain the other. The moral law forbids it, and the technical law (as it is sometimes flippantly called) is also prohibitive of such a course. He cannot give up his warranty for a consideration, and afterwards take it back. Where a person has presented to him an election of inconsistent remedies, he must, once for all, choose between them, and is bound by his choice so made. When the plaintiff sent the sideboard to defendant for reparation, so that it should be made to answer the warranty, he thereby waived all right to sue upon the covenant, provided however, that defendant, being entitled to a reasonably sufficient time and opportunity to do the work and return the article, so as to discharge himself from blame, had really used due diligence and care, under the circumstances of the case, to comply with his undertaking to restore the sideboard to such a state that it would fulfill his contract. Plaintiff contends that there was no waiver of his right to sue upon the warranty by returning the sideboard for repairs; but we think that it is such a clear and unmistakable waiver, upon the conceded facts, as to require no further argument from us to establish this position. He received the

sideboard, paid for it, and the title passed thereby from defendants to him. It was not revested in defendants by the return of the sideboard for the purpose of restoration, and we think the learned and able counsel of plaintiff virtually submitted to this view of the transaction, when asked the question if such a change of title had taken place. If he did not, it is, in law, correct, and must, by reason and authority, be so, and could not well be otherwise. But how does the law stand? We will attempt briefly to review it, with special reference to the facts of this case.

According to the classification of the civil law, "bailments" are of six kinds: (1) "Depositum," which is a delivery of goods to be kept for the bailor without recompense. (2) "Mandatum," which is a delivery of goods to have some service performed about them by the bailee without recompense. (3) "Commodatum," which is a gratuitous loan of goods to be temporarily used by the bailee, and returned in specie. (4) "Mutuum," which is a delivery of goods, not to be returned in specie, but to be replaced by other goods of the same kind. At common law, such a transaction is regarded as a sale or exchange, and not a bailment. (5) "Pignus." A pignus, pledge, or pawn, is a delivery of goods as security for some debt or engagement, accompanied by a power of sale in case of default. (6) "Locatio." A locatio, or hiring, is a bailment for reward, and may be of four kinds: (a) "Locatio rei," or the hiring of a chattel for use. (b) "Locatio operis faciendi," or the hiring of work and labor. (c) "Locatio custodiæ," or the hiring of care and services to be bestowed on the thing delivered. (d) "Locatio operis mercium vehendarum," or the hiring of the transportation of goods. The above classification is unnecessarily refined. The rights and liabilities of the parties to a bailment, as we shall see, depend primarily upon which one is to receive the benefits of the transaction. The law justly imposes a stricter liability upon the one who is to receive the whole benefit of the bailment than upon one who entered into it solely out of good will, and for the accommodation of the other party. Accordingly, bailments may be divided with reference to the party who is to receive the benefit into three classes, which will include all the principles of the law of bailments. The various kinds of bailments in the Roman classification group themselves naturally under these three heads, and it may be convenient to sometimes use the Roman terms to indicate subdivisions. The classification we adopt is:

The rights and liabilities of the parties to a bailment, as we have said, depend primarily upon which party the bailment is intended to benefit. Bailments may therefore fall within these divisions:

(a) Bailments for the bailor's sole benefit, including (1) depositum and (2) mandatum.

(b) Bailments for the bailee's sole benefit, including (1) commodatum.

(c) Bailments for mutual benefit, including (1) pignus, and (2) locatio.

These views are well supported by the authorities, and especially by Hale on Bailments, pp. 36 and 37.

The transaction in this case more nearly resembles the locatio custodiæ of the civil law, or the hiring of care and services to be bestowed on the thing delivered, and comes under the head of locatio in the last classification given above.

The rights and liabilities of the parties to a bailment are primarily determined by the contract and bailment purpose. The following principles, however, are common to all classes of bailments: (a) The subject of the bailment must be personalty. (b) There must be a delivery, actual or constructive, of the property. (c) There must be a voluntary acceptance by the bailee. (d) There must be competent parties. (e) Possession by the bailor is considered as sufficient title to support a bailment. (f) The right of property remains in the bailor, and he may maintain an action to protect it. (g) The bailee is estopped from disputing that the bailor had title at the time the goods were delivered. (h) The bailor must not expose the bailee to danger without warning. (i) The bailee must exercise due care.

The parties may enlarge or diminish their liability by special contract, provided: First, that the contract is not in violation of law or against public policy; second, that the liability of the bailee is not to be enlarged or restricted by words of doubtful import; and, third, that the bailee must exercise perfect good faith at all times. He is always liable for his positive wrong or fraud. It is further required that the bailee must deliver up the property uninjured at the termination of the bailment, or else excuse his inability to do so. Hale on Bailments, pp. 10 and 11. Commensurate care, or due care under the circumstances, is the measure of the bailee's obligation, in the absence of express contract, no matter what may be the object of the bailment.

In all ordinary classes of bailment, losses occurring without negligence on the part of the bailee fall upon the bailor. The bailee's liability turns upon the presence or absence of negligence. In some exceptional kinds of bailments, as in the case of carriers or innkeepers, there is a special liability, approximating that of an insurer; but, generally speaking, there can be no recovery against a bailee for loss or damage to the property, in the absence of negligence.

In Coggs v. Bernard, Lord Holt distinguished as to bailments and divided them into three grades or degrees of negligence. Said he: In bailments for the sole benefit of the bailor, the bailee will be liable only for gross negligence; in bailments for the

mutual benefit of both parties, he will be liable for ordinary negligence; in bailments for the exclusive benefit of the bailee, he will be liable even for slight negligence. This distinction, and the consequent distinction into three degrees of negligence, has been perpetuated in text-books and decisions, until it has become so interwoven with the law of bailments that it is impossible to discard it, though it has been frequently, severely, and perhaps, in some respects, justly, criticized. It certainly may be misleading, if not properly considered. "Negligence" may be defined generally as the breach of a duty to exercise commensurate care, and, to be actionable, it must proximately result in damage. Brewster v. Elizabeth City, 137 N. C. 392, 49 S. E. 885. Any omission of the duty to exercise due care and resulting in damage ought to impose liability. There is no such thing as excusable negligence which causes a wrong. It is said that gross negligence is "ordinary negligence with a vituperative adjective." It would, perhaps, be more logical to apply the adjective of comparison to the term "diligence" rather than to the correlative term, "negligence." This conception of ordinary and gross negligence seems to have had its origin in the law of bailment, and we may illustrate here. Thus, where the exercise of great diligence is the duty imposed, a slight omission of care—i. e., slight negligence—will be regarded as a failure to exercise commensurate care. Where only slight diligence is the measure of duty, slight omissions do not involve a failure to exercise commensurate care, and therefore there is no negligence. In such a case it is very misleading to say that there is slight negligence, but no liability. When only slight diligence is required, there must be a gross omission of diligence—an omission of almost all diligence—in order to involve a failure to exercise commensurate care, or, in other words, to constitute negligence; for commensurate care in such a case is slight care. Nevertheless, the terms "slight negligence," "gross negligence," and "ordinary negligence" are convenient terms to indicate the degree of care required; but, in the last analysis, the care required by the law is that of the man of ordinary prudence. This is the safest and best rule, and rids us of the technical and useless distinctions in regard to the subject; ordinary care being that kind of care which should be used in the particular circumstances and is the correct standard in all cases. It may be high or low in degree, according to circumstances, but is, at least, that which is adapted to the situation.

It remains to show what is meant by the terms "slight," "ordinary," and "great or extraordinary" diligence or negligence—a task which is by no means an easy one. According to Judge Story, "slight diligence is that which persons of less than common prudence or, indeed, of any prudence at all, take of their own concerns." By Sir William Jones, slight diligence is to be considered to be "the exercise of such diligence as a man of common sense (and prudence), however inattentive, takes of his own concerns." It is probably safe to say that the diligence shown in their own affairs by men careless in their habits, and not necessarily prudent by nature, but of ordinary intelligence, is slight diligence. Want of such diligence constitutes great or gross negligence, which has by some been held to amount to fraud, or to be evidence thereof. It may be safely stated, however, that gross negligence, except under unusual circumstances, is not equivalent to fraud, nor does it necessarily raise a presumption of fraud. Ordinarily diligence may be said to be that displayed in the management of their own affairs by the average business or professional men, met with in daily life—men who have the usual amount of common practical sense in the management of the necessary details of their business, and who are endowed with ordinary prudence and foresight.

In this view of the question, it will be seen that what constitutes ordinary diligence is dependent upon and varies with the facts of each case. In the words of Judge Story:

> "That may be said to be common or ordinary diligence, in the sense of the law, which men of common prudence generally exercise about their own affairs in the age and country in which they live."

As defined by Sir William Jones, it is "the care which every person of common prudence and capable of governing a family, takes of his own concerns." The standard of ordinary diligence must, of necessity, vary with time and place, since what might be ordinary diligence at certain times and in certain localities might, at different times and at other places, amount to but slight diligence. The influence of custom and business must also be considered in determining what is ordinary diligence, as, in certain trades, dispositions may be made of goods by a man of ordinary prudence which, under other circumstances, would certainly be open to the charge of great negligence. Moreover, what would be the exercise of ordinary care with regard to articles of a certain kind might be far from such with regard to those of a different sort. Where one is wanting in the exercise of ordinary care, he is said to be guilty of ordinary negligence. Great diligence is that care shown in the management of his own business by a man of great vigilance and foresight, and of a prudent nature—one given to exerting unusual skill and care upon his business affairs. Want of it is slight negligence. These statements are supported by Hale on Bailments, pp. 25, 26, and 27.

As has been seen, the obligation to redeliver or deliver over the property at the termination of the bailment on demand is an essential part of every bailment contract. If the bailee fails to do so, he is liable, unless

he can show that his inability arises without fault on his part. There is considerable confusion among the decisions in regard to the burden of proof in cases where a bailee is sued for a loss or injury. A line of decisions hold that in cases founded on negligence the burden of proving it affirmatively rests on the plaintiff throughout, and that, when a bailee is sued for a negligent loss or injury, mere proof of the loss or injury does not alone make a prima facie case. But the better opinion, supported by the weight of authority, holds that while the burden of proving negligence rests upon the plaintiff, and does not shift throughout the trial, the burden of proceeding does shift, and that where the plaintiff has shown that the bailee received the property in good condition, and failed to return it, or returned it injured, he has made out a prima facie case of negligence. "When he has shown a situation which could not have been produced except by the operation of abnormal causes, the onus rests upon defendant to prove that the injury was caused without his fault." Res ipsa loquitur. Unless the bailee overcomes this prima facie case by satisfying the jury that the loss or damage was consistent with the absence of fault on his part, the plaintiff may prevail. Where the bailee makes such showing, however, as where it appears that the property was stolen or injured by vis major, the burden of proceeding shifts back to the plaintiff, and he must show that the bailee was negligent in exposing the property to risk of harm, or in failing to avoid the danger after it was known. In other words, the weight of the evidence may be in favor first of one party and then the other; but the burden of establishing the issue in his favor rests on plaintiff throughout. Hale on Bailments, pp. 31 and 32.

We have referred to Mr. Hale's excellent treatise on bailments very liberally, because the law is stated by him so clearly and seems to have such a direct bearing upon the facts of the case, as to make the reference very apposite, though a little full. This is somewhat of a new question in this court, and must be treated at some length in order to state fully the essential principles. It bears, though, a close analogy to similar doctrines applicable in other branches of the law. Substantially the same views are expressed by other text-writers on the subject, such as Van Zile on Bailments and Carriers, § 26 et seq.; Story on Bailments (9th Ed.) c. 1, §§ 1-40; Schouler's Bailments and Carriers, pt. 1, §§ 1-17; 5 Cyc. pp. 162, 163, 164. 165. It is said in Cyc., supra, that the Roman classification of bailments is usually supplanted by a division with reference to compensation, under which bailments are divided into three kinds only: (1) Bailments for the benefit of both parties; (2) bailments for the sole benefit of the bailor; (3) bailments for the sole benefit of the bailee, and the locatum, or what is denominated generally as a bailment for hire. Judge Story, at section 426 of his 9th Ed., states that if, while the work is being done on a thing belonging to the employer, or after it is finished, but before it is delivered to the employer, the thing perishes by internal defect by inevitable accident, or by irresistible force, without any default of the workman (as Pothier holds), the latter is entitled to compensation to the extent of the value of the labor actually performed on it, unless his contract import a different obligation, for the maxim is, "Res perit domino." Pothier, supra, further insists that if the workman has employed his own materials, as accessorial to those of the employer, he is in like manner entitled to be paid for them, if the thing perishes before it is completed. The same doctrine seems to have been promulgated in the Roman law, and was applied to the case of a house accidentally thrown down by an earthquake, while in building; and the loss was held to fall wholly on the owner. The following seems to have been deduced by Mr. Bell, in his treatise on this subject, as the true rules on the subject: (1) If the work is independent of any materials or property of the employer, the manufacturer has the risk, and the unfinished work perishes to him. (2) If he is employed in working up the materials, or adding his labor to the property of the employer, the risk is with the owner of the thing with which the labor is incorporated. (3) If the work has been performed in such a way as to afford a defense to the employer against a demand for the price, if the accident had not happened (as if it was defectively or improperly done), the same defense will be equally available to him after the loss. In this last point, Pothier also agrees with him, and he seems supported by the Roman law. Story on Bailments, § 426; 1 Bell, Comm. (4th Ed.) 392, 394, and (5th Ed.) 456, 458.

But those rules are, of course, subject to the qualification that the bailee is bound, in all proper instances, when intrusted with the bailee's property, to exercise due care with respect to the subject. It is very clear that, at common law, if the thing of the employer, on which the work is done, and for which materials are furnished, is by accident, and without any fault of the workman, destroyed or lost before the work is completed, or the thing is delivered back, the loss must be borne by the employer, and he must pay the workman a full compensation for the work and labor already done, and materials furnished, although he has derived no benefit therefrom. Thus, where a ship was accidentally destroyed by fire, while she was in the dock of a shipwright, undergoing repairs, it was held that the shipwright was entitled to full compensation for all his work and labor done and mate-

rials found and applied thereto, before the loss. But the general rule may be controlled by a special agreement of the parties, as in this case, or by general usage and custom of the trade. Schouler remarks that the fundamental idea of our whole subject is that one whose pains are to go wholly unrewarded ought to be the most lightly bound; a maxim which, however distasteful to the strict moralist, is thoroughly consonant with the teaching of the common law. And since no nice gradation by the amount of recompense is here attempted, bailments at common law may well be grouped under these three heads, as Judge Story himself has admitted: (1) Those for the sole benefit of the party on the bailor's side; (2) those for the sole benefit of the party on the bailee's side; (3) those for the benefit of both parties. In the first two instances, the benefit designed is unilateral; in the third, bilateral or reciprocal.

We are to bear in mind that it is not the actual issue of the undertaking, but its intent, by which recompense is to be tested. Under such a classification, the foregoing titles fall readily into place; and the parade of Roman names imposes less readily upon the reader who reflects that there is much the same variety of transactions capable of performance, whether one is to get his reward or serve gratuitously. Schouler's Bailments and Carriers, § 14, p. 15. Under the title, "Negligence or Diligence," with regard to bailments, Van Zile, at section 34, thus states the rule in a practical way:

"Coupled with the question of benefit is the question of negligence or diligence; for the receiving of benefits brings the requirement of diligence, and the absence to a certain extent excuses negligence. If, for example, the bailee is to receive no compensation and no benefit, and the bailment relation is solely for the benefit of the bailor, a depositum or a mandatum, the law does not require of the bailee so high a degree of diligence as it would in case of commodatum, where the benefit is entirely for the bailee, and no benefit whatever to the bailor. And so the duties and liabilities of the bailee, when there is no special contract, depend almost entirely upon the benefit received, and the diligence he has shown or the negligence he is guilty of. If the bailment, for example, is for the sole benefit of the bailor, the law only requires of the bailee slight diligence, and holds liable for gross negligence. If for the sole benefit of the bailee, then he is held to high diligence, and liable for slight negligence; if for the benefit of both bailor and bailee, ordinary diligence and ordinary negligence. This is the correct summing up of the doctrines."

[2] Let us apply this rule to our facts. Defendant had given a warranty as to quality or workmanship and material. Plaintiff says he breached it, as the sideboard proved to be defective; but defendant denied this allegation. The parties were therefore in controversy, and, in order to adjust it, they agreed that, instead of plaintiff suing on the warranty, defendant should place the sideboard in the condition before warranted by him. The settlement of the dispute in this way was sufficient to make the consideration material and reciprocal between the parties, and sufficient to support the contract, just as, at common law, the payment of a part of a debt upon a promise to release or forgive the balance was nudum pactum; but, if there was dispute between the parties as to the debt or the amount of it, this constituted a sufficient consideration to support the release of the balance upon a settlement. York v. Westall, 143 N. C. 276, 55 S. E. 724.

[3, 4] The bailment was therefore for the benefit of both parties, and not solely for that of the bailor or bailee, and consequently the bailee was bound to the use of ordinary care in respect to the thing bailed to him. While the burden was upon the bailor to show the bailee's negligence, the latter knew better than the bailor how the accident happened by which the property was destroyed, or should know, and is called upon to offer proof that the destruction arose from the operation of forces beyond his control or while he was exercising ordinary care for the preservation of the property and in the completion of the work upon it; not that the burden shifts to him, upon proof of the loss, which is prima facie evidence of negligence, but that he should satisfy the jury as to his due care or take the risk of an adverse verdict. Wintringham v. Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. Rep. 725. The prima facie case arising from his failure to return the property, and its destruction, does not forestall the verdict, as the burden of proof still rests upon the plaintiff and he must ultimately satisfy the jury of the existence of negligence; but defendant takes his chances on the verdict, if he fails to go forward with proof and thereby prevents the jury from deciding according to the prima facie case; not that they are bound to do so, as the circumstances raising it may satisfy them, without further proof, that in fact there was no negligence, but that they may do so, and, if they should so view the evidence, the defendant would lose. State v. Wilkerson, 164 N. C. 436, 79 S. E. 888, and cases cited therein; Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815.

This court said, in Henderson v. Bessent, 68 N. C. 223:

The bailment was for the benefit of the parties; "so upon the settled distinction, the bailee is only liable for ordinary neglect, which does not embrace a case of accidental destruction by fire, without default on the part of the bailee."

That is the principle under which this case must be tried, and we cannot adopt the defendant's contention that it was a gratuitous bailment on his part, and he is liable, therefore, only for gross negligence, or conversely bound to the use of slight care. Plaintiff released the cause of action on the warranty, in exchange for his promise to repair the sideboard, and the benefit he thereby derived furnished the consideration for his undertaking as bailee.

[5] It would seem that, by the common law, in such a case as this one, the workman,

independent of any usage of trade, would not be entitled to any compensation for his labor and material, and that the rule would apply that the thing should perish to the bailor, and the work and material to the mechanic or bailee, if the latter has performed his duty by exercising the care required of him in the possession and preservation of the thing bailed to him for hire. Story on Bailments (9th Ed.) § 462b; Gillett v. Mawman, 1 Taunton, 137.

The judge should have tried the case upon the issue tendered by the defendant, and there was error in refusing to do so.

New trial.

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(168 N. C. 43)

## FOURTH NAT. BANK OF FAYETTEVILLE v. McARTHUR et al.

(No. 285.)

(Supreme Court of North Carolina. Jan. 13, 1915.)

1. TRIAL ⟸29 — MISCONDUCT OF JUDGE — STATEMENTS.

Where, in an action on certain notes, the alleged signatures of indorsers were claimed to be forgeries, a question by the trial judge to plaintiff's counsel as to why he did not call the maker to testify as to the genuineness of the indorsers' signatures was prejudicial error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80–83, 508; Dec. Dig. ⟸29.]

2. EVIDENCE ⟸567 — EXPERTS — CROSS-EXAMINATION — SIGNATURES.

On an issue as to the genuineness of the alleged signatures of indorsers to the notes sued on, it was error to submit to witnesses, testifying to their opinion as to the genuineness of the signatures, on cross-examination, immitated signatures made by engravers in order to test the witnesses' knowledge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2391; Dec. Dig. ⟸567; Witnesses, Cent. Dig. § 932.]

3. EVIDENCE ⟸380 — PHOTOGRAPHS — SIGNATURES.

On an issue as to the genuineness of the signatures of alleged indorsers of certain notes sued on, enlarged photographs of the disputed writings were inadmissible without preliminary evidence of the photographer who made them as to how and under what conditions they were taken, so that the jury might determine whether they were exact reproductions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1657; Dec. Dig. ⟸380.]

Appeal from Superior Court, Cumberland County; Rountree, Judge.

Action by the Fourth National Bank of Fayetteville against Adam McArthur and others. Judgment for plaintiff against J. Sprunt Newton and in favor of the other defendants, and plaintiff appeals. Reversed, and new trial granted.

This is an action upon two promissory notes of $10,000 each, dated February 3 and 4, 1914, and due respectively at 60 and 90 days after their date. They were signed by J. Sprunt Newton, as maker, and apparently indorsed by Adam McArthur, Newton's brother-in-law, and Mrs. M. C. McArthur, his mother-in-law. Judgment by default for want of an answer was taken against J. Sprunt Newton, and the other defendants filed answers denying the genuineness of the indorsements, and averring that they never indorsed the said notes or authorized any one to do so for them, and out of this controversy the issue in the case arose. It may be well for a proper understanding of the exceptions considered in this court to state, in a summary way, the nature of the testimony introduced by the parties to support their respective contentions.

The plaintiff's evidence was of the following kind: (1) Opinions of witnesses who testified that they were acquainted with the defendants' handwriting by virtue of having seen the defendants write, or their admitted signatures in the course of business prior to this controversy, and that from such a recollection they were able to form an opinion as to the genuineness of the indorsements in controversy; (2) opinions of witnesses who, by virtue of experience or special study, were either admitted or shown to be experts, and had thereby become qualified to compare admittedly genuine handwritings and those in dispute and give their opinion upon the disputed signatures; (3) other circumstances and inferences which the plaintiff attempted to use, such as statements from their witnesses as to alleged conversations with Adam McArthur about his obligations upon notes similar to these in controversy, and some of these notes referred to in the conversations the plaintiff claimed to be old notes of which the notes in controversy were renewals. These conversations were denied by Adam McArthur, and the defendants contend that there were corroborating circumstances tending to show that the denial was true. Among the above-stated circumstances, the plaintiff contended that there was similarity between the signatures of the defendants admitted in the cases as standards of comparison and the signatures in controversy.

On the other hand, the defendants relied upon the following kind of testimony: (1) The statements of the defendants themselves that they did not sign their names upon the notes in controversy, which was corroborated by other testimony; (2) the opinion of witnesses who had known the defendants for many years, and had become acquainted with the handwriting of both of the defendants in the course of business with them, that the alleged indorsements were not genuine; (3) the opinions of experts by comparison of the signatures in dispute with admitted standards to the effect that, in their opinion, the signatures in controversy were not genuine, and these witnesses gave many reasons, facts, and circumstances tending to corroborate their opinion, and to show before the jury how they arrived at such an opinion; (4) other facts and circumstanc-

es which tended to show the improbability that the defendants indorsed the said notes, such as the entire lack of consideration on the part of the defendants to become liable for the $20,000 in notes sued upon, the proceeds of the notes having been paid to other parties, and evidence that some controversy had already arisen before the date of the alleged notes which tended to put the defendants upon their guard about papers coming from the source that these notes are alleged to have come, and the evidence of good character of the defendants and their witnesses, and the dissimilarity, as shown on the standards, and the signatures in controversy.

The above statement of the nature of the evidence, rather than a summary of the evidence itself, which is not necessary, was taken, substantially only, from the defendant's brief, and may not be quite as strong for, or favorable to, the plaintiff as perhaps it should be. It will, however, answer our purpose, and the defendant cannot complain of it.

The jury returned a verdict for the defendants, and from the judgment thereon, plaintiff appealed.

Rose & Rose, of Fayetteville, Manning & Kitchin, of Raleigh, and Sinclair & Dye, of Fayetteville, for appellant. Shaw & MacLean, of Fayetteville, and McLean, Varser & McLean, of Lumberton, for appellees.

WALKER, J. (after stating the facts as above). There are many exceptions in the record—32, we believe. The number could easily be reduced to less formidable proportions without any sacrifice to the plaintiff, if we desired to do so, but, as only 2 or 3 of them will be examined, we will not undertake the task of reduction, but may be permitted to suggest that counsel, in preparing assignments of error, would greatly simplify and facilitate the work of this court, if, after having had the time and the opportunity to carefully examine their exceptions reserved during the hurry of the trial, some of which are necessarily made inadvisedly, and not upon proper or sufficient study and due deliberation, they would cull out those by a process of intelligent selection or elimination, as the case may require, and thus leave only those of real or supposed merit. This method would not only be of decided advantage to the court by excluding immaterial matter calculated to divert attention from the main questions and relieve it of useless labor, but it would also greatly conserve the interests of the appellant by presenting his case in a more solid and compact form. We respectfully commend this admonition to our brethren of the bar, in the confident hope that they will heed it in the future preparation of appeals.

The three exceptions we will consider are these: (1) The alleged expression of opinion by his honor, when asking the plaintiff's counsel why they did not call J. Sprunt Newton. (2) The testimony of the witness O. A. Lester as to imitations of the genuine signatures of Adam McArthur made by him, he being an expert engraver, which were used and submitted to the jury, with his explanation and illustration of them, to show that the signature of Adam McArthur was easily simulated, and also similar imitations of Mrs. McArthur's genuine signature, which were permitted to be used for the purpose of disproving the genuineness of her signature to the notes in dispute. Certain of these imitations by the engraver were handed to some of plaintiff's witnesses, among others, A. L. McGowan and S. W. Cooper, D. I. Fort and R. M. Nixon, who had testified to the signatures of the two McArthurs as being genuine. They were shown to the witnesses in an envelope, with a section of the same cut out in the lower right-hand corner, sufficient only for the purpose of exhibiting the signature itself, and not the remainder of the paper. The witnesses were then asked for their opinions as to the genuineness of those signatures, and the court allowed them to be cross-examined in regard thereto, with a view of contradicting or at least weakening their former testimony. (3) The introduction of certain enlarged photographs of the disputed signatures, known as photographic-microscopic reproductions of the same, magnified 154 times by the process of photography, for the purpose of enabling David N. Carvalho and O. A. Lester to compare or contrast with the admittedly genuine signatures, which had not been so photographed and enlarged, and thereby show the discrepancies between the two, and otherwise to explain and illustrate their testimony as handwriting experts. There was a vast deal of testimony in the case, and, as we have stated, numerous other exceptions, some of merit, and some having none, but the foregoing synopsis of three points will suffice for a clear apprehension of the case, so far as we will discuss it.

[1] First. We are of the opinion that the remark of the learned and unusually careful judge in regard to calling J. Sprunt Newton should not have been made, and was calculated, as an intimation, if not a direct expression, of opinion upon the facts, to prejudice the plaintiff, and is forbidden by the statute, which provides:

"No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion as to whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon."

There have been numerous decisions upon this statute, and this court had shown a fixed purpose to enforce it rigidly as it is written.

There must be no indication of the judge's opinion upon the facts, to the hurt of either party, either directly or indirectly, by words or conduct. The judges should be punctilious to avoid it, and to obey the statutory injunction strictly. We are absolutely sure that they fully desire to do so, and their occasional expressions which have come before this court for review and held to be violations of the statute, have evidently been inadvertent, but none the less harmful. The evil impression when once made upon the jury becomes well-nigh ineradicable. Judge Manly, who was one of the most eminent and just of our judges, said in State v. Dick, 60 N. C. 440, 86 Am. Dec. 439:

"He [the presiding judge] endeavored to obviate the effect of his opinion, by announcing, in distinct terms, the jury's independence of him; * * * but this was not practicable for him to do. The opinion had been expressed, and was incapable of being recalled. * * * The object [of the statute] is not to inform the jury of their province, but to guard them against any invasion of it. The division of our courts of record into two departments—the one, for the judging of the law, the other, for the judging of the facts—is a matter lying on the surface of our judicature, and is known to everybody. It was not information on this subject the Legislature intended to furnish; but their purpose was to lay down an inflexible rule of practice—that the judge of the law should not undertake to decide the facts. If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by innuendo. What we take to be the inadvertence of the judge, therefore, was not cured of its illicit character by the information which he immediately conveyed. * * * The error is one of those casualities which may happen to the most circumspect in the progress of a trial on the circuit. When once committed, however, it was irrevocable, and the prisoner was entitled to have his case tried by another jury."

And to the same effect did Justice Hoke speak in State v. Cook, 162 N. C. 586, 77 S. E. 759, citing and approving State v. Dick:

"The learned and usually careful judge was evidently conscious that he had probably and by inadvertence prejudiced the prisoner's case, for he added, 'But the court has no right * * * to express an opinion about the case;' but the forbidden impression had already been made, and as to the vital portion of the prisoner's plea, and on authority, the attempted correction by his honor must be held inefficient for the purpose."

So in State v. Ownby, 146 N. C. 678, 61 S. E. 630, we said:

"The slightest intimation from a judge as to the strength of the evidence, or as to the credibility of a witness, will always have a great weight with the jury, and therefore we must be careful to see that neither party is unduly prejudiced by an expression from the bench which is likely to prevent a fair and impartial trial."

And again in the same case:

"We know that his honor unguardedly commented upon the testimony of the witnesses, but, when the prejudiced remark is made inadvertently, it invalidates the verdict as much so as if used intentionally. The probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has thus been impaired is entitled to another trial."

Like views and cautionary requests to the judges were stated in Withers v. Lane, 144 N. C. 184, 56 S. E. 855:

"The learned and able judge who presided at the trial, inspired, no doubt, by a laudable motive and a profound sense of justice, was perhaps too zealous that what he conceived to be right should prevail, but just here the law, conscious of the frailty of human nature at best, both on the bench and in the jury box, intervenes and imposes its restraint upon the judge, enjoining strictly that he shall not in any manner sway the jury by imparting to them the slightest knowledge of his own opinion of the case."

The case of Perry v. Perry, 144 N. C. 330, 57 S. E. 1, repeats this injunction to observing the mandate of the statute, for it is there said:

"Any remarks of the presiding Judge, made in the presence of the jury, which have a tendency to prejudice their minds against the unsuccessful party, will afford ground for a reversal of the judgment."

It is very strongly and urgently reiterated in Park v. Exum, 156 N. C. at page 228, 72 S. E. 309, as follows:

"The court has always been swift to enforce obedience to our law which forbids a presiding judge to express an opinion on the disputed facts of a trial, and, under numerous decisions construing the statute, we must hold this remark of his honor, in the presence of the jury and before verdict, to be reversible error."

We have not cited these cases for the purpose of adjudging that plaintiff can avail itself of what was said by the judge during the trial of this case, but to again emphasize the imperative necessity of keeping the statute steadily in mind and freeing trials of an adverse or injurious intimation of opinion, to the end that there may be such a fair and impartial trial as is guaranteed by the Constitution and enforced by the statute. Many more cases could be cited to illustrate the great importance of this matter, but we omit any reference to them, for the obvious reason that those mentioned are quite sufficient for the purpose. It is true we have held that where, by the nature of the case, a party is called upon to prove or disprove a fact material to his success, and the witness who, if anybody, can testify to it, is accessible to him, the failure to produce and examine him is a proper subject of comment before the jury (Powell v. Strickland, 163 N. C. 393, 79 S. E. 872; Goodman v. Sapp, 102 N. C. 477, 9 S. E. 483), but this of course, meant comment of counsel, and not of the judge, whose slightest intimation as to whether a fact has been found or not will have the greatest weight with the jury. It is not necessary to decide whether plaintiff was prompt and diligent enough in the protection of its rights to now take advantage of this slip of the judge, as we will order a new trial upon another point. It may be that he has under the circumstances, but we leave the question undecided.

[2] Second. Our opinion is that there was error in permitting the witnesses of the plaintiff to be cross-examined in regard to

the signatures which were written or engraved by Mr. Lester and exhibited to them through the aperture made in the envelope, without showing the rest of the paper in which the signature was written, it being called in this case, rather facetiously, though not inappropriately, the "cat-hole test." These papers should not have been admitted at all. They tended to introduce collateral questions; to multiply the issues, in fact, though perhaps not in form; to divert the minds of the jurors from the real and only question to be decided; to confuse them in their deliberations and to put the witness to an unfair disadvantage and to entrap him unwarily; and also to take the plaintiff by surprise and deprive him of a fair opportunity to know the general nature of the evidence, so that he may prepare to meet it. It tends more to muddy the waters like the cuttlefish, than to advance the purpose for which all judicial procedure is adopted, and that is to conduct the trial so as to establish the truth and to adjudicate rights according to the pertinent and the determinative facts, and always to adhere closely to the issue upon which the decision should turn. It was well said in Hardy v. Harbin, 154 U. S. 598, Append., 14 Sup. Ct. 1172, 22 L. Ed. 378, s. c., Fed. Cas. No. 6,059, that, taken at its best, evidence of experts by comparison of handwriting is very unreliable. And in Adams v. Field, 21 Vt. 256:

"Those having much experience in the trial of questions depending upon the genuineness of handwriting will not require to be reminded that there is nothing in the whole range of the law of evidence more unreliable, or where courts and juries are more liable to be imposed upon."

Expert testimony is permissible in such cases, but it is not always the best proof of which the matter is susceptible, and its efficiency and probative force is sometimes easily magnified, and by it the truth is deftly concealed. It therefore follows that all proper precautions should be taken to prevent impositions upon the court and jury. Hoag v. Wright, 174 N. Y. 36, 66 N. E. 579, 63 L. R. A. 163; U. S. v. Pendergast (C. C.) 32 Fed. 198.

We may remark imprimis, and for the purpose of showing the application of the authorities hereinafter cited, that it was not competent to submit specimens of the admittedly genuine and the disputed papers to the jury for their independent examination, before the passage of our recent statute. The old and strict rule had been somewhat relaxed before them, by allowing the witness to hand the papers to the jury—the standards and the questioned documents—and explain the similarities and the dissimilarities to them, so as to illustrate his own testimony and the reasons for his opinion. Fuller v. Fox, 101 N. C. 119, 7 S. E. 589, 9 Am. St. Rep. 27; Martin v. Knight, 147 N. C. 564, 61 S. E. 447; Nicholson v. Lumber Co., 156 N. C. 59, 72 S. E. 86, 36 L. R. A. (N. S.) 162; Thomas v. State, 18 Tex. App. 213. But this was the extreme limit, beyond which the party was not allowed to go. The statute changes the rule, but is so carefully and explicitly worded as to exclude by clear implication the examination of any papers but those admitted to be genuine, as standards or models of the true handwriting, and the writings in dispute. It provides:

"In all trials in this state, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of the witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

Before the enactment of this law, this court held, in Tunstall v. Cobb, 109 N. C. 316, 14 S. E. 28, and other cases, that the investigation must be restricted to the writings that are genuine and those alleged to be spurious, and that other writings not of this class should be excluded in making the comparison. We are aware that there has been some conflict of authority upon this question, but in the midst of all the differing notions about it we prefer, as we have the choice, not only to abide by the language of our statute as being restrictive in its nature, but to adopt what is said in Rogers on Expert Testimony (2d Ed.) p. 342, § 144, which is as follows:

"The question has been raised whether it is competent on cross-examination to test the knowledge of the witness by showing him real and fictitious signatures and asking him to say which of them are genuine. In those states where a comparison is only allowed to be made with writings which are admitted to be genuine, it is evident that such a comparison should not be allowed except both parties are agreed which of the signatures are real and which false, for, unless so agreed, side issues are raised which complicate the case. The rule which excludes writings not admittedly genuine applies with as much force to the cross-examination as to the direct examination. To admit such writings would lead, as well in the one case as in the other, to an indefinite number of collateral issues, and would operate as a surprise to the opposite party who would not know what writings were to be produced, and therefore could not be prepared to meet them"—citing Howard v. Patrick, 43 Mich. 121, 128, 5 N. W. 84, Rose v. First National Bank of Springfield, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258, Massey v. Bank, 104 Ill. 327, Hilsley v. Palmer, 32 Hun (N. Y.) 472 (1884), and Van Wyck v. McIntosh, 14 N. Y. 439, which support the text.

See, also, Dietz v. Fourth National Bank, 69 Mich. 287, 289, 37 N. W. 220.

The case of Hilsley v. Palmer, supra, is an interesting one, and decisive of this one, if we follow it as an authority and adopt its conclusions, and we do not see why we should not, as it is of a very persuasive character, by reason of its clear statement and strong reasoning. The New York Court of Appeals has considered this question in at least one famous and hotly contested case (People v. Albert T. Patrick, 182 N. Y. 175, 74 N. E.

843), in which, with its usual convincing logic, it demonstrates the unfairness of this kind of examination when applied to an opinion witness—that is, one who testifies from actual knowledge of the handwriting in question, or his familiarity with it, acquired by business intercourse or other association with its supposed author—and concludes that "it was, obviously, an unfair test," and then says:

"It is to be observed that Harmon was called upon to testify, by reason of his competency to form an opinion from long acquaintance with the handwriting of the deceased, and not by reason of his being a professional expert in handwriting or penmanship. I think the question is distinguishable, upon the facts, from that passed upon in Hoag v. Wright, 174 N. Y. 36 [66 N. E. 579, 63 L. R. A. 163]."

The case of Hoag v. Wright, supra, was distinguished from People v. Patrick, because in the former the witness was an acknowled expert in handwriting, and, we suppose, was therefore thought to be able to take care of himself, and to be better acquainted with the "tricks of the trade."

The law is well stated in Andrews v. Hayden's Adm'r, 88 Ky. 455, 459, 11 S. W. 428, 430:

"The admissions of these spurious signatures, prepared by an experienced expert, for the purpose of being presented to the witnesses for the plaintiff, was manifestly wrong. They were executed with such skill as to deceive any ordinary observer, or those having no other experience than their familiarity with their neighbor and his handwriting. Such writings should have been excluded, because tending to obstruct the proper administration of the law, and deceiving, by the skill in their execution, the minds of honest men. It was neither a just nor legal test, and threw no light on the issue presented."

A strong case favoring this view is Wilmington Savings Bank v. Waste, 76 Vt. 331, 336, 57 Atl. 241, where the court held that in cross-examination it was competent for the defendant, for the purpose of testing the correctness of the witness' judgment, to show him signatures of the defendant conceded or proved to be genuine, but this was the limit of comparison. The defendant examined the witness as though he were an expert, when he was not. His testimony was directly upon the question whether or not the signature upon the note in suit was genuine. But, if the witness had been an expert, the rule required that a standard of comparison should be established before he could be examined by the use of signatures made for the purpose of the trial. It appears that the signature upon another note in evidence was conceded to be the defendant's, but the exceptions do not show that it was used in the cross-examination. The witness was required to select from the three papers the genuine signatures of the defendant, and then the papers went to the jury. It was error to permit this course of examination and to allow the papers to be submitted to the jury. Sanderson v. Osgood, 52 Vt. 309; Rowell v. Fuller, 59 Vt. 688, 10 Atl. 853; Costello v. Crowell, 133 Mass. 352; Abbott's Trial Ev. (2d Ed.) 488, 489. Speaking of collateral writings, the court, in State v. Minton, 116 Mo. 605, 614, 22 S. W. 808, 810, said:

"They were no part of the record in the case, not admitted to be in the handwriting of either one of the defendants, and clearly inadmissible for the purpose of comparison."

While we have noted that there is some conflict, we yet think the weight of authority and the rule of reason is in favor of the plaintiff's contention and against the court's ruling. We add to the authorities already cited the following: Thomas v. State, 18 Tex. App. 213, approved by repeated decisions in that court; Wigmore on Evidence, §§ 1996, 2001, and 2002; King v. Donahue, 110 Mass. 155, 14 Am. Rep. 589; Sanderson v. Osgood, 52 Vt. 309; U. S. v. Chamberlain, 12 Blatchf. 390, Fed. Cas. No. 14,778; Gaunt v. Harkness, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297; Van Wyck v. McIntosh, 14 N. Y. 439; Bank v. Hyland, 53 Hun, 108, 6 N. Y. Supp. 78; Rose v. Bank, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258; and analogous cases are: State v. Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227; Bacon v. Williams, 13 Gray (Mass.) 525; Kirksey v. Kirksey, 41 Ala. 636; Howard v. Patrick, 43 Mich. 128, 5 N. W. 84; People v. Murphy, 135 N. Y. 455, 32 N. E. 138; Fogg v. Dennis, 3 Humph. (Tenn.) 48. In Rose v. Bank, supra, the court said:

"The rule which excludes extrinsic papers and signatures, is substantially the same in the direct and cross examination. Papers * * * not relevant, as evidence, to the other issues, are excluded mainly on the ground that to admit such documents would lead to an indefinite number of collateral issues, and would operate as a surprise upon the other party, who would not know what documents were to be produced. * * * The reason of the rule applies to the cross examination with as much force as to the direct examination. The signatures should have been excluded, whether used to test the witness as an expert, or to test his knowledge of the handwriting of the plaintiff."

Wigmore on Ev. §§ 1996, 2001, 2002, subsec. 2, says:

"The specimens, to afford a fairly trustworthy inference, must, of course, be genuine. But, furthermore, the process of proving their genuineness may result (as in the case of the expert's use of them) in a multiplicity and confusion of issues. The specimens submitted to the jury must be genuine."

2 Elliott on Ev. § 1105, says:

"In those jurisdictions where there are no statutes regulating the admissions of opinion as to comparison of handwriting three distinct rules seem to prevail. In a few jurisdictions the rule is that the opinion of experts based on any comparison is improper; in other jurisdictions the rule is that opinions are admissible in case the writings to be compared are in evidence for another purpose and admitted to be genuine; and the third rule is that opinions of experts are admissible as in the rule immediately preceding and, in addition, on writings whose genuineness has been proved in the trial for the express purpose of comparison. The reason given for holding that the only papers that can be used in such an examination of an expert are those which have been brought into

the case for another purpose is that such a limitation is necessary in order to avoid the evil of collateral issues, the danger of fraud in selecting specimens, and the danger of misleading the jury."

It is perfectly clear that evidence of this kind may be liable to abuse, and so manipulated or used as to give the jury a false impression as to the real value of a witness' testimony. It is dangerous, to say the least of it, and may tend more to suppress than to disclose the truth. The imitation may be made so perfect as to mislead a trained expert, and it seems from the books that this has sometimes been done. How, then, can a mere opinion witness be expected to stand the ordeal of such an examination, without the benefit, even of a tithe of the expert's study and experience, if the latter fails? It shows the necessity of confining the examination to the genuine specimens and the disputed writings. The above authorities, or some of them, also hold that it is incompetent to introduce such imitations of the genuine signature for the purpose of showing how easily it may be forged or counterfeited. Thomas v. State, 18 Tex. App. 218. And in Hickory v. U. S., 151 U. S. at page 306, 14 Sup. Ct. 335, 38 L. Ed. 170, the court said:

"In the absence of statute, papers irrelevant to the issues on the record were held not receivable in evidence at the trial for the mere purpose of enabling the jury or witnesses to institute a comparison of hands. Bromage v. Rice, 7 Car. & P. 548; Doe v. Newton, 5 Ad. & El. 514; Griffits v. Ivery, 11 Ad. & El. 822; 1 Greenleaf, Ev. § 580. The danger of fraud or surprise and the multiplication of collateral issues were deemed insuperable objections, although not applicable to papers already in the cause, in respect of which, also, comparison by the jury could not be avoided."

[3] Third. The enlarged photographs of the disputed writings should not have been used, at least without proving, by the man who made them, how and under what conditions they were taken by him, so as to let the jury finally decide, from the facts, whether they are an exact reproduction. It was held in Bank v. Wisdom, 111 Ky. 148, 63 S. W. 461, that such enlargements of the signatures should be authenticated by the photographer. In Tome v. Parkersburg R. R. Co., 39 Md. 36, 17 Am. Rep. 540, it is said, with reference to this subject:

"The testimony of the photographer comes within the same principle as that of Paine. It was offered to establish the forgery of the certificates in controversy, by comparing them with copies (obtained by photographic processes, either magnified or of natural size) of certain signatures assumed or admitted to be genuine, and pointing out the differences between the supposed genuine and disputed signature. As a general rule, in proportion as the media of evidence are multiplied, the chances of error or mistake are increased. Photographers do not always produce exact facsimiles of the objects delineated, and, however indebted we may be to that beautiful science for much that is useful as well as ornamental, it is at last a mimetic art, which furnishes only secondary impressions of the original, that vary according to the lights and shadows which prevail whilst being taken."

This principle has been sanctioned by the following authorities: Hynes v. McDermott, 82 N. Y. 41, 50, 37 Am. Rep. 538; Oil Co. v. Bank, 34 Tex. Civ. App. 555, 79 S. W. 651; Railway Co. v. Bank, 56 Ohio St. 385, 47 N. E. 249; Bank v. F. S. S. & G. S. F. R. Co., 137 N. Y. 242, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712; Houston v. Blythe, 60 Tex. 512; Eborn v. Zimpelman, 47 Tex. 513, 26 Am. Rep. 315; Howard v. Bank, 189 Ill. 577, 59 N. E. 1106; Smith v. Martin, 135 Cal. 251, 67 Pac. 779; Healy v. Bank, 160 Ill. App. 637; Erb et al. v. G. R. Railway Co., 42 U. C. Q. B. 42; B. & O. Railway Co. v. Wilkens, 44 Md. 17, 22 Am. Rep. 26; Harrison and Brown, Trustees, v. A. & E. R. Railroad Co., 50 Md. 513; W. M. R. R. Co. v. Bank, 60 Md. 42, 48; Burrows v. Klunk, 70 Md. 460, 17 Atl. 378, 3 L. R. A. 576, 14 Am. St. Rep. 371; Barabasz v. Kabat, 86 Md. 34, 37 Atl. 720; Lamm v. Homestead Ass'n Co., 49 Md. 241, 33 Am. Rep. 246; Insurance Co. v. Swain, 100 Md. 575, 60 Atl. 469; Moores v. Bank, 111 U. S. 169, 4 Sup. Ct. 345, 28 L. Ed. 385.

The court said, in Hynes v. McDermott, supra:

"It would be carrying the matter much farther to permit an expert to compare photographic copies of signatures, and therefrom to testify as to the genuineness of a disputed signature. We may recognize that the photographic process is ruled by general laws that are uniform in their operation, and that almost without exception a likeness is brought forth of the object set before the camera. Still somewhat for exact likeness will depend upon the adjustment of the machinery, upon the atmospheric conditions, and the skill of the manipulator. And in so delicate a matter as the reaching of judicial results by the comparison of writings through the testimony of experts it ought to be required that the witness should exercise his acumen upon the thing itself which is to be the basis of his judgment; and still more, that the thing itself should be at hand, to be put under the eye of other witnesses for the trial upon it of their skill. The certainty of expert testimony in these cases is not so well assured as that we can afford to let in the hazard of errors or differences in copying, though it be done by howsoever a scientific process. Beside, as before said, there was no proof here of the manner and exactness of the photographic method used. It was right not to receive Loader's evidence as that of an expert."

The courts that have allowed this kind of evidence have generally held that both the admittedly genuine signature and the one in dispute shall be alike photographed, and the testimony of the photographer taken as to the accuracy of the method pursued by him and the results obtained. U. S. v. Ortiz, 176 U. S. 422, 20 Sup. Ct. 466, 44 L. Ed. 529, and other cases, supra. It is not necessary now to say more upon this question, as the deficiencies in the proof may be easily supplied. All we decide is that the photographic copies were not admissible in the then state of the evidence, and no more.

There are other errors assigned which seem

to have merit in them, but we will refrain from any further reference to them, as they may not occur again. For those already indicated a new trial is ordered.

New trial.

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(168 N. C. 36)

## YOUNG v. WESTERN UNION TELEGRAPH CO. (No. 517.)

(Supreme Court of North Carolina. Jan. 13, 1915.)

1. TELEGRAPHS AND TELEPHONES ⟸66—DELAY OF MESSAGE—EVIDENCE.

Evidence that plaintiff, an hour after delivering to defendant's agent a message requesting the addressee to meet him with a conveyance, told the agent that he was sick, and was informed by the agent that the message had been delivered, is admissible, in an action for delay, on the issue of notice to defendant of the importance of the message.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 61–63; Dec. Dig. ⟸66.]

2. TELEGRAPHS AND TELEPHONES ⟸27—NEGLIGENCE IN TRANSMISSION OF MESSAGE—WHAT LAW GOVERNS.

A telegram was sent from one state to a point in an adjoining state, to which there was no direct telegraph line. The nearest point, however, was connected with the place of destination by telephone. The telegraph company, as agent for the sender, attempted to telephone the message. *Held*, that the telephoning of the message was a purely intrastate transaction, and the telegraph company's liability for negligence in that particular was governed by the law of the state of the destination of the message.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 80; Dec. Dig. ⟸27.]

3. TELEGRAPHS AND TELEPHONES ⟸67—DELAY—DAMAGES.

Where plaintiff, who had the measles, wired home for a conveyance to meet him at the station, and the telegraph company negligently delayed the message, so that plaintiff was not met, it was not liable for injuries resulting from plaintiff's walking home, where he might have secured lodging at the place at which he alighted or telephoned for a conveyance.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 64–68; Dec. Dig. ⟸67.]

4. TELEGRAPHS AND TELEPHONES ⟸54—LIMITATION OF LIABILITY—DELAY OF MESSAGE.

A printed condition on the back of a telegraph blank that, unless the message was repeated, recovery was limited to $50, is invalid.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 39–47; Dec. Dig. ⟸54.]

5. TELEGRAPHS AND TELEPHONES ⟸54—LIMITATION OF LIABILITY—AMOUNT.

A stipulation, in an interstate message, that recovery should not exceed $50, unless it was repeated, is invalid.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 39–47; Dec. Dig. ⟸54.]

Appeal from Superior Court, Mitchell County; Webb, Judge.

Action by F. W. Young against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

George H. Fearons, of New York City, and Alfred S. Barnard, of Asheville, for appellant. Chas. E. Greene and John C. McBee, both of Bakersville, and J. W. Pless, of Marion, for appellee.

CLARK, C. J. On February 13, 1913, the plaintiff filed in the defendant's office at Johnson City, Tenn., a message addressed to his wife, "Bakersville, N. C., via Toecane." reading as follows: "Am coming home today; have conveyance at station."

[1] Exceptions 1 and 15 are that the plaintiff was allowed to testify that at 12 o'clock noon, about an hour after he had filed the message, he again went to the defendant's office in Johnson City and asked the official in charge if the message had been delivered, stating that he was very sick and anxious to have it delivered promptly. He was told in reply that it had been delivered all right. As the defendant's evidence is that the message did not reach Toecane till 2:30 p. m., this evidence was competent to show that the defendant had notice of the importance of promptness before the message in fact was sent. The plaintiff was not estopped by the incorrect reply that the message had already been delivered. It would not have taken the train 2½ hours to go from Johnson City to Toecane. The telegraph ought to be speedier.

[2, 3] It is 2½ miles from Toecane to Bakersville, and there is a telephone line over which the defendant should have transmitted this message to Bakersville. Indeed, according to the evidence, it could have been sent over, with proper diligence, by the mail or other means long before the plaintiff arrived at 9:30 p. m.

The defendant undertook to transmit this message over its telegraph line from Johnson City to Toecane, which was an interstate transaction. There was no damage alleged in this respect, for the message was not received at Toecane till 2:30 p. m. This was seven hours before the plaintiff's arrival at that point on the 9:30 p. m. train. The defendant further undertook to transmit the message, on behalf of the plaintiff, over the telephone line from Toecane to Bakersville. This was purely an intrastate transaction, and as to that default there was evidence of negligence, for the natural consequences of which the defendant is liable. It is not liable because the plaintiff had measles, nor for the weather, nor for the plaintiff's ill-advised conduct under such circumstances in walking out that night from Toecane to Bakersville, when the evidence shows that he could have secured lodging in Toecane, or might have phoned out to Bakersville for a conveyance after his arrival at Toecane.

In view of the errors assigned in these respects, there must be a new trial. It is proper to say, however, that we do not

sustain the objection to the maintenance of the action here, because the telegram originated in another state. This has been discussed and fully settled in Penn v. Telegraph Co., 159 N. C., and cases cited by Hoke, J., at pages 309, 310, and cases cited in the concurring opinion at page 315 (75 S. E. 16, 41 L. R. A. [N. S.] 223).

[4, 5] Nor do we concur in the objection that the plaintiff cannot recover more than $50 because of the stipulation to that effect as to unrepeated messages on the back of the message. This court has always held such stipulation invalid. Brown v. Telegraph Co., 111 N. C. 187, 16 S. E. 179, 17 L. R. A. 648, 32 Am. St. Rep. 793, citing numerous cases and the text-books; Sherrill v. Telegraph Co., 116 N. C. 658, 21 S. E. 429; Efird v. Telegraph Co., 132 N. C. 271, 43 S. E. 825. Nor even if this were an interstate message—as the defendant contends—and the default was not solely at Toecane in this state, after the message was received there would it affect this ruling. In Telegraph Co. v. Milling Co., 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815, it is held that, where the state court held that telegraph companies cannot thus limit their liability for negligent failure to deliver a telegram addressed to a person in another state, this is not an interference with interstate commerce, and will be sustained. That case will be found with full annotations. 36 L. R. A. (N. S.) 220. The default complained of, having occurred in this state, is governed by our law, though the message originated in Tennessee. Telegraph Co. v. Brown, 234 U. S. 547, 34 Sup. Ct. 955, 58 L. Ed. 1457.

But for the reasons given, there was, in other respects, error.

WALKER and BROWN, JJ., concur in the result, that there should be a new trial, but are of the opinion that in no view of the evidence, as presented in the record, can plaintiff recover damages beyond the amount paid for the service or the cost of the message, because the transaction was interstate, and the contract between the parties required a continuous transmission of the message from Johnson City, Tenn., to Bakersville, for which the plaintiff paid the entire toll, when the message was delivered by him to the operator at the former place. The record clearly shows that the defendant did not agree to transmit the message to Toecane, N. C., and for plaintiff's accommodation, or as his agent, to forward it over the telephone line to Bakersville, but to send it through to Bakersville for one charge, which was prepaid. Being, therefore, an interstate message (W. U. Telegraph Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; Same v. Brown, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457), the highest federal court, by whose decisions upon the question we are bound, has held, contrary to our ruling, that the stipulation as to repeating the message, and as to the amount of damages to be recovered, if not repeated, is a valid one. Since the passage of the act of Congress of June 18, 1910 (1 Fed. Statutes Anno. Suppl. of 1912, p. 112; U. S. Comp. St. 1913, § 8563), telegraph companies are to be considered as common carriers, within the meaning and provisions of the Interstate Commerce Act. The power of Congress over such interstate commerce is exclusive, as it has occupied the field, and the exercise of such power cannot be affected or impaired, or in any degree changed or modified by state regulation. Mich. Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; Erie R. Co. v. New York, 233 U. S. 671, 34 Sup. Ct. 756, 58 L. Ed. 1149. In the last case, the court said:

"When Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the state ceases to exist."

But, coming down to the very question herein presented, it has been held, in Primrose v. W. U. Telegraph Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, that a regulation of a telegraph company requiring the sender of a message to have it repeated and to pay an additional amount therefor, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, is a reasonable one, and further that the terms printed on the back of the message, so far as otherwise not inconsistent with law, form part of the contract between the sender and the company, under which the message is transmitted, citing numerous cases from the English and American courts, and stating that "the great preponderance of authority in this country sustains the reasonableness and validity of such regulation." Among other reasons for its decision is this one:

"By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence, but only to require the sender of the message to have it repeated and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delay in transmitting or delivering, or for not delivering a message, whether happening by negligence of its servants or otherwise."

The validity of like stipulations, limiting the measure of liability in case of loss of goods resulting from the negligence of an interstate carrier, has been sustained in numerous cases and, among others, are the following: Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Ch., B. & Q. R. Co. v. Miller, 226 U. S. 517, 33 Sup. Ct. 155, 57 L. Ed. 323; Ch., St. Paul, M. & O. R. Co. v. Latta, 226 U. S. 519, 33 Sup. Ct. 155, 57 L. Ed. 328; Mo., K. & T. R. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; S. A. L. R. Co. v. Pace Mule Co., 234 U. S. 751, 34 Sup. Ct. 775, 58 L. Ed. 1576; W. U. Telegraph Co. v. Bilisoly (Va.) 82 S. E. 91;

W. U. Telegraph Co. v. Compton (Ark.) 169 S. W. 946. See, also, W. U. Tel. Co. v. Dant, recently decided in the Court of Appeals of the District of Columbia.

Under the cases last cited, if plaintiff can recover more than the cost of the message, his recovery could not exceed the stipulated maximum amount of $50 as liquidated damages.

The case of W. U. Telegraph Co. v. Brown, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457, cited in the opinion of the court, is not in point, the case involving only the right of one state to control the law of another state, as to a transaction taking place partly in both; the court specifically holding that the statute of South Carolina, as to the recovery for mental anguish in telegraph cases, could not operate in the District of Columbia, but it did give strong intimation that the statute was an unwarranted interference with interstate commerce.

Since the passage by Congress of the act of 1910, above mentioned, telegraph companies are subject to the provisions of the Interstate Commerce Act, and, whatever the law may have been before that time, the case is now governed by the principles as stated in Adams Express Co. v. Croninger and other like cases, supra.

(168 N. C. 69)

## J. L. SMATHERS & CO. et al. v. TOXAWAY HOTEL CO. (No. 567.)

(Supreme Court of North Carolina. Jan. 13, 1915.)

1. BILLS AND NOTES ⟸497—PRESUMPTION—BURDEN OF PROOF—GOOD FAITH—HOLDER IN DUE COURSE.

Under Revisal 1905, § 2201, defining a "holder in due course," section 2208, providing that every holder is deemed prima facie a holder in due course, unless the title of his indorser was defective, section 2206, declaring that the holder in due course holds free from any defects of title, and section 2205, providing that to constitute notice of a defect of title the taker must have actual knowledge or knowledge of such facts that his taking amounts to bad faith, the holder of a note by indorsement before maturity from one who participated in its execution in fraud of creditors had the burden of showing that he had no actual notice or knowledge of the fraud, and his good faith in taking the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1448, 1675–1681, 1683–1687; Dec. Dig. ⟸497.]

2. APPEAL AND ERROR ⟸1064—HARMLESS ERROR—INSTRUCTION.

In such case, where the defense was that the person negotiating the note participated in its execution in fraud of creditors, an instruction that the evidence of fraud having placed the burden upon the holder to show that he was a holder in due course, and he having shown that he acquired the note by indorsement before it was due when complete and regular on its face and when it had not been previously dishonored, there was no evidence of any knowledge of the fraud, was erroneous in assuming that plaintiff's evidence was true and withdrawing the question from the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. ⟸1064.]

3. BILLS AND NOTES ⟸537—ACTIONS—QUESTION FOR JURY—GOOD FAITH.

In such action, *held* on the evidence that whether the holder took the note without actual knowledge that the person negotiating it had executed it in fraud of creditors and in good faith was for the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862–1893; Dec. Dig. ⟸537.]

Appeal from Superior Court, Buncombe County; Harding, Judge.

Action by J. L. Smathers & Co., against the Toxaway Hotel Company and others, in which one McMichael and Frank & Co., intervened. Decree for intervener McMichael and against intervener Frank & Co., and Frank & Co. appeal. Reversed, with directions to call another jury for the trial of an issue.

See, also, 83 S. E. 844.

Bourne, Parker & Morrison and T. F. Davidson, all of Asheville, for appellants. W. R. Whitson and J. C. Martin, both of Asheville, for appellees.

WALKER, J. [1] There are several of the exceptions in this record which are common to both this appeal and that of McMichael, which makes it necessary to discuss only the assignment of error relating to the question whether the court should have given the instruction requested by the interveners Frank & Co. that, if the jury believe the evidence, they will find that they are innocent purchasers for value and without notice of any fraud in the transaction connected therewith, or, in other words, that they are holders in due course, notwithstanding any infirmity in the instruments or any defect in the title of the person who negotiated them. There can be no doubt that Frank & Co. acquired their title to the instruments by indorsement before they were due, and that each of them was, all that time, complete and regular on its face and had not been previously dishonored, so that the only requisite to an unimpeachable title to the notes, under Revisal, c. 54, § 2201, is that, at the time they were negotiated, Frank & Co. had no notice of "any infirmity in the instruments or any defect in the title of the person who negotiated them." Revisal, § 2208, provides, in part, that every holder is deemed prima facie to be a holder in due course, but when it is shown that the title of any person, who has negotiated the instrument, was defective, the burden is on the holder to prove that he, or some person, under whom he claims, acquired the title in due course. The interveners started out with prima facie evidence that they were a holder in due course; but, when it was found that the notes had been executed in fraud of creditors, the burden shifted to them, and they were bound to prove that they acquired the title as holders in due course, or from some person who held the notes as such. It has been held to be in-

sufficient to show merely that the holder purchased the note before its maturity and paid value for it, but to entitle him to recover upon it, under Revisal, § 2206, as a holder in due course, he must go further and show that he acquired it bona fide, and without notice of any infirmity in the instrument or defect in the title of the person who negotiated it to him. In order to constitute such notice, it is further provided by Revisal, § 2205, that the holder, claiming the right of recovery upon it, "must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith." Norton on Bills and Notes, 334, speaking of the burden of proof when there is an infirmity in the note or a defect in the title, says:

"The burden is cast upon the plaintiff to show that he took the paper for value and in good faith. Some of the cases declare that the holder need not show that he had lack of notice, but need only show value, because the burden of showing notice is upon the party who seeks to impeach the title. But the other courts maintain, and properly, that in addition to proving value the holder should prove that he bought the note in good faith, and should show that he had no knowledge of or notice of the fraud. If value and notice are disputed as facts, they must be passed upon by the jury."

So in Tatam v. Haslar, 23 Q. B. Div. (1889) p. 345. the court says:

"When fraud is shown, the burden of proof is on the holder to prove both that value has been given and that it has been given in good faith, without notice of the fraud."

And in Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836:

"Where the maker of negotiable paper shows that it has been obtained from him by fraud, a subsequent transferee must, before he is entitled to recover thereon, show that he is a bona fide purchaser, or that he derived his title from such a purchaser. It is not sufficient to show simply that he purchased before maturity and paid value; he must show that he had no knowledge or notice of the fraud."

See, also, Giberson v. Jolley, 120 Ind. 301, 22 N. E. 306; National Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676.

The above cases are cited with approval in Bank v. Fountain, 148 N. C. 590, 62 S. E. 738, and are fairly illustrative of the prevailing doctrine. See, also, Cox v. Wall, 132 N. C. 730, 44 S. E. 635; Morgan v. Bostic, 132 N. C. 743, 44 S. E. 639; Bank v. Hollingsworth, 135 N. C. 556, 582, 47 S. E. 618; Crockett v. Bray, 151 N. C. 615, 619, 66 S. E. 666.

[2] The question now arises whether Frank & Co. had actual knowledge of the fraud, or of any such facts as constituted bad faith in taking the notes. With respect to this feature of the case, they asked the court to instruct the jury that there was no evidence of any such knowledge or implicative facts. But it would have been error, upon the evidence as it now appears, for the judge to have so charged. There being an infirmity in the notes, and the hotel company not having a good title to them, as it participated in the fraud and was the principal offender, the burden was cast upon Frank & Co. to prove that they had acquired them without the guilty knowledge, and they were not entitled to such a peremptory instruction. It must be a very plain and conclusive case to justify such an instruction in favor of the party having the burden of proof, as the credibility of the evidence adduced in support of his claim that he is a holder in due course is for the jury to decide. If they do not believe the evidence, he has failed to discharge the burden resting upon him by the terms of the statute, and the verdict should therefore be against him, unless there is other evidence or circumstances sufficient for that purpose, and whether there is the jury at last must also decide. But the interveners Frank & Co. were entitled to the other instruction, which was based upon the credibility of the evidence, and permitted the jury to pass upon it. Even when there is an infirmity in the instrument or defect in the title thereto, if the holder makes a full and fair disclosure of the facts and in no reasonable view of the evidence does it appear that he had the guilty knowledge described in the statute, and there is no circumstance or other evidence in the case contradicting it, or from which an adverse inference might be drawn, such an instruction as that requested should be given. We so held in Bank v. Fountain, 148 N. C. 590, 62 S. E. 738, where it was said by Justice Hoke, when dealing with a like question:

"The fraud having been established or having been alleged, and evidence offered to sustain it, the circumstances and bona fides of plaintiff's purchase were the material questions in the controversy; and both the issue and the credibility of the evidence offered tending to establish the position of either party in reference to it was for the jury and not for the court"—citing State v. Hill, 141 N. C. 771, 53 S. E. 311; State v. Riley, 113 N. C. 651, 18 S. E. 168.

Again it is said:

"As heretofore stated, when fraud is proved or there is evidence tending to establish it, the burden is on the plaintiff to show he is a bona fide purchaser for value, before maturity and without notice, and the evidence must be considered as affected by that burden. If, when all the facts attendant upon the transaction are shown, there is no fair or reasonable inference to the contrary permissible, the judge could charge the jury, if they believed the evidence, to find for the plaintiff; the burden in such case having been clearly rebutted. But the issue itself and the credibility of material evidence relevant to the inquiry is for the jury, and it constitutes reversible error for the court to decide the question and withdraw its consideration from the jury."

The court there adverts to the unsoundness of the rule, as stated in Daniel on Neg. Instr. § 819, as to the burden of proof, and says it is not in accordance with our enactment upon the subject.

[3] It would be useless to prolong the discussion of the law applicable to cases of this kind, as it is fully set forth in Bank v. Fountain, supra, with proper reference to the

authorities, which case has been later and frequently approved by this court. Manufacturing Co. v. Summers, 143 N. C. 102, 55 S. E. 522; Bank v. Griffin, 153 N. C. 72, 68 S. E. 919; Myers v. Petty, 153 N. C. 462, 69 S. E. 417; Park v. Exum, 156 N. C. 228, 72 S. E. 309. The case of Bank v. Griffin, supra, is clearly in point, and shows that the interveners were entitled to have the jury instructed as they requested, provided the state of the evidence warranted it, and we think it did. It tended to show, if believed, that Frank & Co. took the notes as collaterals for a pre-existing and bona fide indebtedness of the Toxaway Hotel Company to them for a larger amount, which, of course, is a valuable consideration. Revisal, §§ 2173, 2175; Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822; Manufacturing Co. v. Summers, 143 N. C. 102, 55 S. E. 522. Frank & Co. were then holders for value. Did they buy in good faith and without notice of the plaintiff's equity, or of any infirmity in the instruments, or of any defect in their indorser's title thereto? E. W. Frank positively testifies that they did, and gives in detail all the circumstances connected with the transfer of the notes, in an apparently full, fair, and candid manner, and without any noticeable concealment or suppression of the facts. If he told the truth, the conclusion is inevitable that they bought for value and without notice of any infirmity or defect, and also in good faith. The only remaining inquiry therefore is: Did he tell the truth? And the court should have left that question to the jury, with instructions as to the evidence and quantum of proof, and as to such other matters as would be pertinent and proper for them to consider, upon these questions of value, notice, and the burden of proof. Norton on Bills and Notes, pp. 318, 319, states the rule with substantial accuracy, and which we adopt with slight qualification to be noted hereafter. After showing, at pages 292, 310, and 311, that where an infirmity or defect has been shown the burden is upon the holder (whether plaintiff or defendant or intervener) to prove that he holds bona fide, for value and without notice, he says:

"The reason for this rule is that, where there is fraud, it is but reasonable to suppose that he who is guilty of it will part with the instrument for the purpose of enabling some third party to recover upon it. Such presumption operates against the holder and devolves upon him the duty of showing value and lack of notice in rebuttal of the duress or fraud in order to maintain his action. In the cases of illegality the rule is the same, and for the same reason. The burden is cast upon the plaintiff to show that he took the paper for value and in good faith. Some of the cases declare that the holder need not show he had lack of notice, but need only show value, because the burden of showing notice is upon the party who seeks to impeach the title. But the other courts maintain, and properly, that, in addition to proving value, the holder should prove that he bought the note in good faith, and should show that he had no knowledge or notice of the fraud. He should show, also, that he paid value for the note; and, if value and notice are disputed as facts, they must be passed upon by the jury. Hence it follows that it is not necessary for the defendant, as in case of lack or failure of consideration, to show that the plaintiff did not pay value, or that he had notice of the facts of the defense; but these facts must appear affirmatively on the plaintiff's (holder's) part. It is probable that this rule does not mean that the plaintiff (holder) must prove a direct negative, but that, as a part of the direct case, he must show the facts of the transaction constituting the transfer, and then, if there is nothing in the transaction itself to show bad faith, and there is no proof from other sources of want of good faith, or actual or constructive notice of the defense, the plaintiff (or holder) must prevail"—provided, as we will add, the jury believe the evidence, for as the "burden of proof," under the statute, is upon the holder, intervener in this case, when the "infirmity in the instrument or defect in the title" is shown, if he fails to satisfy the jury of his being a holder in due course, the burden has not been discharged by him, but still remains.

A prima facie case is made out by him, in the beginning, when he produces the note, proves its execution and its indorsement to him (Bank v. Fountain, supra, and Tyson v. Joyner, 139 N. C. 69, 51 S. E. 803); but this prima facie case vanishes when the infirmity in the instrument or defect in the title appears. It is not transferred to the maker of the note, for he stands in a better position by the express terms of the statute, which casts the burden of proof upon the holder to show that he is an innocent purchaser for value. The instruction therefore should have been given in response to the intervener's prayer therefor. It may also be remarked that the charge seems to have been based upon the rule of Lord Tenterden, instead of that of Lord Denman, which has been written into our statute. Revisal, § 2208. See Appeal of McMichael, at this term. It is not enough that facts should appear calculated to arouse suspicion in the mind of a prudent man, or to excite inquiry; but there must be either knowledge of the infirmity or defect, or, in this case, the fraud, or knowledge of such facts as will evince bad faith on the part of the intervener, or holder, in taking the note, for the statute so provides.

If a statement of the law be found in any former decision of this court which would seem to militate against the view herein expressed, it was inadvertently made, attention not having been directed, at the time, to the exact terms of the statute, or it was due, perhaps, to the wrong citation of the doctrine in Bank v. Burgwyn, 110 N. C. at 273, 14 S. E. 623, 17 L. R. A. 326, as stated in Daniel on Neg. Instruments, § 819, which was virtually repudiated in Bank v. Fountain, supra, as being in conflict with our enactment upon the question; the court there saying that:

"The law, as expressed by Mr. Daniel, has been subjected to adverse comment in the decisions upon this subject, which we have adopted as law by our statute, and there is doubt if, since its passage, what is said by Mr. Daniel can be regarded as correctly stating the rule.

under our statutory provision, in reference to the burden of proof."

And the court then immediately proceeds to lay down and apply the opposite rule, placing the burden upon the holder. If the burden is upon the plaintiffs, as creditors, who attack the validity of the notes, the case, as it appears in this record, would be still stronger against them.

It was suggested that there were contradictions in the testimony of E. M. Frank, but we have failed to discover them, or, at most, any material one. His deposition, on the contrary, appears now to be consistent, credible, and believable, and free, so far as we can see, from any reasonable ground of suspicion. The jury, though, must be the final arbiters of its credibility.

The case is remanded, with directions to call another jury for the trial of the issue involving the validity of the notes held by these interveners.

New trial.

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(168 N. C. 40)

## BUCHANAN v. RITTER LUMBER CO.

(No. 518.)

(Supreme Court of North Carolina. Jan. 13, 1915.)

1. MASTER AND SERVANT ⟸101, 102—MASTER'S DUTY—SAFE PLACE TO WORK—LOGGING ROADS.

A master, in the exercise of reasonable care, must provide his servants a safe place to work and a failure of duty in such respect is negligence; and such duty extends to a master's use of a logging road.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178–184, 192; Dec. Dig. ⟸101, 102.]

2. MASTER AND SERVANT ⟸286—ACTION FOR INJURY—QUESTION FOR JURY—NEGLIGENCE.

On evidence, in an action for the death of a servant knocked off a logging engine by a log projecting from the side of the road, and run over, *held*, that defendant's negligence as to furnishing a safe place to work was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. ⟸286.]

3. MASTER AND SERVANT ⟸289—ACTION FOR INJURY—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE—AVOIDABLE INJURY.

On evidence in such action, *held* that whether the master was negligent by reason of his failure to avail himself of the last clear chance of avoiding the injury was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. ⟸289.]

4. MASTER AND SERVANT ⟸289—ACTION FOR INJURY—QUESTION FOR THE JURY—CONTRIBUTORY NEGLIGENCE.

On evidence in such action, *held*, that whether deceased was negligent in failing to observe a log projecting from the side of the track and in failing to use the hand rod on the engine was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. ⟸289.]

5. NEGLIGENCE ⟸136—QUESTIONS FOR JURY—PROXIMATE CAUSE.

If on a given statement of facts, two men of fair minds could come to different conclusions as to the existence of negligence, or as to whether it was the proximate cause of an injury, the questions must be determined by the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig ⟸136.]

6. APPEAL AND ERROR ⟸1064—HARMLESS ERROR—INSTRUCTIONS.

The fact that the court, modifying a requested charge, prefaced it by saying, "This is defendant's prayer for instruction," was without prejudice, where the statement and the entire context showed that the court intended it as a modification of defendant's prayer, and the jury must have so understood it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. ⟸1064.]

7. MASTER AND SERVANT ⟸129, 247—ACTION FOR INJURY—PROXIMATE CAUSE.

On the two issues of negligence and contributory negligence, the negligence of the master or of the servant has no controlling significance unless it is the contributing and proximate cause of the injury, or one of them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257–263, 795–800; Dec. Dig. ⟸129, 247.]

8. MASTER AND SERVANT ⟸289—ACTION FOR INJURY—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

On evidence, in an action for the death of a servant knocked from the running board of a logging engine by a log projecting from the side of the track, and run over, *held*, that on the issue of contributory negligence the question of proximate cause was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. ⟸289.]

9. TRIAL ⟸255 — INSTRUCTIONS — REQUEST FOR INSTRUCTION.

In such action the master, if desiring a charge whether certain other servants pushed deceased from the engine and caused his death, should have requested such a charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627–641; Dec. Dig. ⟸255.]

Appeal from Superior Court, Mitchell County; Long, Judge.

Action by D. L. Buchanan, administrator, against the Ritter Lumber Company. Judgment for plaintiff, and defendant appeals. No error, and judgment on the verdict affirmed.

There was evidence on part of plaintiff tending to show that on April 23, 1910, the intestate, an employé of defendant company, then making $1.50 or $2 a day, a young man of 21 or 22 years of age, of good habits, industrious, of good vigor of mind and body, was run over and fatally injured, dying soon after, by a steam engine of defendant company which was being operated over defendant's road in the course of the company's work; that at the time of the injury defendant was engaged in doing a large lumbering business in Caldwell county, N. C., the mills being situate at Mortimer, in said county, and the logs being hauled there from a point about four miles further up, the com-

pany having a roadbed to that point, with iron rails and steam engine of the ordinary kind used in such work, constructed so as to move backwards and forwards with equal facility and having a running board 8 or 10 inches along the side and across the rear of the tender, about 10 inches above the track, where employés were accustomed to ride, and where they might stand or move as the course of their duties should require, and there was a handrail higher on the tender, to which they might hold as they stood or moved about; that the particular duties of the intestate, at the time, was as "top loader," one who laid the logs straight and secured them as they were lifted onto the cars by machinery, the evidence of plaintiff tending to show that this was not a position of authority, and that he directed the engineer only in the sense that he gave him proper signals as a train of cars had to be moved backwards or forwards in efficient performance of the work; that the engineer was one Joe Effler and, on the day in question, he was running the engine backwards over the road at three or four miles an hour; that intestate and three or four other employés were on the tender and he and two others were standing on the running board at the rear of tender, Garfield Hughes being on the outside to the right, the intestate next, and Arthur Blevins on the left and, at a point not far from the logging yards, a hemlock limb, 5 to 7 feet long and 1½ to 2 inches in diameter at the smaller end, which was stuck in a hole or pile of brush in the bank and, projecting towards the roadbed at an angle of about 45 degrees, struck the intestate about the feet and in some way prized him off the engine, throwing him prone upon the track and, at about 70 to 75 feet further along, he was run over and fatally injured, dying in about an hour and a half. Several eyewitnesses testified to the fact that the intestate was knocked off the engine by the hemlock stick. There was evidence further for plaintiff, tending to show that this stick had been in such a position, leaning towards the road, for a week; that the end was worn slick where it had scraped along the engine and cars; that there were signs of hemlock bark along the journal boxes of the engine and on the running board, giving indication that the stick had been continuously rubbed by the passing cars. There was also a statement of this engineer, Joe Effler, who was afterwards examined as a witness for defendant, and which seems to have been admitted without objection, that he had noticed the stick and its position for a week before the occurrence. There was further testimony for plaintiff tending to show that when he was first knocked off there were calls and cries, both from the crew and from persons outside the track, to the engineer in the endeavor to attact his attention, but that he was looking out of the window at the side, and they failed to attract his attention, and the train ran, as stated, 70 to 75 feet up the track before the intestate was run over and finally one man rushed up to the cab and called out to him, when he immediately stopped the engine, which was and had been moving at a very slow pace, not more than 3 or 4 miles an hour.

There was testimony on the part of defendant company to the effect that no stick had been seen in any position threatening the train before this occurrence; that the intestate's position as top loader gave him full authority over the train and crew, and that he was standing on the running board, where he had full opportunity to look ahead on the track, and if there was any obstruction threatening the train, he could have observed and noted it; that he was not holding by the rail along the engine at the time, but was standing there smoking with his hands under the cape of his overcoat; that Garfield Hughes, who was on the outside nearer the stick, avoided the collision and escaped harm by reason of holding to the handrail and lifting himself up; and, further, that the intestate before his death had said to several persons that he was, in some way, pushed off the running board by one or both of the young men who were in there with him; that these men were there without permission, and the inference being that, in a playful scuffle between them, the intestate was unintentionally knocked off the engine.

On the ordinary issues in such action of negligence, contributory negligence, and damages, there was verdict for plaintiff, and defendant excepted and appealed.

L. C. Bell, of Columbus, Ohio, and Bernard & Johnston, of Asheville, for appellant.
John C. McBee, of Bakersville, and Pless & Winborne, of Marion, for appellee.

HOKE, J. (after stating the facts as above). It was earnestly urged for error by defendant that his honor refused to nonsuit plaintiff both on the pleadings and the evidence, but the position cannot be sustained.

[1] It is fully established with us that an employer, in the exercise of reasonable care, must provide for his employés a safe place to do his work and a failure of duty in this respect will constitute negligence. Cook v. Cranberry Co., 161 N. C. 39, 76 S. E. 473; Jackson v. Lumber Co., 158 N. C. 317, 74 S. E. 350; Tanner v. Lumber Co., 140 N. C. 475, 53 S. E. 287.

An examination of the authorities will show that the position is very insistent in the case of railroads where a breach of duty in this respect is not unlikely to result in serious and often fatal injuries, and, in various cases, it has been held that these logging roads come clearly within the principle and are held to the same standard of care. Worley v. Railroad, 157 N. C. 490, 73 S. E. 107; Sawyer v. Railroad, 145 N. C. 24, 58 S. E.

598, 22 L. R. A. (N. S.) 200; Hemphill v. Lumber Co., 141 N. C. 487, 54 S. E. 420. In reference to these obligations, in Sawyer's Case, supra, it was said:

"That these logging roads, in various instances and in different decisions, have been described and located as railroads and held to same measure of responsibility and the same standard of duty" (citing Hemphill's Case, supra, and Simpson v. Lumber Co., 133 N. C. 96, 45 S. E. 469, and Craft v. Timber Co., 132 N. C. 156, 43 S. E. 597).

And, further:

"This * * * duty arises not so much from the fact that railroads are common carriers or quasi public corporations as from the high decree of care imposed upon them on account of the dangerous agencies and implements employed and the great probability that serious and in many instances fatal injuries are almost certain to result in case of collision."

[2] Considering the present case in the light of these decisions, it is clear, we think, that the court would not have been justified in directing a nonsuit, there being facts in evidence tending to show that, for a week or more, the defendant's road had been left with a limb or snag deep in the ground at one end and leaning over towards the railroad track in such manner that it, day by day, scraped along the sides of the engine and cars, and where it was liable, at any time, to cause an injury of some sort to the train or its employés. Hudson v. Railroad, 142 N. C. 198, 55 S. E. 103; Drum v. Miller, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528.

[3] Again, a nonsuit would have been improper because of facts in evidence tending to show that, after the intestate was knocked off the engine and was prone upon the track, the train, running at only three or four miles an hour, continued to move along the track for 70 or 75 feet before the fatal injury was received, and meantime persons on the train and off endeavored in every way to attract the attention of the engineer, and failed to do it until one of them went right up to the cab, the testimony permitting the inference that he was looking out to the side and entirely inattentive to the movements of his train or the safety of the persons who were on it. In that aspect of the case, the defendant company might well be held responsible by reason of the failure to avail itself of the last clear chance of avoiding the injury; this whether the intestate was or was not guilty of contributory negligence, as the term is generally used and applied. Snipes v. Mfg. Co., 152 N. C. 42, 67 S. E. 27.

[4, 5] It was further contended that there was error committed in modifying certain prayers for instructions by defendant, chiefly in reference to the question of contributory negligence, request No. 2 being to the effect that a servant is required to exercise ordinary care for his own safety, to observe the machinery and appliances used in connection with his work, and to discover those dangers which a man of ordinary prudence would discover and, if he fails in this duty and is thereby injured as an immediate result, he cannot recover damages.

"Therefore the court charges you that, if you find by the greater weight of the evidence that plaintiff's intestate was riding upon the rear of defendant's engine, in plain view of the obstruction upon or over the track, and if you find there was an obstruction and he failed to observe same and further failed to avail himself of the safety appliance, called the hand rod in the evidence, and you further find that by using same he could have saved himself, the court instructs you that he was guilty of contributory negligence, and you would answer second issue, 'Yes.'"

The court gave the instructions as prayed, with the modification, after the words, "could have saved himself," by adding:

"And you find that he was negligent in regard to these omissions and his neglect contributed to the injury."

In other words, the court referred it to the jury to determine whether, upon the facts in evidence as suggested in the prayer, the intestate was negligent in failing to observe and note the obstruction and in failing to use the hand rod, and whether such neglect on his part was a contributory cause of the injury.

In Russell v. Railroad, 118 N. C. 1098, 24 S. E. 512, and in cases before that time, it was declared to be the correct principle that, if, on a given state of facts, two men of fair minds could come to different conclusions as to the existence of negligence, the question must be determined by the jury, and that a like principle should prevail in reference to the question of proximate cause. The position has been since repeatedly upheld with us, and is also approved by the Supreme Court of the United States as the correct rule for the trial of causes of this character. Graves v. R. R., 136 N. C. 3, 48 S. E. 502; Ramsbottom v. R. R., 138 N. C. 39, 50 S. E. 448; Harvell v. Lumber Co., 154 N. C. 254, 70 S. E. 389; Alexander v. Statesville, 165 N. C. 528, 81 S. E. 763; Grand Trunk Railroad v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Davidson v. United States, 205 U. S. 187, 27 Sup. Ct. 480, 51 L. Ed. 764.

Applying the rule to the facts in evidence, we think that his honor was clearly right in submitting the question as to the conduct of the intestate to the decision of the jury. True, there was testimony on the part of the defendant to the effect that he was "top loader," a position of authority, and that he had entire charge of the train and its crew, but there is also the permissible view that he was a young man of 21 or 22 years of age, getting only $1.50 to $2 per day; that he had only held the position a short while, and that his duty as top loader was only to see that the logs were properly laid and secured on the cars, and that he directed the engineer only in the sense that when they were engaged in loading, he signaled the engineer when to move back and forth as the necessities of the work required, and, in any event, he was

not in charge of the train at that time, nor in a position to direct or control its movements. He was only out on this running board where the hands were accustomed to ride on their way to work, the train being in motion, and the duty on him, under such circumstances, to observe and note an obstruction of this character and correctly estimate its proper effect; a small stick, leaning over towards the rail, was a very different obligation from that incumbent on defendant company and its employés, charged with the especial duty of keeping the track and roadbed in a reasonably safe condition. In the latter case, it would undoubtedly import menace tending to inculpate, whereas to the intestate, it might very well be a question of debate, and one that, under our law, must be referred to the jury.

On this exception, there seems to be some discrepancy between the defendant's assignment of error and the case on appeal, for in the assignment defendant substitutes for his prayer the modification of his prayer as contained in his honor's charge, but the true bearing of the exception is readily ascertained from the case on appeal, showing that his honor modified defendant's prayer for instruction, as stated.

[6] The further exception, that his honor prefaced this portion of his charge by stating, "This is defendant's prayer for instruction," is without merit. The statement and the entire context shows that the court intended it as a modification of defendant's prayer, and the jury must have so understood it. The prayer, in effect, requested the court to rule on the question of intestate's conduct as a matter of law, and his honor submitted it for the consideration of the jury, and the position, as we have stated, is in accord with our decisions.

[7, 8] The court was further requested to charge the jury that:

"If they found that defendant had provided a handrail, conveniently located for the use and safety of persons riding upon the running board at the rear of the tender, and that intestate was riding upon said running board while the engine was in motion and was standing up in easy reach of said handrail, with his hands in the bib of his overalls or in front of him, and he stood so at the time of his fall, this within itself would be contributory negligence and they should answer the second issue, 'Yes.'"

The court gave this and another prayer substantially similar, adding thereto that, under the circumstances suggested, the jury would answer the second issue, "Yes," provided they found, further, that the failure to use this handrail "proximately contributed to the injury."

It is the accepted position, in actions of this kind, that on the two issues of negligence and contributory negligence the negligent conduct of defendant or of the claimant has no controlling significance, unless it has been the contributory and proximate cause of the injury or one of them. In a case, at the present term, of McNeill v. Railroad, 83 S. E. 704, the charge is approved to the effect that:

"In order to enable you to answer the first issue [that as to defendant's negligence] 'Yes,' you must find * * * that that train had no electric headlight, * * * and that not having the headlight was the cause, and the proximate cause, of the injury."

And Associate Justice Allen, in a well-sustained opinion, shows that this is an essential requirement to the proper decision of such an issue. The same principle prevails on the issue as to contributory negligence; it is a very important part of its correct definition—that it is the proximate cause of the injury.

Numerous authorities with us are in support of the position, and they hold, too, that where negligence is shown to have caused an injury, it is only in exceptional cases that the question of proximate cause can be withdrawn from the jury. Boney v. Railroad, 155 N. C. 95, 71 S. E. 87; Farris v. Railroad, 151 N. C. 489, 66 S. E. 457, 40 L. R. A. (N. S.) 1115; Coley v. Railroad, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817; Brewster v. Elizabeth City, 137 N. C. 392, 49 S. E. 885.

It is true that the testimony shows that the intestate was standing on the running board and had no hold of the handrail. It was shown, also, that another man standing by him was enabled to save himself after he saw the stick by catching hold of the handrail, but, as we have heretofore stated, the intestate had no part in directing the train, and was not in a position to control its movements. He was not charged with the special duty of looking ahead for its safety, nor did he have anything to do with keeping the roadway in repair. He was just riding on the engine to his work as the others were accustomed to do, and, as we have heretofore stated, the character of the obstruction was not such as to affect him with notice of a probable injury as a conclusion of law. If he had fallen off by the ordinary jars and jolts of the train's movements, there might be more force in the position, but it is not at all a necessary conclusion that the intestate could have saved himself if he had taken hold of the rail; and on all the facts as presented, we concur in his honor's view that, on the issue as to contributory negligence, the question of proximate cause was for the jury.

Defendant excepted, further, that his honor, in charging the jury—

"failed to instruct them at any point as to the law arising on the evidence and contention of defendants that some one of certain employés pushed plaintiff's intestate from the engine and caused his death."

[9] This, in any event, was only an omission on the part of his honor, and the proceeding could very well be sustained on the ground that, if defendant desired that such a position be referred to, he should have made a request to that effect, as he did on the other points. Pardon v. Paschal, 142 N. C. 538, 55

S. E. 365; State v. Worley, 141 N. C. 764, 53 S. E. 128; Simmons v. Davenport, 140 N. C. 407, 53 S. E. 225. But, it is not necessary to rest the matter here on this principle. From a perusal of the record it plainly appears that the principal issue between the parties on the testimony was whether the intestate was knocked off by the stick or snag or pushed off by one of the other hands, and defendant's counsel therefore did not think it necessary to make a request on the subject. The charge was that intestate was knocked off by this stick, negligently left as an obstruction on defendant road, and not otherwise, and there was no occasion for his honor to make special reference to a different cause. In support of this view, it was stated on the argument for appellee, and not challenged, that counsel for plaintiff admitted in the argument before the jury that if the intestate was pushed off by one of the employés his client had no cause of action, and this is no doubt the reason that the capable and diligent counsel did not think it necessary to have any reference to the matter made by the judge.

The exceptions to testimony are without merit, and were very properly not insisted on in defendant's brief. Lynch v. Rosemary Mfg. Co., 83 S. E. 6, at present term.

After careful consideration, we are of opinion that no reversible error appears, and the judgment on the verdict must be affirmed. No error.

(168 N. C. 60)

## WAYNESVILLE TRANSP. CO. v. WAYNESVILLE LUMBER CO. (No. 597.)

(Supreme Court of North Carolina. Jan. 13, 1915.)

APPEAL AND ERROR ⟸432—RECORD—FILING—TIME.

Where time for serving a case and counter case on appeal was extended by agreement, and both were served within the time of the extension agreed on, but neither was accepted by the other, it was appellant's duty to immediately request the judge to settle the case, as required by Revisal 1905, § 591, and he was required to docket the record proper in the Supreme Court within the time required by rule 17 (66 S. E. vii), and to pray for certiorari to send up the case, and, in case of a failure to do so, appellee could move to docket and dismiss.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2177–2181; Dec. Dig. ⟸ 432.]

Action by the Waynesville Transportation Company against the Waynesville Lumber Company. Judgment for defendant, and plaintiff appealed. On defendant's motion to docket and dismiss under rule 17 (66 S. E. vii). Granted.

John M. Queen and Hannah & Leatherwood, all of Waynesville, and R. N. Simms, of Raleigh, for appellee.

CLARK, C. J. This case was tried at July term, 1914, of Haywood. By agreement the time was extended for serving the case and counter case on appeal, which is a bad custom, and not to be encouraged. The plaintiff appellant served its case on defendant September 9, 1914, and the defendant served its counter case on the appellant November 9, 1914, both being within the time of the extension agreed upon in writing. Neither case was accepted by the other, and, the transcript not being docketed here, the appellee now moves on December 10th to docket and dismiss under rule 17 (66 S. E. vii). This he was entitled to do. If the appellant was not in default for the delay in settling the case on appeal, he was required to docket the record proper at the time required by the rule, and should have asked for certiorari for the case on appeal, provided he showed that on receipt of the counter case he had "immediately" requested the judge to settle the case, as required by Revisal, § 591, and that the appellant was in no wise to be blamed for the delay in doing so. This has been repeatedly held by this court. Hawkins v. Tel. Co., 166 N. C. 213, 81 S. E. 161, is one of the most recent cases, and refers to numerous others in which the matter has been discussed and fully settled in every aspect, quoting Vivian v. Mitchell, 144 N. C. 472, 57 S. E. 167, in which the court cited, among other cases, Harrison v. Hoff, 102 N. C. 25, 8 S. E. 887; Jones v. Asheville, 114 N. C. 620, 19 S. E. 631; Paine v. Cureton, 114 N. C. 606, 19 S. E. 631; Mortgage Co. v. Long, 116 N. C. 77, 20 S. E. 964; Barbee v. Justice, 138 N. C. 20, 50 S. E. 445; Craddock v. Barnes, 140 N. C. 427, 53 S. E. 239; Cozart v. Assurance Co., 142 N. C. 523, 55 S. E. 411. And the court added:

"The decisions to this effect have been uniform, and so often repeated that of late years the court has usually contented itself by following the precedents, without opinion, by a per curiam order."

Revisal, § 591, provides that, if the appellant does not accept the appellee's counter case, he "shall immediately request the judge to fix the time and place for settling the case before him." Stroud v. Tel. Co., 133 N. C. 253, 45 S. E. 592. It does not appear that the appellant did this. It is also true that the appellant might contend that in such case his case as amended by the defendant's counter case should be taken as the case on appeal. But in either of these cases it is none the less necessary that the appellant should docket the record proper and apply for a certiorari, and in the latter case it was his duty to send up his case as amended by the appellee's case.

In Hewitt v. Beck, 152 N. C. 759, 67 S. E. 586, the court said that, when the appellant seeks to excuse himself because there has been delay in settling the case without any fault on his part, the court has uniformly held that he must nevertheless docket his "transcript of the record proper" in proper

time, to get a foothold in this court. In Burrell v. Hughes, 120 N. C. 277, 26 S. E. 782, it is said, citing many cases: "There are some matters * * * which should be deemed settled and this is one of them." That case has been often cited since. See Anno. Ed.

Motion allowed.

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(143 Ga. 31)

## BURTCHAEL v. BYRD. (No. 133.)

(Supreme Court of Georgia. Jan. 14, 1915.)

*(Syllabus by the Court.)*

1. ESTOPPEL ⟸65—CONDUCT—EJECTMENT.

An owner of land executed a deed to one of his daughters, and took from her an instrument agreeing to pay $750 to another daughter after his death, and that he should have the use of the land during his life. The grantee made and delivered to her sister a note for the amount stated, and the grantor remained in possession. At a later date he executed a deed to the same land to another daughter. Subsequently he filed an equitable petition against the first grantee, seeking to cancel the deed on account of his mental unfitness to make it, and that he was induced to do so by the persuasion of the grantee. To this action the second grantee was not a party. The defendant denied the substantial allegations, and also set up that the plaintiff had executed a deed to the second grantee, and had conveyed any title which he had. On the trial the presiding judge intimated that the plaintiff could not maintain the action after having made the second deed. Thereupon the plaintiff dismissed the case, and retained possession until his death, the agreement for him to do so having been recorded the day before the trial. After his death the first grantee brought suit against the second grantee, to recover the property. *Held*, that the above stated facts did not prevent the plaintiff in the present action from asserting that her title was superior to that of the second grantee, after the death of the common grantor.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 155–158; Dec. Dig. ⟸65.]

2. ADVERSE POSSESSION ⟸114 — PRESCRIPTIVE TITLE—SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and there was no error in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683, 685, 686; Dec. Dig. ⟸114.]

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Action by Mrs. George Byrd against Mrs. Dora Burtchael. Judgment for plaintiff, and defendant brings error. Affirmed.

Mrs. George Byrd brought suit against Mrs. Dora Burtchael, seeking to recover certain land. The defendant denied that the plaintiff had title, alleged that she herself had the title, and pleaded a prescriptive title. The plaintiff and the defendant were sisters. Each claimed under their father, G. W. Ambrose. The plaintiff claimed under a deed from her father dated May 3, 1905, and recorded on the day after its execution. The defendant claimed under a deed from the same grantor, dated August 10th thereafter. On May 3d Mrs. Byrd, the grantee in the first deed, executed to her father an instrument, which recited that he had, on that day, made to her a deed to the lot where he then resided; that one condition thereof was that the grantee was to pay to another sister, Mrs. Vaughn, the sum of $750 30 days after the father's death, that the grantee had executed a note to her sister for that sum, and to secure it had executed a mortgage on the place, and that the husband of the grantee was under a contract with the grantor to build a house for the use of Mrs. Burtchael. The instrument then declared that it was agreed and so understood that Ambrose, the maker of the deed to Mrs. Byrd, should have the sole and undisturbed possession of said home place during his life, without rent, and that it was further agreed that, should Ambrose die before the completion of the building referred to, Mrs. Burtchael should have the use of the home and lot, without rent, until the building was finished. This instrument was attested like a deed, and was recorded on September 12, 1907. The grantor executed a deed to certain other land to Mrs. Burtchael. After the execution of the deed to Mrs. Byrd, the grantor demanded its return, which was refused. He then executed a deed, covering the same land, to Mrs. Burtchael, dated August 10, 1905, and recited a consideration of $5 and love and affection. This lot, together with the other property conveyed to Mrs. Burtchael, included all the real estate of the grantor. It was agreed by Mrs. Burtchael that she would take care of her father, pay all obligations which might be or become due by him, and give him a decent burial at his death. On August 15, 1905, Ambrose filed his equitable petition against Mrs. Byrd, seeking to cancel the deed which he had made to her, on the ground that when it was made he was aged, had been enfeebled by sickness, was mentally unfit to transact business and dispose of his property, and was induced to make the deed by the persuasion of his daughter, who had great influence over him, on account of the kindness and affection which she had exhibited toward him. The defendant denied these allegations, and alleged:

"That the plaintiff has made deeds to all his property, either shortly before or soon after filing said petition, in which he has made other conveyances of the said house and lot, the said 80-acre tract hereinbefore referred to, and that she has reason to believe that all of said property was therein and thereby conveyed to Mrs. W. L. Burtchael, or to her and her husband."

On the trial of that case, after the plaintiff had closed his testimony, a deed from him to Mrs. Burtchael, covering the land in dispute, was exhibited to the court; and the contention was made by the defendant that the plaintiff could not maintain the action. The court intimated that he would sustain the position. Thereupon the plaintiff dismissed his suit on September 13, 1907. On

September 12th the agreement made by Mrs. Byrd to the then plaintiff as to his having a life use of the property was recorded. In the present case the defendant moved the court to direct a verdict in her favor, which was refused, and she excepted pendente lite. The jury found in favor of the plaintiff the premises in dispute for $60 rent. The defendant moved for a new trial, which was refused, and she excepted.

Mark D. Irwin, of Lawrenceville, and Simmons & Simmons, of Atlanta, for plaintiff in error. O. A. Nix and I. L. Oakes, both of Lawrenceville, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The plaintiff brought an action of complaint to recover land, and a verdict was rendered in her favor. The defendant, having failed to obtain a new trial, excepted.

[1] 1. After the father of these two sisters had executed a deed to one of them, the plaintiff in the present action, he filed an equitable proceeding to have it set aside because of alleged incapacity to transact business when he made it. In addition to denying the substantial allegations of such petition, the grantee set up in her answer that, shortly before or soon after bringing the suit, the grantor had executed other deeds conveying this and other property to a sister of the first grantee, or to her and her husband (the sister being the present defendant). On the trial of that case the deed made to the sister of the defendant was brought in under subpœna duces tecum. On the trial of the equitable action, after the plaintiff had closed his evidence, the second deed made by him to his other daughter, the defendant in the present case, was exhibited to the court; and the contention was made that the plaintiff in the action, having conveyed away the title before bringing suit, could not maintain the proceeding to set aside the first deed made by him. The court intimated that he would sustain the position, and thereupon the plaintiff in the case dismissed the suit. The defendant in the instant case contends that the present plaintiff is estopped from now attacking the deed which was so used, and that she elected to defend that case by treating the conveyance as valid, and must abide such election. There are several reasons why these positions are unsound. The present defendant was not a party to the former case, but the plaintiff there was a person who had already executed the deed to her. He did not await a ruling of the court, but on an intimation dismissed his case. By his first deed and the instrument executed to him by the grantee therein, he conveyed the fee to her, and she agreed that he should have the sole and undisturbed possession for life, without payment of rent. This amounted to reserving a life estate, or at least a use for life. If thereafter he made a conveyance of more than he had, it might be good as against him and yet inferior to his prior deed. There was no essential inconsistency in asserting that the plaintiff in that case had no right or title left in him authorizing him to bring the suit, and yet that his second conveyance was inferior to the first. If an owner of land makes two deeds to it, either may be good as to him, denuding him of any title, but this does not settle the question as to which is superior to the other. Nor could this properly have been determined in an action to which the grantee in the second deed was not a party, so as to be an adjudication as between the holders of the two deeds. If the agreement between the grantor and the first grantee be treated as creating or leaving in him a life estate, his second deed might have conveyed that only, although it may have purported to be a conveyance of the fee. Civil Code 1910, § 3671. The common grantor, who was the plaintiff in the proceeding filed to cancel his first deed, did not offer to restore the status; indeed the agreement leaving a life use in him was recorded the day before the trial. The defendant in that case, who is the plaintiff in the present action, is not prevented from asserting the superiority of the conveyance to her over the later one to her sister, either under the doctrine of estoppel or that of the election of remedies. The case differs from that of David v. Tucker, 140 Ga. 240, 78 S. E. 909, and similar cases. There a widow filed an equitable proceeding to cancel a deed which had been executed by her husband, and obtained a decree, thus restoring the title to the status in which it was before the deed was made. Subsequently she sought to hold the property and repudiate the title which was asserted by the administrator of her husband.

[2] 2. The plaintiff in error further contends that the evidence demanded a finding that she had a prescriptive title. While the evidence was conflicting, there was some of it on behalf of the defendant in error which tended to show that the grantor in the original deed remained in possession until his death in March, 1913, controlling the property, sometimes renting out a part of it, and that the defendant lived with him as his daughter during a part of the time; that he returned the land for taxation and paid the taxes on it until and including 1909, and that it was returned by the defendant only in 1910, 1912, and 1913. She also knew of the prior deed to her sister, though she testified that she did not think that it was good, and thought she herself was obtaining a good title. This, with other evidence, was sufficient to authorize a finding that there was no adverse possession by the plaintiff in error of the necessary character, and for a sufficient length of time to ripen into a prescriptive title.

The rulings made substantially control the case. The verdict was supported by the evidence, and there was no error in overruling the motion for a new trial.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 30)

FISKE v. WIMBURN et al. (No. 132.)

(Supreme Court of Georgia. Jan. 14, 1915.)

*(Syllabus by the Court.)*

BROKERS ⟸42—COMMISSION—DEFENSE—LICENSE TAX.

It was recently held by this court: "Under a statute passed for the purpose of raising revenue, which provides that every person or firm engaged in the business of buying or selling real estate on commission shall pay the sum of $10 for each county in which he or they may conduct such business, and that before such persons shall be authorized to open up or carry on such business, they shall go before the ordinary of the county in which they propose to do business and register their names and the business they propose to engage in, the place where it is to be conducted, and shall then pay their tax to the collector, and that any person failing to comply with the foregoing requirements shall be guilty of a misdemeanor, but which does not provide that the contracts made by such persons failing to comply with the statute shall be void and unenforceable, it is not a defense to a suit brought by such person selling or buying real estate on commission, to recover commissions on sales of real estate made by him, that he had failed to pay the tax and register as required by the statute." Toole v. Wiregrass Development Co., 142 Ga. 57, 82 S. E. 514.

(a) The judgment of the trial court in the case now under consideration was rendered before the decision above cited, and was based on the cases of Ford & Pruett v. Thomason, 11 Ga. App. 359, 75 S. E. 269, and Rountree & Leak v. Lewis, 13 Ga. App. 47, 78 S. E. 780, which decisions were also rendered before the decision first above cited, and which are not binding upon the Supreme Court.

(b) Under the ruling of this court above announced, it was erroneous to dismiss the petition in the present case on demurrer.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 43; Dec. Dig. ⟸42.]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action between W. M. Fiske and C. C. Wimburn and others. From the judgment, Fiske brings error. Reversed.

Geo. T. Jackson, of Augusta, for plaintiff in error. Isaac S. Peebles, Jr., of Augusta, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 25)

DE FOE et al. v. SIMMONS. (No. 128.)

(Supreme Court of Georgia. Jan. 13, 1915.)

*(Syllabus by the Court.)*

1. GROUNDS FOR NEW TRIAL.

The grounds of the motion for new trial relating to the admissibility of evidence were too indefinite to present any question for decision.

2. DIRECTION OF VERDICT.

Upon the uncontradicted evidence, the verdict was properly directed.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between Thos. De Foe and others and C. J. Simmons, administrator. From a judgment on a directed verdict, the parties first mentioned bring error. Affirmed.

Virlyn B. Moore, of Atlanta, for plaintiffs in error. Simmons & Simmons, of Atlanta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 25)

GRUSIN v. OLD SPRINGS DISTILLING CO. (No. 129.)

(Supreme Court of Georgia. Jan. 13, 1915.)

*(Syllabus by the Court.)*

INTOXICATING LIQUORS ⟸329—SALES—RECOVERY OF PRICE.

In a suit brought to recover the price of whisky, it appeared that the agent of a wholesale whisky dealer solicited and took an order from the defendant at his place of business, at Augusta, Ga., for the sale of a certain quantity of whisky. The agent sent the order to his principal in another state, who testified: "This order was received through the mail by us on December 31, 1910, from our salesman, O'Connor. The order was in no way conditional, but a straight order for the goods. The order was accepted at Cincinnati, Ohio, and the goods shipped to defendant, * * * marked and consigned to J. Grusin [the defendant], % People Transfer Company, Augusta, Ga. The order was taken at Augusta, Ga., but we concluded the transaction at Cincinnati, Ohio." The seller paid the freight charges in advance, and the goods were delivered to the defendant at his place of business by the transfer company. *Held*, that the sale was in violation of the prohibition law of this state, and there can be no recovery by the plaintiff. Bogle v. State, 42 Tex. Cr. R. 389, 55 S. W. 830; Julius Winkelmeyer Brewing Ass'n v. Nipp, 6 Kan. App. 730, 50 Pac. 956; 11 Am. & Eng. Enc. Law, 742.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 474–481; Dec. Dig. ⟸329.]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by the Old Springs Distilling Company against J. Grusin. Judgment for plaintiff, and defendant brings error. Reversed.

Isaac S. Peebles, Jr., of Augusta, for plaintiff in error. S. H. Myers, of Augusta, for defendant in error.

EVANS, P. J. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 26)

FENELON v. SOUTHERN RY. CO. (No. 130.)

(Supreme Court of Georgia. Jan. 13, 1915.)

*(Syllabus by the Court.)*

1. NEGLIGENCE ⟸136—CONFLICTING EVIDENCE—QUESTION FOR JURY.

There was evidence tending to show that the plaintiff, an employé of the defendant rail-

way company, was injured while in the discharge of his duties, and that his injury resulted from being thrown down by stepping on a bolt which, the jury might have inferred, had been negligently left lying at night in the railway yard, and partly upon a rail, by other employés who had been that day working on the engine to which he was going, and which bolt had been allowed to remain there in violation of a rule of the company. The evidence did not authorize the presiding judge to declare as a matter of law that the injury resulted from a mere accident without negligence on the part of the other employés of the defendant, nor that the plaintiff was himself guilty of negligence preventing a recovery by him. It was accordingly error to grant a nonsuit.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. ⊂⊃136.]

2. AUTHORITIES.

The authorities cited by counsel for the defendant in error do not control this case.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by J. T. Fenelon against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Robt. L. Berner, of Macon, for plaintiff in error. Harris & Harris, of Macon, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 7)

## CAUSEY v. WHITE. (No. 117.)

(Supreme Court of Georgia. Jan. 12, 1915.)

*(Syllabus by the Court.)*

1. AMENDMENT TO PETITION—DISMISSAL.

There was no error in allowing the amendment to the petition and in refusing to dismiss the case on motion in the nature of a general demurrer.

2. HUSBAND AND WIFE ⊂⊃9—DEED BY MARRIED WOMAN—ADMISSIBILITY IN EVIDENCE.

Where in 1848, before the passage of "the married woman's law" in reference to her separate property, a deed was executed to a woman who (it may be gathered from the pleadings) had been married, before the deed was admissible in evidence as a basis for recovery by her administrator in a suit brought in 1911, after her death in 1879, there should have been some evidence to show that her husband's marital rights did not attach, so that the title remained in her.

(a) In the present case, while there was no proof on this subject prior to the admission of the deed in evidence, subsequently evidence was introduced tending to show that the grantee's husband was dead before the deed was made to her, so that no marital rights could have attached, and that she took and held possession as the owner.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 22, 30–37; Dec. Dig. ⊂⊃9.]

3. WITNESSES ⊂⊃158—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Where a suit to recover land was brought by one administrator against another, an heir of the intestate of the plaintiff, who appeared to be interested in the recovery, was not competent to testify to transactions with the intestate of the defendant (Civ. Code 1910, § 5858, par. 4); but this did not render the witness incompetent to testify to conversations with one under whom the defendant's intestate claimed as an heir. Castleberry v. Parrish, 135 Ga. 527 (5), 528, 69 S. E. 817; Oliver v. Powell, 114 Ga. 592 (5), 593, 40 S. E. 826.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 663, 665, 698, 699; Dec. Dig. ⊂⊃158.]

4. EVIDENCE ⊂⊃314—HEARSAY—ADMISSIBILITY.

It was not admissible to show by hearsay evidence that the possession of the defendant's intestate, and of one under whom she claimed as an heir, was permissive rather than adverse.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1168–1173; Dec. Dig. ⊂⊃314.]

5. ADVERSE POSSESSION ⊂⊃85—PRESCRIPTIVE TITLE—EVIDENCE.

If competent evidence showed that a woman orally agreed or "requested" that a son living with her on certain land owned by her should have the use of it after her death so long as he lived, and that he did so remain with no paper title, it would also be competent to show that this was communicated to children and grandchildren of the woman, and that they therefore delayed bringing suit to recover the land until after the death of the son (no administration having been sooner granted), as tending to show that the possession of the son was acted on as permissive and not adverse to those claiming after his death, and to explain the delay in bringing the suit.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 313, 498–503, 656, 657, 660, 668, 688–690; Dec. Dig. ⊂⊃85.]

6. PAROL EVIDENCE.

There was no error in rejecting parol evidence to show that the present defendant had brought an action of trover against the present plaintiff for the purpose of recovering possession of certain deeds.

7. EVIDENCE ⊂⊃273—HEARSAY—DECLARATIONS OF PERSON IN POSSESSION.

Declarations of a person in possession of land are admissible to characterize the possession, as bearing on whether it was permissive or adverse, when that fact is relevant, but not to show the truth of the statements, without more. Civil Code 1910, § 5767.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108–1120; Dec. Dig. ⊂⊃273.]

8. ADVERSE POSSESSION ⊂⊃71—"COLOR OF TITLE"—WHAT CONSTITUTES.

A mere form of a deed unexecuted does not constitute color of title, and is not admissible as such.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415–429; Dec. Dig. ⊂⊃71.

For other definitions, see Words and Phrases, First and Second Series, Color of Title.]

9. ADVERSE POSSESSION ⊂⊃95—EVIDENCE—TAX RECEIPTS.

Tax receipts, which are not shown to include payments of tax on the property in dispute, are irrelevant, when offered as tending to show adverse possession. If they are shown to be for or to include the taxes on the property in dispute, and the question of adverse possession is in issue, they are admissible.

(a) In this case it appears in the brief of evidence that it was admitted that the son of the plaintiff's intestate, under whom the defendant's intestate claimed, had paid the taxes on the land at a valuation of $500 per year, "as shown in the digests." This would serve to make relevant state and county tax receipts to such person. But whether, under the admission, in re-

gard to the payment of taxes, this would require a new trial, need not be decided.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 530–532; Dec. Dig. ⟸ 95.]

10. TRIAL ⟸143—DIRECTION OF VERDICT—CONFLICTING EVIDENCE.

While the evidence introduced by the plaintiff was to the effect that the possession of the person under whom the defendant's intestate claimed (which continued for more than 20 years) was permissive and not adverse, and that the possession of the defendant's intestate, if not also permissive, was not sufficient to establish a prescriptive title, yet there was some evidence on behalf of the defendant tending to conflict with this, such as the calling of the land his by the person first mentioned, while he occupied it, the erection by him of improvements and the like; and the case was not one for the direction of a verdict for the plaintiff, but for submission to the jury under proper instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. ⟸143.]

11. GROUNDS FOR NEW TRIAL.

Some of the grounds of the motion for a new trial are so imperfect as not to raise any question for decision. None of those not dealt with above are such as to require a new trial.

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action between J. H. Causey, administrator, and W. W. White, administrator. From the judgment, Causey brings error. Reversed.

J. S. James, of Douglasville, for plaintiff in error. W. T. Roberts, J. H. McLarty, and J. R. Hutcheson, all of Douglasville, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 17)

GUTHRIE v. BULLOCK et al. (No. 121.)

(Supreme Court of Georgia. Jan. 12, 1915.)

*(Syllabus by the Court.)*

CHAMPERTY AND MAINTENANCE ⟸7—SALE BY ADMINISTRATOR — "ADVERSE POSSESSION."

This was a claim filed upon advertisement of an administrators' sale of real estate. The administrators exhibited muniments of title to 100 acres, more or less, in the eastern part of land lot 245 in the Tenth district of Berrien county, with certain boundaries. The claimant exhibited muniments of title to 50 acres, more or less, in the northwest corner of the same land lot, with designated boundaries. The eastern call of the claimant's muniments of title was to an agreed line; and the western call of the administrators' muniments of title was to an original and agreed line. The evidence was in dispute as to the location of the eastern boundary of the claimant and the western boundary of the land held under the administrators' title. The evidence of the administrators showed that the eastern portion of the land embraced within the boundaries of the tract offered for sale by them had certain trees growing upon it, which were being operated for turpentine purposes by the claimant at the time the property was advertised for sale. *Held*, that the occupation by the claimant of a portion of the land, evidenced by his working the trees for turpentine, was such adverse possession as to forbid sale by the administrators of that portion of the land under the statute which declares: "An administrator cannot sell property held adversely to the estate by a third person; he must first recover possession." Civil Code 1910, § 4033; Lowe v. Bivins, 112 Ga. 341, 37 S. E. 374; Downing Lumber Co. v. Medlin, 136 Ga. 665, 667, 72 S. E. 22.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 54–110; Dec. Dig. ⟸7.]

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action between S. F. Guthrie and E. M. Bullock and others, administrators. From the judgment, Guthrie brings error. Reversed.

Wm. R. Smith and Lovett & Murray, all of Nashville, for plaintiff in error. J. A. Alexander and W. D. Buie, both of Nashville, for defendants in error.

HILL, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 9)

FOSTER v. HEARN. (No. 118.)

(Supreme Court of Georgia. Jan. 12, 1915.)

*(Syllabus by the Court.)*

REVIEW ON APPEAL.

No material error is made to appear in those portions of the court's charge complained of, nor in the rulings of the court touching the admission or exclusion of evidence.

Error from Superior Court, Heard County; R. W. Freeman, Judge.

Action between M. F. Foster and E. W. Hearn. From the judgment, Foster brings error. Affirmed.

R. B. Blackburn, of Atlanta, for plaintiff in error. Frank S. Loftin and D. B. Whitaker, both of Franklin, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 11)

PEAGLER v. DAVIS. (No. 120.)

(Supreme Court of Georgia. Jan. 12, 1915.)

*(Syllabus by the Court.)*

1. SUBROGATION ⟸27—PURCHASER OF MORTGAGED PROPERTY—AGREEMENT WITH MORTGAGOR.

The owner of real estate executed a mortgage on it to a banking corporation, to secure a debt due to the bank. The president of the mortgagee and the mortgagor agreed that in consideration of the former paying to the bank the mortgagor's indebtedness, and to the mortgagor such additional sum as would total a certain amount, he would buy the property. It was further agreed between them that the purchaser was to be subrogated to the rights and remedies of the mortgagee. The purchaser paid to the mortgagee the mortgage debt, and the mortgagor executed to the purchaser a deed to the property. At the time of the taking of the deed the purchaser did not know of a judgment against the

mortgagor, the execution issuing on which was entered in the clerk's office on the same day the deed was given. In ignorance of the prior judgment, the purchaser requested the bank to mark the mortgage satisfied, and it was also marked canceled on the record. *Held*, that the purchaser was entitled, by virtue of the agreement made with the mortgagor, to be subrogated to the rights and remedies of the mortgagee whose mortgage was paid by the purchaser.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 68, 78; Dec. Dig. ⟸27.]

2. SUBROGATION ⟸14 — PURCHASER — PAYMENT OF PRIOR LIEN.

Where a purchaser buys land and takes a deed thereto, and subsequently pays a prior lien on the property, he is subrogated to the rights and remedies of such prior lien, as against a lien which is superior to his title.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 35–39; Dec. Dig. ⟸14.]

3. MORTGAGES ⟸58—EXECUTION—WITNESSES—STOCKHOLDER.

A stockholder, though incompetent to take an acknowledgment of a mortgage as a notary, because he is a stockholder of the mortgagee corporation, is not incompetent as a nonofficial witness to the signature of the mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 153, 154; Dec. Dig. ⟸58.]

4. EVIDENCE ⟸113—VALUE OF PROPERTY.

The value of property cannot be established by the amount at which it is listed by a real estate broker for sale.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259–296; Dec. Dig. ⟸113.]

5. PLEADING ⟸380 — ISSUES — EVIDENCE WITHIN PLEADINGS.

Testimony which does not illustrate any issue made by the pleadings should be repelled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1237, 1239–1252; Dec. Dig. ⟸380.]

6. INSTRUCTIONS.

Certain excerpts from the charge were open to the criticism that they were not properly adjusted to the facts of the case.

7. SUBROGATION ⟸33 — RIGHTS — EXTENT — PAYMENT OF PRIOR LIEN.

A purchaser of land, entitled to subrogation to the rights and remedies of a prior incumbrancer, whose lien he discharges, cannot, as against an intervening lien, assert title on the ground that the land is not worth more than the lien he discharged. His subrogation is limited to the remedies of the lien creditor to whose rights he becomes subrogated.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 96–98; Dec. Dig. ⟸33.]

Error from Superior Court, Grady County; Frank Park, Judge.

Action by H. J. Peagler against J. R. Everett. A fi. fa. was issued on judgment for plaintiff, and Walter Davis interposed a claim. Judgment for claimant, and plaintiff brings error. Reversed.

H. J. Peagler recovered a judgment against J. R. Everett on July 22, 1909. Fi. fa. issued thereon and was duly entered on the general execution docket July 28, 1909. It was afterwards levied upon a certain lot of land in the city of Cairo. Walter Davis, on September 2, 1910, interposed a claim, and the case was returned to the superior court of Grady county for trial. At the trial the claimant was allowed to file an equitable amendment in aid of his claim, in which it was alleged: That the defendant in fi. fa., J. R. Everett, was indebted to the Cairo Banking Company in the principal sum of $1,276, which indebtedness was secured by a certain mortgage upon the property levied upon, dated February 1, 1909, and due October 15, 1909; that on the 28th of July, 1909, Everett represented to the claimant, who was the president and a stockholder in the Cairo Banking Company, that he was unable to pay the mortgage, and requested the claimant to assume the indebtedness to the bank; that the claimant, being desirous that the bank should not be forced to the necessity of foreclosing the mortgage, and being desirous of owning the property, agreed, in consideration of paying to the bank all the indebtedness which Everett owed to the bank, including the amount due on the mortgage and also a debt of $95.25 which Everett owed him, and such other sum as would make the purchase price amount to $1,400, to buy the property levied upon. It was further agreed between Everett and the claimant that the latter was to be subrogated to the rights of the Cairo Banking Company. In accordance with this agreement, the claimant caused Everett to make him a deed of conveyance to the property, and the claimant paid to the Cairo Banking Company the mortgage in full, which, with the indebtedness to him, amounted to the agreed purchase price. At the time of this transaction, the claimant, not knowing of any subsequent lien or incumbrance on the property, requested the Cairo Banking Company to mark its mortgage satisfied, which was done, and the mortgage was delivered to the clerk of the superior court of Grady county and canceled upon the record. The claimant was ignorant that there had been a judgment obtained against Everett. Nor did the claimant know of the lien of the Dyson Manufacturing Company for material furnished to improve the property levied upon, which was an outstanding lien. At the time of such transaction, there was no lien or incumbrance recorded against the property, except the mortgage of the Cairo Banking Company and the lien of the Dyson Manufacturing Company; and claimant did not know that some time during the day the plaintiff's execution was recorded on the general execution docket. Claimant had no knowledge of any execution or lien against the defendant at the time he requested the Cairo Banking Company to mark the mortgage satisfied. It was further alleged that the mortgage was a higher and better lien than the judgment of the plaintiff; that the claimant had paid the taxes upon the property since he owned the same, and also paid the lien of the Dyson Manufacturing Company ($20.25); that he was not a mere volunteer, and if he should be subrogated to the rights of the Cairo Banking Company

and the Dyson Manufacturing Company the plaintiff in fi. fa. will not be placed in a worse position than he was prior to the payment to the Cairo Banking Company and the lien of the Dyson Manufacturing Company. Wherefore he prayed that the Cairo Banking Company and the Dyson Manufacturing Company and J. R. Everett be made parties to the action, and that the conveyance by the defendant in fi. fa. have the legal effect of conveying the unincumbered title to the claimant, and, in the event the property should be found subject to the fi. fa., that the claimant be subrogated to the rights of the Cairo Banking Company and to the rights of the Dyson Manufacturing Company, and that the mortgage of the Cairo Banking Company and the lien of the Dyson Manufacturing Company be set up as a lien against the property according to their respective dates and rights of priority, and a decree be had adjudging that the claimant have the first and highest lien upon the property, that the mortgage be revived and foreclosed, and that upon the sale thereof the funds arising therefrom be applied, first, to the payment of the principal and interest due on the Cairo Banking Company's mortgage and the lien of the Dyson Manufacturing Company, and to the payment of such taxes, repairs, and insurance as may have been paid by the claimant, less the rent collected since he has had the property in his possession; and for general relief. The plaintiff in fi. fa. demurred generally and specifically to the equitable amendment. The general demurrer was overruled, and certain special demurrers were sustained. The plaintiff filed an answer to the amendment, and the case came on to be tried upon the issues therein made, and resulted in a verdict for the claimant. A motion for new trial was overruled, and exception is taken to the overruling of the demurrer, as well as to the judgment overruling the motion for new trial.

Little, Powell, Hooper & Goldstein, of Atlanta, R. C. Bell and J. S. Weathers, both of Cairo, and H. C. Parker, of Statesboro, for plaintiff in error. Roscoe Luke and C. E. Hay, both of Thomasville, and M. L. Ledford, of Cairo, for defendant in error.

EVANS, P. J. (after stating the facts as above). [1, 2] 1, 2. The statute pertaining to the registration of transfers and liens requires the clerk of the superior court of each county to keep a general execution docket; and it is provided that, as against the interest of third persons acting in good faith and without notice, who may have acquired a transfer or lien binding the property of the defendant, any money judgment obtained within the county of the defendant's residence shall be a lien upon the property of the defendant from its rendition, if the execution issuing therein shall be entered on the general execution docket within 10 days from the time the judgment is rendered. Civil Code 1910, § 3321. In the instant case the record upon the general execution docket was made within 10 days from the date of the judgment, and therefore the lien of the judgment upon which the fi. fa. is proceeding dates from the judgment, which is superior to the deed made to the claimant by the defendant in fi. fa. The claimant sought to protect himself by claiming subrogation to the rights and remedies of the Cairo Banking Company, whose mortgage he paid. In Wilkins v. Gibson, 113 Ga. 31, 47, 38 S. E. 374, 381 (84 Am. St. Rep. 204), after an elaborate review of the authorities, it was held that:

"Subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay, or where he had some interest to protect, or where he advanced the money under an agreement, express or implied made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor."

It is under the latter provision of the rule thus announced that the claimant seeks to bring his case. He makes the specific allegation that he advanced the money to the Cairo Banking Company under an express agreement with the mortgagor that he would be subrogated to the rights and remedies of the mortgagee. If such be the facts, and the demurrer admits them to be true, then the claimant is entitled to be subrogated to the rights of the Cairo Banking Company to the extent of the money he paid to it. Ragan v. Standard Scale Co., 128 Ga. 544, 58 S. E. 31. If the claimant's title should fail on account of the superior lien of the plaintiff's judgment, he also would be entitled to be reimbursed for such moneys as he may have expended in discharge of valid liens upon the same after he became the owner of the property. The doctrine of subrogation will be applied so as to reimburse one who has been compelled to pay the debt of a third person in order to protect his own rights or to save his own property. 37 Cyc. 446. The claimant alleges that since he acquired title he has been forced to pay the duly recorded lien of the Dyson Manufacturing Company and certain taxes. As to these items he is entitled to subrogation by operation of law. The court therefore properly overruled the general demurrer. A ground of special demurrer, as to certain sums not covered by the mortgage alleged to have been paid to the Cairo Banking Company, was properly sustained; and the ground which demanded that the amount of taxes which had been expended since the purchase should be alleged should have been sustained. With this exception, the other grounds of special demurrer were without merit, and were properly overruled.

[3] 3. The mortgage from J. R. Everett to the Cairo Banking Company was attested

by two witnesses, one of whom was a notary public. It appeared from the evidence that the nonofficial witness was a stockholder of the mortgagee corporation, and it is insisted that he is incompetent on that account to be an attesting witness. This court held, in Southern Iron & Equipment Co. v. Voyles, 138 Ga. 258, 75 S. E. 248, 41 L. R. A. (N. S.) 375, Ann. Cas. 1913D, 369, that a stockholder of a corporation bears such financial relation to it that he is disqualified from attesting, as a notary, a mortgage to which the corporation is a party. The rule was said to be founded on a sound public policy, which forbade an official from taking an acknowledgment of an instrument in which he had a beneficial interest, though he may not in strict law be a party to it. The statute permits recordation of a mortgage only on the attestation or acknowledgment of certain officials, or upon the affidavit of a nonofficial witness. All officials authorized by law to attest a mortgage so as to entitle it to registration act under their oath of office, and a wise public policy requires that such officials should be disinterested and entirely impartial as between the parties. Impartiality of conduct is best secured by denying an interested official the power to act where he is, or may be, pecuniarily benefited by the transaction. It does not follow, however, that a stockholder, though incompetent to take an acknowledgment of the corporation's deed, is likewise incompetent as an attesting witness. There is no reason to extend the public policy which forbids the former so as to include the latter. An unofficial attesting witness does not act under oath of office, and is not selected because of that impartiality of conduct to be presumed of a sworn official. Besides, the statute declares that a mortgage "must be executed in the presence of, and attested by, or proved before, a notary public or justice of any court in this state, or a clerk of the superior court (and in case of real property by one other witness), and recorded." Civil Code 1910, § 3257. An individual who is not a party to a mortgage may attest it as a witness. Under the doctrine of corporate entity, the corporation's mortgage is not the mortgage of the stockholder; and it has been held that notwithstanding an acknowledgment of a deed before a notary, who was at the time a stockholder of the grantor corporation, is not good as an acknowledgment, nevertheless such certification may be allowed to stand for the notary's attestation as a nonofficial witness. Spink v. Guarantee Bank & Trust Co., 181 Ala. 272, 61 South. 302. We hold that one, though incompetent to take an acknowledgment of a mortgage as a notary because he is a stockholder of the mortgagee corporation, is not incompetent as a nonofficial witness to the signature of the mortgagor. See Maddox v. Wood, 151 Ala. 157, 43 South. 968; 1 C. J. 807.

[4] 4. The court allowed in evidence an advertisement in a local newspaper of a real estate firm, proposing to sell the property in controversy for the sum of $1,400. This testimony was irrelevant to any question made in the pleadings. If the purpose of the advertisement was to show that the value of the property was that named in the advertisement, which was the sum contracted to be paid for it by the claimant, the evidence was clearly inadmissible and should have been repelled. The value of property cannot be established by the amount for which it is listed in a real estate office.

[5] 5. The claimant was allowed to testify that he had put some improvements on the land, including a fence, a crib, barns, and some things of that sort, at an expense of about $150 or $200. This testimony was objected to on the ground that there was nothing in the pleadings to authorize it. The objection was well taken, and the evidence should have been excluded.

[6] 6. The several excerpts from the charge, upon which error is assigned in the motion for new trial, in stating the law of subrogation, the court referred to the deed from the defendant in fi. fa. to the claimant as a lien. In the equitable amendment to his claim, and the evidence introduced in support of its allegations, the insistence of the claimant was that the deed from the defendant in fi. fa. to himself was one of bargain and sale, executed under the circumstances alleged in the equitable amendment. The charges were inaccurate in referring to the claimant's deed as a lien.

[7] 7. The jury were instructed that if the claimant was entitled to be subrogated to the rights of the lienors whose liens he discharged, and they found the property was not worth more than the sum paid to discharge such liens by the claimant, a verdict would be authorized finding the property not subject. This instruction was error. The claimant, if entitled to subrogation, is entitled to the remedies of the lienors whose liens were discharged by him. Simpson v. Ennis, 114 Ga. 202, 39 S. E. 853. Under subrogation the claimant is entitled to no other or different remedies than those of the creditors to whose rights he is subrogated, even though the property be proved to have been worth no more than the liens which he discharged. Their claim against the property is one of lien, and not of title.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 18)

BUSK v. F. WOLF & CO. (No. 123.)

(Supreme Court of Georgia. Jan. 12, 1915.)

*(Syllabus by the Court.)*

1. REFUSAL OF CONTINUANCE.
There was no error in refusing to postpone the trial of the case.

2. CONTRACTS ⊜117—VALIDITY—RESTRAINT OF TRADE.
The following contract was the basis of an action to enjoin the defendant from engaging in business in violation of its terms.

"Glynn County, Georgia.

"This agreement entered into on this the thirty-first day of March, 1913, by and between C. Busk, as party of the first part, and F. Wolf & Co., a firm composed of F. Wolf and S. Abady, as parties of the second part, all of said county and state, witnesseth: That whereas the parties of the second part, for and in consideration of the sum of one thousand ($1,000.00) dollars, have this day purchased the business of said first party, and having paid the full amount of the purchase price of one thousand ($1,000.00) dollars, the party of the first part agrees in consideration of this sale not to engage, either directly or indirectly, in the clothing, tailoring, or other business of like character in the city of Brunswick, Glynn county, Ga., for a period of three (3) years from this date. The party of the first part agrees, that if he should engage in the tailoring or clothing business in said city of Brunswick within the next three years after date, to give to the said parties of the second part all profits received in said business so conducted by him. In witness whereof we have hereunto set our hands and affixed our seals on this the day and year first above written." (Signed by the parties.)

*Held*, that the contract was not void as being in restraint of trade, or as being unreasonable. McAuliffe v. Vaughan, 135 Ga. 853, 70 S. E. 322, 33 L. R. A. (N. S.) 255, Ann. Cas. 1912A, 290; Floding v. Floding, 137 Ga. 531, 73 S. E. 729.

(a) The case is not controlled by the act of 1896 (Laws Ga. 1896, p. 68), if that act (which is not embodied in the Civil Code of 1910) is valid and in force.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554–569; Dec. Dig. ⊜117.]

3. INJUNCTION ⊜61—GROUNDS—BREACH OF CONTRACT—ADEQUATE REMEDY AT LAW.
The provision that, if the vendor should operate another business of the character above mentioned, he should pay the profits thereof to the vendee, would not prevent an injunction; there being evidence to show that the vendor was not financially responsible in damages, and that he declined to give any account of the profits, and that it was impracticable to show the exact amount of loss that would be sustained by the continuance in business of the vendor.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 120–123; Dec. Dig. ⊜61.]

4. INTERLOCUTORY INJUNCTION—DISCRETION.
While the evidence was conflicting, there was no abuse of discretion in granting the interlocutory injunction.

Error from Superior Court, Glynn County; O. B. Conyers, Judge.

Action by F. Wolf & Co. against C. Busk. Judgment for plaintiffs, and defendant brings error. Affirmed.

F. H. Harris, R. W. Durden, and Bolling Whitfield, all of Brunswick, for plaintiff in error. A. H. Crovatt and A. D. Gale, both of Brunswick, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 22)

STEWART et al. v. WHITE. (No. 126.)

(Supreme Court of Georgia. Jan. 13, 1915.)

*(Syllabus by the Court.)*

1. EVIDENCE ⊜197 — FORGERY — DOCUMENTARY EVIDENCE—PRIOR EXAMINATION.
Where, on the trial of an action brought to cancel a deed as being a forgery, it appeared that the deed was signed by mark, instead of by the signature of the vendor, and it was shown by evidence that the vendor could write, it was not error, over the particular objections which were urged thereto, to allow the plaintiff to introduce in evidence the original plea, instead of a certified copy thereof, filed in another suit, brought against the vendor about the time of the execution of the deed alleged to be forged, with the signature of the vendor affixed to such plea, for the purpose of showing that the vendor could write, and that she signed her name in writing, and not by mark.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 681, 681½; Dec. Dig. ⊜197.]

2. ASSIGNMENTS OF ERROR—DENIAL OF NEW TRIAL.
The other assignments of error are without substantial merit, and the court did not err in denying the motion for a new trial.

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Action between W. W. Stewart and others and Malinda White. From the judgment, the parties first mentioned bring error. Affirmed.

Lankford & Moore, of Douglas, for plaintiffs in error. O'Steen & Wallace and J. W. Quincey, all of Douglas, for defendant in error.

HILL, J. This was a suit brought by Mrs. Malinda White in the court below against W. W. Stewart et al., wherein it was sought to cancel a certain timber deed which plaintiff contended was not executed by her, but was a forgery. The trial resulted in a verdict and judgment in favor of the plaintiff for the cancellation of the deed in controversy. The defendants having filed a motion for a new trial, the same was overruled, and they excepted.

[1] 1. Error is assigned because the court received in evidence an original plea filed to a suit on a note in the city court of Douglas, in which the First National Bank of Waycross was plaintiff, and Malinda White and the Stewart Mercantile Company, as indorsers, were defendants. The plea was sworn to and signed by Malinda White, and was offered in evidence for the purpose of showing that it was signed by her in her own name, and not by mark, as was the case with respect to the deed in controversy. This evidence was objected to on the ground that, if it was offered to show that Mrs. White signed the same in her own hand, and did not sign same by mark, then it was not ad-

missible, because it was not submitted to the attorneys for the defendant for examination before the trial of the case began, as required by the statute (Civil Code, § 5836); also because a certified copy of the record from the city court of Douglas is legal evidence, instead of the original record or a part thereof. As against these objections, we think it was proper in this case to allow the original record in evidence, so that the jury could see how Mrs. White signed her name at that time. A certified copy of the plea without the signature affixed manifestly would not show the handwriting of the plaintiff, but the original would. The deed attacked was signed by mark. One of the witnesses in the case testified that the plaintiff could read and write. The original lease (or timber deed) was not offered in evidence at all; one of the witnesses testifying that he had searched for it and could not find it. Therefore there was nothing to compare; and section 5836 of the Civil Code, which provides that other writings proved or acknowledged to be genuine may be admitted in evidence for the purpose of comparison by the jury, and that such other new papers, when intended to be introduced, shall be submitted to the opposite party before he announces himself ready for trial, does not apply in a case like the present. The court did not err in admitting the plea, with the signature of the plaintiff affixed, for any of the reasons assigned.

[2] 2. The two other special assignments of error are without substantial merit. The verdict was supported by the evidence, and there was no error in denying a new trial.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 20)

## ROUNSAVILLE v. ROUNSAVILLE.

(No. 125.)

(Supreme Court of Georgia. Jan. 13, 1915.)

*(Syllabus by the Court.)*

TRUSTS ⟸359—ENFORCEMENT—REMEDY—PETITION.

There was no error upon the part of the court below in sustaining a general demurrer to the petition and dismissing the same.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 554, 565, 566; Dec. Dig. ⟸359.]

Error from Superior Court, Floyd County; H. L. Patterson, Judge.

Action by F. H. Rounsaville against J. A. Rounsaville. Judgment for defendant, and plaintiff brings error. Affirmed.

F. H. Rounsaville brought suit against J. A. Rounsaville, alleging as follows: The defendant "is indebted to him in the sum of $15,000 principal debt, besides interest at 7 per cent." J. W. Rounsaville died testate on October 4, 1910, leaving a wife and five children. The eldest of the children is petitioner, and the other children were of full age at the date of the death of J. W. Rounsaville. The will was offered for probate, and petitioner filed a caveat. At the hearing in the court of ordinary the will was admitted to probate in solemn form, and from this judgment petitioner appealed to the superior court. Under one of the items of a codicil to the will it was provided that any legatee contesting the will forfeited the bequest granted unto him. While the caveat was pending the estate could not be distributed, because it was doubtful as to whether the parties at interest would take as legatees or as heirs at law, and the sum which any of them should take could not be ascertained. The legatees other than the caveator desired to set up the paper offered as a will, and, in order to induce the petitioner to dismiss his appeal, they entered into and bound themselves by a certain undertaking which was reduced to writing and signed by all of the legatees. In that written instrument, after reciting the facts of offering the will for probate, the caveat filed, the judgment of the court of ordinary, and the dismissal of the appeal, it was agreed by the other parties at interest that the sum of $5,000 should be added to the amount named in the will of the said J. W. Rounsaville, to be invested by the executors, and the proceeds thereof paid over to the said F. H. Rounsaville, the petitioner, making the aggregate sum of $15,000. Out of the sum of $15,000, $1,500 was to be paid to the attorneys of record for F. H. Rounsaville in full of all their claims against said F. H. Rounsaville; and it also provided that certain other debts should be paid, and the balance of said sum of $15,000 was to be placed in the hands of J. A. Rounsaville as trustee, and invested in certain securities to be held by him "as the trustee of Mrs. Mary F. Rounsaville, Mrs. Mamie R. Cartledge, Geo. M. Rounsaville, R. B. Rounsaville, and Roy Rounsaville, with directions that the net income thereof shall be applied semi-annually, or from time to time as may be required, to the maintenance and support of said F. H. Rounsaville during his life, and at his death the corpus thereof paid or delivered to" the other parties named, or their representatives. This instrument was duly signed by F. H. Rounsaville and the others. Nearly two years have elapsed since the date of this written agreement, and the defendant, into whose hands the money was to be placed and by whom the investment was to be made, refuses to pay "said sums so due, and refuses to redeliver same to said makers that they might make such payment. With ample means in his hands, coupled with a duty to make full payment, defendant stubbornly refuses, in the face of a pressing necessity, frequent and urgent appeals, to pay said sum, which said sum is less than an undivided one-sixth interest in said es-

tate." The petition was dismissed upon general demurrer, and the plaintiff excepted.

Henry Walker and Denny & Wright, all of Rome, for plaintiff in error. Maddox & Doyal, of Rome, for defendant in error.

BECK, J. (after stating the facts as above). We are of the opinion that the court below properly sustained the general demurrer and dismissed the petition. The petition does not seek to have the corpus of an alleged trust turned over to him on the ground that the trust is executed and that he is entitled to the corpus of the estate, but he evidently stands squarely upon the written contract, and his petition, where it is not ambiguous, insists that a debt due him in accordance with the terms of the contract be paid over to him, and he is seeking a judgment in his favor against the defendant for the full amount set apart for his benefit, after deducting the amount paid therefrom to his attorneys, as stipulated in the contract. If the written instrument which we have set forth created a trust, and petitioner is entitled to have the same executed by the trustee turning over to him for life the corpus as a trust estate, he should have instituted proceedings appropriate to the obtaining of such relief, and the court might then, in case it was adjudged proper to turn the corpus of the estate over to petitioner, have put such terms upon it as would have safeguarded the estate. But the plaintiff did not see fit to do this. He saw fit to stand upon the entire contract according to the terms thereof, and yet have a judgment for the amount of money which went into the hands of this defendant. He was not entitled to any such judgment and the case was properly dismissed.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 26)

## WADE v. HURST et al. (No. 131.)

(Supreme Court of Georgia. Jan. 14, 1915.)

*(Syllabus by the Court.)*

JUDGMENT ⟸220, 470—RENDITION—VALIDITY—PRESUMPTION—CONCLUSIVENESS.

There was no error in refusing to allow the amendment and in dismissing the petition on demurrer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 396–399, 907, 982½; Dec. Dig. ⟸220, 470.]

Error from Superior Court, Pierce County; T. A. Parker, Judge.

Action by Jesse Wade against N. N. Hurst and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Jesse Wade brought a petition seeking partition of land, cancellation of deeds, judgment for damages, and other relief. He alleged that A. P. Wade procured a homestead to be set aside in 1875 to himself and family. Among the property included in the homestead was lot of land No. 156 in the Fifth district of Pierce county. His wife died, and he remarried, pending the minority of the children. He died in 1895, leaving a widow, and children of both marriages. In 1896 his wife, who had married again, presented her petition to the judge of the superior court of Pierce county, praying an order for the sale of the homestead property for the purpose of reinvestment. An order was granted allowing a sale of the property at private sale, fixing the minimum price at $4,000 and providing for the reinvestment of the proceeds of the same for the same uses. In pursuance of the order, the widow, upon an alleged consideration of $4,000, conveyed the whole of the homestead estate, including lot 156, to Harley Davis, Jr. In part payment of the property conveyed to him, Harley Davis, Jr., immediately reconveyed to the widow, Susan L. White, formerly Wade, in her own right and as trustee for her four minor children (one of whom was Jesse Wade), a part of lot 156, reciting a consideration of $2,000. On January 2, 1905, Susan L. White wrongfully and fraudulently, and without any order of court, and in her own right and as trustee for the minor children of A. P. Wade, deceased, on an alleged consideration of $1,000, conveyed the 165 acres of lot 156 to N. N. Hurst. All of the beneficiaries except two minors, Jesse Wade and his sister, Annie, joined in that conveyance. Afterwards Susan L. White, formerly Wade, unlawfully permitted and allowed the A. P. Brantley Company to obtain a judgment in its favor against her as trustee, and specially against 165 acres of lot No. 156. Execution issued upon this judgment, and was levied upon the land therein described, namely, the 165 acres of lot 156. The land was sold by J. L. Tuten as sheriff of Pierce county, and purchased by N. N. Hurst for the sum of $195, and the sheriff made to Hurst a deed. On February 15, 1909, N. N. Hurst, for the alleged consideration of $3,700, conveyed certain premises, including 165 acres of lot 156, to Mary P. Hurst who shortly thereafter reconveyed the same land, on a consideration of $1 and natural love and affection, to N. N. Hurst. The homestead estate did not terminate until July 16, 1912, when the plaintiff, who was the youngest child of A. P. Wade, became of age. There were born unto A. P. Wade by the first marriage five children, two of whom survive, and the deceased children left surviving children. By the second marriage there were born unto A. P. Wade four children. All of the children by the first marriage of A. P. Wade had received advancements to an amount more than they would be entitled to receive out of his estate, and

plaintiff and his sister, Annie, were entitled to a partition of the 165 acres with N. N. Hurst, in the proportion of one part to plaintiff and one part to his sister and three parts to N. N. Hurst. Upon receiving a deed to the land, N. N. Hurst entered into possession, committed waste by cutting timber of the value of $500, and ousted the plaintiff, for which he claims as punitive damages the sum of $5,000. The plaintiff's mother, Mrs. White, his brothers and sisters, and heirs of three deceased sisters, A. P. Brantley Company, M. P. Hurst, N. N. Hurst, and J. L. Tuten, sheriff of Pierce county, were named as defendants. The prayer was for the reformation of the sheriff's deed to N. N. Hurst and the deed from N. N. Hurst to Mary P. Hurst, so as to exclude the 165 acres of lot 156; for partition; for damages against N. N. Hurst; and for general relief. By amendment it was alleged that N. N. Hurst well knew, at the time he accepted the deed of conveyance from Susan L. White, formerly Wade, in her own right and as trustee for the four minor beneficiaries, that the premises had been conveyed to Susan L. White, formerly Wade, in her own right and as trustee, by Harley Davis, in part payment of the homestead estate under order of court for reinvestment, and purchased at the reinvestment sale by Harley Davis, and the land was homestead property, and that the homestead had not terminated, and that the title he bought was not good as against petitioner as a beneficiary of the homestead; that the fraud on the part of Susan L. White consisted in the fact that she knew the premises had been conveyed to her in her own right and as trustee for the beneficiaries of the homestead, in part payment of the homestead property sold for reinvestment and purchased by Harley Davis at the time she permitted the A. P. Brantley Company to obtain a judgment against herself individually and as trustee for the minor children of A. P. Wade, deceased, against the 165 acres of lot 156, and that the land was homestead property. The court allowed this amendment, but refused to allow an amendment alleging:

"The judgment of the A. P. Brantley Company was not obtained for any of the purposes enumerated under the law, or any debts falling due under the exceptions."

The petition was dismissed on general demurrer filed by N. N. Hurst and Mary P. Hurst. The plaintiff sued out a writ of error, complaining of the two rulings just stated.

Walter A. Milton and E. H. Williams, both of Blackshear, for plaintiff in error. Wilson, Bennett & Lambdin, of Waycross, for defendants in error.

EVANS, P. J. (after stating the facts as above). The plaintiff sues as heir at law of his deceased father. He eliminates the interests of his half brothers and sisters by a general averment that they had received advancements in excess of their share in the estate. He deals with the estate as owned by himself, his sister, and N. N. Hurst, as assignee of his mother and a sister and a brother. In order to establish his right of partition in the specific land, he undertakes to attack the sheriff's sale on the ground that his mother unlawfully allowed the A. P. Brantley Company to obtain a judgment against her as trustee for the homestead beneficiaries, because she knew that the premises had been conveyed to her in part payment of the homestead property, and that the judgment of A. P. Brantley Company was not "obtained for any of the purposes enumerated under the law, or any debts falling due under the exceptions." He neither prays for cancellation of the judgment upon which the execution issued which sold the land, nor for cancellation of the deed of the sheriff made in pursuance of the sale. His prayer is that the sheriff's deed be "reformed as a cloud on petitioner's title, so as to comport not to convey petitioner's interest in said property." Even if the allegation respecting facts relied on as constituting fraud on the part of his mother be sufficient to vacate the judgment, he does not charge the A. P. Brantley Company with any fraudulent conduct. His allegation in the rejected amendment is that the judgment was not obtained on any grounds which would make the homestead estate liable. His attack is upon the ground that the court did not have sufficient proof to render the judgment. The superior court is a court of general jurisdiction, and the presumption of law is that the court had sufficient proof before it before rendering the judgment; and there is no rule of law which requires the judgments of a court of record to express upon their face that they are rendered after due proof. Tucker v. Harris, 13 Ga. 1, 7, 58 Am. Dec. 488; Jones v. Tarver, 19 Ga. 279; Cobb v. Pitman, 49 Ga. 578. The court had jurisdiction of both the parties and the subject-matter, and no rule of law is more firmly established than that, when a court of competent jurisdiction has rendered a judgment in relation to subject-matter and person within its jurisdiction, such judgment will be conclusive until it is reversed in a proper proceeding for that purpose. Wiley v. Kelsey, 9 Ga. 117. The plaintiff's attack upon the sheriff's sale is insufficient to invalidate it, and that sale divested his interest in the land. Accordingly, the demurrer to the petition was rightly sustained.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 9)

## CENTRAL GEORGIA POWER CO. v. CORNWELL. (No. 119.)

(Supreme Court of Georgia. Jan. 12, 1915.)

*(Syllabus by the Court.)*

1. EMINENT DOMAIN ⟸222—CONDEMNATION PROCEEDINGS—INSTRUCTIONS.

The charge complained of in the first ground of the amendment to the motion for a new trial, standing alone, was not an accurate statement of the contention of the condemnor, in saying that it contended that the amount of the award was just and adequate compensation "for the property taken by it," while the property owner contended that the amount fixed by the assessors was too low, and that she was entitled to recover a larger sum for the actual and consequential damages sustained by her. But when this statement is taken in connection with its context, where the presiding judge informed the jury as to the origin and nature of the proceeding, that the trial in the superior court was a de novo investigation, and that the jury should not be influenced one way or the other by the award which had been made, and instructed them as to the elements of recovery which they might consider, there is no probability that the jury were misled by the use of the expression, "for the property taken by it," in stating the contention of the condemnor, which had paid or tendered the amount of the award, from which award the property owner had entered an appeal to the superior court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 562–567; Dec. Dig. ⟸222.]

2. TRIAL ⟸133—OPENING STATEMENT—CURE OF ERROR.

Where, on the trial of an appeal from the award of the assessors in a condemnation proceeding by an electric power company, counsel for the condemnee, in his opening statement to the jury, said that the plaintiff (condemnor) "had robbed the defendant of her home," whereupon counsel for the condemnor objected to the statement and moved the court to rebuke counsel and to declare a mistrial, and where the presiding judge instructed the jury that the statement was not proper, and that they should not consider it, and counsel for the condemnee, who made the statement, withdrew it and apologized to the court, there was no error in refusing to grant a mistrial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. ⟸133.]

3. EMINENT DOMAIN ⟸201—CONDEMNATION PROCEEDINGS—EXCLUSION OF EVIDENCE.

There was no error in excluding evidence that a witness, who testified on behalf of the condemnor and gave his opinion as to the value of the land taken and the extent of the consequential damage done, had formerly been chosen by the son of the condemnee as an assessor in a condemnation proceeding in regard to certain property of the son.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 540½; Dec. Dig. ⟸201.]

4. EVIDENCE ⟸500—OPINIONS—ANSWERS—CONDEMNATION PROCEEDINGS—DAMAGES.

While a witness who is shown to be qualified to give an opinion as to values in a condemnation proceeding may testify as to the effect of the taking and using of that part of the land actually taken upon the remainder of the land, the value of the remainder of the land before such taking and thereafter, and other relevant facts tending to aid the jury in determining the amount of consequential damages, it is not competent for the witness to state in general terms that he thinks a named amount would probably be a fair estimate of the consequential damages to the land not taken. Accordingly, there was no error in rejecting such a general estimate of damages.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2290, 2291; Dec. Dig. ⟸500.]

5. EMINENT DOMAIN ⟸221—CONDEMNATION PROCEEDINGS—ISSUES—SUFFICIENCY OF EVIDENCE.

There was no evidence which showed that a particular estate in favor of another had been carved out of the fee owned by the condemnee, or which required a submission to the jury of the question whether the amount of the recovery by the condemnee should not be lessened by reason of the ownership of such particular estate by another and any right on his part to recover for damages thereto.

(a) The mere institution of a suit against the present condemnor by another, claiming that he was a tenant of the present condemnee, and that his rights as such had been injuriously affected by the erection of the condemnor's dam and the occupation of the land of the present condemnee, which had been taken for the purpose of a reservoir, did not show the correctness of such allegation, or require a submission to the jury of the question as to whether a particular estate had been carved out of the fee, so that the damages which might be awarded in favor of the owner of the ultimate fee should be thereby lessened.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 560, 561; Dec. Dig. ⟸221.]

6. GROUND FOR NEW TRIAL.

Under the facts of the case, there was nothing in the ninth ground of the motion for a new trial which requires a reversal.

7. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The verdict was authorized by the evidence, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Jasper County; J. B. Park, Judge.

Condemnation proceedings by the Central Georgia Power Company against E. S. Cornwell. From the award, the condemnor brings error. Affirmed.

Hatcher & Smith, of Macon, and Greene F. Johnson, of Monticello, for plaintiff in error. W. S. Florence, of Monticello, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 19)

## COLLIER et al. v. HOWARD. (No. 124.)

(Supreme Court of Georgia. Jan. 12, 1915.)

*(Syllabus by the Court.)*

DENIAL OF NEW TRIAL.

The motion for new trial contained only the general grounds. The verdict was supported by the evidence, and there was no error in overruling the motion.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between John Collier and others and G. P. Howard. From the judgment, the parties first mentioned bring error. Affirmed.

C. B. Reynolds and Leo Sudderth, both of Atlanta, for plaintiffs in error. Colquitt & Conyers, of Atlanta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 23)

JONES et al. v. FOLSOM. (No. 127.)

(Supreme Court of Georgia. Jan. 13, 1915.)

*(Syllabus by the Court.)*

EXECUTORS AND ADMINISTRATORS ⟹314—ACTION FOR BEQUEST—PETITION—SUFFICIENCY.

A testator bequeathed a certain sum to each of his employés "who have been in my employment or service for ten years up to and next preceding my death." Several plaintiffs joined in a suit against the executor, alleging that they had been in the testator's service for 10 years previous to his death. The defendant demurred on the ground that the plaintiffs did not allege themselves to have been in the testator's service for 10 years up to and next preceding the testator's death. The demurrer was properly sustained.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274–1297; Dec. Dig. ⟹314.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by James Jones and others against H. L. Folsom, executor. Judgment for defendant, and plaintiffs bring error. Affirmed.

Gober & Jackson, of Atlanta, for plaintiffs in error. Ulysses Lewis, of Atlanta, for defendant in error.

EVANS, P. J. James Jones and 11 other plaintiffs filed their petition against the executor of Leonard B. Folsom, alleging that the twelfth item of the will of the defendant's testator is as follows:

"I give and bequeath the sum of $150.00 to each of my employés in my restaurant, hotel, and barber shop in Atlanta, who have been in my employment or service for ten years up to and next preceding my death. But no person can take under this twelfth item who takes under any other item of this will."

The plaintiffs were alleged to have been employés in the restaurant of the defendant's testator for more than 10 years previous to his death. It was alleged that more than 12 months had elapsed since the probate of the will, and that the executor "refuses to assent to said legacies and to pay plaintiffs the bequests given them under and by the terms of said will; that under the law they are entitled to it and under and by the provisions of the will of the testator whom they served so long and so well." The prayers were to compel the executor to assent to the legacy, and for judgment against the executor in favor of each plaintiff for the sum of $150. The defendant demurred to the petition, on the grounds, inter alia, that the petition fails to allege that the plaintiffs, or any of them, was in the employment or service of the testator for 10 years up to and next preceding the death of the testator. The court sustained the demurrer, and the plaintiffs sued out a writ of error.

The testator's legacy to his servants was clear and unambiguous. He included as objects of his bounty only those who were in his employment at the time of his death and had been continuously so for 10 years preceding his demise. The plaintiffs' allegation that they had been in the testator's employment previous to his death was lacking in certainty, as describing them to be included among the persons intended by the testator, who made it clear not only that the persons to whom the bequests were made must have been in his service for more than 10 years, but also that they must have been engaged in his service for 10 years up to and next preceding his death. The objection raised by this ground of the demurrer went to the very vitals of the plaintiffs' case; they failed to allege any right of recovery in themselves; and the court properly sustained the demurrer on this ground. In view of this ruling it becomes unnecessary to decide the other grounds of the demurrer.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 18)

TAYLOR et al. v. TANNER. (No. 122.)

(Supreme Court of Georgia. Jan. 12, 1915.)

*(Syllabus by the Court.)*

1. NEW TRIAL ⟹132—BRIEF OF EVIDENCE—DISMISSAL OF MOTION.

An approved brief of evidence is an indispensable part of a motion for a new trial; and if not prepared and presented as provided in the order setting the hearing in vacation, the motion for a new trial is properly dismissed on motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 273–275; Dec. Dig. ⟹132.]

2. APPEAL AND ERROR ⟹867—SCOPE OF REVIEW—NEW TRIAL.

The final judgment complained of being the dismissal of the motion for a new trial, exceptions taken pending the trial of the main case, which are appropriate to be taken in a motion for a new trial, are not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476–3486; Dec. Dig. ⟹867.]

Error from Superior Court, Jeff Davis County; C. B. Conyers, Judge.

Action between J. A. Taylor and others and B. H. Tanner. From the judgment, the parties first mentioned bring error. Affirmed.

C. E. Hay, of Thomasville, and L. D. Passmore, of Sylvester, for plaintiffs in error. L. E. Heath, of Douglas, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(15 Ga. App. 571)

## STANDARD OIL CO. et al. v. REAGAN et al.

(No. 5475.)

(Court of Appeals of Georgia. Jan. 20, 1915.)

*(Syllabus by the Court.)*

1. EXPLOSIVES ⟸9—KEROSENE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where oil sold as kerosene is used in starting a fire, by one who believes it to be kerosene, when it is in fact a more dangerous liquid and explodes when so used, its use for this purpose is not such negligence per se as would bar a recovery from the seller for resulting injuries to the person so using it.

(a) Whether kerosene oil could or could not be used with safety in a particular manner in starting a fire is a question for the jury.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 6; Dec. Dig. ⟸9.]

2. EVIDENCE ⟸121—ADMISSIBILITY—"RES GESTÆ."

"What is the res gestæ of a given transaction must depend upon its own peculiarities of character and circumstances. Courts must be allowed some latitude in this matter." Mitchum v. State, 11 Ga. 615, 623. "Declarations of a party, to be admitted as part of the res gestæ, must be at the time of the transaction they are intended to explain; must be calculated to unfold its nature and quality, and must harmonize with it." Carter v. Buchannon, 3 Ga. 513 (2).

(a) Declarations made by a wife to her husband, who had just reached her side, three or four minutes after a fatal injury, when she was still lying on the ground where she had been blown by the force of an explosion, surrounded by circumstances corroborating her statement, and with her person still smoking from the flames which consumed her clothing, may be treated as "part and parcel of the catastrophe," and may be admitted as part of the res gestæ, when there is nothing to indicate that they were prompted by device or afterthought.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307–338, 1117, 1119; Dec. Dig. ⟸121.

For other definitions, see Words and Phrases, First and Second Series, Res Gestæ.]

3. EVIDENCE ⟸150—EXPERIMENTS—PROBATIVE EFFECT.

Proof of a simple and primitive test, tending to indicate the actual identity of a substance by showing its characteristics in one or more particulars, may be introduced in evidence, and should have such probative value as, from the certainty of the test, the degree of capacity required to make the test, and the capacity possessed by those making it, it is, in the opinion of the jury, entitled to receive—measured by the evidence or by common knowledge so general as to be practically universal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 489; Dec. Dig. ⟸150.]

4. EXPLOSIVES ⟸9—KEROSENE—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

While evidence that one had used kerosene oil for many years in a particular manner might be no measure of diligence for another, who was fatally injured by using it in the same way, yet it might tend to indicate that the injured person was not guilty of gross negligence amounting to a lack of ordinary care in thus using it.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 6; Dec. Dig. ⟸9.]

5. DEATH ⟸77, 103 — EVIDENCE ⟸383 — DAMAGES—LIFE EXPECTANCY—PROOF.

Where the age of a person is shown, his expectancy of life may be determined by the jury without any other direct evidence on the subject. Tables of the probable length of life and its probable worth may be useful, but are not conclusive or absolutely essential for that purpose. Upon proof as to a person's age, health, and earning capacity, the jury may estimate the value of his life, and reduce that value to its present cash value, by any method satisfactory to them which produces a definite result that is fair and reasonable and is authorized by the evidence.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 96, 141; Dec. Dig. ⟸77, 103; Evidence, Cent. Dig. §§ 1660–1677; Dec. Dig. ⟸383.]

6. APPEAL AND ERROR ⟸1069—GROUND FOR REVERSAL — DISREGARD OF INSTRUCTIONS — DAMAGES FOR DEATH.

When the jury disregard instructions from the court as to a method of calculation, and by some other method reach a result which is fairly deducible from the evidence, but different from what they might have reached by adopting the method suggested by the court, the verdict may nevertheless be sustained. It is immaterial how a result be reached, so that it is legal, just, and accurate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4136, 4138, 4139; Dec. Dig. ⟸1069.]

7. DEATH ⟸92 — DAMAGES RECOVERABLE — DETERMINATION.

The jury may increase damages awarded for death caused by wrongful act, by including in the total sum awarded legal interest on the present cash value of the life of the deceased at the time of death, from that time to the date of the verdict.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 102; Dec. Dig. ⟸92.]

8. DEATH ⟸87 — DAMAGES RECOVERABLE — EARNING CAPACITY.

The reasonably probable average earnings of the deceased may be deduced by the jury from evidence as to past earnings, and taking into consideration age and health, and the probable future increase in efficiency during future years, as well as the natural diminution in earning capacity, consequent upon old age.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 115; Dec. Dig. ⟸87.]

9. DEATH ⟸87 — TRIAL ⟸311 — DAMAGES RECOVERABLE—LOSS OF SERVICES.

In estimating the value of ordinary domestic services rendered by a wife, the jury is authorized to take into consideration what may be the value of many services incapable of exact proof, but measured in the light of their own observation and experience. "Some wives perform manual labor; others do not. Yet the husbands of the latter no less than those of the former would certainly be entitled to compensation from wrongdoers for causing inability to perform service. * * * There need be no direct or express evidence of the value of the wife's services, either by the day, week, month, or any other period of time, or of any aggregate sum." Metropolitan St. R. R. Co., v. Johnson, 91 Ga. 466, 471, 472, 18 S. E. 816, 817.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 115; Dec. Dig. ⟸87; Trial, Cent. Dig. § 739; Dec. Dig. ⟸311.]

10. VERDICT APPROVED.

The evidence authorized the verdict, and no substantial error was committed by the court.

*(Additional Syllabus by Editorial Staff.)*

11. WORDS AND PHRASES—"ORDINARY KEROSENE."

"Ordinary kerosene," being the kerosene sold in the open market, means kerosene of a lawful grade and quality ordinarily sold for the general use of the public for illuminating purposes.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by G. W. Reagan, in his own behalf and as next friend for his minor child, Ellis Reagan, against the Standard Oil Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Theo. Titus, of Thomasville, and King, Spalding & Underwood, of Atlanta, for plaintiffs in error. Little, Powell, Hooper & Goldstein, of Atlanta, and Roscoe Luke, of Thomasville, for defendants in error.

WADE, J. G. W. Reagan brought an action in his own behalf and as next friend for his minor child, Ellis Reagan, against the Standard Oil Company, J. W. Dillon, and Israel Bowdre, to recover damages on account of the death of Lula Reagan, his wife, whose death he alleged was caused by the negligence of the defendants. The petition as amended alleged that the Standard Oil Company was a dealer in illuminating oils on July 3, 1912, and was engaged in selling the same through J. W. Dillon and Israel Bowdre, its employés; and that on the day named Dillon, acting as its local manager, placed Bowdre in charge of a wagon loaded with both kerosene oil and gasoline, which was offered for sale to any who desired to buy; that Bowdre came to the petitioner's store and sold to him and placed in his kerosene tank ten gallons of a fluid which Bowdre stated, and which petitioner supposed, was kerosene oil, but which in fact was gasoline, resembling kerosene oil in appearance, but a much more dangerous and a very much more explosive substance; that a day or two thereafter the petitioner drew out from the said tank about a gallon of what he supposed to be kerosene oil, but which was in fact a portion of the gasoline sold and delivered to him for kerosene by the defendants, and placed it in a small can and sent it to his home near by for domestic use; that several days thereafter, to wit, on the 18th of July, 1912, at or about 10 o'clock in the morning, his wife put certain fuel in the stove in his home and lighted it with fire, and poured thereon some of the gasoline in the family oil can, supposing it to be kerosene, when the gasoline exploded and set fire to the contents of the can, which also exploded, so that therefrom she was set on fire and received burns, from which she died about 4:30 o'clock p. m. on the same day; that, at the date of her death, Lula Reagan was 24 years old and was in good health, and the value of her services was $100 per month, and she then had a life expectancy of 40 years; and that Ellis Reagan was then an infant 17 months old, and was her only child. The petition further alleged that the death of Lula Reagan was occasioned solely by the negligence and wrong of the defendants in selling and in causing to be sold and delivered to the petitioner gasoline, which is a highly dangerous substance, liable to explode and cause destruction of human life and property, unless handled most carefully, and in selling the same for "fireproof" kerosene oil, which is a substance greatly resembling gasoline in its superficial appearance, but which is comparatively free from danger when handled in an ordinary manner, and in placing it and causing it to be placed in the dispensing tank of petitioner, where he was likely to use it and to dispense it to his own family and to others; and that the wrongful act of the defendants in causing gasoline to thus be placed and delivered as kerosene, in such a manner that in the natural course of things, and in a way that could be reasonably expected, it came into the possession of Lula Reagan, and was used as kerosene by her without any knowledge on her part that it was in fact gasoline, was the direct, proximate, and natural cause of her death, and the negligence complained of was in law and in fact the negligence of each of the defendants and of all of them. The petitioners asked for damages in the sum of $20,000.

[1] 1. The defendants filed a demurrer, on the ground that the petition set forth no cause of action, because it appeared therefrom that the injury complained of was caused directly and proximately by the negligence of Mrs. Reagan, and that such negligence would prevent a recovery; and also because it appeared from the petition as amended that by the use of ordinary care Mrs. Reagan could have avoided the consequences of the alleged negligence of the defendants, and her contributory negligence would therefore prevent a recovery. These grounds are in effect repeated in somewhat different words, but no other point is raised by the demurrer. The precise issue therefore raised by the demurrer was that as a matter of law it is contributory negligence, amounting to a failure to exercise ordinary care, for one to attempt to build a fire with kerosene oil. In order to sustain this view, we would be compelled to hold that according to common knowledge, practically so universal as to amount to judicial notice, kerosene oil is a substance so highly explosive and so dangerous, when brought into close proximity to fire, that any person using and employing it to kindle a fire would be properly chargeable with the natural injurious results liable almost certainly to flow from such a reckless and negligent employment of so dangerous an agency. To the contrary, kerosene oil of the quality permitted under our statutes is in such general use for the purpose of kindling fires that the court might almost be prepared to hold as a matter of law that its use for such a purpose and under certain restrictions is not dangerous, but ordinarily is entirely safe. However, in the determination of this question we are not required to go so far, or in fact to go further than to hold that the employment of kero-

sene oil in starting a fire is not such negligence per se as would bar a person injured by an explosion thereupon resulting from a recovery, upon proof that the grade of oil was too low or that the substance sold as, used for, and supposed by such person to be, kerosene oil, was not in fact kerosene oil at all, but a more dangerous substance altogether.

In the case of Peterson v. Standard Oil Co., 55 Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625, the Supreme Court of Oregon held:

"A complaint, alleging that F., a merchant, ordered of defendant a certain kind of kerosene that would stand an open-fire test of 120 degrees; that defendant negligently delivered to him, in a tank marked as containing the article ordered, a distillate that would only stand a test of 88 degrees; that F., relying on his contract and the label, sold some of it to plaintiff's intestate, as the article ordered; that she, while trying to kindle a fire with it, without negligence, was killed by an explosion which resulted; and that, had it been as represented, no explosion would have resulted—is sufficient, at least as against a general demurrer, without any allegation of the dangerous character of such distillate; the court taking judicial notice of its dangerous character, which is generally known, and a quality of a substance that is taken judicial notice of being in effect pleaded when the substance is mentioned."

In the present case the petition alleged distinctly that the gasoline supplied to the plaintiff through the negligence of the defendants in lieu of the kerosene which he ordered and paid for was in fact a much more dangerous substance than that purchased. The point was raised, in the Peterson Case, supra, by the answer of the defendant, that the death of the plaintiff resulted from her own negligence in using oil for the purpose of starting a fire, since neither kind of kerosene mentioned in the plaintiff's complaint was intended or manufactured to be used in this way, and therefore the injuries resulting in her death were caused by her own want of care, and without fault or negligence of the defendant or any of its servants or agents. In the decision it was said:

"The common knowledge of the community is that its primary use is for the purpose of illumination; that secondarily it is used in oil stoves for heating purposes. It is also used for the purpose of removing grease and oil from wood or iron, and for kindling fires, as well as for many other purposes. Its use for any of these purposes is not uncommon, and we think that the employment of it for the purpose of kindling fires is not in itself negligence."

The court also quoted with approval from Ellis v. Republic Oil Co., 133 Iowa, 11, 110 N. W. 20, as follows:

"The use of kerosene in kindling fires is too common and too well known for us to say that a person using reasonable care may not employ that agency without being chargeable with negligence."

In Ives v. Welden, 114 Iowa, 476, 87 N. W. 408, 54 L. R. A. 854, 89 Am. St. Rep. 379, it appeared that the plaintiff was burned by the explosion of gasoline, which she was using for starting a fire, supposing it to be kerosene oil. A short time before she was injured her father went to the defendant's store with a jug, which he testified he directed the clerk to fill with kerosene oil, but the clerk filled the jug with gasoline instead. The jug was taken home by the father, and the plaintiff, supposing that it contained kerosene oil, poured some of its contents into a small can, and thence into the stove. She then applied fire thereto, and it exploded and set fire to her clothing. The right of the plaintiff to recover under these circumstances was upheld by the court.

In Riggs v. Standard Oil Co. (C. C.) 130 Fed. 199, where, in attempting to start the fire in a stove, one poured oil on wood which had been placed on top of a few live coals and an explosion resulted, it was held that there was such contributory negligence as would defeat recovery from the manufacturer of the oil for resulting injuries, on the ground that it was below standard test; and we may infer that, under this ruling, the manner in which the oil was used in starting a fire, or other conditions then existing, might in some cases determine whether or not there was contributory negligence on the part of the plaintiff in using it for such purpose.

The petition in the instant case, as amended, alleges that the deceased "put certain material in the stove in petitioner's home, lighted it with fire, and poured thereon some of the gasoline which had thus been put in the family oil can, supposing it to be kerosene." It does not appear from these allegations that the stove was already heated, or that there were any live coals under the lighted material. A distinction appears to be drawn, in the several cases first referred to above and in the last case cited, between the effects properly to be expected where oil is first poured on the fuel and fire afterwards applied, and where the oil is poured upon a fire already lighted or upon live coals; but we are not prepared to hold, either on the basis of common knowledge and experience or from such judicial declarations as may have been made by different courts, that there is such a radical difference in the degree of danger resulting from applying fire to kerosene oil and from applying kerosene oil to fire, as would justify a holding that, while the former would not involve such negligence as would amount to a lack of ordinary care, the latter would be such gross negligence as would bar a recovery. We think the whole matter should be relegated to the jury for determination, and a recovery would depend upon the evidence disclosing whether or not kerosene oil could be used with safety in the manner the petition alleges it was actually employed by the deceased; and therefore the court did not err in overruling the demurrer.

[2] 2. The case as laid in the petition was

supported by proof sufficient to authorize the verdict of $10,000 against the Standard Oil Company and Israel Bowdre; it being admitted by counsel for the plaintiffs that no case had been made out against the defendant J. W. Dillon, and the jury therefore finding in his favor. A motion for a new trial was made by both Bowdre and the Standard Oil Company; but it is unnecessary to discuss the general grounds of the motion, in view of the statement above made. Several amendments were made to the motion for a new trial, which we will discuss in the order in which they occur. The first ground of the amendment to the motion for a new trial was:

"Because the following material evidence was illegally admitted to the jury by the court over the objection of movant, to wit: 'The deceased wife of plaintiff, G. W. Reagan, and mother of Ellis Reagan, said she was starting a fire in the stove, and had some chips in the stove, and, to start the fire to burning, she thought she would pour some oil on the chips, and when she did the fire went up in the can and burst all over her, just all in a second.'"

Exhibit A of the motion, including a statement of evidence, was by reference made a part of this ground:

"Before the witness was allowed to testify as to the declaration of Mrs. Reagan, the deceased, the following proof was adduced as showing, or tending to show, that the declarations were made as part of the res gestæ of the burning, to wit: 'That she (the deceased) died from burns received about 10 o'clock in the morning, and that she died about 4 o'clock in the afternoon of the same day; that she was burned practically all over her body, all the flesh and skin upon her entire person was burned. On the morning of the burning, the witness, who was the husband of the deceased, was at his store between 200 and 225 yards from his residence, where the deceased was, when he heard a noise or explosion which went 'like an automobile goes sometimes—kinder like a gun or pistol.' He was called home and went immediately, and when he got there found his wife on the ground in front of the kitchen door, burned all over from her head to her feet. The kerosene can which was exhibited in evidence was found lying on the floor, and the kitchen was all smoked up; the can being close to the kitchen stove, with its bottom blown out. His wife was lying just at the kitchen steps. The period elapsing between the time when the witness heard the explosion and when he got there to where his wife was was just a few minutes—three or four minutes—'just as quick as he could get there.' When the witness got there the deceased was on the ground talking—seemed to be suffering a lot of pain, she was conscious and talking freely. She was talking about dying and said she didn't want to die on account of her husband and baby. She was not giving any signs of pain, only you could look at her and tell—her hands were stiff and she was burned mighty bad. There was mighty little clothing on her, but there had been a quilt spread over her and water poured over her—she was burned and parched all over. Her clothing was smoking and steaming when the witness got there, but the fire was out. The distance from the house to the store was not over 200 or 225 yards, and the witness ran there hurriedly, as fast as he could, and when he got there he asked what the matter was, and, in reply to his question, the deceased made the statement excepted to in paragraph 1 of the amended motion of which this exhibit forms a part."

The defendant objected to the admission of this evidence on the ground that it was irrelevant and immaterial, was hearsay, and did not constitute a part of the res gestæ of the case. In his cross-examination the witness Reagan said:

"With reference to the statement which I claim my wife made to me as to how this accident occurred, first I asked her how it happened, and she stated she had started to make a fire in the stove, and that she had put some wood in the stove, and had some chips under the wood, and had lighted the chips under the wood, and that after she had lighted the chips under the wood she poured the oil out of the can on the wood, and the fire followed the oil up into the can. The fire followed the oil up the stream to the can, and, when the fire followed from the chips up the stream to the can, the can exploded; that is the statement she made to me."

It certainly cannot be seriously contended that the evidence objected to was immaterial and did not relate to the question at issue, so that the exception raises the point alone whether or not the evidence was a part of the res gestæ of the case.

Our Code provides that:

"Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of res gestæ." Civil Code, § 5766.

The general principle of this exception to the hearsay rule—

"is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts." 3 Wigmore on Evidence, § 1747.

"The utterance, it is commonly said, must be 'spontaneous,' 'natural,' 'impulsive,' 'instinctive,' 'generated by an excited feeling which extends without let or breakdown from the moment of the event they illustrate.'" Id., § 1749.

"There must be some shock, startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting. * * * The utterance must have been before there has been time to contrive and misrepresent, i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. This limitation is in practice the subject of most of the rulings. It is to be observed that the statements need not be strictly contemporaneous with the exciting cause; they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated." Id., § 1750.

"If the declarations appear to spring out of the transaction—if they elucidate it—if they are voluntary and spontaneous, and if they are made at a time so near to it as reasonably to preclude the idea of deliberate design, then are

they to be regarded as contemporaneous." Mitchum v. State, 11 Ga. 626.

"What the law altogether distrusts is not afterspeech but afterthought. * * * That they [the declarations] shall be or appear to be spontaneous is indispensable, and it is for this reason alone that they are required to be speedy." Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 775, 776, 12 S. E. 18, 26.

It is well settled that there can be no definite and fixed limit of time, but that each case must depend upon its own circumstances; "for what is the res gestæ of a given transaction must depend upon its own peculiarities of character and circumstances. Courts must be allowed some latitude in this matter." Mitchum v. State, supra, 11 Ga. 623.

It cannot be maintained as a reasonable or logical deduction that, simply on account of the fact that the statement of the deceased as to how she sustained the injuries from which she was then about to die was made in response to an inquiry from her husband, who arrived at the scene of the tragedy in three or four minutes after the fatal explosion occurred, her account of the burning was not spontaneous. The natural question propounded by her husband may have directed her mind to the details of the accident, and her wavering attention may have been thereby fixed upon the immediately preceding occurrence long enough to enable her to give an account of the happening; but, from the simple question the distressed husband put to his dying wife, we cannot by any stretch of imagination discover anything calculated to direct her thoughts to any particular line of explanation, or to suggest to her mind any device or afterthought whatsoever. To the contrary, the inquiry from the husband, under such circumstances, must have been irresistibly compelled by the promptings of affection and even by the ordinary feelings of humanity. And so, too, the reply of the wife, offering an explanation of her condition, must have welled up spontaneously to her lips at sight of her husband and even without any inquiry from him.

It was held in Galveston v. Barbour, 62 Tex. 176, 50 Am. Rep. 519, that declarations made by a child, in a childlike manner, to its mother, where he came home immediately after he received an injury, crying, and smarting from the pain resulting from it, making known to her how he had been hurt, were admissible. Equally natural, it appears to us, would be declarations made by a wife to a husband three or four minutes after a fatal injury had been inflicted upon her, and immediately after he reached her side, when she was still lying on the ground where she had been blown by the force of an explosion, with her person still smoking from the flames that consumed her clothing. It is both unreasonable and unnatural to suppose that the statement of the injured woman, horribly burned but three or four minutes before, and even then trembling on the verge of eternity, could have been prompted by a conscious thought of possible pecuniary damages to be recovered from any one, and tainted with the suspicion of device or afterthought; and, in fact, it is almost impossible to imagine that the injured wife and mother, recognizing the approach of the fell destroyer death, and declaring her willingness to die, but lamenting that she must leave her infant son and the husband of her choice, could have entertained even for a moment such sordid considerations. Though wracked by physical torture, her thoughts were on the heights, and she was gazing upward and unafraid into the undiscovered future then opening before her, and not downward into the valleys of human littleness, weighing the dross of worldly wealth, or estimating the possibilities of recoverable damages.

"Res gestæ are the circumstances, acts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. Declarations of a party, to be admitted as part of the res gestæ, must be at the time of the transaction they are intended to explain; must be calculated to unfold its nature and quality, and must harmonize with it." Carter v. Buchannon, 3 Ga. 513.

The case of Ferguson v. Columbus & Rome Railway, 75 Ga. 637, appears to be exactly in point. The first headnote of the decision is as follows:

"Where a child of 10 years of age was seriously injured at a turntable belonging to a railroad, and a witness who reached the spot a few minutes after the injury occurred, and who testified to circumstances tending to show that the turntable was the instrument by which the child was hurt, such as the appearance of fresh, warm blood, and pieces of flesh, torn from her limbs, being on the machine and in the pit under it and on the ends of the rails, it was error to refuse to allow such witness to testify what the child said when he reached the place, as to how she was hurt. Such statements were part of the res gestæ. Nor did it matter as to their admission whether the child lived or died."

In Augusta Factory v. Barnes, 72 Ga. 217, 53 Am. Rep. 838, a statement made to the plaintiff by his injured daughter on his return to his home, where she had been carried from the factory directly after she had been wounded, as to how the injury occurred, was admitted by the court, though about a half hour had elapsed between the time of the injury and the statement. The statement was offered as part of the res gestæ, and the court said that:

The fact "that the statement was made at a different place from that at which the injury occurred, and after the lapse of some short time, if there were nothing else connected with it, would hardly afford a plausible ground for its rejection; but, considering the circumstances, the terrible suffering the child was then and had been enduring from the frightful injury that had so recently occurred, we think a case was presented where a judge should have paused long before rejecting it. The propriety of the rejection would have been, to say the least, doubtful, and, in cases where the competency of evidence is doubtful, it should go to the jury, that they may consider how far its force is impaired by these incidents."

In discussing the admissibility of certain declarations, in Goodman v. State, 122 Ga. 111, 118, 49 S. E. 922, 925, the Supreme Court said:

"At most, we think it could only be said that their admissibility was doubtful, and it has long been the rule in this state, when the admissibility of evidence is doubtful, to admit it and leave its weight and effect to be determined by the jury."

See, also, cases there cited.

Counsel for plaintiff in error contended that the statement of Mrs. Reagan to her husband was inadmissible because it was a narrative statement detailing the manner in which she was injured, made after the transaction was over, and hence was no part of the res gestæ.

"While as a general rule that which is mere narrative is apt to carry with it the impress of afterthought, there may be a narrative which is entirely free from afterthought." Southern Ry. Co. v. Brown, 126 Ga. 4, 54 S. E. 911, and citation.

The case of McBride v. Georgia Railway & Electric Co., 125 Ga. 515, 517, 54 S. E. 674, is cited by counsel for plaintiff in error. It appears, however, that in that case a narrative statement was made not only some minutes after the transaction was over, but after the plaintiff had walked away from the place where the injury was inflicted to her intended destination, 200 or 300 yards away. Also, it does not appear in that case that the person making the statement was suffering such extreme agony, or was in the stress of such nervous excitement, as would still the reflective faculties and remove their control, so that her utterances might be considered as "a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock." Quite different are the facts in the present case, where the injured person made the statement objected to at the scene of the injury, within three or four minutes after the explosion occurred, and while writhing in agony and surrounded by physical evidences which agreed with and corroborated what she said.

In White v. Southern Railway Co., 123 Ga. 353, 51 S. E. 411, also cited by the plaintiff in error, the plaintiff offered to prove as part of the res gestæ of the occurrence a statement made by her son half an hour after the train which had injured him had departed, and also a statement made by him on the morning of the day following his injury, in the presence of a physician and of an agent of the company, who reduced to writing what he said concerning the manner in which he got hurt. Here, again, the second statement was made not only some time after the infliction of the injury, but away from the scene of its occurrence, and under circumstances calculated to direct the attention of the injured person to the legal consequences which might depend upon his explanation of the manner in which he was injured; for not only were his mother and his physician present, but an agent of the company was also there at the time, reducing to writing what he had to say, and thus necessarily emphasizing its importance and possible effect, and his first statement was a narrative to two casual passers-by, who discovered him half an hour after his injury and after the train inflicting the injury had departed. Neither does it appear that the injured person was suffering any pain at the time he made either statement offered as part of the res gestæ, but the shock of the accident may have numbed his capacity for suffering and left his mind undisturbed, clear, and calculating, and, while he died soon after the second statement was made, he may nevertheless have been unaware of his approaching dissolution, and his thoughts therefore may have rested upon the possible material results of the accident.

In Western & Atlantic R. Co. v. Beason, 112 Ga. 553, 557, 37 S. E. 863, 865, it was held that the trial court erred in permitting two witnesses to testify to accounts given to them by the deceased after he had fallen from a train, touching the place upon the train where he had been riding, and explaining the manner in which he was thrown to the ground and injured. The court declared the evidence should have been excluded, since what the injured man said to the witnesses was manifestly a mere narrative of a past occurrence.

"His statements, notwithstanding the fact that he was suffering great pain, were made deliberately and connectedly. They were in no sense exclamatory, and manifestly did not proceed from him *as part and parcel of the catastrophe.* [Italics ours.] It is true these statements were made within a few minutes thereafter; but, in determining whether declarations should be received as a part of the res gestæ of an occurrence, the mere question of the lapse of time is not controlling. The real test is: Were the declarations a part of the occurrence to which they relate, or were they a mere narrative concerning something which had fully taken place and had therefore become a thing of the past?"

It does not appear in that case whether the statements were made at the place where the injury occurred, or whether the train from which he fell was at the scene or had disappeared in the distance, and therefore the declarations could scarcely be considered in any view as part of the occurrence to which they relate—they were not "part and parcel of the catastrophe." Quite different are the facts in this case; for while it appears that the statements made by Mrs. Reagan were perhaps made connectedly, and it does not appear that they were in any sense exclamatory, nevertheless they were made, not only within three or four minutes after the explosion which caused her death, but at the scene of the tragedy, while she was resting on the ground within a few feet of the wreck-

ed stove, with the fatal oil can lying near, and with the smoke still rising from her charred person and burnt clothing. It was something more than a mere narrative, connected and deliberate; and, though her statements may have related to something which had occurred an infinitesimal time before, it could hardly be characterized as a past occurrence only, though in a sense finished and completed. The reverberations from the explosion could scarcely have died in her ears, the smoke of the flames was still rising, and she was at the exact spot of the tragedy, surrounded by the circumstances corroborating her story.

[3] 3. Grounds 2, 3, 4, and 5 of the amendment to the motion for a new trial assign error because the court admitted in evidence the following testimony, to wit:

(2) "They poured some of the other oil in an oyster or sardine can and struck a match and stuck in it, and it put it out; but this oil he took out of my tank, they didn't have to put the match to it, because it would catch before the match got close to it." (3) "He poured some ordinary kerosene oil into a can for testing purposes." (4) "I saw a lighted match applied to the ordinary kerosene. Well, they wasn't no ways alike. You would have to hold the match to it before you could get it to catch, and, if they stuck the match in it, it would put it out. You could not do this with the oil taken from my tank." (5) "I have been using kerosene all my life in making fires, and we have been using it there working for the railroad company in starting the fires, putting the wood and chips down first, and then we take the can of oil and pour in there on it after the fire has been started, and in all my experience with kerosene I never have seen any act like that did."

The plaintiff in error complains that the evidence set forth in grounds 2 and 4 was irrelevant and immaterial, and that no proper foundation for proof as to the making of the experiments therein referred to had been laid, because it was not shown that the party making the experiments had sufficient capacity or means suitable for making them. The evidence set forth in the third ground is objected to for the reasons assigned in the second and fourth grounds, and for the additional reason that the opinion of the witness as to what is ordinary kerosene was thereby admitted. The evidence set out in the fifth ground is objected to on the ground that it was irrelevant and immaterial, and set forth a wrong standard to use in determining the question of negligence.

The question at issue was whether or not gasoline, a substance alleged to be more explosive and very much more dangerous than kerosene, had been sold and delivered by the defendant, through its agents and employés for and instead of the kerosene actually ordered and paid for by the plaintiff; and, to determine this question, any evidence tending to show that the liquid sold and delivered to Reagan was more inflammable, explosive, or dangerous than kerosene, and was different from kerosene, was clearly admissible as a circumstance to be considered by the jury in determining the identity of the liquid taken from the tank of the plaintiff (which was purchased from the defendant), and any test, no matter how simple and primitive, which would tend to establish the existence of such a difference, would therefore be admissible. The fact that "ordinary" kerosene was more difficult to ignite or was less inflammable than the liquid sold to Reagan may not have been conclusive as to the absolute nature and character of the liquid—whether gasoline or not—but certainly was a circumstance tending to establish the contention of the plaintiff that the liquid was in fact gasoline, and distinctly corroborated the testimony of the witness Billings, who said he was in the automobile business and had used gasoline and kerosene in launches, motor boats, and automobiles for 20 years, and testified directly and positively that some of the liquid, shown by other testimony to have been obtained from the tank of the plaintiff and to be a part of what was sold to the plaintiff by the defendant company, was in fact and in truth gasoline or had gasoline in it. That a simple test was made with fire only is no reason why this evidence should be entirely without probative value. A chemical analysis alone, for instance, would accurately determine many of the differences between black sand and ordinary black gunpowder, with grains of approximately the same size, and yet, if a witness swore that, though he had analyzed neither, he was entirely familiar with ordinary black sand, with its qualities and characteristics, and he had applied fire both to a small quantity of sand and to a substance resembling both sand and gunpowder, which last exploded, while the sand did not, and from this fact he was ready to assert that the substance resembling gunpowder was not sand, since it behaved in a different way when fire was applied thereto from any ordinary sand he had ever seen, but was an explosive acting in no sense like sand, could it be said that this testimony would be of no probative value, or would be irrelevant and immaterial in determining whether or not the substance sold for sand, but resembling gunpowder, was in fact not sand, but probably gunpowder? We therefore cannot see any force in the objection that the tests referred to in these excerpts from the evidence were not made by a person of sufficient capacity or sufficient means for making the experiments. It is evident that no great degree of capacity and nothing more elaborate than a match, together with two cans, each containing a portion of one of the two different liquids, would be requisite to accomplish the tests made. Nor do we see any force in the objection that, since the evidence in the case indicated that the liquid in question was poured upon chips

in a stove to which fire had already been applied, testimony showing that ordinary kerosene in an open vessel would not catch readily from a match, but the liquid sold to the plaintiff and represented to be kerosene would catch when the same test was applied thereto, was irrelevant. Irrespective of whether the tests with the match and cans full of the liquid taken from Reagan's tank and full of "ordinary" kerosene actually duplicated the conditions which the deceased stated existed at the time of her injury, these tests would demonstrate the comparative inflammability, explosiveness, and dangerous nature of kerosene and of the fluid delivered to Reagan for kerosene, and tend to establish the real identity of the latter.

[11] The objection that the testimony set out in the third ground of the amendment to the motion for a new trial allowed the opinion of the witness as to what was ordinary kerosene to go before the jury is, we think, also without merit, since it must be conceded that commercial kerosene is a substance in such general, if not universal, use, that the term "ordinary kerosene" has a meaning almost as well understood as the terms "ordinary wood," or "ordinary water," or "ordinary air" would have. So that we must assume that this expression meant kerosene of the grade and quality ordinarily sold for the general use of the public for illuminating purposes, and of the kind and quality with which the witness and the public at large were familiar. Besides, we must presume, in the absence of anything to the contrary, that "ordinary kerosene," being the kerosene sold in the open market, means kerosene of lawful grade, and hence of the quality which Reagan sought to purchase, and which the other persons making the tests had actually purchased, both from the Standard Oil Company and from other manufacturers of oil.

[4] 4. The testimony objected to in the fifth ground of the amendment to the motion for a new trial was not subject to the objection made. The witness Welch stated that he actually saw tests made of oil said to have been drawn from Reagan's tank (and which other testimony showed had actually been drawn from this tank), and that a lighted match placed near the oil from Reagan's tank would ignite, whereas kerosene oil would "not do that way." The witness said he saw the liquid from Reagan's tank ignited by merely holding a lighted match close thereto. He further said that he had had experience in the handling of ordinary kerosene oil, and had practically used kerosene in building fires every day for several years, and had been using it all his life in making fires; that he had been using it in working for a railroad company, starting the fires by putting down wood and chips first, and after the fire had been started pouring oil upon it from a can; and in all his experience with kerosene he had never seen any kerosene act as did the oil taken from Reagan's tank, which "was either all gasoline or had a good portion of gasoline in it." He further said that the oil which came from Reagan's tank would flame up, but none of the oil that came from the other stores would act in this manner; that the Reagan oil would burn on the ground if poured out, and the oil obtained from other places would not burn under like conditions. The fact that Welch had often built fires in the identical manner Mrs. Reagan employed, and without injury to him, would not necessarily be a measure of diligence for Mrs. Reagan; but his evidence that he built fires day after day for many years in this manner without suffering any injury might tend to indicate that Mrs. Reagan was not guilty of negligence amounting to a lack of ordinary care in attempting to start a fire with what she had reason to suppose was kerosene, in the identical manner so often employed with safety by Welch. The testimony appears to be amply sufficient to support a finding that the substance sold and delivered to Reagan was not ordinary lawful kerosene, but was something more highly explosive and very much more dangerous, and was in fact either in whole or in part gasoline. Without attempting to set out all the testimony supporting this view, we may say generally that, in addition to the plaintiff himself, eight witnesses, who so far as the record discloses are both reputable and disinterested, testified concerning experiments made with the oil shown to have been obtained from Reagan's tank and to be a part of the liquid sold to him by the defendant company, and each and all of these witnesses testified in effect to the same state of facts, and by their evidence demonstrated clearly that the oil from the plaintiff's tank was far more inflammable than ordinary kerosene oil. In this connection we may add that the witness Knight testified that he purchased some oil from the plaintiff about the time the wife of the latter died, and that he poured some of it in a common glass lamp, which he had used in his home for burning kerosene for 3 or 4 months, and that when he "stuck a match to it it burst-ed."

[5-10] 5-10. The sixth ground of the amendment to the motion for a new trial complains that the court erred in charging the jury that, in the event that the plaintiff was entitled to recover, the amount of the recovery should be "the full value of the life of said deceased as shown by the evidence, the full value of the life of the deceased as shown by the evidence being the full value of her life without deduction for necessary or other personal expenses of said deceased had she lived." This charge was objected to: (a) Because it was "not a correct statement of the law and is erroneous and incomplete"; (b) because there was no evidence to support the charge, there being no competent testimony upon which the jury could find the value of the life

of the deceased; (c) because it was too vague, indefinite, and confusing, and did not furnish the jury any proper methods or standard for ascertaining the value of said life; and (d) because the judge did not thereby or elsewhere in his charge furnish the jury with any proper methods or standards for arriving at the value of the life of the deceased. It does not appear from any specific assignment of error wherein the charge is "not a correct statement of the law," or for what reason it is "erroneous and incomplete," and hence exception "a" need not be considered or discussed. As to the exception "b," that there was no evidence to support this charge—we think this objection is not well taken, since the testimony of the plaintiff, and of several of the witnesses for the defendants, certainly afforded the jury competent evidence upon which they might find and determine the value of the life of the deceased. The plaintiff testified that his wife did all the housework, nursed his baby, cooked his food, and did the sewing for the household, and, in addition to all this, helped him in his store. He further said that to procure the services of a cook to do such cooking as his wife did would cost $5 or $6 per month or more, at least that much; that it would cost $4 or $5 per month for a nurse for his child; that the family sewing would cost something, but he was unable to say how much; that it would cost $6 or $7 per month to get a housekeeper; and to procure a person to help him in his store as his wife did would cost him $25 or $30 per month or more. Spence, a witness for the defendant, testified that the services of a cook in the neighborhood where the plaintiff lived would be worth from $1.50 to $2 per week, that a nurse would be worth "about the same thing as a cook," and that a housekeeper would, in his opinion, command a salary of $10 per month, or more. Bulloch, another witness for the defendant, estimated the services of a nurse for a child about the age of the plaintiff's infant son to be worth $1 per week, and stated that it would cost from $1.25 to $1.50 per week to do the sewing for a family of three like the family of the plaintiff. The jury, of course, had the right to take the highest value shown, and thus, under the testimony of the plaintiff, might have found that the value of Mrs. Reagan's services in his store were worth $30 per month or $360 per annum, and could have concluded, under the testimony of Spence, that her services as a cook were of the value of $2 per week for 52 weeks in each year, or of a total value of $104 per annum, and also a like sum per annum as a nurse; and that her services as a housekeeper were worth $10 per month or $120 per annum. And under the testimony of Bulloch the jury could have found that the services of the deceased in sewing were worth $1.50 per week or $78 per annum. These amounts added together would give the following results:

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|---|---|
| As a nurse, by the evidence of Spence | $104 per annum. |
| As an assistant in his store, by the evidence of the plaintiff | 360 per annum. |
| As a cook, by the evidence of Spence | 104 per annum. |
| As a housekeeper, by the evidence of Spence | 120 per annum. |
| As a seamstress, by the evidence of Bulloch | 78 per annum. |
| Total value of services per annum | $766. |

So that, according to this testimony, which the jury had the right to accept and believe, the services of the deceased might have been worth $766 per annum; and, taking into consideration the proof that she was less than 24 years of age at the time of her death, and was an active and healthy woman, and considering in the light of human experience her long natural expectancy, there was ample evidence to demand a charge concerning the gross and present value of her life. The charge complained of gives the measure of damages in a homicide case as laid down in section 4425 of the Civil Code; and, if it fails to furnish the jury with such methods or standards for ascertaining the value of the life of the deceased as to the plaintiff in error appeared to be necessary, a special request in writing for a more specific charge should have been made. Certainly there is nothing vague, indefinite, or confusing in the simple words of the statute which the trial judge embodied in this excerpt from his charge. Where the age of the person in question is shown, expectancy of life may be determined by the jury without having the mortality tables before them, or without any other direct evidence on the subject. Atlantic Coast Line Ry. Co. v. Moore, 8 Ga. App. 185, 68 S. E. 875. See, also, Boswell v. Barnhart, 96 Ga. 521, 23 S. E. 414; Merchants' & Miners' Trans. Co. v. Corcoran, 4 Ga. App. 654, 669, 62 S. E. 130. Tables of the probable length of life and its probable worth may be useful, but are not conclusive or absolutely essential for that purpose. Savannah, Florida & Western Railway v. Stewart, 71 Ga. 427; Central Ry. Co. v. Perkerson, 112 Ga. 923, 936, 38 S. E. 365, 53 L. R. A. 210; Atlantic Coast Line R. Co. v. Moore, 8 Ga. App. 185, 196, 68 S. E. 875; Augusta Ry. Co. v. Glover, 92 Ga. 132–148 (13), 18 S. E. 406. In the absence of any testimony other than that as to the age of the deceased, her health, and her earning capacity, any fuller instruction by the court to the jury concerning the methods to be used in determining the value of her life was not necessary, in the absence of a specific written request.

The seventh ground of the amendment to the motion for a new trial assigns error on the following charge of the court:

"When you ascertain what was the gross amount of the value of that life, you will reduce that amount to its present cash value, figured at the rate of 7 per cent. per annum. The present worth of a given sum is arrived at by

dividing it by $1 plus the legal rate of interest, 7 per cent. for the given time."

The instruction as a whole is excepted to; and, since the first part of the instruction, which directs the jury to reduce the gross amount of the value of the life of the deceased to its present cash value, is not erroneous, it is unnecessary to consider the various general grounds of objections urged thereto. Anderson v. Southern Ry. Co., 107 Ga. 501 (4c), 33 S. E. 644. However, it does not appear to us that there was any error harmful to the defendant in this charge; for, had the jury estimated the present cash value of the life of the deceased by taking "the gross amount of the value of that life" and "dividing it by $1 plus the legal rate of interest, 7 per cent. for the given time," they would have been compelled to find a verdict much less than the verdict returned (on a basis of $766 per annum), interpreting the instruction to mean that the gross amount should be divided by $1 plus 7 per cent. on $1 for the entire life expectancy of the deceased; or, in other words, that the gross value, which the jury might have found to be $30,640 (at $766 per annum for 40 years, had they fixed the expectancy at 40 years), should be divided by $1 principal, plus $2.80 interest on $1 at 7 per cent. for 40 years, or by a total of $3.80, which would have given a present cash value of only $8,063.15—more than $1,000 less than the result reached by use of the annuity table. If this instruction was misleading and harmful to any one, it certainly could not have been harmful to the defendant, since the jury reached a result greater than could have been reached had they followed the method suggested by the court.

The eighth ground of the amendment to the motion for a new trial complains that the court erred in charging the jury as follows:

"If you find that both the deceased and the defendants, the Standard Oil Company and its alleged employés, were guilty of negligence contributing to the inflicting of the injuries on the deceased, such as are claimed in the petition herein, but if you find that the deceased's negligence was not equal to or greater than that of the defendants, and that the deceased, by the exercise of ordinary care, could not have avoided the consequences of the defendant's negligence after it became apparent to the deceased, if it became apparent to her, or in the exercise of ordinary care on her part she could have discovered it, the plaintiff may nevertheless recover, but in that event the damages should be diminished by the jury in proportion to the amount of default attributable to the deceased" —the alleged error being that the charge was not a correct statement of the law, as it authorized a finding against the defendant although the negligence of the deceased may have been greater than that of the defendants; and that it was not applicable to the evidence, and there was no evidence upon which to base it, and it did not state the law as to contributory negligence, and was not a correct statement of the law of negligence applicable to the issues in this case.

There is no merit in the contention that this instruction was not applicable to the evidence. In what manner the excerpt complained of is "not a correct statement of the law," or wherein it fails to correctly state the law with reference to contributory negligence, or to state the law of negligence applicable to the issues in this case, cannot be determined from the exceptions, and the only remaining exceptions which it is necessary to consider are the exceptions which raise the point that this charge authorized the jury to find against the defendants although the negligence of the deceased may have been equal to or may have even exceeded the negligence of the defendants.

A close examination of the charge complained of will demonstrate that these exceptions are without substantial merit, since the court charged the jury that, if they should find "that the deceased's negligence *was not equal to* or *greater* than that of the defendants" [italics ours], etc., the plaintiff might nevertheless recover. This plainly amounted to an instruction that the jury might find for the plaintiff if the negligence of the deceased was less than that of the defendants. See Central Railroad & Banking Co. v. Newman, 94 Ga. 560, 21 S. E. 219; Dempsey v. City of Rome, 99 Ga. 192, 27 S. E. 668; Southern Ry. Co. v. Watson, 104 Ga. 243, 30 S. E. 818; Wrightsville & Tennille R. Co. v. Gornto, 129 Ga. 204, 58 S. E. 769.

The ninth ground of the amendment to the motion for a new trial is that the verdict for $10,000 is excessive and should be set aside because there is no evidence to support the same and it is so unreasonable as to show that it was the result of passion, prejudice, partiality, or undue bias on the part of the jury. This court would be loath to set aside any verdict upon such a ground, unless the record made it clear and unmistakable that in fact the verdict was unfair and excessive, or was plainly produced by prejudice, passion, or undue bias on the part of the jury. A careful inspection of the record in this case does not bring us to this conclusion. There was in our opinion ample testimony to sustain the verdict rendered; and who can say that the estimate placed by the jury upon the value of the life of the deceased was excessive, in view of the undisputed testimony showing her youth, health, and earning capacity, and taking into consideration the long stretch of years which lay before her when the tragedy (which the jury found had been brought about by the gross negligence of the defendants) cut short her days and deprived her son and husband of the value of her actual manual labor, as well as of her tender ministrations, unselfish devotion, and countless loving services. We may not go beyond the bald proof in the case and outside of common experience, or consider from the standpoint of sentiment the priceless value of a wife and mother; but, having only in

mind the evidence which tends to indicate the present cash value of that life, we cannot on this ground set aside the verdict returned.

It does not appear from the record that the mortality tables or the annuity table (70 Ga. 844 et seq.) were any of them introduced in evidence; but, as said before, it is well settled that the jury is not restricted to the use of these tables or of any of them in determining the life expectancy of any person or the cash value of a life, or bound by the results to be reached thereby, but may determine from other circumstances in proof—as for instance the age, health, etc., of the deceased—what such value and expectancy might be. The tables not being in evidence, the court, of course, could not properly instruct the jury in regard to the use thereof.

In the case of Savannah, Florida & Western Ry. v. Stewart, 71 Ga. 427, 446, Chief Justice Jackson, in specially concurring for the majority of the court, said:

"I do not think that there is any Procrustean rule in the mode of estimating the value of a life. The age of a man, the health he enjoys, the money he is making by his labor, his habits, are data from which the jury may argue how long he will probably live and work, and what his life is worth to his wife in its pecuniary value. I know of no law which requires tables of the probable length of life and its probable worth to be introduced. They may be a useful circumstance, but are not conclusive or absolutely essential."

In R. & D. R. Co. v. Allison, 86 Ga. 145, 148, 149, 12 S. E. 352, 354, 355 (11 L. R. A. 43), Justice Simmons said:

"This court has considered this question upon different occasions, and in several cases has said that there is no 'Procrustean rule,' or fixed rule, in cases of this kind."

And in the same case it was further said:

"It may be said, however, that the life tables put in evidence would show a man's expectancy of life, and that the amount he was earning at the time he was injured would be a sufficient basis upon which to prescribe such a rule; but we do not think that this would in all cases be fair either to the plaintiff or to the railroad company. If the plaintiff were a young man of character, capacity, and industry, and had chosen his occupation and commenced its pursuit, his yearly income at first might be small, but in a few years he might be able to increase it very largely; yet, under the rule contended for, he would be confined during his life to the small income he was making at the commencement. On the other hand, if the plaintiff were an aged or a middle-aged person making a large yearly income, it would be unfair to the railroad company to take that income and his expectancy of life as the sole basis to determine the amount of his recovery; because our experience shows that a man in declining years has not ordinarily the same capacity to labor and earn money as a young man. It is then that sickness, inability, and indisposition to labor come upon him more and more each year as he grows older. These and like facts should then be taken into consideration by the jury in behalf of the railroad company. None of these things can be proved with such exactness as would authorize a court to prescribe a fixed rule. As was said by the Supreme Court of the United States in Vicksburg, etc., R. Co. v. Putnam, 118 U. S. 554, 7 Sup. Ct. 2, 30 L. Ed. 257: 'It has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the conscience of the jury.'"

In Augusta, etc., Ry. Co. v. Glover, supra, the Supreme Court said that a charge which in effect limited the jury to the consideration of the life and annuity tables was subject to misconstruction, for "neither here nor elsewhere was the charge quite full enough as to the right of the jury to avail themselves of facts in the evidence irrespective of the mortality tables."

In Boswell v. Barnhart, supra, it was said that:

"There was evidence that the deceased was 38 or 40 years old at the time of his death, and that when he was sent to the chain gang he weighed 195 pounds, was able-bodied, and, according to the testimony of several witnesses, was worth about $100 a year as a laborer. This evidence furnishes a sufficient basis for an estimate as to the probable value of the life of the deceased."

We may test the verdict returned in several ways: The annuity table on page 847 of 70 Ga. fixes the sum of 12.037 as the sum to be multiplied by the annual earning capacity of a person 24 years old, in order to ascertain the present cash value of such a life; and this, multiplied in the instant case by $766, as the proved earning capacity of the deceased per annum, would produce a result less than $10,000, or only $9,220.34, which is considerably less than the amount of the verdict returned. On the other hand, while the Carlisle mortality tables give the life expectancy of a person 24 years of age as 38.59 only, the jury may have concluded that the expectancy of Mrs. Reagan exceeded this number of years, and, under the facts in evidence, might amount to 40 years, as alledged in the plaintiff's petition, since the results given and the methods suggested in the mortality and annuity tables are not binding and conclusive, even where the tables are in evidence.

It is true it appears from the seventh ground of the amendment to the motion for a new trial that the judge instructed the jury as to the use of one method suggested by him for arriving at the cash value of the life of the deceased, and, had the jury strictly followed the instructions given them, they could not, under the evidence (unless they had estimated the life expectancy of the deceased beyond the 40 years alleged, or had estimated her earning capacity above $766 per annum), have found a verdict for as much as $10,000; for, allowing that the expectancy would be 40 years, the gross value of the life of the deceased at $766 per annum would be $30,640, and this sum, divided by $1 plus the interest on the sum of $1 for 40 years at 7 per cent., or by 3.80, would make the cash value of the life of the deceased only $8,063.15. However, it must be borne in mind that the jury were seeking to determine the cash value of earnings amounting to $766 per annum for a period of about 40 years, or,

to put it differently, the present cash value of an annuity of $766, payable during a fixed period of about 40 years, and that the present cash value of a lump sum due and payable at the expiration of 40 years from a given date would be quite different and much less than the actual present cash value of the same sum payable in yearly installments, during a like period of 40 years. To illustrate the difference we have in mind, the present cash value of an annuity of $1 for a term of 40 years at 5 per cent., properly compounding the interest, would, according to a table in Merriman's "American Civil Engineers' Pocket Book" (John Wiley & Sons, New York, 1911), p. 1144, be $17.159; whereas, the present value of a lump sum of $40 (the aggregate sum of $1 per annum for 40 years) would, according to the method suggested by the court, at 5 per cent. simple interest, amount to $13.333 only.

Again, suppose, by way of further illustration only, the jury found the expectancy of the deceased to be 40 years, and concluded that her annual prospective earnings would average considerably less than the highest cash value proved at the time of her death, and, while adopting the suggestion of the court that the present value of her life be ascertained by dividing the sum total of such prospective earnings for 40 years by $1 plus the interest thereon at 7 per cent. (not compounded), they may have further decided to compute such interest for the average time of 20 years only, instead of for the entire period of 40 years, for the reason that such earnings might be considered as an annuity, and they might thus have easily found more than $10,000, and this method, though evidently not mathematically accurate, may nevertheless have produced a correct result, under some views they may have entertained of the evidence, and allowing for proper adjustments and reductions, and all necessary modifications. It is unnecessary, however, for us to surmise how the jury reached its verdict, if the verdict found was, under any view, reasonably authorized by the evidence. It is true the trial judge instructed the jury how to arrive at the present cash value of the life of the deceased, and (as we have said above) the use of this method may have produced an amount less than the amount of the verdict; but the jury were not confined to the particular method of calculation suggested by the court, or in fact to any particular method of calculation, and were authorized to adopt any method which might produce a correct and legal result, and a result in excess of that which could be reached through the method suggested by the court. So, entirely regardless of whether the instruction given by the court was absolutely correct or not, or was in fact followed by the jury, and without even conjecturing how the jury reached their verdict, if that verdict can be upheld under any view of the evidence and under recognized legal rules, in the absence of error in the conduct of the trial which was harmful to the defendant, it should not be set aside because, under some view or by some particular method of calculation, we cannot arrive at the same result. As held in Spence v. State, 7 Ga. App. 825, 68 S. E. 443:

"The validity of a verdict is to be tested by the law as it is written, and not by the law as it is given in charge."

In Birmingham Fertilizer Co. v. Dozier, 13 Ga. App. 760, 79 S. E. 927, it was said:

"If the result reached by the jury would have been the correct conclusion of the case had the judge ruled or charged in accordance with the contentions of one of the parties to the case, the verdict will not be set aside merely because the judge erroneously * * * omitted to give in charge to the jury a principle which should appropriately have been included within his instructions. In other words, if the result reached would have been the same had the court ruled properly, and if the jury found rightly in spite of judicial error, the finding will not be set aside in order that the same result may be reached by a proceeding free from legal error."

See, also, Young v. State, 10 Ga. App. 116, 72 S. E. 935; Register v. State, 10 Ga. App. 633, 74 S. E. 429; Jones v. State, 12 Ga. App. 135, 76 S. E. 1070; Southern Railway Co. v. Ansley, 8 Ga. App. 325, 330, 68 S. E. 1086.

Again, if we estimate that the jury found $766 per annum to be the earning capacity of the deceased at the time of her death, then, tested by the rule laid down in the annuity table in 70 Ga. 844, the present cash value of her life at the age of 24 would have been, as already shown (766x12.037) $9,220.34, and this amount the jury might have lawfully increased by the inclusion as damages in their lump sum verdict of 7 per cent. interest thereon from the date of the death of Mrs. Reagan, July 18, 1912, to the date of the rendition of the verdict on September 17, 1913—1 year, 1 month, and 29 days. This interest would amount to $751.20, which, added to $9,220.34 principal, would give a sum total of $9,971.54, or practically $10,000—even allowing for an expectancy of less than 40 years, or of only 38.59 years, as shown by the Carlisle table. And to this might easily and properly be added an additional amount, under the rule in the case of Metropolitan R. Co. v. Johnson, 91 Ga. 466, 18 S. E. 816, or because of the average increased value of her annual services, as hereinafter discussed.

In Central R. v. Sears, 66 Ga. 499, it was held that:

"The question of increasing damages in such a case [a homicide case] was for the jury."

See, also, Western & Atlantic R. Co. v. McCauley, 68 Ga. 818; Western & Atlantic R. Co. v. Brown, 102 Ga. 13, 29 S. E. 130; Central of Georgia Ry. Co. v. Hall, 124 Ga. 322, 338, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, 4 Ann. Cas. 128.

Of course, "where the damages found are discretionary or punitive, this rule does not

apply." Central of Georgia Railway Co. v. Hall, supra. See, also, Western & Atlantic R. Co. v. Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; Ratteree v. Chapman, 79 Ga. 574, 4 S. E. 684.

Still again, we may conclude that, even if the jury found that the annual earning capacity of the deceased was less than $766 at the time of her death, they may have considered that her services would grow more and more valuable for many years to come, as she became more intelligent and experienced with the lapse of time (and possibly in ministering to a larger family), and that the average value of the services she would be able to render her husband and child during her entire expectancy of about 40 years (after making all proper allowances for diminutions in earning capacity to be anticipated in her later years) would possibly exceed $766 per annum, and might amount to as much as $800 or $900 per annum, or some greater sum, and that the jury could therefore have legitimately found a larger verdict (including interest) than one based on an earning capacity of only $766 per annum.

Lastly, under the rule laid down in Metropolitan R. Co. v. Johnson, 91 Ga. 466, 18 S. E. 817, the jury, in estimating the value of the ordinary domestic services rendered by a wife, were authorized to take into consideration what the value of many services hardly capable of exact proof might be, measured in the light of their own observation and experience, notwithstanding such elements of loss as manual labor would be subject to estimation by witnesses.

"When the loss of a wife's services, resulting from a personal injury to her, is to be compensated for, she is not to be treated as an ordinary servant or as a mere hireling. Cooley on Torts, *226; Pennsylvania R. Co. v. Goodman, 62 Pa. 329. She sustains to her husband and his household a relation special and peculiar. Her place cannot be supplied; no other is capable of filling it. Some wives perform manual labor; others do not. Yet the husbands of the latter, no less than those of the former, would certainly be entitled to compensation from wrongdoers for causing inability to perform service. The actual facts and circumstances of each case should guide the jury in estimating for themselves, in the light of their own observation and experience and to the satisfaction of their own consciences, the amount which would fairly and justly compensate the plaintiff for his loss. Certainly some elements of loss, such as manual labor, would be subject to estimation by witnesses; and, if evidence of this kind were produced, of course the jury should consider it together with the other facts. But what we hold distinctly is that there need be no direct or express evidence of the value of the wife's services, either by the day, week, month, or any other period of time, or of any aggregate sum. The court committed no error in denying a new trial."

This ruling as to domestic services is cited with approval in Georgia R. Co. v. Tice, 124 Ga. 459, 469, 52 S. E. 916, 4 Ann. Cas. 200. An application of the above principle might alone be sufficient to account for a considerable discrepancy, if under any view such a discrepancy in fact appeared to exist between the cash value of the life of the deceased, as estimated by any method from the direct testimony touching the services she rendered and the value thereof, and the amount of the verdict actually returned by the jury.

From a careful review of the entire record, it appears that there were no errors committed by the trial court which were calculated to prejudice the rights of the defendants; and, since there was evidence upon which the jury could legitimately base the verdict returned, the judgment in overruling the motion for a new trial is affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 632)

## WILSON v. STATE. (No. 6040.)

(Court of Appeals of Georgia. Jan. 20, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸942 — NEW TRIAL — GROUNDS — FALSE TESTIMONY.

An affidavit from one of the state's witnesses, declaring that her testimony given upon the trial was false, is not cause for a new trial. Clark v. State, 117 Ga. 254 (8), 43 S. E. 853, reaffirmed on review in Jordan v. State, 124 Ga. 417, 52 S. E. 768.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2316, 2331, 2332; Dec. Dig. ⟸942.]

2. CRIMINAL LAW ⟸938 — NEW TRIAL — GROUNDS — NEWLY DISCOVERED EVIDENCE — DISCRETION.

The affidavits submitted in support of that ground of the motion for a new trial which was based upon alleged newly discovered evidence being met by a countershowing which contradicted the truth of the alleged newly discovered testimony, it cannot be said that the judge abused his discretion in refusing to grant a new trial. Rivers v. State, 8 Ga. App. 703, 70 S. E. 50; Bowers v. State, 135 Ga. 310 (1), 69 S. E. 536; Washington v. State, 124 Ga. 424 (13), 52 S. E. 910; Jordan v. State, 120 Ga. 864 (5), 48 S. E. 352; Wilcher v. State, 118 Ga. 196, 44 S. E. 995.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306–2315, 2317; Dec. Dig. ⟸938.]

3. CRIMINAL LAW ⟸938 — NEW TRIAL — GROUNDS — NEWLY DISCOVERED EVIDENCE.

Newly discovered evidence, which is cumulative and impeaching in character, is not a good ground for a new trial. Clark v. State, 5 Ga. App. 605 (5), 63 S. E. 606; Moody v. State, 1 Ga. App. 772 (9), 58 S. E. 262; Bowers v. State, 135 Ga. 310 (1), 69 S. E. 536.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306–2315, 2317; Dec. Dig. ⟸938.]

4. CRIMINAL LAW ⟸918 — NEW TRIAL — GROUNDS — DISCRETION.

The affidavits submitted to show that the bailiffs in charge of the jury had not been legally sworn in as officers were met by a strong countershowing which contradicted the truth of these affidavits, and the judge did not abuse his discretion in refusing a new trial on this ground.

Tolbirt v. State, 124 Ga. 767 (1), 53 S. E. 327, and cases cited above, in paragraph 2.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2163–2192, 2195, 2196, 2219–2224; Dec. Dig. ⟸918.]

5. CRIMINAL LAW ⟸761 — INSTRUCTION — ASSUMPTION OF FACTS.

There was no error in the instructions complained of. The excerpts objected to, standing alone, would be subject to criticism; but considered in connection with the entire charge (which was an exceptionally full, fair, and correct presentation of the law and of the contentions of both parties), and the undisputed evidence in the case, they were not erroneous. The facts assumed by the court in these excerpts had been established by uncontradicted testimony, and the jury, under the law and the evidence, could not have found otherwise on these undisputed points. Shields v. Georgia Ry. & Electric Co., 1 Ga. App. 172, 57 S. E. 980; Fitzgerald Oil Co. v. Farmers Supply Co., 3 Ga. App. 217, 59 S. E. 713; Deen v. Wheeler, 7 Ga. App. 509, 516, 517, 67 S. E. 212; Dexter Banking Co. v. McCook, 7 Ga. App. 436, 67 S. E. 113.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754–1764, 1771, 1853; Dec. Dig. ⟸761.]

6. CRIMINAL LAW ⟸1156—APPEAL—DISCRETIONARY RULING—NEW TRIAL.

Where there is any evidence to support the verdict, and there is no harmful error of law, the discretion of the trial judge in overruling the motion for a new trial will not be controlled. Plummer v. State, 1 Ga. App. 507, 57 S. E. 969; Moody v. State, 1 Ga. App. 772 (10), 58 S. E. 262; Widener v. State, 9 Ga. App. 302, 70 S. E. 1119; Brown v. Hawkins, 13 Ga. App. 309, 79 S. E. 76.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067–3071; Dec. Dig. ⟸1156.]

7. CRIMINAL LAW ⟸1178—APPEAL—ASSIGNMENTS OF ERROR—ABANDONMENT.

The other assignments of error, not being argued in the brief of plaintiff in error, are deemed to have been abandoned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3190, 3191; Dec. Dig. ⟸1178.]

8. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the verdict, there was no error of law, and the judge did not abuse his discretion in refusing to grant a new trial.

Error from Superior Court, Coffee County; J. W. Quincey, Judge.

Frank Wilson was convicted of crime, and brings error. Affirmed.

C. A. Ward, Levi O'Steen, and T. A. Wallace, all of Douglas, for plaintiff in error. M. D. Dickerson, Sol. Gen., of Douglas, for the State.

BROYLES, J. Judgment affirmed.

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(15 Ga. App. 623)

## BRAGG v. STATE. (No. 5939.)

(Court of Appeals of Georgia. Jan. 20, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸655, 1030—IRREGULARITY—WAIVER—CONDUCT OF COURT.

Where an irregularity or impropriety in the progress of a trial is known to counsel, it will be treated as having been waived, unless prompt and appropriate objection is made.

(a) "To ask counsel publicly, in the presence of a jury trying a case, whether the jury should be allowed to disperse, is error." But where the judge called counsel to the bench before the attorneys for either party had made any answer to such an inquiry, and consequently the jury could not have known upon whose objection they would have been prevented from dispersing had either party objected, and under these circumstances counsel for the defendant and the solicitor general agreed that the jury might disperse, a motion for mistrial, upon the reassembling of the court after a recess, came too late, and it was not error then to refuse to declare a mistrial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520–1523, 1527, 1535, 2619–2621, 2632, 2653; Dec. Dig. ⟸655, 1030.]

2. CRIMINAL LAW ⟸814—INTOXICATING LIQUORS ⟸239—PROSECUTION—INSTRUCTIONS—EVIDENCE.

The evidence authorized an instruction upon the law prohibiting the keeping of intoxicants at a place of business, and the instruction given was not prejudicial to the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. ⟸814; Intoxicating Liquors, Cent. Dig. §§ 331–347; Dec. Dig. ⟸239.]

3. CRIMINAL LAW ⟸828 — INSTRUCTION — STATEMENT OF ACCUSED.

The jury were properly instructed on the law as to the scope and effect of the defendant's statement to the court and jury, and the court was not required, in the absence of an appropriate and timely written request, to give any other or further instruction on the subject.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. ⟸828.]

4. CRIMINAL LAW ⟸668, 777½—STATEMENT OF DEFENDANT — "EVIDENCE" — INSTRUCTIONS.

The statement of a defendant on the trial of a criminal case is not "evidence," and the trial judge is not required, while giving instructions as to the law applicable to the consideration of the evidence, to reiterate reference to the defendant's statement, and to incorporate such reference in each and every instruction relating to the evidence and the law applicable thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1584–1590, 1807; Dec. Dig. ⟸668, 777½.]

For other definitions, see Words and Phrases, First and Second Series, Evidence.]

5. CRIMINAL LAW ⟸782 — INSTRUCTIONS — STATEMENT OF DEFENDANT.

While the jury have the right to consider the defendant's statement apart from the evidence, and may base their verdict upon the defendant's statement alone, even though it be unsupported, still, when the jury had been fully and correctly instructed to this effect, it was not error to charge that, "as to the question of his being guilty upon either one of the theories about which I have charged you, you look to all the evidence and all the circumstances in the case, all the evidence for and against, and in this connection you have the right to consider the prisoner's statement." This was not subject to exception on the ground that it deprived the jury of the right to consider the statement apart from the evidence or on the ground that

it tended to depreciate the statement of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880–1882, 1906, 1907, 1909–1911, 1960, 1966, 1967; Dec. Dig. ⟸782.]

6. CRIMINAL LAW ⟸828 — INSTRUCTIONS — REASONABLE DOUBT.

In the absence of an appropriate and timely written request for additional instructions, the charge of the court upon the subject of reasonable doubt was not for any reason assigned, erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. ⟸828.]

7. CRIMINAL LAW ⟸432 — DOCUMENTARY EVIDENCE—ADMISSIBILITY.

Bills of lading, supplemented by warehouse receipts, in which one accused of selling intoxicating liquors, or of keeping such liquors on hand at his place of business, has acknowledged the delivery to himself of such intoxicating liquors, may supply a circumstance of such relevancy as to render these papers admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1021; Dec. Dig. ⟸432.]

8. INTOXICATING LIQUORS ⟸224—PROSECUTION—PRINCIPAL AND AGENT — BURDEN OF PROOF.

The fact that one who was behind the counter of a "near beer" saloon sold whisky without hindrance or protest on the part of the proprietor or any of his agents may authorize the inference that the seller is an agent of the proprietor of the saloon, and it is certainly sufficient to place the burden upon the saloon keeper to show that this seller was not in fact his agent.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 275–281; Dec. Dig. ⟸224.]

9. INTOXICATING LIQUORS ⟸286—PROSECUTION—SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and there was no error in refusing a new trial.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300–322; Dec. Dig. ⟸236.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

E. F. Bragg was convicted of violating the prohibition law, and brings error. Affirmed.

W. A. McClellan and W. D. McNeil, both of Macon, for plaintiff in error. Jno. P. Ross, Sol. Gen., of Macon, for the State.

RUSSELL, C. J. The plaintiff in error was convicted of a violation of the prohibition law, and excepts to the judgment overruling his motion for new trial. In addition to the usual general grounds, the motion is based upon a large number of special assignments of error. The last two grounds relate to the court's making inquiry in the hearing of the jury as to whether counsel objected to the jury's dispersing and to the action of the court in subsequently thereafter refusing to declare a mistrial. If the court should have declared a mistrial, naturally all the other proceedings of the trial were nugatory; and for this reason we shall consider the assignments of error in reverse order.

[1] 1. As appears from the certificate of the trial judge, before the inquiry which he addressed to counsel in the presence of the jury had been answered by either of them, and therefore before the jury could have been prejudiced by any objection made by either side, the court called counsel privately to the bench, and counsel for the defendant there agreed with the solicitor general that the jury might disperse. A recess was then taken and, upon the reassembling of the court (and after the jury had been retired), counsel for the defendant moved that a mistrial be declared. We are of the opinion that the court's refusal then to declare a mistrial was not such error as requires the grant of a new trial. The defendant could not have been prejudiced, as is insisted, even if counsel had objected to the jury's dispersing; for nothing was said by either counsel, except in private consultation with the judge on the bench, and, so far as appears, not in the hearing of the jury, and the jury could not have known which of the parties objected. The statement of counsel for the plaintiff in error that it is well known that state's counsel rarely, if ever, objects to the separation of the jury during a recess, so far from being a matter of common knowledge, does not conform with our observation or experience; and so we cannot hold that the defendant was compelled to consent to the separation of the jury through fear that he primarily would be suspected of having been the party who objected in the private conference with the judge, and would thereby expose himself to the odium of having reflected upon the integrity of the jury. There is a manifest reason why the state's counsel would generally be less disposed than counsel for the accused to agree to a separation of the jury. Any attempt to influence in any way a juror in behalf of the state might by its disclosure result in a new trial if the defendant were convicted, whereas the disclosure of a successful attempt to influence a juror in behalf of the defendant would be fruitless after a verdict of acquittal. Naturally therefore the incentive for improper communication with jurors on the part of the accused or his friends is greater than on the part of the prosecution. However, aside from the fact that to make trifling and immaterial irregularities a pretext for setting aside verdicts would defeat the ends of justice, we need not rule that seemingly the circumstance of the judge's inquiry was not prejudicial in the present case, for it is clear to our minds that the defendant, by consenting to the dispersal of the jury instead of promptly moving at that time for a mistrial, waived any objections he might have had to the irregularity. See Heavner v. Saeger, 79 Ga. 472, 4 S. E. 767, and Desverges v. Goette, 121 Ga. 65, 48 S. E. 693. It has been more than once held that it is error for a judge to inquire in the hearing of the jury whether counsel

have any objections to the dispersal of the jury, but it has also been held that under certain circumstances this judicial impropriety may not be of sufficient materiality to require the grant of a new trial. In Lyman v. State, 69 Ga. 404 (8), it was held that:

"To ask counsel publicly in the presence of the jury trying a cause whether the jury should be allowed to disperse is error."

But the Supreme Court declined to grant a new trial on account of the judge's inquiry, because the jurors who heard it had not been impaneled.

The assignment of error upon the overruling of the motion for mistrial in this case does not appear meritorious to us, because the impropriety or misconduct was not promptly brought to the attention of the court and the proper remedy was not invoked as soon as the irregularity was known. The point involved is similar in principle to that dealt with in the recent case of Roberson v. State; for, although the latter case dealt only with the misconduct of jurors, the doctrine of waiver is alike applicable to any irregularity in the trial of a case of which a party is apprised and which he may deem prejudicial. There is a time for all things, and a party cannot blow both hot and cold.

[2] 2. In the fourteenth ground of the motion for a new trial it is insisted that the court erred in charging the jury as follows:

"But even if he did not sell any, and the evidence does not authorize you to find he did sell any, of these liquors, why then, if he is guilty of the offense of keeping at his place of business any of these liquors prohibited by law, why then he is guilty, and you would be authorized to find him guilty."

It is insisted that this instruction was erroneous, upon the ground that there was no proof that the defendant ever kept alcoholic liquors at his place of business, and there was no evidence authorizing a charge upon that subject. The judge did not confine his instructions to "alcoholic liquors," but designated the fluids referred to as "any of these liquors prohibited by law." There was evidence that the defendant had, within the statutory period, kept on hand lager beer, as well as numerous beers whose trade-names are not the subject of judicial cognizance and which may not be known to be intoxicating. In the practical operation of the prohibition law, beer, or so called "near beer," assumes many thinly veiled disguises in the attempt to evade the law. The trial court could not judicially know that "Schlitz Beer," "Cook's Beer" or "Red Eagle Beer" (the bottles or labels of which the jury did not see) was intoxicating, but the witness Leland Williams swore that he found lager beer in the defendant's place of business in November, 1913; and though this witness testified that he did not know whether lager beer, if drunk to excess, would intoxicate, the courts do know that it will have that effect. Cripe v. State, 4 Ga. App. 832, 62 S. E. 567; Dent v. State, 14 Ga. App. 269, 80 S. E. 548. The trial court therefore had the right, merely upon proof of the presence of lager beer in the defendant's place of business, to give the jury the instructions to which complaint is directed. Not only did this testimony authorize the instruction, but (under the act of 1911, Ga. Laws of 1911, p. 180) the possession of a revenue license or tax receipt, which was submitted to the jury without objection, made such prima facie evidence of guilt as was sufficient to charge the burden of proof on the defendant to show not only that he did not sell, but that he did not keep, intoxicating liquors on hand at his place of business.

[3, 4] 3, 4. In several assignments of error the point is raised that the court erred in confining the jury, in their deliberations on the question of guilt or innocence of the defendant, to a consideration of the evidence only, and shut off entirely from consideration the defendant's statement to the court and jury, in arriving at a conclusion in the case. A review of the various excerpts to which exceptions are taken, in connection with the charge of the court as a whole, shows that these exceptions are without merit. It is true that the court told the jury that they were to determine the guilt or innocence of the accused by a consideration of the evidence, and did not couple the defendant's statement with this reference to the evidence; and also told them that it was for them to say whether, under the law as given in charge and "the evidence in the case," they were satisfied to a reasonable and moral certainty and beyond a reasonable doubt of the defendant's guilt—again omitting mention of the defendant's statement. The court charged, also:

"Now, you take all the evidence in this case, for the purpose of finding out and coming to a conclusion as to whether or not this defendant is guilty either of selling or keeping at his place of business."

This instruction is attacked on the ground that the court failed to reiterate that the jury might consider the defendant's statement, as well as on the ground, already discussed, that there was no evidence whatever showing that the defendant ever kept intoxicating liquors at his place of business. The statement of a defendant in a criminal case is not evidence, and the court is not required to charge the jury upon any theory arising solely out of the defendant's statement, in the absence of a timely and appropriate written request. The jurors are sworn to try the case according to the evidence, and no reference to the defendant's statement is included in a juror's oath. The instructions of the court in the present case, as to the jury's consideration of the evidence, and as to a reasonable doubt arising either from insufficiency of evidence or from the nature of the evidence itself, were full and correct, and the jury were told that, in connection with the evidence, they had the right to consider

the prisoner's statement, and that, if they saw fit to give it preference over the sworn evidence, they might do so. If it was desired to have the attention of the jury more specifically directed to the defendant's statement, appropriate instructions should have been requested. See Early v. State, 14 Ga. App. 467 (2), 469, 81 S. E. 385, and cases there cited; Hart v. State, 14 Ga. App. 714, 82 S. E. 164.

[5] 5. While complaining on the one hand that the judge, in referring to the evidence, did not reiterate the reference to the defendant's statement, the defendant nevertheless complains per contra that, after having charged, "as to the question of his being guilty upon either one of the theories about which I have charged you, you look to all the evidence and all the circumstances in the case, all the evidence for and against," the judge erred in adding, "and in this connection you have the right to consider the defendant's statement." Immediately following this instruction, which was apparently intended merely as a prelude to what followed, the court gave in charge to the jury, in effect, the provisions of section 1036 of the Penal Code of 1910. The instruction complained of was not error either for the reason that it deprived the jury of the right to consider the statement apart from the evidence, or that it tended to depreciate the statement of the accused, as is insisted. Manifestly it is the duty of the jury to consider the evidence, and the statement must be considered in comparison with the evidence. The statement may so contradict the evidence that if the jury (as is their right) give preference to the statement, the testimony will be obliterated; but, unless the jury decide that they will disregard the testimony, both testimony and the statement must be considered; and in this sense, no doubt, the court used the words "in this connection." It is true that the jury has the right to consider the defendant's statement apart from the evidence in the case, and may base their verdict upon the defendant's statement alone, even though it be unsupported by any evidence; but this cannot be done until they have considered the evidence along with or in connection with the statement, and have determined to give preference to the statement and to disregard the testimony as incredible and unreliable.

[6] 6. In the absence of an appropriate and timely written request for additional instructions, the charge of the court upon the subject of reasonable doubt was not erroneous for any of the reasons assigned. Upon this subject the court charged:

"Now a reasonable doubt is not a mere conjecture, not a mere fancy, but it is a doubt that grows out of the consideration of the evidence in the case."

It is insisted that the latter sentence of this charge instructed the jury that a reasonable doubt could only arise from a consideration of the evidence, whereas under the law a reasonable doubt may arise from the evidence, of from the evidence and the defendant's statement, or from the lack of evidence, or from the defendant's statement; and further it is contended that this instruction was error because it limited the origin of a reasonable doubt to the evidence, whereas such a doubt may arise from the defendant's statement disassociated from the evidence. The instruction of which complaint is made was immediately followed by the following instruction, of which it was a part:

"It is your duty to take all the evidence in the case and consider it with care, without prejudice or bias for or against the defendant, and, after you have done that, say whether or not there is in your minds a doubt, a reasonable doubt growing out of a reasonable consideration of the evidence in the case, either on account of the want of evidence or the insufficiency of evidence, or on account of the nature of the evidence itself."

From this it appears that the contention of the plaintiff in error merely resolves itself into a complaint that the court, in instructing as to a reasonable doubt, did not specifically refer to the defendant's statement. We have heretofore ruled upon this point; but, since the judge told the jury that a reasonable doubt might be raised either by the insufficiency of the evidence or on account of the nature of the evidence itself, it is manifest that, in any case in which the jury might give the preference to the defendant's statement, the evidence would in their opinion, be insufficient or of such a nature as to be incredible. Upon this subject, see Early v. State, supra, and citations; Hart v. State, supra.

[7] 7. Error is assigned upon the admission of a number of bills of lading in which the defendant was the consignee, and of a number of warehouse receipts purporting to have been signed by the defendant. It is insisted that the bills of lading were irrelevant, and that there was no proof that they were correct, and that they are declarations of third persons not under oath, mere hearsay, and not binding on the defendant; and the warehouse receipts were objected to upon the same ground. It appears from the record that the bills of lading were presented by the defendant, and upon their presentation he was given an order on the Southern Railway warehouse in Macon for what purported to be whisky, and the several shipments were delivered in his presence, and the receipts for the shipments were signed by him. The bills of lading recited that they were for shipments of whisky, and the warehouse receipts recited that the packages receipted for contained whisky. The defendant, by indorsing the bills of lading and signing receipts for the packages, admitted that the packages contained whisky. This court has more than once held that receipt of shipments of unusual quantities of liquor is a circumstance

of more or less probative value for the consideration of the jury, and we find no error in the admission of the papers to which objection is made.

[8, 9] 8. Counsel for the plaintiff in error insist that the evidence is not sufficient to authorize the conviction of the accused of selling intoxicating liquors, and that the state affirmatively proved that the party making the sale was not the agent nor in the employ of the defendant, for the reason that a witness introduced by the state swore that he was the only clerk employed by the defendant, and that he did not make the alleged sale. It is argued that the inevitable conclusion is that the man who sold the whisky was an outsider who happened to be in the store of the accused at the time, and made the sale there for himself or for some undisclosed principal occupying some nearby building. The jury were not bound to credit all or any of the testimony of the witness referred to, and the state was not so bound as to be unable to dispute testimony of this witness in conflict with the testimony of any other witness. Amorous v. State, 1 Ga. App. 313, 57 S. E. 999. The testimony of one of the state's witnesses was to the effect that the man who sold him the bottle of whisky delivered it and accepted the money, in return, from behind the counter of the defendant's place of business. The transaction was in broad daylight and in a store situated on a public street of a populous city. From the fact that the sale was made without hindrance, molestation, or protest on the part of Bailey, the defendant's clerk and his agent (if, as he says, he was the only clerk), we are of the opinion that the jury were authorized to infer that the seller was an agent for whose sale the defendant was liable as accessory, and since in misdemeanors there are no accessories, but all are principals, the sale by this temporary occupant of the counter can be treated as the act of the principal. The circumstances were certainly sufficient to raise such a presumption that the actual seller was an agent of the defendant as to shift the burden and call for explanation at his hands and proof of the fact that the party making the sale was not his agent. But even if the seller was not an agent of the principal, the evidence amply warranted the conviction, because there was sufficient evidence (for reasons already stated) to have supported the conclusion that the defendant was guilty of keeping intoxicating liquors at his place of business; and, since both offenses are charged in a single count, evidence sufficient to carry conviction of the guilt of the accused either of selling or of keeping on hand at his place of business would support the conviction and a general verdict of guilty. Tooke v. State, 4 Ga. App. 495, 61 S. E. 917; Hall v. State, 8 Ga. App. 747, 70 S. E. 211. Of course, the case would be quite different if the selling had been charged in one count, and the keeping on hand in a separate and distinct count. In that event the general verdict of guilty could not be supported unless the evidence was sufficient to authorize conviction of both, and not merely of one of these two congruous offenses.

Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 645)

## RICKS v. STATE. (No. 6170.)

(Court of Appeals of Georgia. Jan. 20, 1915.)

*(Syllabus by the Court.)*

1. FALSE PRETENSES ⟸7, 49—COMMON CHEAT AND SWINDLER—SUFFICIENCY OF EVIDENCE.

One who knowingly misrepresents a defective horse as being sound, and thereby cheats and defrauds a person swapping for the animal, is, under section 719 of Penal Code 1910, guilty of being a common cheat and swindler; but, where the evidence shows that these defects were not only patent, and discoverable by ordinary diligence, but were actually discovered by the prosecutor before the trade was concluded, a conviction was unauthorized.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5–12, 25, 62; Dec. Dig. ⟸7, 49.]

2. FALSE PRETENSES ⟸49—CHEATING AND SWINDLING — KNOWLEDGE OF DEFECTS — PROOF REQUIRED.

Where one is accused of being a common cheat and swindler, the jury may be authorized to find from circumstances that the defendant had knowledge that defects in a horse traded by him, and which he represented to be sound, existed at the time the representations were made; nevertheless the defendant's knowledge of such defects must be proved in some way before a conviction will be authorized. Mere suspicion will not suffice.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. ⟸49.]

Error from City Court of Tifton; R. Eve, Judge.

R. E. Ricks was convicted of cheating and swindling in violation of Pen. Code 1910, § 719, and brings error. Reversed.

J. J. Forehand, of Sylvester, for plaintiff in error. Jas. H. Price, Sol. of Tifton, for the State.

WADE, J. During the fall of 1913 the accused went to the home of J. A. Goodwin, near Ty Ty, Ga., and carried with him a one-eyed bay mare, which he proposed to trade for an old horse belonging to Goodwin. Goodwin testified on the trial that he "looked at the mare. She was blind in one eye, but Robert [R. E. Ricks, the defendant] said that the other eye was perfectly good. I examined what he called the good eye, and saw that something was wrong with it, or I thought there was a defect in it, and called Robert's attention to it, and he said it was perfectly good, and must be good when he said so. He further said that she was a good mare, and that he just wanted to show me what a good trade he could give me.

So, upon his recommendation and guarantee of the eye, I traded with him and promised him $50 to boot." After Goodwin had traded on Saturday afternoon, his boy took the mare off and stayed away until Monday morning. Before the boy brought the mare back, Ricks came to Goodwin's house very early Monday morning and bought some cattle from him in adjustment of the boot due on the horse trade. About 9 o'clock on that morning, and after Ricks had gone, Goodwin's son returned home with the mare, and Goodwin found that both of the animal's eyes were badly inflamed, and that the eye which Ricks "claimed was a good eye was entirely gone—she could not see out of it at all—and that she was totally blind." It appeared further that the mare's eye remained in this condition for two weeks before there was any change, and that Goodwin went to see the defendant on Friday following the day the trade was made, and told him the mare was blind, and asked him to "make his word good," and told him he wanted his "cattle" back; that the defendant said that he did not know whether he could get the cattle or not, but told Goodwin to wait there and he would see about it, but, instead, he took the train and went to Tifton. After two weeks the mare's eyes improved, and occasionally since that time she goes blind and remains so for several days, and then gets better—"the blind spells in the mare's eyes get further and further apart." Goodwin testified that Ricks told him on Monday morning, after Ricks "had gotten the cattle and started off," and in response to an inquiry as to where he obtained the mare he traded to Goodwin, that he got her from gipsies; but when the trade was made, on Saturday before, he said that he got the mare from "some fellow down below Ty Ty, Ga." Another witness for the state said that he was at Ty Ty, Ga., during the latter part of the year 1913, or the first part of the year 1914, and had a talk with the defendant, in which the defendant stated that he had been doing some good horse swapping lately, and had traded some with the gipsies who had been around Ty Ty, and had done some good trading with the stock he got from them; that he got an animal that was nearly blind and patched up her eyes and traded her off and made a good trade. The witness could not say whether the horse traded to Goodwin was the horse Ricks was talking to him about or not, but Ricks made the statement about the time of the trade between him and Goodwin. This was all the evidence for the state. The defendant, in his statement to the jury, said that at the time he traded the mare to Goodwin he had only had the mare two or three days, and that he told Goodwin of this fact; that her eye looked all right to him, and that Goodwin had the mare from Saturday night through Sunday, and up to the time on Monday, when he paid the boot, which was about as long as the defendant had owned her before the trade; that this was not the mare the defendant got from the gipsies, which he told Mr. Hitchcock about, and he did not know that the mare's eye was nearly out, and, in fact, it was not out yet. Since the motion for a new trial is based upon the usual general grounds alone, it is only necessary to determine whether the evidence was sufficient to authorize the verdict.

[1, 2] In the case of Rainey v. State, 94 Ga. 599, 19 S. E. 892, which involved a similar prosecution growing out of a horse trade, it appeared that the party who traded with the defendant thought he discovered something wrong in one of the mare's legs, and so told the defendant, who replied, "No; there is nothing the matter with her; it is the way she is standing;" and the defendant further said that the mare was "all right," but she turned out afterwards to be weak-eyed and had a big leg. The witness further said that he did not know that the defendant knew at the time that anything was wrong with the mare. A majority of the Supreme Court held that, as the evidence showed that the defects in the mare traded by the accused to the prosecutor were patent, and were actually discovered by the latter before the trade was concluded, a conviction was not authorized.

In Tatum v. State, 58 Ga. 409, the court said that:

"Knowingly to misrepresent a blind horse as sound (the horse's eyes being apparently good), and thereby to cheat and defraud a person swapping for the animal, is to commit the offense of being a common cheat and swindler, under section of the Code 4595." Penal Code 1910, § 719.

From the opinion in that case it appears that the evidence showed that the eyes of the mare traded "were perfect in appearance, and not to be distinguished by inspection from sound eyes," so that there was nothing even to put the defendant on inquiry as to the condition of the mare's eyes, much less any defect so apparent so as to be properly called a patent defect.

In the Rainey Case, supra, the prosecutor testified:

"I thought I discovered something wrong with one of the mare's legs, and so told the defendant."

In the case under consideration it will be observed that the prosecutor said:

"I examined what he [the defendant] called the good eye, and saw that something was wrong with it, or I thought there was a defect in it, and called Robert's attention to it, and he said it was perfectly good, and it must be good when he said so."

This evidence apparently puts this case directly under the ruling made in the Rainey Case, supra, since it appears that the defects in the one-eyed bay mare traded by Ricks to Goodwin were patent, and were actually dis-

covered by Goodwin before the trade was concluded; and hence the conviction of the accused of the offense of being a common cheat and swindler was not warranted, although he represented that the mare was perfectly sound, and especially made representations as to the defects observed by the prosecutor. The difference, therefore, between the Tatum Case, supra, and the case under consideration (as well as the Rainey Case, supra), is obvious, since both in the Rainey Case and in this case the defects were noticeable and discovered before the trade was consummated; whereas in the Tatum Case the defect was neither apparent nor discoverable by ordinary inspection. We would feel constrained, therefore, to reverse the judgment of the trial court, under the ruling made in the Rainey Case, if that were the sole question involved.

In another particular we conclude that the evidence was insufficient to authorize the verdict of guilty, since it does not appear, either from any direct proof or from proof of circumstances, that the defendant had any knowledge, at the time he represented to Goodwin that the mare was sound, that these representations were false, and that the eye which he said was sound was, in fact, defective. It is true such knowledge may be shown by circumstances, including the opportunities which the accused had to ascertain the facts, but it must be established in some way before a conviction would be authorized. The only evidence relied upon to show that the accused knew of the defects in the mare at the time he made the trade with the prosecutor is the evidence of the prosecutor that the accused told him, on the day he traded the mare, that he procured her "from some fellow down below Ty Ty, Ga.," and that on Monday morning following the accused stated that "he got her from the gipsies," and the evidence of Hitchcock that about the day when the trade with Goodwin was made the defendant told him "that he [the defendant] had traded some with the gipsies who had been around Ty Ty, and had done some good trading with the stock which he got from them, and that he got an animal which was nearly blind, that he patched her eye up, and made a good trade." This witness, however, stated that he did not know whether the horse traded to Goodwin was the one the defendant told him about or not, nor was there any other evidence to show that this was the horse the defendant had reference to when he was talking to Hitchcock, and, in fact, the defendant in his statement expressly denied that the horse he told Hitchcock about was the same one traded to Goodwin, or was one he got "from the gipsies." There is no other evidence tending to show even remotely that the defendant had any knowledge that his representations in regard to the horse's eye were untrue at the time he made them to Goodwin, nor were the jury authorized to infer from any other facts proved that he had such knowledge, since it appears from his statement that he had only had the horse two or three days, and there is no evidence to contradict this assertion, and, while we may suspect that the defendant had more knowledge as to the defect in the eye of the animal traded to Goodwin than he admitted, still something more than a mere suspicion is necessary to sustain a conviction. In Watermon v. State, 114 Ga. 262–264, 40 S. E. 262, 263, the Supreme Court said:

"Since the deceitful means necessary to sustain a conviction in a case of this character involve knowledge of the falsity of the representation by the seller, no action or proceeding can be maintained without proof of the scienter; deceit is the foundation of the action, which cannot exist without knowledge of the falsity of the representation upon which the other party acted. Mr. Wharton is amply supported by authority when, in his Criminal Law, in discussing this subject, he says (volume 2, § 1185): 'The statement must not only be false in fact, but false to the knowledge of its utterer.' The knowledge that the representations were false must be proved to exist before the offense charged is made out."

Judgment reversed.

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(15 Ga. App. 642)

JONES v. STATE. (No. 6161.)

(Court of Appeals of Georgia. Jan. 20, 1915.)

*(Syllabus by the Court.)*

MASTER AND SERVANT ⟸67—LABOR CONTRACT ACT — PROSECUTION — BURDEN OF PROOF.

In a prosecution for a violation of the labor contract act (Pen. Code 1910, § 715), the burden rests upon the state to show that there was no sufficient reason for the breach of the contract on the part of the defendant, or, in default thereof, that there was no good and sufficient reason why the money advanced on the strength of the contract was not returned. "Without this proof the state's case is incomplete, because the prosecution has not created the evidentiary presumption necessary to rebut the presumption of innocence. Presumably the accused had good and sufficient cause." Thorn v. State, 13 Ga. App. 10, 78 S. E. 858. See, also, Lewis v. State, 15 Ga. App. —, 83 S. E. 439.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. ⟸67.]

Error from City Court of Millen; Thos. L. Hill, Judge.

Fannie Jones, alias Fannie Edwards, was convicted of violating the labor contract law, and brings error. Reversed.

G. C. Dekle, of Millen, for plaintiff in error.

WADE, J. Fannie Jones, alias Fannie Edwards, was convicted under an accusation charging her with the violation of the "labor contract law." She excepts to the order overruling her motion for a new trial. The entire evidence adduced at the trial was as follows:

J. W. Jones, sworn for the state, testified:

"The defendant contracted to work for me as a cook in my kitchen and dining room, in my dwelling at Thrift, Ga., in this county. She got $3 from me on the faith of this contract. I advanced the money to her on the 3d day of April, 1914. She was to begin work for me on the following day, April 4, 1914, and was to work until May 4, 1914. She was to receive for this service the sum of $5. She did not work any after she got the money. If there was any reason why she did not perform her contract, I did not know it. If she had any reason for not doing the work, I do not know what it was—I do not know of any that she had. This was in Jenkins county, Ga."

On cross-examination:

"The first time that I saw Fannie after she got the money was when the sheriff brought her to my place. That was the first time that she told me about any row that she had with the man, who lived with her in my yard. At the time the contract was made, we had an agreement where the work was to be done. It is true that she had been working with me before, but I had the forethought to put her under another contract before letting her have the money. She got the money on Friday, and was to start working on the next day. Of course she was to continue working, but under a new contract. I do not know that I always put my hands under a new contract when I advance them anything. Under that contract she was to do any and all work that she might be directed to do around the house by my wife or myself. Under the contract she was to cook; she was also to make up beds, sweep yards, go after groceries, milk cows, and, as I said, do any other work she was called upon to do around the premises. I expected her to do any of these things under her contract. She did not work any on it. She did not work Saturday on it. It is true she was to get off to go to church Sunday, but she got off before then, as she did not work any Saturday. I do not know anything about the row she had at church on Sunday. I was not at home on that day. As I said before, the first time she told me about that was when the sheriff brought her to my house. It is not true that she offered me the money but that I refused it because she would not pay an old account of hers that I had bought from Mr. Wiggins. This is not so. I am positive she was to work with me from April 4th until May 4th. I do not remember the day of the week that May 4th came on, but know she was to work until that time. She has never done any of the work, nor has she ever returned or offered to return the $3 she obtained from me upon the faith of the contract."

The defendant made the following statement:

"As to the contract, I did not make any contract with the gentleman. I had been working there several months, and I went to him on the 3d of April, and told him I wanted $3 to get me some clothes for Easter Sunday, and he let me have it. He is mistaken about me not working for him Saturday, for I did. I lived in his back yard, and that Sunday the man who lived with me there got after me at church, with a pistol and knife, and would have killed me if some of them had not stopped him, and said if I went back there he would get me; and I was afraid of him, and that is the reason that I did not go back. Besides, Dr. Jones was not at home that Sunday, and, after I went over a few miles to my people, I decided I had better stay away from that man and try to make the money and send it to Dr. Jones; and so in a few days he had me arrested before I had time to do anything, and that is all I know about it."

As ruled in the Thorn Case, supra, and also in Lewis v. State, supra, the burden rests upon the state to show that there was no good and sufficient reason for the breach of a labor contract on the part of the defendant, or, in default thereof, that there was no good and sufficient reason why the money advanced on the strength of the contract was not returned. The sole witness for the state in this case testified as follows:

"If there was any reason why she did not perform the contract, I did not know it. If she had any reason for not doing the work, I did not know what it was—I did not know of any she had."

He further said:

"She has never done any of the work, nor has she ever returned or offered to return the $3 she obtained from me on the faith of the contract."

From this it is apparent that the burden resting upon the state was not carried, since it does not affirmatively appear from the evidence that there was no good and sufficient reason for the breach of the contract by the defendant, or that there was no good and sufficient reason for her failure to return the money advanced upon the strength of the contract.

Judgment reversed.

(15 Ga. App. 600)

## FARMERS' STATE BANK v. ROWLAND.

(No. 5689.)

(Court of Appeals of Georgia. Jan. 20, 1915.)

*(Syllabus by the Court.)*

1. BILLS AND NOTES ⟸370—ACTION ON NOTE—DEFENSES.

The consideration of the promissory note which was the basis of the suit was expressed therein as being for the purchase price of stock in an incorporated company known as the Southern Finance Corporation, and, under the act of the General Assembly approved August 17, 1912 (Acts 1912, p. 154, § 2), the maker of the note was let in to all the equities existing between himself and the original payee. There was, therefore, no material error in any of the rulings upon the admissibility of testimony to which exception is taken.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 963; Dec. Dig. ⟸370.]

2. BILLS AND NOTES ⟸113—VALIDITY—STATEMENT OF CONSIDERATION—WAIVER OF STATUTE.

The act of 1912 which requires the consideration of promissory notes given for certain stocks to be expressed in the face of the contract was enacted for reasons of sound public policy, which would be absolutely defeated were the maker of a contract involving the purchase of such stock as was within the scope of the legislative enactment permitted to waive the legal consequences of the statute.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 223; Dec. Dig. ⟸113.]

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The verdict being supported by some evidence, the judgment of the trial judge, overruling the motion for new trial, will not be disturbed.

Error from City Court of Nashville; C. A. Christian, Judge.

Action between the Farmers' State Bank and B. A. Rowland. From the judgment, the Bank brings error. Affirmed.

W. R. Smith, of Nashville, for plaintiff in error. W. D. Buie, of Nashville, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

(15 Ga. App. 614)

## WILLIAMS-THOMPSON CO. v. MARSHBURN. (No. 5691.)

(Court of Appeals of Georgia. Jan. 20, 1915.)

*(Syllabus by the Court.)*

1. SALES ⟸284—WARRANTY—CONSTRUCTION.
Under a written contract for the purchase of cantaloupes, in which it was stipulated that they were "to be shipped" by the seller on a day certain, "such shipment to be free of split ends and overripe stock," the court did not err in instructing the jury that "the place at which the warranty in question [that the melons were 'free of split ends and overripe stock'] is to be complied with is the place where the cantaloupes were delivered to the railroad" for shipment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 803–805; Dec. Dig. ⟸284.]

2. APPEAL AND ERROR ⟸1002 — VERDICT — CONFLICTING EVIDENCE.
There was evidence directly and positively sustaining the plaintiff's contention that he delivered the cantaloupes in accordance with his contract, "free of split ends and overripe stock," to a common carrier for shipment; and while there was evidence in behalf of the defendants tending to show that the melons arrived at destination in an overripe condition, the verdict of the jury settled the question of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. ⟸1002.]

3. ASSIGNMENTS OF ERROR.
There is no merit in any of the assignments of error.

Error from Municipal Court of Atlanta.

Action between the Williams-Thompson Company and N. E. Marshburn. From the judgment, the Williams-Thompson Company brings error. Affirmed.

Dillon, Burress, Westbrook & Kobak, of Atlanta, for plaintiff in error. Hewlett, Dennis & Whitman, of Atlanta, for defendant in error.

WADE, J. Judgment affirmed.

(15 Ga. App. 633)

## GARVIN v. MAYOR AND COUNCIL OF CITY OF WAYNESBORO. (No. 6128.)

(Court of Appeals of Georgia. Jan. 20, 1915.)

*(Syllabus by the Court.)*

1. DISORDERLY CONDUCT ⟸1—VIOLATION OF ORDINANCE—ELEMENTS OF OFFENSE.
It is not always essential that noise or disorder should disturb more than one person to constitute a violation of a city ordinance making it an offense to "make any unnecessary noise calculated to disturb the peace and good order of the city, or otherwise act in a disorderly manner."

[Ed. Note.—For other cases, see Disorderly Conduct, Cent. Dig. §§ 1–8; Dec. Dig. ⟸1.]

2. DISORDERLY CONDUCT ⟸9—VIOLATION OF ORDINANCE—SUFFICIENCY OF EVIDENCE.
The evidence in behalf of the city, though somewhat weak and unsatisfactory, was sufficient to uphold the conviction.

[Ed. Note.—For other cases, see Disorderly Conduct, Cent. Dig. §§ 16, 17; Dec. Dig. ⟸9.]

Russell, C. J., dissents.

*(Additional Syllabus by Editorial Staff.)*

3. BREACH OF THE PEACE ⟸1—DISORDERLY CONDUCT ⟸1—COMPARED.
The term "disorderly conduct" is one of rather nebulous and uncertain meaning. One who commits a breach of the peace is guilty of disorderly conduct, but not all disorderly conduct is necessarily a "breach of the peace." The term "disorderly conduct," as used in a municipal ordinance, where its limitations are not expressly declared by the ordinance, includes not only violent or boisterous conduct calculated to disturb the peace and quiet of an entire community, but also loud, boisterous, or offensive conduct which affects the peace and quiet of the person or persons who witness the same and may be disturbed thereby.

[Ed. Note.—For other cases, see Breach of the Peace, Cent. Dig. §§ 1–3; Dec. Dig. ⟸1; Disorderly Conduct, Cent. Dig. §§ 1–8; Dec. Dig. ⟸1.

For other definitions, see Words and Phrases, First and Second Series, Disorderly Conduct; Breach of the Peace.]

Error from Superior Court, Burke County; W. W. Sheppard, Judge.

Bessie Garvin was convicted of violating a city ordinance, and brings error from an order overruling certiorari. Affirmed.

C. B. Garlick, of Waynesboro, for plaintiff in error. H. J. Fullbright, of Waynesboro, for defendant in error.

WADE, J. The plaintiff in error was tried in the police court of the city of Waynesboro for the violation of a city ordinance which declares that:

"Any person or persons who shall use loud, boisterous, or obscene language, or who shall fight, quarrel, make any unnecessary noise calculated to disturb the peace and good order of the city or otherwise act in a disorderly manner, shall upon conviction be punished as provided in section 62 of these ordinances."

From the judgment of the mayor finding her guilty she appealed to the superior court by petition for certiorari, and to the order overruling the certiorari she excepts.

[1, 2] It appears from the record that on a certain night in April, 1913, a Mrs. Strother, who operated a restaurant in connection with sleeping rooms on a street in the city of Waynesboro, sent for a policeman and complained to him that she thought there was a negro woman in the room occupied by a Mr. Nolls, one of her boarders, and explained that she thought this "because she heard loud talking in the room and noise of the bed." The policeman went to the room

and found two negro women with Mr. Nolls. There was no light in the room when he entered, and Nolls was in his night clothes, but neither woman was undressed. One of them was sitting in a chair, and the other was standing, and when the policeman entered they told him they were there to bring some clothes to Mr. Nolls which one of them had washed for him, and stated that they had remained so long because Nolls got one of them to sew a button on his pants. The husband of the woman who made the complaint testified that he was at the time in a room adjoining the room occupied by Nolls, and heard no noise whatever in there, and that he would not have known that there was any one in there if his wife had not told him so. The defendant stated that she accompanied another negro woman to the room of Nolls, on the night in question, where this other woman was going to deliver to Mr. Nolls some clothes, and that while they two were in the room of Nolls he asked the washerwoman to sew some buttons on his pants, and this she did, and that nothing disorderly or immoral occurred while the two women were there, and no noise was made and "no one could have been disturbed." This was all the evidence.

The plaintiff in error insists that the conviction in the mayor's court was unlawful, because the evidence does not disclose that there was any disorder, and, while the inference might possibly be drawn that acts of immorality were committed, there was no disturbance to the public or to any individual. Counsel relies upon the case of Kahn v. Macon, 95 Ga. 419, 22 S. E. 641, where the Supreme Court held that:

"Quietly playing and betting for money at a game of cards in a private room, although the room be situated over a barroom and the gaming be done on the Sabbath morning, while an offense against the penal laws of this state, is not 'disorderly conduct' as against the municipal ordinances of the city of Macon: it not appearing that the offense was in any sense publicly committed, that the public was in any manner disturbed thereby, or even had any knowledge of the same until the participants in the game were discovered and detected by the police officers who made a 'raid' upon the room for that purpose."

It will be seen that it did not appear from the record in that case that the public was in any manner disturbed by the conduct of the defendant, or, in fact, that *any one* outside of those present in the room where the game was going on had any knowledge that the defendant and his associates were even present in the room in question until the police officers entered. So, also, the record in that case discloses that the ordinance under which the defendant was prosecuted was quite different from the ordinance in the present case, as that ordinance provided that:

"Any person who shall be found *in the streets*, acting in a disorderly, riotous, tumultuous manner, or who shall be guilty of any act against the public safety, morality and decency, not herein specified, shall be arrested," etc.

Of course, under that ordinance the recorder had no authority to impose a fine upon any offender who might be "guilty of an act against the public safety, morality, and decency" not specified, if the particular offense which the defendant committed was one punishable under a general law of the state; and hence the conviction of that defendant under a charge of "disorderly conduct" could not be sustained where it appeared from the testimony that the defendant had not been "found in the streets" acting in a disorderly manner, but had simply been gambling in violation of the state law, quietly, without disturbing any one, and without the knowledge of any person until the policemen entered the room. In the present case the ordinance appears to be broader, and includes within its scope not only the use of loud, boisterous, or obscene language, etc., anywhere within the city limits, but the making of "any unnecessary noise calculated to disturb the peace and good order of the city," or acting in a disorderly manner "otherwise"; the term "or otherwise," etc., receiving an ejusdem generis interpretation. Fleming v. Rome, 130 Ga. 383, 386, 387, 61 S. E. 5.

[3] Apparently the term "disorderly conduct" is one of rather nebulous and uncertain meaning, since it has been variously defined in different jurisdictions, and no definition of such precision is generally accepted as that it may always be readily determined whether particular conduct is or is not disorderly. One who commits a breach of the peace is, of course, guilty of disorderly conduct, but not all disorderly conduct is necessarily a breach of the peace, as where it is merely calculated to disturb or annoy. Mt. Sterling v. Holly, 108 Ky. 621, 57 S. W. 491. Among acts which have been held to constitute disorderly conduct are: Making noises, exclamations, and outcries in the public street by which people are drawn together and the highway obstructed (Commonwealth v. Spratt, 14 Phila. [Pa.] 365); reveling or behaving in a boisterous manner (In re Began, 12 R. I. 309); calling a nonunion workman a scab during a period of public excitement (Commonwealth v. Redshaw, 2 Pa. Dist. R. 96, 12 Pa. Co. Ct. R. 91); riotously raising a pole in a public street (Commonwealth v. Morrison, Add. [Pa.] 274); exhibiting an effigy calculated to provoke a breach of the peace (Commonwealth v. Haines, 4 Pa. L. J. Rep. 17, 6 Pa. L. J. 239); depositing an irritant substance so that one may apply it to his person (People v. Blake, 1 Wheeler Cr. Cas. [N. Y.] 490); purposely driving a heavily loaded wagon over a water hose in use by firemen at a fire (Commonwealth v. Moore, 21 Pa. Co. Ct. R. 321); and even the act of an innkeeper in refusing to entertain a traveler (4 Blackstone Comm. 168). As

was said in Sheppard v. City of Jackson, 11 Ga. App. 811, 812, 76 S. E. 367:

"We recognize, of course, that the expression 'disorderly conduct' would include a variety of acts, and generally it would be a question for the magistrate to say whether or not the particular act complained of was comprehended within the expression 'disorderly conduct.' * * * Generally, 'disorderly conduct' means some act which tends to a breach of the peace, or at least to disturb that portion of the public which may see or hear the conduct claimed to have been disorderly."

Equally varied have been the definitions applied to the term "disorderly person." So far as we can gather from the decisions by courts of last resort in this state, the term "disorderly conduct," as used in a municipal ordinance, where its limitations are not expressly declared by the ordinance, has been held to include not only violent or boisterous conduct calculated to disturb the peace and quiet of an entire community, but also loud, boisterous, or offensive conduct which affects the peace and quiet of the person or persons who witness the same, and who may be disturbed thereby. In other words, a single resident or person in a community is entitled to the full protection of the law in preserving him from any unnecessary and annoying destruction of that quietude which he has the right to enjoy. In Daniel v. Mayor, etc., of Athens, 110 Ga. 289, 34 S. E. 1016, the Supreme Court held that:

"The use, in the presence of a man, of an obscene word in an ordinary tone, without anger, and under circumstances not calculated to offend the hearer or cause a breach of the peace, does not constitute a violation of a municipal ordinance prohibiting disorderly conduct 'calculated to disturb the peace of the citizen.'"

This would indicate that, if the obscene word should be used in the presence of one in a loud or unusual tone and in an angry manner, and under circumstances calculated to offend the hearer or cause a breach of the peace, the offense of disorderly conduct would be complete under such an ordinance.

In Fountain v. Fitzgerald, 2 Ga. App. 713–716, 58 S. E. 1129, 1130, Judge Russell said:

"Whether a gun or a stick was used, the intimidation of a citizen [one citizen], in the peace of the state, by the defendant, would properly come within the definition of 'disorderly conduct.'"

In Douthit v. City of Blue Ridge, 13 Ga. App. 645, 79 S. E. 744, where the evidence showed that certain men and women were heard by a town marshal talking in a loud tone in the woods near a residence, and others also heard the talking and laughing, but there was no evidence of any improper conduct on the part of the defendant, and it did not appear that *any single person was disturbed*, it was held that the evidence was not sufficient to sustain a conviction under an ordinance prohibiting any person from disturbing the peace, quiet, and good order of the city by loud and boisterous language, or by otherwise acting in a disorderly manner tending to disturb the quiet and peace of the residents of the city, etc. And in the case of Kahn v. Macon, supra, it will be remembered, as we have already suggested, that the proof showed absolutely no disturbance of the peace and quiet *of any single citizen* up to the time the policemen entered the room where the defendant was quietly engaged in gambling in violation of the state law. The ordinance of force in the city of Waynesboro, as we have already suggested, declares that no person or persons "shall use loud, boisterous or obscene language, or shall fight, quarrel, make any unnecessary noise calculated to disturb the peace and good order of the city, or otherwise act in a disorderly manner." It does not expressly provide that the loud, boisterous, or obscene language, or the unnecessary noise which the ordinance prohibits, shall be punished if the use of such language or the making of such unnecessary noises may happen to be heard by a single person only, or by any named number of persons, but the offense consists of the use of such language or the making of such noises as would in their nature be "calculated" to disturb the peace and good order of the city. Suppose one should, without any right or reason for such conduct, make an alarm, at a dead hour of the night, at the door of a house situated within the corporate limits of a town or city, and occupied alone by a respectable female, and his assault on her door, calculated to arouse her gravest apprehensions and to excite her wildest fears, should be heard only by her, could it be said that, since the peace and quiet of only one person was disturbed by his conduct, such behavior would not constitute "disorderly conduct," within the meaning of a municipal ordinance similar to the one under discussion, and especially when it is considered that such conduct would be "calculated" to disturb the peace of the immediate neighborhood if the excited female should give tongue to her terror? It has been held that "the peace of a city" may be disturbed by calling a man "a damn fool and a bastard." Topeka v. Heitman, 47 Kan. 739, 28 Pac. 1096. And it has been held that outcries in a public street constitute an indictable nuisance, although but a single person is disturbed, if the other elements of the offense are present. Commonwealth v. Oaks, 113 Mass. 8.

It appears that Mrs. Strother was most certainly disturbed by the loud talking of the defendant, and also by the "noise of the bed" in the room occupied by Nolls—so much so that she thought it necessary to call in a policeman to suppress the disorder and to free her house from the presence of one or more negro women who were conducting themselves in a decidedly free and easy manner. A boarding house should have the full protection of the law in the preservation of order and reasonable quietude, and, while the proprietress thereof may not be entitled

to enjoy the same degree of privacy she would have in a merely private dwelling, she should nevertheless enjoy immunity from the presence of undesirable persons in the rooms of her lodgers at unseemly hours, and for a length of time calculated to bring the good repute of the house in question; and where a male boarder is visited at night by two negro women, who remain for an hour and a half, and whose conduct is sufficiently boisterous to excite the attention of the landlady, and upon investigation the boarder is discovered in the same room with the women, in the dark and in his night clothes, the recorder, although, of course, he could not have inflicted punishment for the violation of the state law directed against sexual offenses, could punish for disorderly conduct under an ordinance as broad as the one of force in the city of Waynesboro; for it cannot be reasonably doubted, under what we have said above, that the recorder was authorized to infer that the conduct complained of, and for which the defendant was found guilty, was unquestionably sufficiently loud and boisterous to disturb Mrs. Strother, and perhaps others, notwithstanding it failed to disturb her husband, and that it was therefore calculated to disturb the peace and good order of the city. It rather seems to us that the "disorder" was of a most objectionable kind, and, if the landlady could not be protected from such offensive behavior under the city ordinance against "disorderly conduct," she would be practically helpless and unable to preserve the reputation of her house for quiet and good order, and would soon be unable to attract desirable boarders or respectable custom, and would be thus deprived of her means of livelihood. Many acts of disorder not punishable under the state laws might not only have the effect of making a boarding house undesirable to those seeking a temporary home or abiding place, but might even render the place an absolute nuisance to the locality where it is situated.

The excuse offered by the negro women to account for their presence might have been true, and they may have been innocent of any violation of a state law, but nevertheless their presence for the length of time shown by the record, in the room of a white man, and the loud talking and noise they made in the house of Mrs. Strother, disturbed her, and was also calculated to disturb the peace and good order of the city, since it is impossible to gauge the consequences which may have arisen from such unseemly conduct had the landlady seen fit at the time to acquaint the general public with her troubles, rather than to tell them to a policeman. The evidence was somewhat weak as to the amount of disturbance made by the defendant, but the recorder found the evidence sufficient, and the superior court judge approved the finding; and since, under our view of the record, there was some evidence to sustain the judgment rendered, we will not interfere with the result reached in the mayor's court.

Judgment affirmed.

RUSSELL, C. J. (dissenting). I have so much confidence in the judicial conclusions of my Brother WADE, as well as in his discriminating research in the present case, that I have endeavored to agree to the result which has been reached by the majority of the court in this case. The volume of business before the court is so great as to debar me from elaborating my views, but I cannot bring myself to the conclusion that the facts disclosed by the record show the plaintiff in error to be guilty of the municipal offense of disorderly conduct. Apparently there was a palpable and flagrant breach of the proprieties, and the circumstances are suggestive of a violation of a penal law of this state, but, in my judgment, the case is controlled as to the latter feature by the ruling of this court in Cotton v. City of Atlanta, 10 Ga. App. 397, 73 S. E. 683, and upon the merits the case is ruled by the decision of the Supreme Court in Kahn v. City of Macon, 95 Ga. 419, 22 S. E. 641.

So far as I can see, the only disquieting feature disclosed by the record was an apprehension on the part of the prosecutrix that an act of fornication was being committed in her house. The law amply safeguards the peace and dignity of every home, but it is not necessary, for this purpose, to strain the law beyond the facts, or to invoke municipal authority to enforce the laws of the state.

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(15 Ga. App. 564)

## FALK v. LA GRANGE CIGAR CO. et al.

(No. 5460.)

(Court of Appeals of Georgia. Jan. 20, 1915.)

*(Syllabus by the Court.)*

CONTRACTS ⟸189 — PARTNERSHIP ⟸9 — DEBTS OF BUSINESS—LIABILITY.

A contract stipulating that one of the parties thereto shall receive as compensation for certain services a half of the profits of the business to be conducted, and shall not provide any of the assets, nor be bound for any of the losses, is not a contract of partnership, and the party thus receiving a portion of the profits for his services is not bound for debts of the business.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 535; Dec. Dig. ⟸189; Partnership, Cent. Dig. §§ 23, 24; Dec. Dig. ⟸9.]

Error from City Court of La Grange; Frank Harwell, Judge.

Action by M. Falk against the La Grange Cigar Company and others. From judgment for defendants, plaintiff brings error. Affirmed.

E. R. Bradfield and M. U. Mooty, both of La Grange, for plaintiff in error. Hatton Lovejoy, of La Grange, for defendants in error.

RUSSELL, C. J. M. Falk brought suit upon an open account against the La Grange Cigar Company, alleging it to be a partnership composed of F. R. Knight and La Grange Grocery Company. There was no denial of the account by Knight, but the La Grange Grocery Company filed a plea in abatement, denying any partnership with Knight in the business of La Grange Cigar Company or otherwise, and denying any indebtedness whatever to the plaintiff. On the trial there was oral testimony for the plaintiff to the effect that Knight had admitted the correctness and justness of the account sued on, as against the La Grange Cigar Company and himself, but stated that the La Grange Grocery Company, though it got a part of the profits of the La Grange Cigar Company, was not a partner in the business of the cigar company. The plaintiff introduced also certain paid checks of the grocery company, identified as having been in payment of indebtedness contracted by the cigar company; the ledger account of the grocery company against the cigar company, showing credit charges for cigars furnished and debit charges for amounts paid out; and the order book, showing orders addressed to the cigar company for cigars given by the grocery company. There was also introduced in behalf of the plaintiff a certain written contract entered into between the grocery company and F. R. Knight as follows:

"Georgia, Troup County. This contract entered into this 23d day of April, 1909, between the La Grange Grocery Company and F. R. Knight, witnesseth, that whereas, the said F. R. Knight is preparing to equip and operate a plant for the manufacture of cigars, and is desirous of securing the services of said La Grange Grocery Company as selling agents and to act within the limits of this agreement as financial agent of the said F. R. Knight: Now, therefore, it is mutually agreed between the said F. R. Knight and the said La Grange Grocery Company as follows: The said F. R. Knight shall equip and put into operation a plant for the manufacture of cigars in the city of La Grange, Ga., the same to be placed in the building belonging to George E. Dallis, on Ridley avenue. The rent for the room or the space occupied by the said tenant, and all other expenses incident to the manufacture of the cigars, are to be paid by the said F. R. Knight and charged into expenses. The said Knight is to put into the said plant about $800 at this time, and to allow the increase from said earnings to remain in said plant. Said Knight is to operate the said plant and to deliver to said La Grange Grocery Company so many of the cigars made in said plant as said grocery company does sell or take the entire output said Knight can then sell the remainder to his own best advantage. Said grocery company agrees to place said cigars upon the market through their salesman, and to endeavor to sell the entire output of said factory, if possible. Said grocery company further agrees to handle the receipts and disbursements from said sales, and it is agreed that this shall be done for the purpose of determining the profits as hereafter explained. Said grocery company further agrees to assist wherever possible in the purchase of supplies and in other ways in making successful the business of said plant. Said Knight is to manage the factory and have charge of the manufacture and production of cigars. A record shall be kept of all expenses, and the said F. R. Knight shall receive the usual amount as a workman for the making of cigars, but shall draw out no other amount; the aforesaid amount to be received by said Knight to be charged as a part of the expenses. The expenses incurred by said Knight in making sales himself shall not be charged as expenses. For their services in placing the output of said factory upon the market through their salesmen, the said grocery company shall receive as compensation one-half of the profits from the entire output of said factory, including such cigars as may be sold by Knight himself, as well as those also sold by said grocery company. Said profits are to be determined by taking an inventory of the property on hand and making a statement of the assets and liabilities of the business, together with the receipts and disbursements. Should said business prove successful, and should it be determined to incorporate the same at any time in the future, the said grocery company is to have the right to take all the stock in said corporation, except as is taken by the said Knight individually to cover any property and money put in said corporation by him, and in any event said grocery company is to have the right to take 51 per cent. of the said stock of said corporation. Nothing herein contained shall be construed as making the parties hereto copartners, or either of said parties in any way responsible for the liabilities of the other; the only object of this agreement being to secure the services of said grocery company in the placing of the product of said factory upon the market. This contract shall remain in force, except as to a possible change in location, for a period of two years, unless mutually agreed to by both parties."

Then follow the prices of cigars, terms, etc. The contract is signed by both parties, and an indorsement appears thereon as follows:

"By mutual agreement this contract is to remain in force until January 1, 1914."

J. D. Faver, sworn in behalf of the La Grange Grocery Company, testified:

"I am general manager of the grocery company, and was connected with it at the time this contract was made. Knight furnished all money and property for the cigar company. The grocery company did not furnish anything, but were only selling agents, purchasing cigars from him. When we ordered cigars we paid for them according to contract. This gave Knight a profit of 10 per cent., as he estimated. We credited them for him as cash. We gave him orders, the amount was credited at the end of each month as if cash, and he drew against it. We disbursed money for him by paying his approved bills, and no other way. Mr. Knight bought tobacco supplies and everything, and paid all expenses. He got the money from us, but we knew nothing about what he did with it. At his request we would give him a check every Saturday for the pay roll. Nothing was ever paid out of the money belonging to the grocery company, but everything was paid and charged to the cigar company. We had no authority to pay out money in any other manner. We took a mortgage for money due us by Knight, and never put any money in the business, except as a loan to Knight. We charged him up with this money, and he was to pay it back, regardless of whether there were any profits or not, and we had no interest whatever in the business. We advanced him money along with the cigars, and let him draw against it. When he quit business he owed us about $3,000 which we had loaned him, and which was secured by a mortgage. We sold the cigars bought of Knight on our own account. We paid him about what other factories sold them for. The only business in which the grocery company

was to profit was the difference in the cost of manufacturing and the price we paid him for cigars, as stipulated in the contract. Mr. Knight was to keep an account of the total cost of the manufacture of the cigars, and the difference between that and what we paid him would represent the profits. We took practically the entire output of the factory, and kept an account of the money disbursed for Knight, and the balance left, debit or credit, belonged to the cigar company, except as we might have had a profit in it had there been one as called for in the contract. We did not keep the books of the cigar company. I do not know how much he owed. The cigar company is not in business now. Their assets were sold under a mortgage and bought in by the grocery company. Mr. Knight could have sold the plant any time he wanted to. The grocery company could never have sold it. We had no authority to pay out money, except by Knight's direction, and never did. He was always in debt to us after the first two or three months."

W. G. Cleaveland testified, in behalf of the grocery company, that he was the manager of the grocery company at the time the contract was made, and that, when he was connected with the grocery company, the business between it and the cigar company was conducted in about the same manner as related by the witness Faver. His testimony was practically the same as that of Faver.

At the conclusion of the testimony the court directed a verdict against Knight and the La Grange Cigar Company, but directed that the jury find in favor of the grocery company on its plea of no partnership.

It is not contended that the La Grange Grocery Company held itself out to the plaintiff as a partner in the La Grange Cigar Company, and thus induced him to extend credit to the cigar company, but it is contended that Knight and the La Grange Grocery Company were, in fact, partners inter se, and as such they were indebted to him the amount of the account sued on. Partnership is a fact. The oral testimony adduced in this case is of little consequence, as is all the other evidence save the contract, which is set out in full herein. The material question is whether this contract, by its terms, created a legal partnership between the parties thereto and bound them as such for the indebtedness, even though it is expressly stipulated therein that they are not so to be bound.

When a court is called upon to determine whether a particular contract constitutes a partnership, its controlling purpose is to ascertain the intention of the parties as disclosed by the entire transaction. But the intention which controls in determining the existence or nonexistence of a partnership is the legal intention deducible from the terms of the contract and from the acts of the parties, and, if they enter into an enterprise and conduct it in such a way that the law constitutes their relation a partnership, they are partners, although they express their intention not to be. Even an express statement in a contract that the agreement does not constitute a partnership is not conclusive, 30 Cyc. 361. After a most careful study of the contract between the parties in the instant case, and of the law governing partnerships and their creation, we have come to the conclusion that the parties are not partners and are not bound as such. The mode of determining what constituted a partnership has undergone many changes. Under the very early English rule, the mere participation in profits made one a partner. This rule was later abandoned, and it became necessary to show a sharing in both profits and losses to conclude one as a partner. Both these holdings have, however, been abandoned, and the true English rule now seems to be that parties are partners only when they associate in business relationship in such manner as that they are regarded by the law as partners. The old English rule is not of force in Georgia. "A joint interest in the partnership property, or a joint interest in the profits and losses of the business, constitutes a partnership as to third persons. A common interest in profits alone does not." Civil Code, § 3158. We might conclude with this quoted section of the Code, for to our mind this is sufficient to show that the contract in the present case does not constitute a partnership. There is neither a joint interest in the partnership property nor a joint interest in the profits and losses of the business. Let us go further, however, and see what construction our courts have put on this section, and how they have construed all the law relative to partnerships as laid down in the Code.

In Dawson National Bank v. Ward & Gurr, 120 Ga. 861, 48 S. E. 313, our Supreme Court said:

"If the party's interest is that of owner, if he has a right to dispose of and control the profits of the enterprise as profits, then there is a partnership. Where, however, a party makes no contribution to the capital stock of the concern, nor has any right to control the profits, but only is to receive a certain proportion of the net profits in compensation for his labor, the partnership relation does not exist."

In the case at bar the grocery company made no contribution to the capital stock of the cigar company, and had no control of the profits as such. It was to receive a certain proportion of the profits for its services as sales agent and as financial agent. The mere fact that the grocery company was in charge of the funds would make no material difference. It was a part of its duties, under the contract, to keep and disburse money for Knight. It had no right to control any of the proceeds of the factory operated by Knight, nor any right to pay out any funds other than on the order of Knight. In the Ward & Gurr Case, supra, it was probably Gurr's duty not only to receive, but probably to disburse, moneys coming into his hands in the operation of the warehouse, but this did not itself constitute a partnership. See, also, in this connection, Thornton

v. McDonald, 108 Ga. 3, 33 S. E. 680. It has been uniformly held that, where parties have only a "common interest" in the profits, and the position of one is that merely of an employé, with no right of control over the profits, but with only a common interest in them—that is, interested in common with the other in their increase or decrease, because they measure the amount of his wages —then he is not a partner. See Sankey & Shorter v. Columbus Iron Works, 44 Ga. 235, and Thornton v. McDonald, 108 Ga. 7, 33 S. E. 680. "If one only receives part of the profits as a salary or compensation for services, he is not a partner." Huggins v. Huggins, 117 Ga. 156, 43 S. E. 759. It is contended by the plaintiff in error that the instant case comes within the ruling of the Huggins Case, supra, as stated in the third headnote:

"If one who originally contributed no capital, but was to receive a part of the profits as compensation for his services, permits a portion of such profits to remain in the business as firm assets, he thereby acquires a joint ownership in the undivided property, and becomes a partner," etc.

In the present case this cannot be true, however, for, as was shown by the evidence, there were no profits at the time the contract originally expired, nor at any other time thereafter. The grocery company, then, never at any time had any interest of any kind in the profits. No inventory was ever taken to ascertain what were the profits. No one ever received any profits out of the business, and therefore the defendant could not have left any profits in the business to become a part of the firm assets.

It is true, as contended by the plaintiff in error, that the contract was a favorable one to the grocery company. They were, however, perhaps entitled to demand an advantageous contract. They were undertaking to perform for Knight a great service, and the mere fact that they sought to protect themselves by reserving a right to purchase a controlling interest in the business in the future should it prove successful would not make them a partner at present. This was merely good business judgment. If the business had succeeded, through the efforts of the grocery company in placing its goods upon the market, they would have had the right, as a part of their compensation under the contract, to acquire an actual interest in the assets of a corporation to be formed. During the pendency of the original contract, however, their compensation was measured by a half interest in the net profits. It was to their interest to make the cigar company a successful enterprise. They evidently endeavored to make it succeed. They loaned it money from time to time, and took a mortgage as security, and, while this does not enter into the case, except collaterally, the contention of the grocery company that they were not partners is supported by the fact that the grocery company took such a mortgage from Knight, "doing business as the La Grange Cigar Company," and had the same placed on record, some time prior to the date of the sale of the goods for the purchase price of which the present suit was brought.

While there are numerous conflicting decisions on the question as to what is necessary to show the creation of a partnership, it is clear to us that the parties to the contract in the present case intended merely to divide the net profits, and that the portion thereof which was to go to the grocery company was for its services as selling agent and as financial agent, and that it was not the intention of the parties, nor the legal import of the contract, to create a partnership between them.

The judgment of the court was correct.

Judgment affirmed.

BROYLES, J., not presiding.

(117 Va. 219)

HARTLEY et al. v. NEAVES et al.

(Supreme Court of Appeals of Virginia. Jan. 27, 1915.)

1. LOGS AND LOGGING ⟸8—TIMBER DEEDS—CONSTRUCTION.

A deed to standing timber, with the right for a fixed period to cut and remove it, does not convey an absolute title to all the timber, but merely to such as may be cut and removed within the period fixed.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6–12; Dec. Dig. ⟸3.]

2. LOGS AND LOGGING ⟸8—TIMBER DEEDS—CONSTRUCTION.

Where a timber deed provided that the grantees should have five years in which to cut and remove the timber, and that additional time, not to exceed five years, should be granted for removal upon payment of $15 a year for the additional time, the grantees were bound to make payment and request extension before the expiration of the first five-year period, and, not having done so, their rights under the deed were lost.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6–12; Dec. Dig. ⟸3.]

Appeal from Circuit Court, Dinwiddie County.

Suit for partition by Henry C. Neaves and others, in which E. A. Hartley and another were allowed to intervene as defendants. From a decree for complainants, defendants appeal. Affirmed.

Chas. E. Plummer, of Petersburg, for appellants. R. H. Mann and Robert G. Bass, both of Petersburg, for appellees.

CARDWELL, J. In a suit instituted by Henry C. Neaves against the other heirs of Hadrian A. Neaves and Mary A. Neaves, his wife, both deceased, pending in the circuit court of the county of Dinwiddie, having for its object the partition, allotment, or sale of two tracts of land located in Dinwiddie county, one a tract of 266 acres and the other a tract of 113 acres, belonging to the parties to said suit. E. A. Hartley and R. B. Hartley intervened by petition, claiming to own the timber on the 113-acre tract by virtue of a deed dated July 5, 1905, executed by Mary A. Neaves and her two living children and their wives, viz., H. C. Neaves and Ellie Neaves, his wife, J. W. Neaves and Minnie Neaves, his wife. To this petition all of the descendants of the said Mary A. Neaves, deceased, were made parties defendant.

Mary A. Neaves acquired this tract of land under the will of her father, John M. Baugh, she to receive the profits therefrom during her natural life and at her death the land was to become the property of her children then living. The said H. C. Neaves and J. W. Neaves were the only children of Mary A. Neaves living at her death, and the circuit court, upon a hearing of the cause upon the petition filed therein by E. A. Hartley and R. B. Hartley, having for its object the construction of the aforesaid deed dated July 5, 1905, and to have the court decree against Henry C. Neaves and Ellie Neaves, his wife, and J. W. Neaves and Minnie Neaves, his wife, "requiring of them specific performance of the covenant to grant additional time in which to cut and remove said timber," held, that the grantors in the said deed were the owners of the entire tract of 113 acres of land at the time the deed was made, and therefore conveyed at that time a title to the timber standing on the land to the grantees named in the deed, but further held that said grantees were not entitled to the timber after the expiration of the first five-year period mentioned in the deed, which expired on July 5, 1910, on account of their failure to pay the extension money for the additional time desired on or before July 5, 1910.

Petitioners, E. A. and R. B. Hartley, complaining of this latter ruling, applied for and obtained this appeal, praying that the decree of the circuit court may to that extent be reviewed and reversed by this court.

The provisions of the deed in question, which belongs to that class of conveyances now commonly known and spoken of as "timber contracts," in so far as they are pertinent to this inquiry, are as follows:

"It is agreed that the parties of the second part shall have five years in which to cut and remove the said timber, and shall have free ingress and egress over and upon said land for the purpose of removing said timber. It is also agreed that additional time, not to exceed five years, will be granted to the parties of the second part for removal of said timber upon the payment of fifteen dollars a year for the said additional time."

None of the timber was cut during the first period of five years, which expired on July 5, 1910, and no indication is claimed to have been given of a desire on the part of the grantees in the deed, appellants here, to obtain further time within which to cut and remove the timber, nor any offer made to pay the money required for such extension until some time in October, 1910, or more than 90 days after the expiration of the first five-year period. In October, 1910, a conversation was had by one of the appellants, R. B. Hartley, with J. W. Neaves, one of the appellees, with reference to an extension of the time within which to cut and remove the timber, but the latter declined to receive the extension money or to grant any additional time, saying that the entire estate was in the hands of counsel for settlement, and it would be discourteous to receive the money. Whether or not he would have received the money if the settlement of the estate had not been in the hands of counsel is immaterial.

The errors assigned in the petition for this appeal are: (1) That the circuit court erred in construing this timber contract to be a contract to grant additional time within which to remove the timber from the land, on condition that payment for such additional time was made or tendered on or before the 5th day of July, 1910; (2) that it

was error to declare a forfeiture of the timber for failure to pay or tender, on or before July 5, 1910, the extension money provided for in said contract, even though the payment or tender on or before the time mentioned be regarded as a condition precedent.

[1, 2] In our view of the case it will be unnecessary to consider the second of these assignments of error, for the reason that the law, whatever it may be, with regard to the policy of courts of equity to relieve against the consequences of a failure to perform conditions stipulated in a contract, whether precedent or subsequent, has no application to this case. The decree complained of does not declare a forfeiture of the timber in question to grantors in the timber contract, but simply adjudged and decreed that the grantees had no title to or interest in the timber after the expiration of the period of five years within which to cut and remove the same, they having failed to comply with the terms and conditions upon which they alone would have had a right to further time within which to cut and remove the timber.

In Young v. Camp Mfg. Co., 110 Va. 678, 66 S. E. 843, and Wright v. Camp Mfg. Co., 110 Va. 678, 66 S. E. 843, the construction of instruments such as is in question here was carefully examined, and the conclusion reached that a deed to standing timber, with the right for a fixed period to cut and remove the same, does not convey an absolute and unconditional title to the timber, but only conveys title to such as may be cut and removed within the fixed period.

The conclusion reached in the cases just cited as to the character and effect of such contracts was approved and followed in the later cases of Brown v. Surry L. Co., 113 Va. 503, 75 S. E. 84, Quigley F. Co. v. Rhea, 114 Va. 271, 76 S. E. 330, and in the more recent case of Smith v. Ramsey, 116 Va. 530, 82 S. E. 189, where the preceding cases were reviewed, the opinion by Buchanan, J., saying:

"While the facts in those cases and in this as to what had been done under the contracts or deeds were different, the character of the contract in each was substantially the same. Those decisions would seem, therefore, to settle, if decisions can settle a question, that the provisions in such contracts for the cutting and removal of the timber within a fixed period are not covenants, but conditions."

In Wright v. Camp Mfg. Co., supra, it is said:

"By the great weight of authority it is determined that no right of title exists in the grantee after the expiration of the time specified in the deed or contract."

The controversy here depends upon the meaning of the words in the contract:

"It is also agreed that additional time not to exceed five years will be granted to the parties of the second part for removal of said timber upon the payment of fifteen dollars a year for the said additional time."

It is the contention of appellants that under a proper construction of the contract, the estate in the timber, so long as it remains on the land, is limited to ten years—not to 5—there being no condition or limitation contained in the contract to defeat the estate other than the limitation of the time for cutting, which is fixed at 10 years. As supporting this contention, the cases of Ciapusci v. Clark, 12 Cal. App. 44, 106 Pac. 436, and Perkins v. Stockwell, 131 Mass. 529, are cited.

In the first-named case the contract recited the sale of all timber growing on certain land for a stated price, and gave the purchasers "four years to take said timber off of said land, with the privilege of a longer time by paying the sum of $5 rent in advance for a time not exceeding ten years from date of this agreement," and the court, taking the view that the word "rent" was to be given some significance, and as rent usually was payable on the last day of the term, held that the stipulated sum for the extension of the time limit could be paid as rent, saying:

"Regarding the $5.00 payment as rent, there could be no forfeiture under this agreement without demand by the plaintiff of the rental sum upon or after the last day given the lessee on which to pay."

The court in that case, as do all the decisions of that court construing timber contracts, holds that there may be an absolute title in timber granted, and the specified time to remove is merely a covenant. There is therefore such a conflict with the doctrine declared by the decisions of this and other courts with respect to such contracts that the rule of construction followed by the California court in the case of Ciapusci v. Clark, and others can have no controlling influence in the construction of the contract here under consideration.

In Perkins v. Stockwell, supra, the stipulation as to time of removal was, "Except reserving all the pine trees or pine timber thereon standing and to stand and grow thereon for the term of ten years from October 30th, A. D. 1867, and longer by paying said Stockwell ten dollars per year after the expiration of the ten years aforesaid"; and the court held that the right of the grantor to the pine timber was lost by his failure to elect to have them stand and grow, longer, by any offer of payment of the $10 to Stockwell for more than a year after the expiration of the 10-year period. It is to be observed that by the express terms of the contract the payment of the $10 per year was to be made "after the expiration of the ten years," and the opinion of the court said:

"It was for them [grantors in the deed] to determine at the end of the 10 years whether they desired to secure the further right to which they were entitled. They could only do this in the mode prescribed by the reservation. Whether they should make this payment at the moment or close of the year need not be considered, as no suggestion of payment was made until more than a year after the expiration of the ten years."

The language of the contract construed in that case was quite different in its import and meaning from that appearing in the contract in the instant case with respect to additional time for the removal of the timber.

In a number of cases decided by the Supreme Court of North Carolina, the same view is taken of these timber deeds or contracts that this court has uniformly taken, viz., that by correct interpretation they convey to the grantees an absolute estate in the timber, determinable as to all of the timber not cut and removed within the stipulated period. Among the cases decided by the North Carolina court adverted to is Bateman v. Kramer Lumber Co., 154 N. C. 248, 70 S. E. 474, 34 L. R. A. (N. S.) 615, where a deed conveying standing timber on a certain tract of land stipulated that the grantees should have two years in which to cut and remove the timber, "and in the event they do not cut it off in that time, they shall have one year's time thereafter in which to remove the same by paying to the party of the first part interest on the purchase money for said extension time." Held, that, if the parties of the second part desired an extension of one year, it was a condition precedent to the obtaining of the extension to claim the privilege before the expiration of the two-year period, and notify the party of the first part, the owner of the property, and tender the stipulated amount required for the extension. See, also, Powers v. Angola L. Co., 154 N. C. 405, 70 S. E. 629.

In the still later case decided by the same court in 1912 of Rountree v. Cohn-Bock Co., 158 N. C. 153, 73 S. E. 796, construing a deed or timber contract quite similar to the one here under consideration, in its provisions as to time within which the timber might be cut and removed and as to how the grantee or purchaser of the timber might acquire such additional time as might be required, not exceeding three years, to remove the timber, the opinion of the court says:

"It is well settled that the legal effect of the first clause in the deed to the Gay Lumber Company, conveying the timber with the right to remove the same in five years, is to convey all the timber which the vendee should remove within the prescribed time, and that such as remained thereon after that time would belong to the vendor, or to his grantee of the premises. Hornthal v. Howcott, 154 N. C. 228, 70 S. E. 171; Powers v. Lumber Co., 154 N. C. 407, 70 S. E. 629.

"It was also decided at the last term, in Bateman v. Kramer Lumber Co., 154 N. C. 248 [70 S. E. 474, 34 L. R. A. (N. S.) 615], * * * that the correct interpretation of a clause, extending the time within which the timber may be removed, requires of the grantee, claiming the privilege, that he notify the owner of the property of his intention to exercise it, and that he pay or tender the stipulated amount on or before the expiration of the first period, granted for the * * * removal of the timber. It follows, therefore, from these authorities and upon the admissions that no notice was given to the grantors in the deed to the Gay Lumber Company of an intention to exercise the privilege of extending the time for the removal of the timber, and that no money was paid or tendered on or before the expiration of the first period; that the defendant has no title to nor interest in the timber, unless there is something in the deed which requires the application of a different doctrine.

"The defendant contends there is a clause in the deed, not to be found in any of the timber deeds construed by this court, * * * and relies upon that part providing that, 'The said parties of the second part, their heirs and assigns, shall have power, and are hereby authorized at any time during the period last aforesaid to enter upon the lands,' etc. In our opinion, that clause does not have the effect of waiving any of the conditions necessary to make the extension clause effective, but does define what may be done under it after the conditions have been performed. The 'period last aforesaid' has never had any existence because of failure to give notice and to pay or tender the stipulated amount, and the defendant cannot justify an entry on the lands thereunder.

"We, therefore, conclude that there is no error in the judgment restraining the defendant from entering on said lands and cutting the timber therefrom."

An analogous case is Boring L. Co. v. Roots, 49 Or. 569, 90 Pac. 490, where it is held that a party must prove the allegations or claims on which he relies, and if rights are conditional, he must prove a compliance with the conditions. In the opinion of the court in that case it is said:

"Plaintiff, however, contends that on December 30, 1902, it was granted by defendant an extension of time, amounting to one year, in which to take off the timber, and the record does contain a writing signed by the defendant to that effect but it is conditional, not absolute. The condition is 'in case O. A. Palmer keeps operating the mill at Boring Junction under his contract with F. S. Morris.' This is a condition precedent, and there is no evidence in the record that the condition was complied with so as to make the extension effective."

The rule of construction of timber deeds or contracts followed in the cases cited imposes no unreasonable burden or hardship upon the grantee or vendee in such deeds or contracts. Those cases are directly in point here, and the ruling therein rests upon sound and logical reasoning. Not only so, but in the very terms of the contract we have under consideration, as would seem clear, appellants could only secure the privilege of removing the timber after the five-year period, fixed in the contract as the time limit for the removal of the same, expired, by notice given to appellees of their intention to exercise that privilege and paying or tendering the stipulated amount required to be paid for the extension on or before the expiration of the first-named period granted in the contract. It is admitted that no notice was given by appellants to appellees of an intention to exercise the privilege of extending the time for the removal of the timber, nor was the stipulated amount of money required to be paid for the extension paid or tendered to appellees on or before the expiration of the first period of five years, so that an extension of that period has never had any existence. If appellants could wait over 90 days before giving such notice and paying or tendering the money to

be paid by them for an extension of time for the removal of the timber, they could have as well waited till the end of the year following the expiration of the five-year limit of the time and thus left appellees in suspense as to their right to dispose of their timber, and as to the use they could make of their land upon which the timber is standing. No duty was imposed upon appellees in their contract with appellants with respect to an extension of the time for the removal of this timber other than to grant an extension not to exceed five years upon proper demand being made of them for the extension and the payment or tender of the stipulated amount therefor.

We are of opinion that the decree appealed from, ruling that the appellants, upon the facts in the case, had no title to or interest in the timber in question after the expiration on July 5, 1910, of the five-year period named in the contract between the parties, is plainly right, and therefore is affirmed.

Affirmed.

KEITH, P., absent.

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(117 Va. 76)

## LOW MOOR IRON CO. OF VIRGINIA v JACKSON.†

(Supreme Court of Appeals of Virginia. Jan. 12, 1915.)

1. BROKERS ⟸43—CONTRACT FOR SALE—BROKER'S COMPENSATION—STATUTE OF FRAUDS.
Where the authority given to a broker to effect a sale of real property does not require the contract of sale to be in writing, the agreement to pay him a commission to find a purchaser is not within the statute of frauds, and is valid, though not in writing.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. ⟸43.]

2. BROKERS ⟸84—ACTION FOR COMMISSION—BURDEN OF PROOF.
The burden of showing that the purchaser is able, ready, and willing to purchase rests ordinarily on the broker in his action for commission for negotiating a sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 104, 105; Dec. Dig. ⟸84.]

3. BROKERS ⟸54, 63—RIGHT TO COMPENSATION — SUFFICIENCY OF SERVICES — "PRODUCE."
A broker is entitled to a commission when he produces to his principal a customer ready, willing, and able to purchase upon the terms fixed by the principal and the sale was prevented by the wrongful refusal of the principal to close it on his part; the word "produce" not requiring that the purchaser be brought face to face with the seller, if there be other satisfactory evidence of his existence and his readiness and ability to purchase.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75–81, 94–96; Dec. Dig. ⟸54, 63.

For other definitions, see Words and Phrases, First and Second Series, Produce.]

4. TRIAL ⟸260 — BROKERS — ACTION FOR COMPENSATION — INSTRUCTIONS ALREADY GIVEN.
In a broker's action for a commission, where the court instructed that if he had never offered on behalf of the purchaser more than an amount which the principal declined to accept he was not entitled to a commission, and that the burden was upon him to show by a preponderance of the evidence that he offered the principal's price on behalf of the purchaser who was ready, able, and willing to perform, the refusal of defendant's requested instruction that he could not recover unless he showed by a preponderance of the evidence that he was the purchaser's authorized agent to buy at the principal's price, that defendant within the time allowed accepted the purchaser's offer, that the purchaser made no other proposition, and that the purchaser was always ready and willing to perform, was not reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⟸260.]

5. TRIAL ⟸206—PROVINCE OF COURT AND JURY—INSTRUCTION—WEIGHT OF EVIDENCE.
Juries are the judges of the credibility of witnesses, but they do not exercise an arbitrary discretion, and it is the court's duty, while not intimating its opinion upon facts, to instruct the jury on request or on its own motion, to enable them intelligently to consider and weigh contradictory and irreconcilable evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 500; Dec. Dig. ⟸206.]

6. EVIDENCE ⟸588—WEIGHT OF EVIDENCE—CREDIBILITY OF WITNESS.
The jury, in weighing contradictory and irreconcilable evidence, may consider the accuracy of each witness' recollection, the reasonableness and consistency of each part of his evidence with the rest of it, his interest in the controversy, and his demeanor while testifying.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. ⟸588.]

Error to Circuit Court, Alleghany County.

Action by P. A. Jackson against the Low Moor Iron Company of Virginia. Judgment for plaintiff, and defendant brings error. Affirmed.

After the introduction of the evidence introduced by both the plaintiff and the defendant in this cause, the defendant moved the court to give the jury the following five instructions:

(A) The court instructs the jury that they shall find a verdict for the defendant unless the plaintiff has, by a preponderance of the evidence, proven to their satisfaction:

(1) That on December 30, 1911, John H. Mitchell constituted the plaintiff his agent and authorized him to purchase for him the tract of land in the declaration mentioned at the price of $11,000 at any time within 10 days from the said date.

(2) That on the said date the defendant accepted the said proposition giving the said Mitchell the privilege of purchasing the said land at said price at any time within said period of 10 days, and directed the plaintiff, as its agent, to notify Mitchell accordingly.

(3) That the said Mitchell, at no time within said period of 10 days, made to the defendant a proposition different from that hereinbefore stated.

(4) That the said Mitchell at all times within 10 days from said date was ready and willing to unconditionally pay the said sum of $11,000 for the said property.

(B) The court further instructs the jury that, in weighing the evidence of each of the witnesses who has testified in this case, they should consider the accuracy of his recollection, the reasonableness and consistency of each part of his evidence with the residue thereof, and his interest in the result of this controversy, if he is

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⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

† Rehearing denied.

shown by the evidence to have any interest therein, and his demeanor while testifying.

(C) The court further instructs the jury that, unless for a cause or causes based upon the evidence, they have no right to disregard the evidence of any of the witnesses who have testified in this case.

(D) The court further instructs the jury that, unless they believe from the evidence that the defendant agreed that it would first enter into a written contract with the said J. H. Mitchell with the understanding that the said contract would, afterwards, be carried into effect by deed, they shall find for the defendant.

(E) The court further instructs the jury that, unless the alleged agreement of J. H. Mitchell to purchase the said tract of land was unconditional, and the said agreement or some memorandum thereof was in writing and signed by the said J. H. Mitchell or by his duly authorized agent, the said Mitchell was not legally bound to purchase said property; and, unless they believe that he was legally bound to purchase said property, they shall find for the defendant.

But the court refused to give said instructions A, B,[1] D, and E asked for by the defendant, and, on its own motion and over the objection of defendant, gave the following three instructions, to wit:

(1) If the jury believes from the evidence that Mitchell agreed with Jackson that he would give $11,000 for the land, and that Jackson made this offer to Mr. Means, and that Mitchell was ready, able, and willing to take the land at that price, then the jury are instructed that Jackson was thereupon entitled to commission on the sale price.

(2) If the jury believe from the evidence that Jackson never offered on behalf of Mitchell but $10,500, and that Means declined to sell at that price, and so told Jackson, then Jackson is not entitled to commissions.

(3) The burden is upon Jackson to show by a preponderance of the evidence that he made the offer of $11,000 on behalf of Mitchell, and that Mitchell was ready, able, and willing to carry the offer into a complete purchase

John T. Delaney, of Covington, for plaintiff in error. Geo. A. Revercomb and C. B. Cushing, both of Covington, for defendant in error.

KEITH, P. This suit was brought by Jackson against the Low Moor Iron Company to recover commissions upon a sale of certain real estate owned by the defendant company.

Evidence was introduced before the jury tending to prove that the Low Moor Iron Company had for sale certain real estate in Alleghany county known as the "Rumsey" or "Mud Tunnel" lands; that in October, 1911, the company informed Jackson that if, before any one else would do so, he would get a purchaser for the lands at the price of $11,000, it would pay him a commission. Jackson introduced J. H. Mitchell to make a proposition to the company for the lands. His first offer was $10,000, which Mr. Means, the president of the company declined. Subsequently he procured from Mitchell authority to make an offer of $11,000, and on the 30th of December, in an interview with Means, the president, Jackson, made an offer of $10,500 for the property, which Means also declined, and thereupon Jackson made an offer of $11,000, which, according to Jackson's account, Means accepted and told Jackson to write at once to Mitchell, which Jackson did, as follows:

"Covington, Va. December 30, 1911.

"* * * I saw Mr. Means to-day. He wouldn't take less than $11,000.00, and said that wasn't near the worth of the property. You know what you told me to-day. Everything is clear; they are ready to make you a deed any time. I find there is 3,016 acres in this tract. I would like to hear from you at earliest convenience."

Jackson in his statement further says that at the time he made the offer of $11,000, which was accepted by Mr. Means as president of the Low Moor Iron Company, it was also agreed that Mitchell was to have 10 days from December 30th within which to have the title to the property examined.

On January 5, 1912, S. G. Cargill, assistant treasurer of the Low Moor Iron Company, wrote to Jackson at Covington, Va., as follows:

"Referring to the matter of our 3,217-acre tract known as the Rumsey land, beg to advise that we have sold these lands through another agent to Mr. D. N. Byer."

The testimony of Mr. Mitchell confirms that of Jackson, while the evidence of the plaintiff in error is in irreconcilable conflict with the account given by Jackson. That Mitchell was willing and able to complete the purchase is established by the evidence; nor is there any contest as to the amount of the verdict, if the plaintiff was entitled to a recovery, the position of plaintiff in error being that the defendant in error had failed to make out his case, and that the verdict should have been for the defendant.

One of the principal allegations of error is that the court refused to instruct the jury that to entitle the plaintiff to recover there must have been some agreement or memorandum thereof in writing signed by the purchaser or his duly authorized agent.

There are cases which hold that a written contract between the buyer and the seller, or at least a written offer from the buyer which the seller may turn into a contract, is essential. See Mechem on Agency, § 2431; Wilson v. Mason, 158 Ill. 304, 42 N. E. 134, 49 Am. St. Rep. 162; Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87.

In Caldwell and Wife v. Tannehill, 84 S. E. 6, decided at the present term, the authority of the broker to sell contained a special stipulation, among others, that:

"Unless the place is sold or contracted to be sold in writing on or before November 28, 1913, the whole proposition is withdrawn and if it comes up again it must come up as new business."

Commenting upon this feature of the case, Judge Buchanan says:

"The time within which the authority given could be exercised was extended until December 3d, following. The letter was not a mere authority to find a purchaser, but in order to comply with his undertaking the farm must be

[1] But see Note by Court at end of opinion.

sold or contracted to be sold in writing within the time named. Under such authority the broker does not become entitled to his commissions by merely producing a customer who is ready, willing, and able to purchase unless a sale or contract to sell is actually entered into by the owner of the land."

And the conclusion in that case was that, no contract of sale in writing having been entered into, the commissions could not be recovered by the broker. That case reviews many authorities and states the general rule to be:

"That a real estate broker, to be entitled to compensation, must show that he has completed his undertaking according to its terms, or that its completion was prevented without his fault by his principal at a time or under circumstances when the latter had no right to interfere"—citing 2 Mechem on Agency, § 2427; 2 Skyles & Clark on Agency, § 1770.

[1] Where, however, as in this case, the authority given to the broker by the owner of the real estate does not require a contract in writing with the purchaser, the broker is entitled to his commissions when he procures a purchaser able, ready, and willing to buy, although no written contract for the sale is entered into between the owner and the purchaser.

In Gelatt v. Ridge, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683, it was said that a real estate broker is entitled to his commissions when he procures a purchaser able and willing to buy on terms authorized by his principal, and no binding written contract of sale is required when the principal is in a situation to execute it himself.

[2] It seems that the burden of showing that the purchaser is able, ready, and willing to purchase rests ordinarily on the broker; but, as we have already said, in this case the readiness, willingness, and responsibility of the purchaser are established by the evidence.

[3] Where a sale has actually been completed, the difficulty of determining the rights of the principal and the broker is greatly diminished; but in this case no sale was made by the broker, and to entitle him to recover it must be made to appear that he produced to his principal a customer who was ready, able, and willing to purchase upon the terms fixed by the principal, and that the sale was prevented by the wrongful and arbitrary refusal of the principal to close it on his part.

In Mechem on Agency, § 2432, it is said:

"It was thought at one time, and still seems to be held in some states, that a purchaser had not been 'produced' within the meaning of the second rule until he had been brought face to face with the seller; but this seems not to be indispensable if there be other substantial and satisfactory evidence of his existence and his readiness and ability to purchase."

[4] There is no doubt as to the existence of the purchaser in this case, or (as we have more than once said) of his readiness and ability to purchase. We are of opinion therefore that all of the instructions asked for by the plaintiff in error which were predicated upon the necessity of a memorandum in writing of the sale were properly rejected, and the evidence warranted the court in giving, of its own motion, instruction No. 1, which is as follows:

"If the jury believes from the evidence that Mitchell agreed with Jackson that he would give $11,000 for the land, and that Jackson made this offer to Mr. Means, and that Mitchell was ready, able, and willing to take the land at that price, then the jury are instructed that Jackson was thereupon entitled to commission on the sale price."

The court also told the jury, in instruction No. 2, that:

If they believed from the evidence "that Jackson never offered on behalf of Mitchell but $10,500, and that Means declined to sell at that price, and so told Jackson, then Jackson is not entitled to commissions."

And in instruction No. 3 the jury were told that:

"The burden is upon Jackson to show, by a preponderance of the evidence, that he made the offer of $11,000 on behalf of Mitchell, and that Mitchell was ready, able, and willing to carry the offer into a complete purchase."

These three instructions, we think, are sufficient to guide the jury in their consideration of the evidence as applicable to this branch of the case, and that it was not reversible error to refuse to give instruction A as asked for by plaintiff in error.

[5, 6] Instruction B asked for by plaintiff in error and given by the court was as follows:

"The court further instructs the jury that, in weighing the evidence of each of the witnesses who has testified in this case, they should consider the accuracy of his recollection, the reasonableness and consistency of each part of his evidence with the residue thereof, and his interest in the result of this controversy, if he is shown by the evidence to have any interest therein, and his demeanor while testifying."

And by instruction C the court was asked to tell the jury that:

"Unless for a cause or causes based upon the evidence, they have no right to disregard the evidence of any of the witnesses who have testified in this case"—which the court refused to give.

The evidence in the case is contradictory and wholly irreconcilable. If the testimony of plaintiff's witnesses be true, a case was made out which entitled him to recover; if that of the defendant be true, the verdict should have been for the defendant. Juries are judges of the credibility of witnesses, but they do not exercise an arbitrary discretion, and it is the duty of the court, while not in the least intimating its opinion upon the facts, to give to the jury, either of its own motion or when requested by either of the parties, proper instructions to enable them intelligently to consider, weigh, and determine the value of the testimony and other evidence submitted for their consideration.

The instruction B. correctly and sufficiently

indicates how the duties of the jury in ascertaining and determining the credibility of witnesses should be performed, and the irreconcilable contradictions and conflicts in the evidence make this case one in which it was eminently proper to give such an instruction.

We are of opinion that the case should be affirmed.

Affirmed.

NOTE BY COURT.—It is proper to state that, when the opinion in this case was handed down on January 12th, it appeared from the record that instruction B was refused by the circuit court. As soon as it came to the knowledge of counsel for plaintiff in error that the court had been misled by the record, he with a just sense of propriety brought it to the attention of the court that instruction B had been given, and a stipulation to that effect, signed by counsel for all the parties, was presented to the court, which removed the ground of error upon which the case had been reversed, for while instruction C was refused, though it might properly have been granted, the court did not consider its refusal reversible error. As the facts of the case have been fully considered and deemed sufficient to warrant the verdict and judgment, and as the supposed error upon which the order of reversal was entered has been shown not to exist, there can be no reason for a rehearing, and we have made a final disposition of the case by affirming the judgment.

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(116 Va. 872)

## GWATHMEY et al. v. LYONS.

(Supreme Court of Appeals of Virginia. Nov. 11, 1914. Rehearing Denied Nov. 21, 1914.)

A petition by G. T. Gwathmey and others, members of the Commission of Roads, for a peremptory writ of mandamus against S. W. Lyons. Denied.

Bowden & Heard, of Norfolk, for petitioners. Jos. T. Lawless, of Norfolk, and Frank L. Crocker, of Portsmouth, for respondent.

PER CURIAM. This day came again the parties, by counsel, and the court, having maturely considered the petition of the plaintiffs, the answer of the respondent, and arguments of counsel, is of opinion that this case, in both aspects, is ruled by the decision of this court in Black v. Trower et al., 79 Va. 123. It is therefore considered by the court that the prayer for a mandamus be denied, that the petition of the plaintiffs be dismissed, and that the respondent recover against the plaintiff his costs by him about his defense herein expended.

Denied.

KEITH, P., absent.

(117 Va. 201)

## DISTRICT ROAD BOARD OF CENTER MAGISTERIAL DIST. OF FAUQUIER COUNTY v. SPILMAN.

(Supreme Court of Appeals of Virginia. Jan. 15, 1915.)

1. STATUTES ⟸123—TITLE—ROAD BOARD.
The titles of Acts 1910, c. 106, and Acts 1914, c. 107, which state that they are acts to amend a certain act entitled an act creating a road board for a certain county, and providing for the working of the roads therein, are sufficient to cover the provisions of those acts creating district road boards and authorizing the collection of tolls on macadam roads.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 176–183; Dec. Dig. ⟸123.]

2. STATUTES ⟸109—TITLE OF ACT—AMENDING ACT.
Where the title of the original act is sufficient to cover the provisions of an amendment, the constitutional requirement is satisfied and the title of the amending act is immaterial.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136–139; Dec. Dig. ⟸109.]

3. STATUTES ⟸141—AMENDING ACTS—REFERENCE TO AMENDED ACT—"TITLE."
Acts 1914, c. 107, which is entitled an act to amend a certain act therein specified, and the enacting clause of which provides that section 12 be amended so as to read as follows, sufficiently complies with Const. 1902, § 32, which provides that no law shall be revived or amended with reference to its title, but the act shall be re-enacted and published at length, since the title, which is defined as that part of an act by which it is known and distinguished from other acts, may be referred to to identify the act amended.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 209; Dec. Dig. ⟸141.

For other definitions, see Words and Phrases, First and Second Series, Title.]

4. HIGHWAYS ⟸93—DISTRICT OFFICERS—QUALIFICATIONS—FREEHOLD.
The provision of Acts 1910, c. 106, that two of the members of each district road board must be freeholders, is contrary to Const. 1902, § 32, providing that every person qualified to vote shall be eligible to any office, and renders invalid so much of that act as relates to the appointment and powers of the district road boards.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 304–307; Dec. Dig. ⟸93.]

Appeal from Circuit Court, Fauquier County.

Suit by E. M. Spilman against the District Road Board of Center Magisterial District of Fauquier County. Decree for the plaintiff, and defendant appeals. Modified and affirmed.

John S. Barbour, of Fairfax, and Keith & Richards and G. Latham Fletcher, all of Warrenton, for appellant. Wm. Horgan, of Warrenton, for appellee.

WHITTLE, J. In the suit of appellee, E. M. Spilman, a citizen and taxpayer of Center magisterial district in Fauquier county, against the appellant, the district road board of that district, the decree under review was entered declaring two acts of the General

Assembly, namely, an act of March 9, 1910 (Acts 1910, p. 147), and an act of March 16, 1914 (Acts 1914, p. 191), unconstitutional.

The grounds of the decision are that the title to the first act does not fairly cover the provision for the establishment of five district road boards, or for tollgates and the collection of tolls on macadam roads in the county, and that the title to the second act is defective in that it does not fairly cover the provision in relation to tollgates and the collection of tolls. Moreover, that the latter act is unconstitutional for the further reason that the enacting clause does not fulfill the requirement of the Constitution in that it makes no reference to the act which is referred to in the title and does not purport to re-enact and publish it at length. We shall consider these propositions in the order in which they are stated.

[1] 1. The act of March 9, 1910, is entitled:

"An act to amend and re-enact an act entitled an act to create a road board for the county of Fauquier, and to provide for the working of the roads of said county, approved March 8, 1904, as amended and re-enacted by an act approved March 14, 1906, and as further amended by an act of March 11, 1908, and to provide for the building and repair of bridges in said county."

The title of the act approved March 16, 1914, is identical with the above title, with the addition "and as further amended and re-enacted by an act approved March 9, 1910."

In Iverson Brown's Case, 91 Va. 762, 771, 21 S. E. 357, 360 (28 L. R. A. 110), Judge Riely, in an able and well-considered opinion, explains the reasons for the constitutional requirement as follows:

"The provision of the Constitution is a wise and wholesome one. Its purpose is apparent. It was to prevent the members of the Legislature * * * from being misled by the title of a law. It was intended to prevent the use of deceptive titles as a cover for vicious legislation, to prevent the practice of bringing together into one bill for corrupt purposes subjects diverse and dissimilar in their nature, and having no necessary connection with each other; and to prevent surprise or fraud in legislation by means of provisions in bills of which the titles gave no intimation. And, on the other hand, it was not intended to obstruct honest legislation, or to prevent the incorporation into a single act of the entire statutory law upon one general subject. It was not designed to embarrass legislation by compelling the multiplication of laws by the passage of separate acts on a single subject. Although the act or statute authorizes many things of a diverse nature to be done, the title will be sufficient if the things authorized may be fairly regarded as in furtherance of the object expressed in the title. It is therefore to be liberally construed and treated, so as to uphold the law, if practicable."

That case is controlling authority for the sufficiency of the titles to the acts in question. The titles have reference to the general subject of working the public roads in Fauquier county, and the establishment of district road boards and tollgates and the collection of tolls are congruous and germane to that object. In short, they are merely instrumentalities for the accomplishment of the general purpose of the legislation.

[2] In considering this branch of the subject, too, the principle is not to be lost sight of that, where an act is amendatory of an original act, the title of which in itself is adequate to cover the amendment, the constitutional requirement is satisfied and the subsequent title becomes unimportant.

[3] 2. Nor do we think that the amendment of the act approved March 16, 1914, contravenes the latter portion of section 52 of the Constitution, which declares:

"Nor shall any law be revived or amended with reference to its title, but the act revived or the section amended shall be re-enacted and published at length."

The language of the decree holding the act obnoxious to that provision is that the enacting clause makes no reference to the act referred to in the title and does not purport to re-enact and publish it at length. We have already given the title to that act and it need not be here repeated. This ground of objection involves a denial of the authority of the court to inspect the title for the purpose of identifying the section amended and re-enacted.

Again, in Iverson Brown's Case, supra, at page 779 of 91 Va., at page 363 of 21 S. E., the court observes: "Under the Constitution, the title is a necessary part of every statute." And we may add that one of its functions is to identify enactments and distinguish them from other acts.

Bouvier defines a "legislative title" as:

"That part of an act of the Legislature by which it is known and distinguished from other acts." 2 Bouvier's Law Dictionary (Rawles' Rev.) p. 1121.

The decision of this court in Beale v. Pankey, 107 Va. 215, 57 S. E. 661, 12 Ann. Cas. 1134, much relied on to sustain the ruling of the circuit court, is not in point. The title of the act held to be unconstitutional in that case purports to refer to an act to amend and re-enact an act entitled an act incorporating Pamplin City, Va., etc., whereas the statute itself does not profess to be an amendment and re-enactment of the former act, but in point of fact is a substantive act incorporating the town. On the other hand, the title of the act of March 16, 1914, refers to a former well-described act, the twelfth section of which is proposed to be amended and re-enacted. The enacting clause reads:

"Be it enacted by the General Assembly of Virginia, that section twelve be amended and re-enacted so as to read as follows."

Then follows section 12 published at length in its amended and re-enacted form. This legislation comes within both the letter and spirit of the Constitution, and the identity of section 12 is admittedly established by reference to the title.

We are therefore of opinion that the alleged constitutional objections to the acts of

March 9, 1910, and March 16, 1914, are not well founded.

[4] It appears, however, that the act of March 9, 1910, attaches a freehold qualification to two of the members of each district road board, a qualification that is not warranted by section 32 of the Constitution of Virginia, which provides that:

"Every person qualified to vote shall be eligible to any office of the state, or of any county, city, town, or other subdivision of the state, wherein he resides."

This identical question has twice been decided by this court, and enactments affixing such qualification to the right to hold office have been declared unconstitutional. Black v. Trower, 79 Va. 123, and Gwathmey et al. v. Lyons, Treas., 84 S. E. 103, decided at November term, 1914. Upon these authorities we are constrained to hold that so much of these two acts as relate to the appointment of district road boards and confer upon them administrative control of the working and maintenance of the public roads of their respective districts in Fauquier county is unconstitutional.

For these reasons the decree appealed from must be amended so as to conform to the views expressed in this opinion, and as amended it will be affirmed.

Affirmed.

(75 W. Va. 456)

## FRUTH et al. v. BOARD OF AFFAIRS OF CITY OF CHARLESTON et al.

(No. 2796.)

(Supreme Court of Appeals of West Virginia. Jan. 5, 1915.)

*(Syllabus by the Court.)*

1. EMINENT DOMAIN ⟸82—COMPENSATION—TAKING "PROPERTY."

"Property" within the meaning of our Constitution against the taking or damaging of private property without just compensation paid or secured to be paid comprehends not only the thing possessed, but the right also to use and enjoy it, and every part of it, and in the case of real estate to the full limits of the boundary thereof.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 215–219; Dec. Dig. ⟸82.

For other definitions, see Words and Phrases, First and Second Series, Property.]

2. EMINENT DOMAIN ⟸2—TAKING PROPERTY—COMPENSATION—MUNICIPAL CORPORATIONS—"TAKING PRIVATE PROPERTY."

Wherefore any thing done by a state or its delegated agent, as a municipality, which substantially interferes with the beneficial use of land, depriving the owner of lawful dominion over it or any part of it, and not within the general police power of the state, is the taking or damaging of private property without compensation inhibited by the Constitution.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3–12; Dec. Dig. ⟸2.

For other definitions, see Words and Phrases, First and Second Series, Taking.]

3. MUNICIPAL CORPORATIONS ⟸601—STREETS—BOUNDARIES—VALIDITY OF ORDINANCE.

An ordinance of a municipal corporation ordained pursuant to a provision of its charter authorizing it, establishing a building line on a certain street and inhibiting abutting owners from encroaching thereon, based on merely æsthetic considerations, is not within the police power, and is unenforceable as a police regulation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1333; Dec. Dig. ⟸601.]

4. CONSTITUTIONAL LAW ⟸46—DETERMINATION OF CONSTITUTIONAL QUESTION—PLEADING AND PROOF.

Whether by proper proceeding such statute and ordinance might be upheld and enforced under the power of eminent domain is a subject discussed but not decided because not presented by the pleadings and proofs in this case.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43–45; Dec. Dig. ⟸46.]

Mandamus by Val Fruth and others against Board of Affairs of the City of Charleston and others. Peremptory writ awarded.

Linn & Byrne, of Charleston, for petitioners. A. S. Alexander, E. B. Dyer, and Morgan Owen, all of Charleston, for respondents.

MILLER, P. Mandamus to require the Board of Affairs of the City of Charleston to grant to relators, Trustees of St. Paul's Evangelical Lutheran Church, a permit to construct a church edifice upon their lot at the intersection of Lee Street with Beauregard Street in said city, and having a frontage of 110 feet on each of said streets.

The alternative writ avers that on December 4, 1914, relators, in conformity with the requirements of the ordinances of said city, made formal application to the Building Inspector of said city for such permit, and was informed by him, that he would recommend to said Board of Affairs that said permit be rejected; and that on December 7, 1914, they appeared at a regular meeting of said Board of Affairs, and requested such permit, but that upon the report of said Building Inspector that the said church edifice as proposed to be erected upon said lot would extend over the building line on Lee Street, as established by ordinance adopted on March 19, 1909, and that it would be impossible to construct said edifice on said lot as proposed without encroaching on said building line, said permit, by order entered of record, was rejected, and relators denied the right to so erect their said church building, upon the sole and only ground that the same would encroach upon the building line purporting to have been so established by said city.

The alternative writ further avers that the lot of relators is wholly outside of any prescribed fire limits, and that the proposed structure does not and will not in any way conflict with any ordinance or regulation of said city concerning the safety, the health, the morals, or the good order of or among the citizens or inhabitants of said city, and that the refusal of defendants to award said

building permit rests solely on the question whether the council of said city has the right to prescribe and the Board of Affairs the right to enforce the aforesaid ordinance establishing a building line twenty-five feet from the property line of said Lee Street, and to deny relators the right to occupy their lot with said structure within the said limits.

To so deny relators' right to erect said structure, as proposed, the writ further avers, would be to deprive them of their property without due process of law, and without compensation therefor, paid or secured to be paid, and contrary to sections 9 and 10, of Article 3, of the Constitution.

Defendants appeared and demurred to and moved to quash the alternative writ, and made no other or further return thereto. So the case stands upon the sufficiency of the averments of the alternative writ.

Legislative authority to pass the ordinance in question is referred to section 8, of chapter 3, Acts 1907, the charter act of said city defining its rights and powers, and purporting to give it authority, among other things, "to provide for the regular building of houses or other structures, and to determine the distance that they shall be built from any street or alley."

So there can be no doubt that the Legislature, at least, made attempt to confer on said city power to establish building lines along its streets and alleys. Neither the charter provision nor the ordinance in question passed in pursuance thereof, attempting to establish said building line, make any provision for condemning the property abutting on the street, nor for making compensation to the owner for the burden imposed upon his property for the public benefit.

Whether the charter or ordinance should so provide we think we need not determine, nor need we hold, according to our views of this case, that without such provision for condemnation and compensation, the charter or ordinance is void on constitutional grounds. Possibly the charter and ordinance might be construed as implying the power to condemn and to compensate for property taken or damaged by the lawful establishment of such building lines. In some states, in Missouri, for example, it is held that a law of this kind, making no provision for compensation to the owner, is void as being in contravention of the Constitution against the taking or damaging of private property for public purposes without just compensation. St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226.

Two propositions of law are mainly relied on by defendants as justifying denial of the peremptory writ: First, that the establishment of a building line, for mere æsthetic purposes, is not a taking or damaging of private property for public purposes, within the meaning of the Constitution. Second, that whatever be the nature of the act, it is clearly within the police power of the State, delegated to the municipality, and for which no compensation, as for property taken or damaged, can be demanded, and that when so taken or damaged, the injury is damnum absque injuria.

[1] On the first proposition, what is included within the word "property," as employed in the Constitution? Does it mean the mere abstract thing, the thing possessed, in this case the land embraced in the boundary of the lot? We think not. Literally taken the word is sometimes said to be nomen generalissimum, but it is not always so used. Generally, and particularly in an organic law, it comprehends not only the thing possessed, but the right also to use and enjoy it, and every part of it, and in the case of real estate to the full limits of the boundary thereof. 3 Bouvier's Law Dict. (Rawle's 3d Revision) 2750; Wells Fargo & Co. v. Mayor, etc. (D. C.) 207 Fed. 871 (syl. 4). "Things real are such as are permanent, fixed, and immovable, as lands, and rights issuing out of, or connected with lands." 2 Minor Inst. 4, citing 2 Bl. Com. 15. In short, land, property, includes everything above and below it, ab solo usque ad cœlum. 2 Minor Inst. 4, and 2 Bl. Com. 17. As defined in St. Louis v. Hill, supra, property "is the exclusive right of any person to freely use, enjoy and dispose of any determinate object whether real or personal." Citing 1 Bl. Com. 138; 2 Austin's Jur. 817, 818; 19 Am. & Eng. Ency. Law, 248; Lewis on Em. Dom. sections 57, 58, and 59. And in the same case it is said:

"Property, then, in a determinate object, is composed of certain constituent elements, to-wit: The unrestricted right to use, enjoyment and disposal, of that object."

And by our statute, section 17, chapter 13, serial section 346, fifteenth paragraph, Code 1913:

"The word 'land' or 'lands' and the words 'real estate' or 'real property' include lands, tenements and hereditaments, and all rights thereto and interests therein except chattel interests."

And by the seventeenth paragraph thereof:

"The word 'property' or 'estate' embraces both real and personal estate."

See, also, the general discussion of Judge Brannon, on the definitions of "property" and the right given by the Constitution to "tax all property, real and personal" in Coal & Coke Co. v. Tax Commissioner, 59 W. Va. 605, 608, et seq., 53 S. E. 928.

[2] Upon principle, therefore, as well as upon authority, we hold that anything done by a state or its delegated agent, as a municipality, which substantially interferes with the beneficial use and ownership of land, depriving the owner of his lawful dominion over it or any part of it, not within the general police power of the state, as commonly understood, is a taking or damaging of the property without compensation within

the meaning of our Constitution, and inhibited thereby.

[3] Now on the second proposition: Can the charter authority to establish a property line, as attempted by the ordinance in question, be sustained under the police power of the state? The demurrer to the alternative writ concedes the fact alleged that relators' lot is not within any of the fire limits established by the municipality; and it is alleged and not denied, but in so far as well pleaded, admitted by the demurrer, that the proposed structure does not and will not conflict with any ordinance or regulation of the city covering the safety, the health, the morals, or the good order among the citizens and inhabitants thereof.

It is conceded by relators that an ordinance clearly regulative, and within the police powers of the state, and within delegated powers of the municipality, would be valid, but it is insisted that the ordinance in question does not fall within that category. Stated in its most comprehensive terms by the highest court of our country this power extends not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. Eubank v. City of Richmond, 226 U. S. 137, 142, 33 Sup. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192, citing C., B. & Q. Ry. Co. v. Drainage Com'rs, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175. And in the same connection it is said, on the authority of another case, that:

"It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government." District of Columbia v. Brooke, 214 U. S. 138, 149, 29 Sup. Ct. 560, 568 (53 L. Ed. 941).

But the court held in the principal case, reversing the supreme court of Virginia, that an ordinance of the city of Richmond, based on a provision of its charter act, very similar to that of the City of Charleston, and tested by the extreme limits of the power, namely, the public convenience and general prosperity, that an ordinance which required the street committee on request in writing of the owners of two thirds of the property abutting on any street to establish a building line on the side of the square on which their property fronts to be not less than five feet nor more than thirty feet from the street line, was an unreasonable exercise of the police power, in as much as it authorized one set of property owners to control the property rights of others, and therefore void. The court did not think it necessary to consider and did not decide the power of the city to establish a building line or regulate the structure or height of buildings, and with reference to the cases cited for this proposition said:

"The ordinances or statutes which were passed on had more general foundation and a more general purpose, whether exercises of the police power or that of eminent domain."

And concluding said the court:

"Nor need we consider the cases which distinguish between the esthetic and the material effect of regulations the consideration of which occupies some space in the argument and in the reasoning of the cases."

The Virginia court had held that the power delegated and sought to be exercised by the ordinance was in good faith and a valid exercise of the police power, and

"in the interest of the health, safety, comfort, or convenience of the public, and for the benefit of the property owners generally who are affected by its provisions; and that the enactment tends to accomplish all, or at least some, of these objects."

The supreme court of the United States, in reply, said, that by this ordinance

"one set of owners determine not only the extent of use but the kind of use which another set of owners make of their property. In what way is the public safety, convenience or welfare served by conferring such power?"

In Welch v. Swasey, 193 Mass. 364, 372, 79 N. E. 745 (23 L. R. A. [N. S.] 1160, 118 Am. St. Rep. 523) a case involving the power of Boston, under its charter, to regulate the height of buildings, and to divide the city into districts for that purpose, and to prescribe different rules therefor in the several districts, all in the interest of the safety of the people, the court said of the police power invoked:

"In the exercise of the police power the Legislature may regulate and limit personal rights and rights of property in the interest of the public health, public morals and public safety. Commonwealth v. Pear, 183 Mass. 242 [66 N. E. 719, 67 L. R. A. 935]; Commonwealth v. Strauss, 191 Mass. 545 [78 N. E. 136, 11 L. R. A. (N. S.) 968, 6 Ann. Cas. 842]; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 318 [26 Sup. Ct. 100, 50 L. Ed. 204]. With considerable strictness of definition, the general welfare may be made a ground, with others, for interference with rights of property, in the exercise of the police power. Commonwealth v. Strauss, ubi supra."

We have examined all the judicial decisions cited by the Virginia court for its conclusion in the Eubank's case. With but one exception, that of State ex rel. Berger v. Hurley, 73 Conn. 536, 48 Atl. 215, none of them are building line cases. The other decisions involve the exercise of the police power in other classes of cases. One of them, People ex rel. Kemp v. D'Oench, 111 N. Y. 359, 361, 18 N. E. 862, involved a statute of the legislature regulating the height of dwelling houses and houses used as dwellings for more than one family, thereafter to be erected in the City of New York. The exact question in that case was whether hotel buildings fell within the provision of the statute. The statute was held to be a proper police regulation, as applied to the City of New York, where such regulation was necessary in the judgment of the legislature to protect the lives and conduce to the health of the occupants of such houses in a thickly populated city, but that such statute did not and was not intended to apply to a hotel building. In

the Connecticut case the relator sought mandamus requiring the building commissioners to issue to her a permit to build in front of or beyond a building line, which had existed for ten years or more with the acquiescence of all parties. It will appear from that case that the statute provided for some proceeding to be had beforehand establishing such building line, and the contention of relator was that that proceeding was defective and void. The conclusion of the court was, under the circumstances, that relator's right to a permit was open to grave doubt, and that for this reason a peremptory writ of mandamus ought not to issue.

Sections 118 and 128, of Freund on Police Power, cited by the Virginia court, are in point only in so far as they relate to cases falling within the general police power of the state. The sections of Mr. Freund, particularly applicable to the case at bar, where the purposes of the statute and ordinance are æsthetic and not to provide for the safety, health and morals of the public in general, are sections 180 and 181. These latter sections say, in accordance with the holdings of the courts everywhere, that for mere beauty and symmetry of the streets, or for mere æsthetic purposes, having no reference to the safety, health, morals or general welfare of the community at large, the State may not under its police power regulate or control the use by the owner of private property; that such right of regulation if exercised at all must be done under the power of eminent domain, and within constitutional limitations requiring just compensation to be paid for the taking or damaging of private property. This is the rule in Massachusetts as we understand the decisions. In Welch v. Swasey, supra, the supreme court of Massachusetts says, that although the legislature have no power to restrict the use of private property for purely æsthetic purposes, yet when they have determined that the public health or the public safety requires the limitation of the height of buildings in a city, in exercising the police power for such lawful purposes they may also consider questions of taste and beauty. Counsel in the case at bar rely on McQuillin on Municipal Ordinances, sections 32, 429, 430. In section 32, without citing any authority, Mr. McQuillin does say, that a municipality under a proper grant of power may, by ordinance, establish on certain streets building lines, and provide that a certain class or character of buildings shall be erected in certain districts. It will be found, however, we think, that no adjudged case, except the Virginia case, reversed, has ever gone so far as to hold that for mere æsthetic purposes, or beauty and symmetry of streets, the state may in the exercise of its police power alone limit the owner in the use of his private property; that if such restraint is imposed it must be done under the power of eminent domain and not in the exercise of the police power.

Mr. Dillon, in his recent fifth edition of his work on Municipal Corporations, volume 2, section 695, says:

"Of recent years, in response to a growing demand for the preservation of natural beauty and the conservation of the amenities of the neighborhood resulting from the manner in which it has been laid out and built upon, legislatures and municipalities have sought, by statute and by ordinance, to prevent the encroachment of undesirable features, unsightly erections, and obnoxious trades. This legislation, induced mainly by æsthetic considerations, has given rise to a series of novel questions affecting the legislative power of both the State and its governmental agent, the city. It has been held that, for æsthetic considerations and to promote the popular enjoyment and advantages derived from the maintenance of a public park, the legislature may, by virtue of the power of eminent domain and upon making just compensation, impose restrictions upon the manner in which property abutting on the park may be improved and used. But it is apparent that restrictions founded, not upon the power of eminent domain, but upon the exercise of the police power, stand upon another basis, and several cases have laid down the rule that by virtue of the police power merely, neither the legislature, nor the city council exercising delegated power to legislate by ordinance, can impose restrictions upon the use of private property which are induced solely by æsthetic considerations, and have no other relation to the health, safety, convenience, comfort or welfare of the city and its inhabitants. The law on this point is undergoing development, and perhaps cannot be said to be conclusively settled as to the extent of the police power."

We think this section from Mr. Dillon contains a fair statement of the present status of the law on the subject. The question of the extent of this police power has several times been presented in what are known as the bill or sign board cases, and generally it has been held, that laws and ordinances operating to control the height of bill or sign boards, and the distance from the street or street lines, based merely on æsthetic grounds, and having no reference to their safety, could not be sustained under the police power of the state. In People ex rel. Wineburgh Adv. Co. v Murphy, 195 N. Y. 126, 88 N. E. 17, 21 L. R. A. (N. S.) 735, it is held that an ordinance which purports to legislate for public safety must tend in some appreciable way to that end. Unless there is a substantial connection between the assumed purpose and the end to be accomplished such ordinance is unenforceable. In City of Rochester v. West, 164 N. Y. 510, 58 N. E. 678, 53 L. R. A. 548, 79 Am. St. Rep. 659, the charter of the municipality authorized an ordinance prohibiting the erection of bill boards exceeding six feet in height, except with the permission of the common council. Construing an ordinance passed in pursuance of the charter the New York court said:

"We think this statute conferred upon the common council of the city authority to regulate boards * * * so far, at least, as such regulation was necessary to the safety and welfare

of the inhabitants of the city, or persons passing along its streets."

This object was clearly within the police power. Neither the charter nor the ordinance prohibited the erection of sign boards or bill boards over six feet in height absolutely, but only without permission of council, and the regulation of council was limited to public safety. To the same effect is Varney & Green v. Williams, 155 Cal. 318, 100 Pac. 867, 21 L. R. A. (N. S.) 741, 132 Am. St. Rep. 88. And in the leading case of City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 72 N. J. Law, 285, 62 Atl. 267, 111 Am. St. Rep. 676, 5 Ann. Cas. 995, it was distinctly decided that:

"A city ordinance requiring that sign or billboards shall be constructed not less than 10 feet from the street line is a regulation not reasonably necessary for the public safety, and cannot be justified as an exercise of the police power."

The opinion in that case cites the leading decisions on the subject, including some of those already cited in this opinion.

Our conclusion is, that under the present status of the law, and considering the present conditions as to population existing in the cities of our state, we should not go counter to the great weight of authority and take advanced ground on the question of the police power to regulate and control the use of private property, based on mere æsthetic ground and having no reasonable reference to the safety, health, morals and general welfare of the people at large.

[4] Whether without having made provision for condemnation or compensation for damages to the property taken or injured, and without providing for such condemnation and compensation the charter and ordinance of the City of Charleston is void as an exercise of the power of eminent domain, as already stated, we need not decide, and we leave this question open for further consideration when a case shall be presented calling for such decision.

For the foregoing reasons we are of opinion that the peremptory writ awarded on a former day of the term was properly directed.

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(99 S. C. 383)

## ANDERSON v. MERCHANTS' GROCERY CO. (No. 8865.)

(Supreme Court of South Carolina. July 17, 1914.)

1. TRIAL ⇐=260—GIVEN INSTRUCTIONS—REQUESTED INSTRUCTIONS.

Where the court excluded the defense of a breach of a parol warranty of goods sold, plaintiff's requested charge excluding such defense was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⇐=260.]

2. TRIAL ⇐=296—INSTRUCTIONS—EVIDENCE.

In an action for goods sold, where the answer did not plead a breach of warranties in the written contract and there was no evidence thereon, the court's statement of such warranties could not have misled the jury, in view of its exclusion of an alleged parol warranty.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec. Dig. ⇐=296.]

3. APPEAL AND ERROR ⇐=1033—HARMLESS ERROR—INSTRUCTIONS FAVORABLE TO APPELLANT.

In an action for goods sold, a charge that, if defendant was not damaged on account of plaintiff's misrepresentations and fraud, it would be liable for what the goods were really worth though it had not returned or offered to return them, was not prejudicial to plaintiff, since it was favorable to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052–4062; Dec. Dig. ⇐=1033.]

4. SALES ⇐=396—ACTION FOR PRICE—SUFFICIENCY OF PLEA—FRAUD.

In an action for goods sold, an answer, alleging that when the contract was made the seller told the buyer that the beverage was one thing when he knew it was another, that the buyer relied thereon, and that the seller intended to deceive, was a sufficient plea of fraud.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1134, 1135; Dec. Dig. ⇐=396.]

5. SALES ⇐=396—SUFFICIENCY OF PLEA—OFFER TO RETURN.

An answer, in an action for the price of goods, alleging that soon after their arrival defendant ascertained their character and immediately declined to accept them, and had not accepted them and had so notified the seller, sufficiently alleged an offer to return.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1134, 1135; Dec. Dig. ⇐=396.]

6. SALES ⇐=287—FRAUD OR MISREPRESENTATION—OFFER TO RETURN.

A buyer of goods has a reasonable time in which to ascertain fraud or whether the goods come up to the guaranty, and, when he ascertains fraud or breach of guaranty, must notify the seller and either return the goods or offer to return them.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 811–816; Dec. Dig. ⇐=287.]

7. SALES ⇐=324 — ACTION FOR PRICE — EVIDENCE—OFFER TO RETURN.

In an action for the price of goods sold, the buyer's letter, written 20 days after it received the goods, stating that they were held subject to the seller's order, was admissible on the issue of the buyer's offer to return them for fraud inducing the sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 905, 906; Dec. Dig. ⇐=324.]

Appeal from Common Pleas Circuit Court of Marion County; J. W. De Vore, Judge.

Action by Charles A. Anderson against the Merchants' Grocery Company. Judgment for plaintiff, and he appeals. Affirmed.

The exceptions were as follows:

(1) Because his honor erred, it is respectfully submitted, in allowing the witness Charles A. Anderson, over plaintiff's objection, to answer the question, "Were the goods you shipped the Merchants' Grocery Company pure, unfermented, clarified fruit juice?" It is respectfully submitted that this was error for the reason that, his honor having stated that the question was submitted solely in support of the defense of fraud, no testimony should have been received in support of the defense of fraud, for the reasons stated in plaintiff's ground of objection, to wit: That no actionable fraud had been alleged in defendant's answer, in that there was

no allegation of a tender of a return of the goods nor was any damage alleged on account of the alleged fraud of plaintiff.

(2) Because his honor erred in allowing, over plaintiff's objection, the following testimony of L. C. Lawrence: "Q. Please state in your own way the circumstances connected with your signing of the order set forth in the complaint. A. Mr. Walter came in the office and showed these samples to me, samples of this Mezzo. I asked him what the composition of it was, and he said— (Plaintiff objects to any testimony that tends to vary the written order.) Q. State what representations were made by this man to you. (Objected to. Objection overruled. Exception noted.) A. He represented this to be pure, clarified, unfermented juice from fruits; that it was the same class of stuff as Welch's grape juice. I had a long conversation with him, and told him if it was anything on the order of the low grade of drinks they had around here I wouldn't have it; I wouldn't give him five cents a barrel for it. He said that he guaranteed it was the same class of stuff as Welch's grape juice, only cheaper, and he would guarantee it to be the same stuff. (Plaintiff objects to the above answer, and moves that it be stricken from the record.) The Court: You can strike out what he guaranteed, but not what he said about it being pure, unfermented, clarified juice of fruits. (Exception noted.)" It is respectfully submitted that this testimony should have been excluded, in that it tended to add to, vary, and contradict the written order on which this action was based, and the said testimony should not have been received in support of the defense of fraud, in that no actionable fraud had been alleged in defendant's answer, as there was no allegation of a tender of a return of the goods, nor was any damage alleged on account of the alleged fraud of plaintiff.

(3) Because his honor erred in allowing, over plaintiff's objection, the following testimony from the witness H. W. Little: "Q. Did you hear the conversation that took place between Mr. Walter and Mr. Lawrence? A. Yes, sir. Q. What representations did Mr. Walter make? (Plaintiff objects on grounds before stated. Objection overruled. Exception noted.) Q. Proceed, Mr. Little. A. He said that they handled nothing but high-class soda fountain goods, and said the goods were pure, unfermented, clarified fruit juice, made from juice from pure fruit." It is respectfully submitted that this testimony should have been excluded, in that it tended to vary, add to, and enlarge the written order on which suit was brought, and the testimony could not properly have been received to show fraud, for the reason that defendant had alleged no actionable fraud in his answer, in that there was no allegation of a tender of a return of the goods nor was there any allegation of damage from plaintiff's alleged fraud.

(4) His honor erred in admitting in testimony the letter of defendant to plaintiff, marked "Exhibit C," for the reason that said letter had solely to do with the alleged breach of warranty, which the court had excluded from the case and hence plaintiff could not be affected by any tender of a return of the goods on account of a breach of warranty of which defendant had no right to complain, under the ruling of the court; his honor having ruled that the letter was admitted solely to show what purported to be a tender back of the goods.

(5) His honor erred in not directing a verdict for the plaintiff on plaintiff's motion, for the reasons therein stated, to wit: In that the undisputed testimony showed that defendant had sold all the goods for which suit was brought, and held open accounts on his books against the persons to whom he had sold the goods, which amounted to an adoption of the contract and a waiver of any fraud.

(6) His honor erred in the following charge to the jury: "I charge you as a matter of law that under this contract this is what the plaintiff undertook to guarantee: He guaranteed, 'that our Mezzo is not subject to any special tax, either state, county, or internal revenue.' He guarantees that. Is that true? If that is a fact, that part of the guaranty is carried out; that it is not subject to any special tax either state, county, or internal revenue tax. 'We further guarantee that these goods are nonalcoholic and not adulterated or misbranded, within the meaning of the Food and Drug Act.' Are they nonalcoholic? If they are not, he stood up to that part of his guaranty. If they are not adulterated or misbranded within the meaning of the Food and Drug Act—he doesn't say they are not adulterated, but that they are not adulterated in the meaning of the Food and Drug Act, that is, that they would pass under the Food and Drug Act—if that is so, he stood up to that part of his guaranty. Now, you have got to ascertain from the evidence on that particular part of it whether that is so or not. No testimony that has been sworn to here, that you have heard, but has been ruled out, must be considered by you. In other words, no testimony in reference to the guaranty, except these things he undertook to guarantee in writing, is competent. If the defendant undertook to prove that he undertook to guarantee something else except what was in writing, that would be incompetent, and you should not consider such testimony. So, the testimony on the guaranty must have reference to what he did guarantee in writing and just what I have read; and all other testimony that you have heard that came out before I could rule on it, you must disregard as far as the guaranty is concerned." This charge was erroneous, for the following reasons: (1) Because a breach of any guaranty on the points stated in this charge would be no defense in this case; (2) in giving the defendant the benefit of a defense he had not set up; (3) in charging that the evidence must show that the guaranty mentioned in the charge had been made good or performed, whereas, even if a breach of such guaranties was a defense on which defendant was entitled to rely, it was error to place the burden of proving a performance on plaintiff, when as a matter of law the burden would be on defendant to show a failure in such guaranties; (4) in placing the burden of proving that the stated guaranty had been made good on plaintiff; (5) in making plaintiff's recovery dependent upon proof which he was not as a matter of law required to make.

(7) His honor erred in charging the jury as follows: "If, on the other hand, the defendant within a reasonable time notified the plaintiff that the goods did not come up to the guaranty, or that he had made false representations and the goods were not what they were represented to be, if he did that in a reasonable time and offered to return the goods or to tender the goods to be returned, then his defense would have availed." This charge was erroneous in the following respects: (1) In that it caused the jury to suppose that a breach of a guaranty would be sufficient ground for the rescission of the contract; (2) in instructing the jury that a mere breach of a guaranty would warrant the defendant in returning the goods and rescinding the contract; (3) in instructing the jury that the defendant would be relieved of liability by merely giving a notice to plaintiff that the goods did not come up to the guaranty or the representations and offering to return the goods without proof of the truth of such facts; (4) in that such charge was a charge of the facts, in violation of article 5, § 26, of the Constitution of this state, in stating to the jury what acts by defendant would make out his defense or constitute fraud.

(8) His honor erred in charging the jury as follows: "If the defendant fails to show he has been damaged on account of misrepresentations and fraud, although he has not returned the

goods, or offered to return the goods, he would still be liable for what the goods were really worth, the actual value of the goods. He couldn't wipe out the contract where he had kept the goods. If the goods are of any value at all, he must pay for them, the value of the goods he kept." This charge was erroneous, in that it created the impression on the jury that, even though defendant had not been damaged by the alleged fraud of plaintiff and had not returned or offered to return the goods, he would only be required to pay the actual and not the contract price of the goods.

(9) His honor erred in refusing to charge plaintiff's third request to charge, which was as follows: "I charge you that the defense of breach of warranty cannot be considered by you in this case, for the reason that the written order upon which suit is based, the execution of which is admitted, contains warranties, and the warranty upon which defendant places reliance is not one of them; the rule being that, when certain things are expressly warranted in a written contract of sale, any other warranty except those stated is precluded." It is respectfully submitted that the propositions of law in said request were sound, and the refusal to so charge was prejudicial to plaintiff, in that it permitted the jury to consider breaches of warranty which were not in issue in the case; the issue of warranty made by defendant's answer having been already withdrawn from the jury by other portions of the charge and by the rulings of his honor. The said refusal to charge was also prejudicial, because it permitted the jury to consider the breach of warranty set up in defendant's answer after it had properly been eliminated from the case.

(10) His honor erred in submitting to the jury the issue of breach of guaranty or warranty when there was no such issue before the court.

A. F. Woods, of Marion, for appellant. L. D. Lide, of Marion, for respondent.

GAGE, J. The plaintiff sued on a written contract for goods delivered thereunder. The sum claimed was $151.20. The jury found $62.50. The plaintiff appeals.

There are ten exceptions, but not nearly so many issues. The appellant has grouped them into six, but there are really only three issues in the case.

The testimony shows this: That the defendant signed a written order for 14 kegs of a soft drink called Mezzo; and that the Mezzo was delivered; and that all of the kegs were sold by defendant to its customers; and that one customer returned to the defendant 4 kegs which he had bought of defendant; that some of these customers did not pay defendant for the Mezzo.

The answer plead two defenses: (1) Fraud, and (2) breach of a parol warranty. These in an inverse order.

[1] 1. The court plainly, more than once, excluded the second defense, because there was no warranty expressed in the paper order, such as defendant pleaded. The whole charge made it plain to the jury that, so far as a warranty was concerned, the parties were held down to that expressed in the paper contract, and none other. The jury was instructed:

"If the defendant undertook to prove that he undertook to guarantee something else except what was in writing, that would be incompetent and you should not consider such testimony. So, the testimony on the guaranty must have reference to what he did guarantee in writing and just what I have read; and all other testimony that you have heard that came out before I could rule on it you must disregard as far as the guaranty is concerned."

It was needless therefore to charge plaintiff's third request; and that is the basis of the ninth exception.

[2] 2. It is true the answer did not plead a breach of those warranties which were expressed in the paper, nor was there any testimony thereabout; and the court might well have refrained from a statement of those warranties. But any such statement could not have misled the jury, in view of the plain instructions above quoted.

[3] 3. Thus, exceptions 6, 7, and 10 are without merit. Nor is the eighth exception well taken, because it was a favorable statement for the plaintiff of the defendant's liability.

The other exceptions related to the first defense—that of fraud. And, following the argument, they may be considered together.

[4] 4. First, as to the pleadings. The answer alleges in effect: That the vendor, when the contract was made, told the vendee that the beverage was one thing when the vendor knew it was another; that the vendee relied on the vendor's words; that the vendor had the intent to deceive; that the vendee declined to accept the beverage, and so notified the vendor. By good sense, and by authority, that is a sufficient plea to prove fraud. In every case of fraud the essence of the transaction is the intent of actor. It is not sufficient, as an indictment, to simply charge the existence of the intent; the pleader must go further, and allege a false statement, with knowledge of its falsity, the reliance upon it by the other party, to his hurt. 2 Pom. Eq. § 882; Gem Chem. Co. v. Youngblood, 58 S. C. 56, 36 S. E. 437. The answer here meets the measure of the law; that in Bromonia Co. v. Drug Co., 78 S. C. 482, 59 S. E. 363, relied on by appellant, did not do so by very much. The testimony was responsive to the plea and sustained it.

[5, 6] But the appellant further contends that, to make available the plea of fraud, the respondent must have tendered back to the vendor the worthless goods. The answer alleges such tender. The court charged the jury that a tender must be made. The testimony shows that the tender was made.

5. The answer alleges:

"That soon after the arrival of said goods defendant ascertained the character of the same, and thereupon immediately declined to accept the same, and has not accepted the same, and duly notified plaintiff thereof."

The court charged:

"If there had been no misrepresentation about them, the defendant has the right to have a reasonable time in which to ascertain that fact, but it was his duty to do so in a reasonable time, and if he found out that there had been misrepresentation, or that the goods did not come up to the guaranty, it was his duty, aft-

er he ascertained that fact, either as to fraud or misrepresentation, to notify the plaintiff, and either return the goods or to offer to return them."

[7] Twenty days after the beverage was received, the vendee wrote the vendor: "These goods are here subject to your order." That letter was objected to. The court excluded the irrelevant parts and admitted the part above quoted, which is clearly competent.

There is no ground to reverse the judgment below, and it is affirmed.

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(100 S. C. 1)

## HERNDON v. WARDLAW.

## STEVENS, SANDFORD & JORDAN v. YORK COTTON MILLS.

(No. 8989.)

(Supreme Court of South Carolina. Jan. 18, 1915.)

1. EVIDENCE ⟸450 — PAROL EVIDENCE — WRITTEN CONTRACT—CONSTRUCTION.

Where the president of a corporation signed a memorandum addressed to claimant, agreeing to take $6,000 from claimant and to issue to him preferred stock bearing interest at 7 per cent., it being understood that after one year, if so desired by claimant, and after due notice, the corporation would reimburse him for the amount or continue the transaction on the same terms, to wit, to pay claimant an additional 1 per cent. per annum on the amount, which should begin on the issue of the stock, etc., the contract was ambiguous as to whether it was intended to evidence a sale of stock or a loan of money; and hence parol evidence showing the surrounding circumstances was admissible to enable the court to ascertain the intention of the parties and was not within the parol evidence rule.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082, 2084; Dec. Dig. ⟸450.]

2. CONTRACTS ⟸170 — CONTEMPORANEOUS CONSTRUCTION.

Where a written contract is ambiguous, the practical construction which the parties themselves have given to it, as indicated by their acts, may be shown as reflecting their intention.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. ⟸170.]

3. CORPORATIONS ⟸170—CONTRACTS—SALE OF STOCK—LOAN.

A memorandum, signed by the president of a corporation and addressed to claimant, recited that the corporation would take $6,000 from claimant and issue preferred stock therefor at 7 per cent. payable semiannually, it being understood that after one year, if claimant desired, and after due notice, the corporation would reimburse him for the amount or continue the transaction on the same terms, to wit, paying claimant an additional 1 per cent. per annum on the amount from the issuance of the stock. At the expiration of the year claimant gave notice of his election to terminate the contract and require payment of the amount on surrender of the certificates, but time therefor was extended, and at the expiration of another year the corporation's president wrote claimant that the money would be paid in installments of $2,000 each at specified dates. *Held*, that such facts created claimant a creditor of the corporation and not a stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 624–632; Dec. Dig. ⟸170.]

4. CORPORATIONS ⟸170 — STOCKHOLDERS — "INTEREST."

The word "interest," where used in a contract to pay money to a corporation, the payer receiving preferred stock, is not equivalent to the word "dividends," and sustains the view that the parties intended a loan and not a sale of stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 624–632; Dec. Dig. ⟸170.

For other definitions, see Words and Phrases, First and Second Series, Interest.]

5. EVIDENCE ⟸462—PAROL EVIDENCE—NATURE OF CONTRACT.

A contract which on its face may evidence a sale of corporate stock may be shown by parol to have been merely for a loan of money.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2134–2139; Dec. Dig. ⟸462.]

6. CORPORATIONS ⟸453—CONTRACTS—EXECUTION—SIGNATURE OF OFFICER.

Where a written contract showed on its face that it was made for a corporation, and that W., its president, had authority to act for the corporation, the fact that he signed the contract "W., President," or "Pt.," did not indicate that the abbreviation was mere descriptio personæ and that the contract was his own and not that of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1798, 1799; Dec. Dig. ⟸453.]

Appeal from Common Pleas Circuit Court of York County; J. W. De Vore, Judge.

In the matter of insolvency proceedings by Stevens, Sandford & Jordan against the York Cotton Mills, in which J. G. Wardlaw was appointed receiver. He denied the claim of R. J. Herndon as a creditor of the corporation, and from a judgment in favor of claimant the receiver appeals. Affirmed.

W. W. Lewis, of Yorkville, for appellant. C. E. Spencer and J. S. Brice, both of Yorkville, for respondent.

HYDRICK, J. On April 4, 1910, the respondent Herndon and York Cotton Mills, by its president, J. G. Wardlaw, made the following contract:

"Yorkville, S. C., April 4, 1910.

"R. J. Herndon, Esq., Yorkville, S. C.: We agree to take $6,000 from you, say, on April 25th, May 27th, and June 24th, 1910, to issue you preferred stock bearing interest at 7 per cent., payable semiannually. It being understood that after the expiration of one year, if so desired by you, and after due notice, that we will reimburse you for the amount or continue the transaction upon the same terms as at present, viz., to pay you an additional 1 per cent. per annum on the $6,000, which shall begin upon the issue of the stock.

"J. G. Wardlaw, President.

"I agree to the above. R. J. Herndon."

At that time the corporation had no preferred stock; but on April 21, 1910, the stockholders met, and, by resolution duly adopted, increased the capital stock from $150,000 to $300,000. It was provided that the increase or new stock should be preferred stock, the preference consisting chiefly in its being given priority over the old or common stock as to assets, in case of final liquidation, and as to cumulative dividends out of the net earnings to the extent of 7

per cent. per annum, payable in January and July of each year, and no mortgage was to be placed on the property during the life of the preferred stock. It appears that a mortgage was then outstanding to secure certain bonds. The proceeds of the sales of the preferred stock were to be used to retire these outstanding bonds and to purchase new machinery, and the right was reserved to retire the preferred stock on July 1, 1915, at par together with any unpaid dividends.

Herndon was a stockholder and also a creditor of the mills, and knew of the terms and conditions above stated upon which the preferred stock was to be issued. He advanced money to the mills according to the agreement of April 4th, and on June 1, 1910, the following agreement was executed:

"Memorandum of agreement made this 1st day of June, 1910, between R. J. Herndon and J. G. Wardlaw, president of York Cotton Mills, all of county and state aforesaid, witnesseth:

"R. J. Herndon has bought sixty shares of the preferred stock of York Cotton Mills, paying therefor $6,000 in cash, and has been issued three certificates of stock, each for $2,000, and dated July 1, 1910.

"The York Cotton Mills agrees to pay the said R. J. Herndon 8 per cent. interest on the said $6,000 from July 1, 1910, payable semiannually, that is, 1 per cent. in addition to the 7 per cent. dividend named in the certificate.

"On July 1, 1911, after thirty days' notice, this contract may be terminated by either party, the $6,000 being paid to the said R. J. Herndon upon the surrender of the certificates of stock, or by mutual consent it may be continued at pleasure upon the same terms as hereinbefore mentioned.

"In witness whereof we have set our hands and seals this 1st day of June, 1910.

"R. J. Herndon. [L. S.]
"J. G. Wardlaw, [L. S.]
"President York Cotton Mills."

On July 1, 1910, in accordance with these agreements, 60 shares of preferred stock, of the par value of $100 each, were issued to Herndon, evidenced by three certificates of 20 shares each. These certificates were in the usual form of certificates of preferred stock, with the rights, terms, and conditions, specified in the resolution above mentioned, indorsed thereon. There was nothing on them or on the books of the corporation to show that they were held by Herndon otherwise than as any other holder of preferred stock. At the same time, Herndon converted another obligation which he held against the corporation for $2,500 into preferred stock, and received therefor a certificate similar in all respects to those first above mentioned. As to this stock, no collateral agreement was made, and it is not in issue. In pursuance of the agreement of June 1st, relative to the $6,000, Herndon gave the required notice of demand for payment on July 1, 1911. Subsequently, at the request of the president of the mills, he agreed to extend the time of payment another year, under the existing contract. Again, in 1912, he gave the required notice of demand of payment on July 1, 1912. On being told by the president that the mills could not pay him then, he demanded and received the following additional agreement:

"Yorkville, S. C., June 17, 1912.

"Prof. R. J. Herndon, Yorkville, S. C.—Dear Sir: Referring to certain obligations of this company held by you, these papers will be paid to you as follows:

"$2,000 on October 15, 1912.
"$2,000 on November 15, 1912.
"$2,000 on December 16, 1912.
"Yours truly, [Signed] J. G. Wardlaw,
"President and Treasurer."

On October 9, 1912, the principal action above entitled, which is a creditors' bill, was commenced for the appointment of a receiver, sale of the assets, and payment of the debts of the corporation. A receiver was appointed, creditors were called on to prove their claims and enjoined from proceeding otherwise. Under the call for creditors, Herndon presented this claim, alleging that in the transactions above set forth he loaned the corporation $6,000, and received the stock as collateral security for the payment thereof. The receiver denied liability of the corporation on the allegation that Herndon was a stockholder and not a creditor. The clerk of court, to whom it was referred to take proof of claims, sustained Herndon's contention, and his findings and conclusions were confirmed by the circuit court.

It will be seen at a glance that the pivotal question in the case is: Was Herndon a creditor or a stockholder? In solving that question, the circuit court admitted in evidence, over appellant's objection, the agreement of April 4, 1910, and the letter of June 17, 1912, above quoted, and parol testimony of the facts and circumstances existing and surrounding the parties at the time of the transaction, and also of their agreement that it was intended to be a loan with the stock as collateral security therefor.

[1] If the testimony was competent, it abundantly established Herndon's contention. But appellant strenuously urges that it was incompetent because violative of the rule that parol testimony is inadmissible to contradict or vary the terms of a written instrument. The rule is well settled, but it is not inflexible, and it has limitations and exceptions which are as well settled as the rule itself.

It is not and cannot be contended that the agreement of April 4, 1910, or the letter of June 17, 1912, violate the rule, for they are in writing; but these are objected to on the ground that the one was merged in the agreement of June 1, 1910, and the other affords only an inference of the interpretation of that agreement by the parties themselves, while its true meaning is to be interpreted by the court from the language therein used by the parties.

[2] No doubt, the general rule of interpretation of contracts is that, where they are plain and unambiguous, the court shall ascer-

tain the intention of the parties thereto from the language used by them. But when the construction is rendered doubtful by the language used, with the view of ascertaining their true meaning and the intention of the parties, the courts look not only to the language employed, but to the subject-matter and the surrounding circumstances, so that they may view them in the same light that the parties did when they executed them. In such cases, previous colloquium and all writings which led up to the contracts are admissible, not to vary or contradict them, but merely to explain them and aid in their interpretation. So, too, in such cases, the practical construction which the parties themselves have given them, as indicated by their acts under them, may be shown as reflecting their intention in making them. These principles are well sustained by the authorities, and under them the evidence objected to was admissible, because the contract of June 1, 1910, was one of doubtful interpretation. If Herndon was to be only a stockholder, why was that agreement made? If the transaction was intended to be an absolute sale of the stock, as the agreement in its first clause declares, there was no reason for doing more than accepting his money and issuing to him the certificates of stock. That was all that was done when he took the $2,500 worth of preferred stock which he purchased outright. It may be said, however, that the writing was necessary to show that the stock was to bear 8, instead of 7, per cent., as provided in the resolution for its issue, and that it was to be redeemed by the corporation in a shorter time than that specified in the resolution for the retirement of the preferred stock. While these provisions of the contract are consistent with that view of the transaction, they are equally consistent with the construction that it was a loan with the stock as collateral security. If it be said that they are inconsistent with the latter view, because there was no authority to pledge the stock as collateral, it is answered there was no more authority to agree to pay 8 per cent. dividends thereon, or to redeem it within the time fixed in the resolution.

[3] It is not deemed necessary to consider or decide whether, under the circumstances, the president of the corporation could have pledged the stock as collateral security, or have made a contract binding on the corporation to redeem it within the time fixed in the resolution. But his authority to borrow money and bind the corporation for the payment thereof is unquestioned. Therefore, if it be conceded that he had no power to pledge the stock, or bind the corporation by an agreement to redeem it at the time specified in the agreement, it does not affect Herndon's status as a creditor, since he claims no preference or priority under or by virtue of his having the stock.

[4] But the agreement further provides that the corporation shall pay "interest" on the said $6,000; "that is, 1 per cent. in addition to the 7 per cent. dividend named in the certificates." The certificates provide for the payment of dividends, not interest. The use of the word "interest" in the agreement sustains the view that the parties intended the transaction to be a loan.

The agreement also provides that on July 1, 1911, after 30 days' notice, it might be terminated by either party; that is, the corporation had the right to pay back the money and demand the surrender of the stock, or Herndon had the right to demand payment of the money on surrender of the stock —a provision which is much more suggestive of a loan, with the stock as collateral security, than an absolute sale thereof.

[5] There is another exception to the rule of evidence involved by appellant under which the evidence objected to was admissible; and that is that, where a deed appears on its face to be an absolute sale, it may be shown by parol evidence to have been intended only as a mortgage. We see no reason why this principle should not apply in this case. The rule should work both ways—it is said to be a poor rule that does not—and avail the mortgagee as well as the mortgagor.

[6] The only other point which need be noticed is that the contracts show that they were made with Wardlaw personally, and not with York Cotton Mills; the contention being that the words "President," or "Pt.," the abbreviation for it, and such like words, after the name of Wardlaw signed to the agreement, are merely descriptive of the person. But the contracts show on their face that they were made for the corporation, and the evidence is undisputed that Wardlaw had authority to act for the corporation in borrowing money, that he did so act, and that the corporation got and used the respondent's money. It will not now be allowed to defeat its obligation upon such a technical ground.

Judgment affirmed.

WATTS, FRASER, and GAGE, JJ., concur. The CHIEF JUSTICE disqualified.

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(143 Ga. 69)

## WOOD v. STUBBS. (No. 152.)

(Supreme Court of Georgia. Jan. 18, 1915.)

*(Syllabus by the Court.)*

1. INTOXICATING LIQUORS ⇐279—NUISANCE — PETITION — RESTRAINING ORDER — CONTEMPT.

Where, under Civ. Code 1910, § 5335 (commonly known as the "blind-tiger" law), a verified petition was presented to the presiding judge, sufficiently alleging that the nuisance was existing and continuing, and praying that the defendant be enjoined from selling spirituous, malt, or intoxicating liquors at a certain place, and the judge set a time for the hearing of such application and granted a temporary restrain-

ing order to operate in the meantime, and where after service thereof the defendant violated such restraining order and a rule was issued against him to show cause why he should not be punished for contempt, the restraining order was not void, so as to furnish no basis for the contempt proceeding, on the ground that the original petition did not allege facts which would authorize the court to take jurisdiction or contain a specific prayer for such a temporary order. There was no error in refusing to set aside the restraining order on the grounds mentioned.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 414; Dec. Dig. ⟸279.]

2. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to authorize the judgment finding the respondent to be in contempt.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Proceedings by W. B. Stubbs against I. Wood. Judgment for plaintiff, and defendant brings error. Affirmed.

Osborne & Lawrence, of Savannah, for plaintiff in error. Geo. H. Richter and W. C. Hartridge, Sol. Gen., both of Savannah, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 70)

## WEITZ v. STUBBS.
## ELIOPOLO v. SAME.

(No. 153.)

(Supreme Court of Georgia. Jan. 18, 1915.)

*(Syllabus by the Court.)*

CASES CONTROLLED.

These cases are controlled by the rulings in the case of Wood v. Stubbs, 84 S. E. 114, this day decided.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Actions between L. Weitz and J. G. Eliopolo, and W. B. Stubbs. From the judgments, Weitz and Eliopolo bring error. Affirmed.

Osborne & Lawrence, of Savannah, for plaintiff in error Weitz. Robt. L. Colding, of Savannah, for plaintiff in error Eliopolo. Geo. H. Richter and W. C. Hartridge, Sol. Gen., both of Savannah, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 47)

## HARRIS v. AMOS. (No. 143.)

(Supreme Court of Georgia. Jan. 16, 1915.)

*(Syllabus by the Court.)*

1. WILLS ⟸865, 866 — CONSTRUCTION — INTESTACY.

Martha Harris died leaving a will. For a number of years before her death the testatrix owned two adjacent city lots, both rectangular in shape, each fronting 35 feet on Third avenue, and extending back in uniform width about 180 feet to an alley. For about ten years immediately before the death of the testatrix a fence separated the two lots along the entire dividing line. On one of the lots was a residence in which the testatrix resided. The other was cultivated as a garden. The will contained four items as follows:

"Item 1. I bequeath to my beloved father, Washington Amos, the house and lot where I reside, known as 510 Third avenue, for and during his natural life, with all income therefrom; and after his death, should Washington Amos' wife, Jane Amos, be in life, she is to take for the remainder of her life under the same conditions as set out above; and upon the death of both, same to revert to my estate and to be divided under the laws of distribution.

"Item 2. I desire and direct the executor of my will to cut off from the rear of the lot upon which my house is located, and also from the lot adjacent, a lot of thirty feet wide, fronting on an alley, and running the width of both lots, and deed same to my husband Jim Harris.

"Item 3. I bequeath to my husband, Jim Harris, all of my personal and household effects, with the exception of my sewing-machine and trunk. I desire my sewing-machine to be given to my niece, Martha Stanfield, and the trunk to my niece, Susan Stanfield.

"Item 4. I hereby appoint my father, Washington Amos, as executor of this my will, without bond, and he is expressly relieved from making any returns to the court."

When the testatrix died she left surviving the husband named in the will, but no children or other heirs, and no debts. The will was duly probated by the executor. *Held*, properly construed, there was an intestacy as to so much of the lot adjacent to the one on which the testatrix resided as was not included in the bequest to the husband under the second item of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2188–2203; Dec. Dig. ⟸865, 866.]

2. WILLS ⟸865, 866—PARTIAL INTESTACY—DESCENT OF PROPERTY.

In an action against the executor by the husband, claiming, as legatee, so much of the land as was bequeathed to him under item two of the will, and, as sole heir at law, so much of the lot adjacent to that on which testatrix resided as was not disposed of by the will, when the uncontradicted evidence was as stated above, the plaintiff was entitled to a verdict for all of the lands for which he sued, and it was erroneous to direct a verdict finding for him only the lands bequeathed by the second item of the will, and for the defendant a life estate in all the rest of the land.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2188–2203; Dec. Dig. ⟸865, 866.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by Jim Harris against Washington Amos, executor. Judgment for defendant, and plaintiff brings error. Reversed.

L. D. Moore, of Macon, for plaintiff in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 44)

TURNER BROS. v. CLARKE. (No. 138.)

(Supreme Court of Georgia. Jan. 16, 1915.)

*(Syllabus by the Court.)*

1. SALES ⟸261—WARRANTY—INTENTION OF PARTIES.

An affirmation of soundness of a horse, made at the time of sale, may or may not amount to a warranty, according to the intention of the parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727–735; Dec. Dig. ⟸261.]

2. PRINCIPAL AND AGENT ⟸104—AUTHORITY OF AGENT—WARRANTY.

A salesman employed by a dealer in horses and mules, who bought and traded for his principal, contracted to sell to a purchaser two horses, and to receive in part payment therefor a mule at a value mutually fixed by the salesman and the purchaser. Under these circumstances the salesman, in the course of the negotiations and to induce the sale, was authorized to warrant the soundness of the horses, and to bind his principal by such warranty.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 294–297; Dec. Dig. ⟸104.]

3. PRINCIPAL AND AGENT ⟸121—AUTHORITY OF AGENT—EXTENT—EVIDENCE.

The testimony was insufficient to show knowledge by the purchaser that the salesman was without authority to make the warranty alleged to have been made, and there was no error in repelling the salesman's testimony that he was without authority to warrant the soundness of the horses.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 413–415; Dec. Dig. ⟸121.]

4. APPEAL AND ERROR ⟸1050—TRIAL ⟸142—HARMLESS ERROR—BREACH OF WARRANTY.

Where a witness specifically describes the symptoms of two horses afflicted with disease, it is for the jury to determine the similarity of the symptoms; but a new trial is not required in this case because the court allowed the witness to testify that the symptoms of disease of both horses were alike.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. ⟸1050; Trial, Cent. Dig. § 337; Dec. Dig. ⟸142.]

5. VERDICT SUSTAINED.

The evidence authorized the verdict.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by W. H. Clarke against Turner Bros. Judgment for plaintiff, and defendants bring error. Affirmed.

McClelland & McClelland, of Atlanta, for plaintiffs in error. Mark Bolding, of Atlanta, for defendant in error.

EVANS, P. J. The defendants were horse dealers, and through their salesman sold the plaintiff two horses. It was alleged that the horses died, within a week of the purchase, from a malady with which they were afflicted, and which was not apparent to the plaintiff. The plaintiff further alleged that the salesman warranted the horses to be sound and ready for work, and that suit was for the breach of this warranty.

[1] 1. The plaintiff was allowed to testify that he told the salesman that he was about to harvest his crop, and did not wish to buy the horses unless they were well broken and ready for work, and that the salesman told him that the horses were absolutely sound and ready for work. The objection to the testimony was that the salesman's statement was but an expression of opinion, and that, if the statement amounted to a warranty, the salesman was not shown to have authority to make a warranty. An affirmation of soundness of a horse, made at the time of sale, may or may not amount to a warranty, according to the intention of the parties. Terhune v. Dever, 36 Ga. 648. The trial judge aptly instructed the jury on the difference between a representation of fact, whether intended as a warranty or mere expression of opinion, as understood by the parties.

[2] 2. The salesman was shown to have been employed for several years by the defendants, who were dealers in horses and mules, buying and trading for his employers. In the instant case the plaintiff agreed to pay the price asked for the horses by the salesman, and the salesman agreed with the plaintiff to accept from him, in part payment of the purchase price, a mule at a value mutually fixed by the salesman and the plaintiff. We think it clear that under these circumstances the salesman was invested with apparent authority to make the warranty. Huguley v. Morris, 65 Ga. 666; 2 Benjamin on Sales, § 1294. Moreover, the warranty that the horses were sound and ready for work is but the substantial equivalent that they were merchantable and reasonably suited to the use intended. Snowden v. Waterman, 100 Ga. 588, 28 S. E. 121. It is said in 30 Am. & Eng. Enc. Law, 163, that an implied warranty, being an involuntary incident to the sale and a creature of the law, no question of an agent's authority can arise, and the same principle is applicable to express warranties which amount to nothing more than the law would have implied had the parties been silent.

[3] 3. The testimony was insufficient to afford an inference that the plaintiff knew that the salesman was a special agent, and without authority to make a warranty of soundness. Hence the court properly repelled testimony of the salesman that he was without authority to make the warranty alleged to have been made in this case. A principal is bound to the extent to the apparent authority he has conferred upon the agent, and not by the actual or express authority, where that differs from the apparent authority. 31 Cyc. 1354.

[4] 4. A witness was allowed to testify that the symptoms of both horses were alike, over the objection that the witness should be required to state the symptoms of each and permit the jury to draw any inference of similarity. The witness did testify in

detail to the symptoms of each horse just before death; and, though the testimony may be open to the objection made against it, we do not think the defendants were hurt by its reception in evidence.

[5] 5. The evidence authorized the verdict.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 38)

## HOWELL v. NEW HOPE BENEV. SOCIETY NO. 1. (No. 135.)

(Supreme Court of Georgia. Jan. 16, 1915.)

*(Syllabus by the Court.)*

1. SPECIAL DEMURRERS—AMENDMENTS.
The special demurrers, where meritorious, were sufficiently met by amendments to the petition.

2. CHARITIES ⟸39—PROPERTY OF BENEVOLENT SOCIETY — CORPORATION SUCCESSOR — RIGHTS.
There was no error in overruling the general demurrer to the petition.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 100; Dec. Dig. ⟸39.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the New Hope Benevolent Society No. 1 against Glenn Howell. Judgment for plaintiff, and defendant brings error. Affirmed.

The New Hope Benevolent Society No. 1, hereinafter referred to as the Society, a corporation organized and incorporated under the laws of the state of Georgia, brought its equitable petition seeking an injunction and other equitable relief against Glenn Howell. The petition alleges, in substance, as follows: The petitioner is a charitable association organized for the purpose of mutual charity and fraternal benevolence, its particular work being to provide sick benefits for its members as well as for the burial of any deceased members, and to accomplish certain other enumerated benevolent purposes. The Society was organized as a voluntary association under its present name on July 9, 1878, elected officers, and adopted by-laws. Among its officers were president, vice president, and treasurer; it met once a week; the trustees were elected annually, and their duties were to attend to all building repairing and to look after the property belonging to the Society. In the fall of the year 1878, seeking a permanent location for its regular meetings, the Society began to raise funds for the purchase of a suitable site upon which to erect a lodgehouse. Subscriptions were taken up among the members of the Society, and entertainments to which admissions were charged were given by different lodge members, and finally a sufficient sum was raised to purchase a site and build a lodgehouse. At a regular meeting of the Society in the early part of 1879, Glenn Howell (the defendant in this case), Tom Maddox, and Joe Sanders were elected trustees of the Society, and, acting under the instructions of the Society, negotiated with one Pope for the purchase of a lot of land upon which to erect a building. The negotiations resulted in Pope selling to the Society a certain lot of land and executing a deed thereto. This deed made on February 20, 1879, recites that the parties thereto are Thos. T. Pope, of the one part, and "Thos. Maddox, Glenn Howell, and Joe Sanders, for a benevolent society now in operation, the said Thos. Maddox being president," of the other part; and in the granting clause of the deed the grantor conveys, for a consideration of $25, "unto the said benevolent society, their heirs and assigns," a certain piece of land (the lot of land in controversy); and the habendum and tenendum clause is as follows:

"To have and to hold the said bargained premises, with all and singular the rights, etc., * * * to the only proper use, benefit, and behoof of them, the said parties, for the aforesaid benevolent society, their heirs, executors, administrators, or assigns, in fee simple; and the said Thos. T. Pope the said bargained premises unto the said trustee of the said benevolent society, their heirs, executors, etc., * * * will warrant and defend by virtue of these presents."

The deed closed with the usual attestation clause. At the time the deed was obtained from Pope the Society was in operation and had quite a membership, some 25 or 30 names of members being set forth in the petition. Soon after the purchase of the land the Society, with its own funds and with money contributed by members of the Society, erected a lodgehouse upon the property, took possession of it and carried on the business affairs of the Society therein. The lodgehouse has been maintained, kept up, and occupied continuously since then, except for a short period when the house was burned; and the house to replace this one was built with funds contributed by members of the Society. Since the building of said lodgehouse the members of the Society have contributed regularly by way of dues to meet the obligations of the Society. The defendant, Glenn Howell, has almost continuously since the organization of the Society been an officer thereof until the year 1908, when he ceased to be a member on account of nonpayment of dues. The Society conducted its affairs as a voluntary organization until the year 1894, when Glenn Howell and others who were members of the Society were appointed a committee as representing the Society to employ an attorney and procure a charter for the Society; and an order was granted by the court on July 11, 1894, incorporating New Hope Benevolent Society No. 1. This incorporation was the successor to the voluntary organization. The defendant himself, as chairman of the committee to obtain a charter, presented a charter for the Society, and it was accepted on September 11,

1894. Since then the Society has operated under the charter and continued to operate under the same by-laws which had been in force since the year 1878, and has carried out the rules and regulations and purposes of the Society as they obtained under the original organization. They have paid out thousands of dollars in sick benefits and in relieving want among its members, and paid benefits to the defendant himself. The defendant has never paid taxes on the property nor returned it for taxation. As a member of the committee representing the Society, he paid off the taxes against the Society due upon a fi. fa., issued for taxes against this property out of funds raised by members of the Society, and took a receipt therefor in the name of the Society. He is now claiming that he owns the property individually, and is exercising acts of ownership over it, and is claiming that the New Hope Benevolent Society No. 1, as incorporated, is not the successor to the original Society named in the deed referred to above, and is not the owner nor entitled to possession of the land. Defendant claims the title to said land personally, and has been entering and cutting and hauling away timber therefrom; he has attempted to inclose the land with a wire fence, and is continually cutting trees off of the same. Petitioner prays, among other things, that defendant be restrained and enjoined from doing the acts complained of, and from in any manner interfering with the possession of the plaintiff; that he be required to surrender to plaintiff the original deed from Pope to Maddox, Howell, and Sanders, and that a decree be rendered declaring the title of the land and the right of exclusive possession, as against the defendant or any person or persons claiming under him, to be in the New Hope Benevolent Society No. 1.

The defendant demurred generally and specially to the petition. The demurrers were overruled; he excepted.

Maddox & Sims, of Atlanta, for plaintiff in error. John A. Boykin, of Atlanta, for defendant in error.

BECK, J. (after stating the facts as above). [1] 1. The special demurrers, where meritorious, were sufficiently met by amendments to the petition.

[2] 2. The general demurrer was properly overruled. Whether the petitioner is entitled to all the relief sought is not decided; but there is no special demurrer attacking the appropriateness of the relief prayed for, and the petitioner is entitled to some of the relief which it seeks, certainly to an injunction restraining the defendant from the acts complained of; that is, cutting trees on the land, removing timber therefrom, inclosing the lot of land with a wire fence, and other acts of trespass inconsistent with the right of the plaintiff to have unobstructed entrance to the premises and the complete possession of the same without interference by the defendant. It requires no argument to show that the deed from Pope to the defendant and two other trustees created a trust under which the voluntary organization, called the New Hope Benevolent Society No. 1, took the beneficial interest. And when this voluntary organization was incorporated in the year 1894 and continued to operate under the by-laws of the Society as it existed before incorporation, effecting and carrying out its benevolent intentions, as set forth in the petition and substantially restated in the statement of facts, it became, so far as relates to the beneficial interests in the property involved, the successor to the original society. Huger v. Protestant Episcopal Church, 137 Ga. 205, 73 S. E. 385; Beckwith v. St. Philip's Parish, 69 Ga. 564.

Judgment affirmed.

All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 42)

## GATE CITY COTTON MILLS et al. v. ALEXANDER.

## ALEXANDER v. GATE CITY COTTON MILLS et al.

(No. 137.)

(Supreme Court of Georgia. Jan. 16, 1915.)

*(Syllabus by the Court.)*

1. PARTIES ⟸84—DEFENDANTS—NONJOINDER—PETITION—SUFFICIENCY AGAINST DEMURRER.

A petition alleged, in substance, that three named corporations, which were made defendants thereto, on behalf of a voluntary, unincorporated association of which they and a number of others were members, contracted with the plaintiff as an attorney for certain professional services, which were rendered; that the defendants who were sued were all of the members of the association known to the plaintiff; and that he did not know, and had no means of ascertaining, the names of the other members of such association. *Held*, that the petition was not demurrable on the ground of nonjoinder of parties because the plaintiff failed to make defendants of all the members of the association other than those sued.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 134–142, 171; Dec. Dig. ⟸84.]

2. GROUNDS OF DEMURRER.

None of the rulings on other grounds of the demurrer overruling some of them and sustaining some of them furnished any cause for reversal either upon the main bill of exceptions or the cross-bill.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by H. A. Alexander against the Gate City Cotton Mills and others. Judgment for plaintiff, and both parties bring error. Affirmed.

Tye, Peeples & Jordan, of Atlanta, for plaintiff in error. M. J. Yeomans, of Dawson, for defendants in error.

HILL, J. [1] As a general rule, where suit is brought upon a joint contract, all of the joint contractors should be made parties defendant. The fact that the joint contractors have formed themselves into a voluntary, unincorporated association for purposes beneficial to themselves does not alter this rule. If suit is brought against certain named persons as joint contractors, the defendants may plead in abatement the nonjoinder of their cocontractors. If the plaintiff's petition on its face shows that, in addition to the defendants sued, there were other joint contractors, without showing sufficient reason why they were not joined, the petition is subject to demurrer on that ground, under our practice. It is not, however, an inflexible rule that joint contractors must be sued or the case cannot proceed. Thus, if a joint contractor is a nonresident of the state, or has been discharged in bankruptcy, it would not destroy the right to proceed against the other joint contractors. If, therefore, suit is brought against certain persons based on a contract, and the petition discloses on its face that there are other joint contractors, it is demurrable, unless it shows a sufficient reason why they are not joined as defendants. In the present case it was alleged, in substance, that the three defendants who were sued contracted with the plaintiff on behalf of themselves and others forming a voluntary, unincorporated association which the plaintiff was authorized to represent; that the defendants were the only members of the association known to the plaintiff; and that he had no means of ascertaining who the other members were. He therefore sued the persons who actually contracted with him, and who were all of the other parties to the contract known to him. We think that these allegations were sufficient to withstand a demurrer based on the ground that the other members of the association should have been ascertained and made parties defendants. If the defendants who were sued desired to plead in abatement who were the other members of the association that should have been made parties, they could have done so. But they cannot destroy the plaintiff's entire suit by demurrer on the ground of nonjoinder of the other members of the association whom the plaintiff did not know and had no means of ascertaining. This is the controlling point in the case. Various other points were raised in the main bill of exceptions, because of the refusal of the court to sustain other grounds of the demurrer filed by the defendants, and in the cross-bill of exceptions, because the court struck certain parts of the petition on demurrer. It is unnecessary to take up each of these rulings and consider them in detail. It is sufficient to say that none of the assignments of error based upon them furnish any cause for reversal.

[2] The ground on the demurrer which raised the question of whether the members of the association which were corporations had authority under their charters to become a member of it, or to authorize any contract to be made through it or its agents which would bind them, was withdrawn in the trial court, and was not passed upon.

Judgment on both bills of exceptions affirmed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 41)

WEATHERHOLT v. HOWARD. (No. 136.)

(Supreme Court of Georgia. Jan. 16, 1915.)

*(Syllabus by the Court.)*

1. LIBEL AND SLANDER ⟸105 — LIBELOUS PUBLICATION—EVIDENCE.

In a suit to recover damages for the publications of a libel, while the publication in terms designated a certain named company, it was competent for the plaintiff, under proper allegations by way of innuendo, to show that he formerly owned and did business under the name of the company designated, that this was a trade-name of which the plaintiff's individual name was a component part, and that the statements alleged to be libelous in fact referred to the plaintiff and imputed insolvency to him.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 282, 283, 292–294; Dec. Dig. ⟸105.]

2. LIBEL AND SLANDER ⟸56 — LIBELOUS PUBLICATION—DEFENSE.

The fact that the plaintiff, who at one time was doing business under a trade-name of which the plaintiff's individual name was a component part, had sold the trade-name and the good will to the defendant did not authorize the defendant to falsely publish libelous matter which imputed and suggested that the plaintiff was insolvent and in pecuniary difficulties.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 153–156; Dec. Dig. ⟸56.]

3. LIBEL AND SLANDER ⟸123 — LIBELOUS PUBLICATION—WHAT CONSTITUTES—QUESTION FOR JURY.

While language used in a publication charging the plaintiff with being insolvent, and that he "is in pecuniary difficulties and forced to retire from business at the instance of defendant as a creditor of plaintiff," was not of such character as to authorize the court to instruct the jury as a matter of law that it was libelous, yet it would be proper to submit to the jury as a question of fact, under appropriate instructions, in case the evidence should authorize it, whether the language referred to was libelous or not. Beasley v. Reid, 68 Ga. 380; Odgers on Libel and Slander (5th Ed.) 17, 18; Cox v. Lee, L. R. 4 Ex. 284; Pavesich v. Insurance Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561; Holmes v. Clisby, 118 Ga. 820, 45 S. E. 684.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356–364; Dec. Dig. ⟸123.]

4. LIBEL AND SLANDER ⟸113 — LIBELOUS PUBLICATION — DAMAGES RECOVERABLE — PROOF.

If the language is libelous per se, and the jury should so find under proper instructions from the court, the plaintiff would be entitled to recover general damages, without proof of special damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 342; Dec. Dig. ⟸113.]

5. LIBEL AND SLANDER ⟸113 — DAMAGES RECOVERABLE — INJURY TO BUSINESS — PROOF.

The plaintiff would not be entitled, without showing that he was in business at the time of the libelous publication, to recover general damages because of such publication, unless the matter of publication was libelous per se. That is, he could not recover general damages on the ground that such publication was a charge on him in reference to his trade or profession, calculated to injure him therein. Nor could he recover general damages on the ground that such publication did injure him in his business, when he was not in business at the time of publication. Consequently, paragraph 15 of the petition, which alleges that subsequently to the publication the plaintiff re-entered business, and that the publications set forth in the declaration were intended to and did injure plaintiff in his business and in his character as a dealer in the goods which had formerly been handled by him when operating under the tradename, did not set forth a ground of recovery, and should have been stricken upon demurrer. Except as to the paragraph just referred to, the demurrers of the defendant were properly overruled. And while the judgment will not be reversed for overruling the demurrers to this particular paragraph, direction is given that the same be stricken from the petition.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 342; Dec. Dig. ⟸113.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by W. H. Howard against T. E. Weatherholt. Judgment for plaintiff, and defendant brings error. Affirmed, with directions.

Jos. W. & John D. Humphries, of Atlanta, for plaintiff in error. Felder, Anderson, Coburn & Whitman and Hewlett, Dennis & Whitman, all of Atlanta, for defendant in error.

BECK, J. Judgment affirmed, with direction. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 70)

## BRYAN v. MORRIS. (No. 154.)

(Supreme Court of Georgia. Jan. 18, 1915.)

*(Syllabus by the Court.)*

1. EXECUTORS AND ADMINISTRATORS ⟸397—EXECUTOR'S DEED—EVIDENCE.

A deed executed by one as executor of a deceased testator is not admissible in evidence as conveying title, without proving the appointment of the grantor as such executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1598–1604; Dec. Dig. ⟸397.]

2. LANDLORD AND TENANT ⟸296—WARRANT TO DISPOSSESS—CONDITIONS PRECEDENT.

In order to authorize the issuance and execution of a warrant to dispossess one as a tenant holding over and beyond his term, the relation of landlord and tenant must have existed, and the tenant must have held in subordination to the alleged landlord, or at least to one under whom the latter acquired title, if possession was obtained by the tenant as such under a predecessor in title of the landlord. In the present case there was no evidence showing such relation, and there was no error in granting a nonsuit.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1272–1275, 1283; Dec. Dig. ⟸296.]

Error from Superior Court, Banks County; C. H. Brand, Judge.

Action by J. H. Bryan against W. F. Morris. Judgment for defendant, and plaintiff brings error. Affirmed.

Thos. J. Shackelford, of Athens, for plaintiff in error. W. A. Charters and H. H. Perry, both of Gainesville, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 47)

## CENTRAL OF GEORGIA RY. CO. v. MILLS. (No. 142.)

(Supreme Court of Georgia. Jan. 16, 1915.)

*(Syllabus by the Court.)*

EXCEPTIONS, BILL OF ⟸56—CERTIFICATE—EFFECT.

A certificate to a bill of exceptions, wherein the judge certifies that it is true, "except as hereinafter qualified," and then adds the qualification, after the close of the general certificate, does not amount to a certification that the bill of exceptions as written is true, and the writ of error must be dismissed. Jarriel v. Jarriel, 115 Ga. 23, 41 S. E. 262.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 94–96; Dec. Dig. ⟸56.]

Error from Superior Court, Effingham County; W. W. Sheppard, Judge.

Action between the Central of Georgia Railway Company and Elizabeth Mills. From the judgment the Railway Company brings error. Writ of error dismissed.

H. W. Johnson, of Savannah, for plaintiff in error. J. H. Smith, of Eden, for defendant in error.

EVANS, P. J. Writ of error dismissed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 46)

## GEORGIA & F. RY. CO. v. STAPLETON. (No. 141.)

(Supreme Court of Georgia. Jan. 16, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⟸302—PRESENTATION—NEW TRIAL—GROUND OF MOTION.

A ground of a motion for a new trial which assigns error on the refusal to exclude evidence, but fails to set out, either literally or in substance, such evidence, is insufficient to raise any question for decision by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744–1752; Dec. Dig. ⟸302.]

2. APPEAL AND ERROR ⟸302—PRESENTATION—NEW TRIAL—GROUND OF MOTION.

A ground of a motion for new trial which assigns error in the admitting of evidence "over

objection," but which does not show what objection was made to the evidence offered, is insufficient to invoke a ruling by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744–1752; Dec. Dig. ⟸ 302.]

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence was sufficient to support the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action between the Georgia & Florida Railway Company and L. H. Stapleton. From the judgment the Railway Company brings error. Affirmed.

Saffold & Jordan, of Swainsboro, for plaintiff in error. O'Steen & Wallace, of Douglas, and Williams & Bradley, of Swainsboro, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 59)

## POWELL v. BERRY. (No. 148.)

(Supreme Court of Georgia. Jan. 18, 1915.)

*(Syllabus by the Court.)*

DEATH ⟸46 — PETITION — DEMURRER—CONTRIBUTORY NEGLIGENCE.

Where, in a suit brought by a mother to recover for the tortious homicide of her son, the petition alleges that the injuries to the son, which resulted in his death, were the result of the defendant's driving his automobile at a dangerous and negligent rate of speed around the curve of a road, that the decedent was sitting on a back seat of the automobile and had no control or direction of the defendant, the driver and owner of the car, who was then under the influence of liquor to such an extent as to make him careless and reckless, and that, in consequence of the carelessness and negligence of the defendant, her son was killed by the overturning of the machine, there being nothing in the petition to show that the decedent himself was aware of the defendant's intoxicated condition, the court properly overruled a general demurrer to the petition.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 60; Dec. Dig. ⟸46.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Mrs. F. M. Berry against G. B. Powell. Judgment for plaintiff, and defendant brings error. Affirmed.

Mrs. F. M. Berry brought suit against George B. Powell, to recover damages for the homicide of her son, upon whom, it is alleged, she was dependent, and who contributed to her support. She further alleged that on the day of the fatal occurrence her son entered defendant's automobile as his guest and sat on the back seat; that he had no control or direction of the defendant's actions; that the defendant drove the car at a rapid and reckless rate of speed around the curve of a road, and the car, after running first on one side of the road and then the other, ran off the road upon an embankment, and, suddenly stopping, threw the decedent out, the car turning on top of him, resulting in the infliction of injuries, from the effects of which he died four days later. The defendant filed a general demurrer to the petition, and, to the order of the court overruling the demurrer, he excepted.

Simmons & Simmons, of Atlanta, for plaintiff in error. Westmoreland Bros. and J. Caleb Clarke, all of Atlanta, for defendant in error.

BECK, J. (after stating the facts as above). The court properly refused to dismiss this case upon general demurrer. The petition shows that the death of the plaintiff's son, who contributed to her support, and upon whom she was dependent, was due to the negligence of the defendant, who was driving his automobile, by the overturning of which the plaintiff's son was killed, at a highly dangerous and negligent rate of speed. That the defendant's negligence was the cause of the death of plaintiff's son, under the allegations of the petition, is not disputed in the argument of counsel for plaintiff in error; but they insist upon the contention that the petition shows, if we apply the rule that the pleadings shall be construed most strongly against the pleader, that the decedent himself was guilty of such contributory negligence that, had he survived, he could not himself have recovered from the defendant for any injuries received because of the overturning of the automobile, and therefore that his mother cannot recover, because negligence upon his part, which would have defeated recovery, had his injuries not been fatal, would prevent recovery in an action brought by his mother for his homicide. This contention that the decedent was guilty of such negligence as to prevent recovery is based upon the allegation that the defendant was under the influence of intoxicating liquor to such an extent as to make him careless and reckless and without regard to the safety of the life or limb of the decedent; and counsel for the demurrant insists that the decedent, in getting in an automobile which was to be driven by one in the condition which is ascribed to the defendant, the owner of the car, was guilty of such negligence that neither he, if living, nor the plaintiff in this case, should be allowed to recover. But we cannot agree to this contention. There is nothing in the petition to show that the decedent was aware of the intoxicated condition of the defendant at the time of entering the automobile, nor that he became aware of it in time and under circumstances which would have made it possible for him to leave the car before the catastrophe, or to control or regulate the conduct of the reckless driver and owner of the car. There is nothing in the petition

to show that the decedent ever became aware of the defendant's intoxicated condition at the time of the accident. So far as is disclosed by the petition itself, the plaintiff, who makes the allegations charging the defendant with intoxication at the time of the fatal event, may have ascertained that condition from information furnished by some person other than her deceased son.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 55)

## BALL v. CITIZENS' BANK OF ROME et al. (No. 146.)

(Supreme Court of Georgia. Jan. 18, 1915.)

*(Syllabus by the Court.)*

LANDLORD AND TENANT ⊜255—LANDLORD'S LIEN—RIGHT TO ENFORCE—PURCHASER.

The owner of a certain tract of land, on January 24, 1911; entered into a contract leasing the land to certain tenants for a period of three years, commencing January 1, 1912. As provided in that contract, notes for the annual rent of the premises were given by the tenants. On May 12, 1911 (that is, subsequently to the execution of the rent contract and prior to the commencement of the period for which the premises were leased), the owner executed a warranty deed containing a power of sale, conveying to a creditor of hers, for the purpose of securing a debt, the lands rented, as stated above. On July 12, 1912, and before the maturity of the crops on said rented land for that year, by virtue of the power of sale, the grantee in the deed conveyed the land to one Charles Ball; the latter thereby acquiring all the right and title to the land of the owner first referred to. Prior to the execution of the warranty deed containing the power of sale, the owner of the land, the payee in the rent notes, transferred the notes to the Citizens' Bank of Rome, the defendant in error in this case. In October, 1912, the tenants, apprehending that Ball, the plaintiff in error, the purchaser of the land, would insist upon collecting the rent for the year 1912, and that the bank, the holder of the rent notes, would claim the right to enforce the same for the rent, filed a petition for injunction and interpleader against the plaintiff in error and the defendant in error, offering to turn the rent over to the clerk of the superior court or any depositary designated by the court. The parties were required to interplead; and, upon the hearing of the issue made between the bank and Ball, the court determined the issue in favor of the bank, holding in effect that Ball was not entitled to enforce his demands for rent, and that the money paid into court as rent, or so much thereof as was necessary, should be applied to the extinguishment of the claim of the bank. *Held*, that the plaintiff in error, who became the owner of the rented land before the maturity of the crops, was entitled to recover the rent, and that while, under the provisions of the Civil Code of 1910, § 3343, relating to the transfer of certain liens, the bank was in as good a position to enforce the special landlord's lien as was the person who was the owner of the land at the time of the creation of the rent contract, it was in no better position as transferee than the transferror was; and, as the transferror had parted with the title to the land before the maturity of the crop, he was not in position to enforce a lien, and the transferee could not do so; but the right to enforce a special lien for rent had arisen in favor of the purchaser of the land, the plaintiff in error in this case, and the court erred in holding otherwise.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1047; Dec. Dig. ⊜255.]

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action between Charles Ball and the Citizens' Bank of Rome and others. From the judgment, Ball brings error. Reversed.

Harris & Harris, of Rome, for plaintiff in error. Denny & Wright and M. B. Eubanks, all of Rome, for defendants in error.

BECK, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 71)

## ROBERTS v. STATE. (No. 155.)

(Supreme Court of Georgia. Jan. 18, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⊜814, 824—INSTRUCTIONS—APPLICATION TO EVIDENCE—REQUEST.

Voluntary manslaughter was not involved in the case under the evidence, and there was no error in omitting to give a charge on the subject of that grade of homicide.

(a) If voluntary manslaughter had been involved in the statement of the prisoner alone, and a charge on that subject had been desired, it should have been duly requested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987, 1996–2004; Dec. Dig. ⊜814, 824.]

2. CRIMINAL LAW ⊜789—INSTRUCTIONS—REASONABLE DOUBT.

Where the presiding judge instructed the jury, "Before you would be authorized to find the defendant guilty, gentlemen, you would have to believe that he was guilty beyond a reasonable doubt—not beyond any doubt, but beyond a reasonable doubt," it was not error that the court did not in that connection go further and explain to the jury what a reasonable doubt was.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1851, 1880, 1904–1922, 1960, 1967; Dec. Dig. ⊜789.]

3. CONVICTION AND DENIAL OF NEW TRIAL APPROVED.

There was no merit in any of the grounds of the motion for a new trial. The verdict was supported by the evidence, and there was no error in overruling the motion.

Error from Superior Court, Troup County; C. S. Reid, Judge.

Clarence Roberts was convicted of crime, and brings error. Affirmed.

McLaughlin & Jones, of Greenville, and Hatton Lovejoy, of La Grange, for plaintiff in error. R. R. Terrell, Sol. Gen., of Whigham, Frank Harwell, of La Grange, Warren Grice, Atty. Gen., and A. L. Henson, of Calhoun, for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 64)

## COOPER v. BACON. (No. 151.)

(Supreme Court of Georgia. Jan. 18, 1915.)

*(Syllabus by the Court.)*

1. MORTGAGES ⟸90—DEED GIVEN AS SECURITY—RECORDING—NECESSITY.

It is not essential in this state, in order to convey title to land to secure a debt as between the maker and the grantee, that the deed should be recorded. As between the maker of the security deed and the grantee, the latter would get a good title.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 199, 200; Dec. Dig. ⟸90.]

2. VENDOR AND PURCHASER. ⟸134—TITLE OF VENDOR—OUTSTANDING DEEDS.

Where the owner of real estate executes a deed to the land, and the grantee fails to record the deed, and subsequently the maker executes two other deeds to secure debts to two other persons to the same land, which are duly recorded, and the grantee in the unrecorded deed has the land sold at sheriff's sale under a judgment declaring a special lien thereon, and after reconveyance for the purpose of levy and sale, and the grantee in one of the recorded deeds is the purchaser at the sale, and enters into possession of the land, and subsequently sells it to one who contracts to sell it to a third person, who declines to pay the agreed purchase price, on the ground that the vendor has not the legal title, and the vendor brings an equitable petition against the purchaser in order to compel specific performance of the contract, and on the trial shows that one of the two deeds which was recorded was paid off by the plaintiff and duly canceled, and that the other is held by the purchaser at the sheriff's sale, who conveyed to the plaintiff, it is not error for the trial judge, to whom the case is submitted on an agreed statement of facts, to find for the plaintiff and to enter a decree compelling specific performance of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 238, 250–254, 258; Dec. Dig. ⟸134.]

Error from Superior Court, Chatham County; W. W. Sheppard, Judge.

Action by H. H. Bacon against R. L. Cooper. Judgment for plaintiff, and defendant brings error. Affirmed.

Francis P. McIntire and C. N. Feidelson, both of Savannah, for plaintiff in error. Anderson, Cann & Cann, of Savannah, for defendant in error.

HILL, J. The plaintiff in the court below entered into a contract with the defendant for the sale of certain real estate in the city of Savannah for the sum of $4,000. The defendant refused to consummate the sale, on the ground that the plaintiff did not have a good title to the land, for the alleged reason that the plaintiff had derived his title through a deed from one Horace Rivers, who purchased the property at a sheriff's sale under a judgment declaring a special lien thereon, rendered in the city court of Savannah in a suit based on an unrecorded deed to secure a debt, and that at that time there were in force two recorded deeds to secure debts, one given to the Chatham Real Estate & Improvement Company, and the other to Horace Rivers, the purchaser at the sheriff's sale. On failure of the defendant to comply with the terms of the contract of sale, the plaintiff brought on equitable action against the defendant to compel specific performance of the contract. The case was submitted to Judge Sheppard for decision upon the following agreed statement of facts:

"Henry H. Hull, on September 24, 1896, executed to Lucy G. Hull a deed to the property described in the petition, to secure a debt of $3,060. This deed was not recorded. On January 17, 1903, Henry H. Hull executed and delivered to the Chatham Real Estate & Improvement Company his deed covering said property, to secure a debt for $1,500, without making any reference therein to the then unrecorded deed to Lucy G. Hull. The deed to secure debt to the Chatham Real Estate & Improvement Company was filed for record in the proper office on the day of its execution, and was recorded January 26, 1903. On June 24, 1903, Henry H. Hull executed and delivered to Horace Rivers his deed covering said property, to secure a debt, without making any reference therein to the then unrecorded deed to Lucy G. Hull, conveying all his right, title, and interest in said property under the bond to reconvey given him by the Chatham Real Estate & Improvement Company at the time he executed and delivered to it the security deed referred to above, dated January 17, 1903; said security deed to Horace Rivers being duly recorded on July 9, 1903, and never canceled off the record. Cornelia A. Hull, as executrix of Lucy G. Hull, on October 10, 1905, filed her suit against George H. Richter, as administrator of Henry H. Hull, deceased, alleging and setting forth the deed to secure debt given by the defendant's intestate to the plaintiff's testator, and an indebtedness thereon of $3,060, besides interest from September 24, 1896, at 7 per cent. per annum, and prayed a judgment for the amount of the indebtedness, and that said judgment be enforced specifically and particularly out of the real estate described in said deed to secure debt from Henry H. Hull to Lucy G. Hull, in accordance with the provisions of section 2771 of the Code of Georgia of 1895 and the acts amendatory thereof. An answer was filed by the defendant, admitting the allegations of the petition, and on December 6, 1905, judgment was rendered in favor of the plaintiff, Cornelia A. Hull, as executrix of Lucy G. Hull, against the defendant de bonis testatoris, as administrator of the estate of Henry H. Hull, for $3,060 principal, $1,968.88 interest, and $17.50 costs, said judgment providing that it should be a special lien upon, and enforceable out of, the property of the estate of Henry H. Hull, described in said petition—i. e., the property covered by the security deed from Henry H. Hull to Lucy G. Hull. The judgment described the property, among which parcels are the lots referred to in the petition of Bacon v. Cooper. Upon that judgment execution was duly issued. The executrix of Lucy G. Hull made a conveyance to the administrator of Henry H. Hull for the purpose of levying, which conveyance was duly recorded, after which levy of the execution was made, and, after legal advertisement and otherwise complying with law, the sheriff sold the property at public outcry between the legal hours of sale on the first Tuesday in July, 1906, to Horace Rivers, he being the highest and best bidder. In the deed to Horace Rivers said sheriff, among others usual in sheriff's deeds, made this recital, to wit: 'Whereas said lots of land were sold expressly subject to two certain agreements or deeds to secure debt, to wit, a deed to secure a debt to the Chatham Real Estate & Improvement Company and a certain deed to secure debt to said Horace Rivers,' etc. Neither the judgment nor the execution under which the sale was made in

any way referred to the deed to secure debt to the Chatham Real Estate & Improvement Company and to Horace Rivers. On March 8, 1907, Horace Rivers paid the debt due the Chatham Real Estate & Improvement Company, which marked its security deed canceled and satisfied, and had said cancellation properly recorded on the face of the record of the deed. Horace Rivers subsequently sold the property set forth in the plaintiff's petition to Hal H. Bacon, and Hal H. Bacon and R. L. Cooper, on February 1, 1913, entered into a contract, under the terms of which Bacon agreed to sell, and Cooper agreed to buy, the property described in the petition for the sum of $4,000, taxes to be prorated as of the date of the delivery of the deed, and the buyer to have 30 days within which to examine the title and close the purchase, the title to said property to be a good title. Cooper notified Bacon, before the expiration of the 30 days, that he would not accept the title and pay for the property, for the reasons stated in defendant's answer to the suit. On this being done Bacon tendered a warranty deed to Cooper, covering the property described in plaintiff's petition, and demanded from Cooper that he comply with his contract. Cooper continued to decline, and Bacon filed this suit. Horace Rivers entered into possession of said property under said sheriff's deed, and he, and after him Hal H. Bacon, his grantee, have been in possession ever since. The back title to the property is good, and the only defect claimed by Cooper to render Bacon unable to convey good title is that set forth in the defendant's answer."

[1, 2] Under these facts Judge Sheppard held that the plaintiff had a good legal title to the property in controversy and could convey it to the defendant, and was entitled to the specific performance prayed for, and decreed accordingly. The plaintiff in error contends that Lucy G. Hull, by reason of her failure to record her deed, had no title as against Horace Rivers and the Chatham Real Estate & Improvement Company; that, as against her and Henry H. Hull, both the holders of the recorded deeds to secure their debts had good title; that her judgment obtained in the city court did not serve to vest in Henry H. Hull any leviable interest, and therefore the sheriff's deed conveyed nothing; and that the only title Rivers had which he conveyed to Bacon, the plaintiff, was a title under his security deed, subject to Hull's right of redemption. The reply to this is that, as against the maker of the security deeds, the grantee and holder of the unrecorded deed would get a good title. And, it appearing that the debt to the Chatham Real Estate & Improvement Company has been subsequently paid, and that the purchaser at the sheriff's sale, Horace Rivers, was the owner of the other recorded deed, no one purchasing from Horace Rivers' vendee, other than the plaintiff, can prevail as against the plaintiff, who holds under Rivers, unless it be some innocent purchaser for value, without notice, holding under him prior to plaintiff's title, which does not appear. The record of a deed is not essential in order to convey title as between the parties to the contract. Civil Code, § 3323. If the grantee fails to record his deed as authorized by the statute, he may lose his priority as to some subsequent purchaser for value and without notice of the prior unrecorded deed. While the statute requires deeds to secure debts to be recorded in the county where the land lies, it is expressly provided that such deeds, though unrecorded, shall be valid as against the person executing them, but are postponed to liens created or obtained, or purchases made, prior to the actual record of the deed or bill of sale, etc. Civil Code, § 3307. But in the instant case there is no contest between the subsequent deeds given to secure debts, which were recorded, and the prior unrecorded deed. If there were such contest, of course the recorded deeds would have priority, and the one unrecorded would have to yield to the recorded ones, provided the subsequent and duly recorded deeds were secured by purchasers for value, without notice of the prior unrecorded deed. Since the recorded deeds in the case at bar have either been canceled or satisfied, and there is no contest between the two, and the unrecorded deed conveyed the title to the vendee therein, those holding under the sheriff's deed, pursuant to the foreclosure would likewise get a good title under the facts of the present record.

The case of Shumate v. McLendon, 120 Ga. 396, 48 S. E. 10, cited by the plaintiff in error, is not in conflict with the views above expressed. There was no contest in that case between two deeds. There the owner of certain land conveyed it to secure a debt. Subsequently another secured a common-law judgment against the grantor in the security deed. The land was levied on and sold under an execution issued on this judgment. The sheriff's deed to the purchaser recited that the sale was made subject to certain named prior incumbrances. This court held in that case that a security deed conveyed the absolute title, and left the grantor no interest in the land, which was subject to levy and sale at the instance of a creditor whose judgment was obtained after the execution of the deed. But in the instant case, when Henry H. Hull executed his deed to his wife, Lucy G. Hull, she received the legal title, although the deed was not recorded. See White v. Interstate B. & L. Ass'n, 106 Ga. 146, 148, 32 S. E. 26; Deen v. Williams, 128 Ga. 265, 57 S. E. 427; Wadley Lumber Co. v. Lott, 130 Ga. 135, 141, 60 S. E. 836. As stated above, the Chatham Real Estate & Improvement Company and Horace Rivers are not contesting the right of Lucy G. Hull to foreclose her security deed against Henry H. Hull under the statute. And the legal title to the land being in her, subject to be postponed to the subsequently recorded deeds, it follows that when these were canceled by those having the authority to do so, or were owned by the grantor of the plaintiff, a purchaser at the sheriff's sale under the unrecorded deed took a legal title in the land, not subject to

any superior title disclosed by the record. The court did not, therefore, err in finding for the plaintiff and in decreeing the specific performance prayed for.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 62)

## DURDEN v. WRIGHT. (No. 150.)

(Supreme Court of Georgia. Jan. 18, 1915.)

*(Syllabus by the Court.)*

EXECUTORS AND ADMINISTRATORS ⟸11, 20—ADMINISTRATION—RIGHT—PROCEDURE.

As a general rule, there can be no administration unless there is an estate left by a decedent to be administered.

(a) But although there is no tangible property to administer, yet, if there is something for an administrator to do which may create an estate, such as suing for the death of a decedent, and the like, an administrator should be appointed.

(b) Where one applied for letters of administration upon an estate, alleging that the applicant was a creditor of the decedent and that the latter died leaving a large estate, and one of the next of kin of the decedent filed a caveat to the application, alleging that the decedent died without leaving an estate and that there was none at the date of filing the caveat, it was error to strike the caveat and direct a verdict on ex parte testimony offered by the applicant.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 25, 83–105; Dec. Dig. ⟸11, 20.]

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Action by C. M. Wright against C. W. Durden. Judgment for plaintiff, and defendant brings error. Reversed.

Hines & Jordan, of Atlanta, and Evans & Evans, of Sandersville, for plaintiff in error. S. H. Sibley, of Union Point, and Sibley & Sibley, of Milledgeville, for defendant in error.

HILL, J. Chancey M. Wright filed his petition with the ordinary of Washington county, alleging that James Durden had died intestate in 1904, a resident of that county, leaving an estate of real and personal property of the probable value of $10,000; that it was necessary that the estate should be administered; and that petitioner was a creditor of the estate. He prayed for citation to issue and be published as required by law, and, if no cause was shown to the contrary, that he be appointed administrator upon the estate of the deceased. C. W. Durden, one of the heirs at law of James Durden, filed a caveat to the application for administration, on three grounds: (1) That at the time of the death of James Durden he owned no property and left no estate. (2) That at the present time James Durden has no estate, and there is no necessity for administration. (3) Caveator denies that the applicant is a creditor of James Durden, deceased, and has any right to apply for administration on the estate. It does not appear from the record what action, if any, was taken by the ordinary, or how the case reached the superior court, but presumably it was by appeal. The case is here on exceptions taken to the order of the court below, in sustaining the motion to strike the grounds of the caveat; in admitting, over objection, a certain fi. fa., with the entries thereon, in favor of Charles H. Wright & Son against James Durden (the applicant being one of the plaintiffs in fi. fa.); and to the order of the court (there being no evidence for the caveator) directing a verdict finding in favor of the applicant and decreeing that letters of administration be issued to him upon the estate of James Durden, deceased.

1. The application for administration on the estate of James Durden, alleging that the deceased left an estate, and the caveat filed thereto, denying that averment, made an issue of fact as to whether there was an estate to be administered. Generally speaking, before there can be an administration, there must be some estate to administer. This was the issue raised by the caveat which the court struck; and the caveator was entitled to offer evidence in support of his contention that there was no estate to administer, and that the applicant was not a creditor of the deceased. The leaving of an estate by the deceased is jurisdictional. The court will not do a useless or vain thing and appoint an administrator when there are no duties for him to perform. The question then is: Was there anything for the administrator to do? That was an issue which should have been submitted to the jury under proper pleadings and instructions. Where there is conclusive proof that there is no property to be administered and nothing for the administrator to do, administration should be refused. Croswell on Ex'rs & Adm'rs, § 58. The statute contemplates that there is an estate to be administered, and requires that every administrator, upon his qualification as such, shall give bond, with good and sufficient security, "in a sum equal to double the amount of the estate to be administered." Civil Code, § 3972. It follows logically that there is no administration without bond, and if there is no estate there is no administration. Cases can be conceived where there is no tangible estate, but where there is something to be done by an administrator which in contemplation of law may create an estate, such as suing for the death of a decedent. 18 Cyc. 70 (11). In such cases an administrator should be appointed. But the issue in the present case, raised by the application and the caveat, is that there is no estate to administer; and, under the view we take of the case, the caveator had the right to prove to the jury, if he could, the allegations of his caveat. We think the court committed error in striking the ground of caveat which made

that issue. No question was raised by the caveat as to who was entitled to the administration in case it should be decided by the jury that there was an estate to be administered. There was therefore no ground for the argument of the plaintiff in error that the next of kin of the deceased should have been appointed instead of the applicant.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 56)

## STUBBS et al. v. GLASS. (No. 147.)

(Supreme Court of Georgia. Jan. 18, 1915.)

*(Syllabus by the Court.)*

1. VENDOR AND PURCHASER ⊂=227—ACTUAL NOTICE—RECITAL IN DEED—LIFE TENANCY—REMAINDERS.

Where one by a voluntary deed conveyed to another a life estate in land, with remainder to the children of the first taker, and subsequently the tenant for life executed a warranty deed conveying in fee simple the same land to another, and the grantor first referred to executed also to the purchaser from the life tenant an instrument reciting the execution of the voluntary conveyance first referred to, relinquishing "all right and titles to said claim whatever to [the purchaser], his heirs and assigns, forever in fee simple," the purchaser relying upon the instrument just recited as the deed from the life tenant, as constituting his muniment of title, did not obtain a title which would prevail in his favor, or that of his successors in title, over the rights of the remaindermen asserted upon the death of the life tenant. The deed executed by the life tenant could not convey in any event more than a life estate, and the written instrument, which the purchaser referred to took from the first grantor, charged the purchaser with notice of the existence of the former voluntary conveyance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent.Dig. § 474; Dec. Dig. ⊂=227.]

2. NOTICE ⊂=2—ACTUAL NOTICE—RIGHTS OF LIFE TENANT.

The defendant, being a successor in title, through intermediate conveyances, to the purchaser referred to in the preceding headnote, did not show paper title as against the remaindermen, the plaintiffs in this action, who upon the death of the life tenant asserted in themselves title to the land conveyed in the deed first referred to above.

[Ed. Note.—For other cases, see Notice, Cent. Dig. § 2; Dec. Dig. ⊂=2.]

3. PRESCRIPTIVE TITLE—DIRECTION OF VERDICT.

The evidence was not of such a character as authorized the court to direct a verdict upon the theory that the defendant had a prescriptive title to the land.

Error from Superior Court, Fayette County; Robt. T. Daniel, Judge.

Action by James Stubbs and others against Viney Glass. Judgment for defendant on directed verdict, and plaintiffs bring error. Reversed.

James Stubbs and others sued to recover land, alleging that they were children and grandchildren of Mrs. Barbara E. Stubbs; and that they were the remaindermen, and Mrs. Barbara E. Stubbs was the life tenant, under a deed from Mrs. Rachel Blalock, conveying this land. The defendant set up title in herself, derived through a deed of Mrs. Blalock (of a date later than that of the one first mentioned), and a deed by Barbara E. Stubbs, to one of the defendant's predecessors in title. She also contended that she had a good prescriptive title.

After hearing the evidence, counsel for the opposing sides agreed that a verdict should be directed by the court; each contending that it should be directed in favor of his side. The court directed a verdict for the defendant, and the plaintiffs excepted.

J. W. Culpepper, of Fayetteville, and Daley & Chambers, of Atlanta, for plaintiffs in error. W. B. Hollingsworth and J. Wise, both of Fayetteville, and E. J. Reagan, of McDonough, for defendant in error.

BECK, J. (after stating the facts as above). [1, 2] We are of the opinion that the court erred in directing a verdict for the defendant. The plaintiffs showed that their ancestor, Barbara E. Stubbs, had title to the land under a deed from Rachel Blalock. This deed, executed on January 24, 1866, and recorded on the same day, conveyed a life interest to Barbara E. Stubbs, with remainder to her children; the grantor reserving the use and possession of the land during her life. There is no dispute that this deed was sufficient to vest the grantee with a life estate in the property conveyed. The defendant derived title from a deed executed on September 12, 1871, by Barbara E. Stubbs to Thompson Nash, conveying the same property, and an instrument in writing executed by Rachel Blalock, which recites that she having previously made a deed of gift to the land in controversy, and having in said deed reserved the right to control and use said land during her natural life, "I, Rachel Blalock, do by these presents and in the presence of the witnesses relinquish all right and titles to said claim whatever to said Thompson Nash, his heirs and assigns, forever in fee simple." The defendant contends that this last written instrument executed by Rachel Blalock, taken in connection with the deed from Barbara E. Stubbs to Thompson Nash, was a deed of conveyance; that these conveyances were for a valuable consideration, while the prior deed of Rachel Blalock to Barbara Stubbs was a voluntary deed; and therefore that the defendant's title will prevail over the rights of the plaintiffs, who claim under a voluntary deed, as the defendant took without actual notice of the voluntary deed. This contention is not sound. Mrs. Stubbs' deed to Nash could only convey such interest as she had (her estate for life); and if the instrument recited above, which the defendant insists operates as a deed from Rachel Blalock, be treated as such, it contains on its face notice of the prior conveyance executed to Barbara Stubbs,

and a party taking such an instrument took it charged with notice of the prior conveyance and subject thereto, conceding that it was voluntary in character. The defendant claims title under a series of conveyances from Thompson Nash and his successors in title; but none of these successors in title had a better title than Thompson Nash, and the defendant, relatively to these plaintiffs, occupied no better position than Thompson Nash and the intermediate grantors between him and the defendant; and, when Mrs. Barbara Stubbs died in 1910, the plaintiffs had their right of action to recover the land in controversy.

[3] In her answer the defendant set up a prescriptive title. So far as relates to this claim, it is only necessary to say that the evidence did not authorize the court to direct a verdict for the defendant. Indeed, it is not insisted in the brief of counsel for defendant in error that the evidence showed a prescriptive title in their client. Their contention is solely that the case turned upon competition between a deed executed upon a valuable consideration and a prior voluntary conveyance, of which the first taker under the conveyance for value did not have actual notice. But, as we have seen above, that contention is without support in the evidence.

In the motion for a new trial there are numerous grounds complaining of the admission of evidence; but the assignments of error in these grounds raise no question for determination here, as they fail either to show what objection was urged at the time the evidence was introduced or to set out the evidence introduced, literally or in substance, so that this court could judge of its materiality. The judgment is reversed upon the ground that the judge erred in directing a verdict for the defendant.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 35)

## COCHRAN v. MITCHEM. (No. 134.)

(Supreme Court of Georgia. Jan. 16, 1915.)

*(Syllabus by the Court.)*

1. ASSAULT AND BATTERY ⇐43—CIVIL ACTION—INSTRUCTIONS—EVIDENCE.

The court erred in charging the jury as follows: "If you should conclude under the principles of law given you in charge, if any assault and battery was committed upon the plaintiff by the defendant, he is justifiable under some rule of law, the court charges you the plaintiff would not be entitled to recover any damages in the case." There was no evidence to authorize this charge; the uncontradicted evidence showing an unprovoked assault and battery committed by the defendant upon the plaintiff.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 57–59, 61, 62; Dec. Dig. ⇐43.]

2. TRIAL ⇐252—INSTRUCTION—EVIDENCE.

Nor was there any evidence to authorize the court to submit to the jury the theory that certain injuries alleged in the petition were the result of a mere accident, and a charge upon that subject was error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. ⇐252.]

3. ASSAULT AND BATTERY ⇐43—CIVIL ACTION—INSTRUCTION—DAMAGES.

The court charged the jury: "If the plaintiff is entitled to recover any damages in the case, the court charges you that the damages he would be entitled to recover in the case would be what the law calls direct and general damages." Considered in connection with the entire charge, this was not error.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 57–59, 61, 62; Dec. Dig. ⇐43.]

4. ASSAULT AND BATTERY ⇐40—CIVIL ACTION—NOMINAL DAMAGES—EVIDENCE.

Where in a suit to recover damages for assault and battery the uncontroverted evidence is such as to demand a verdict in favor of the plaintiff for a substantial amount, the jury are not authorized to return a verdict in favor of the plaintiff for nominal damages merely.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 55; Dec. Dig. ⇐40.]

Error from Superior Court, Morgan County; J. B. Park, Judge.

Action by J. W. S. Cochran against C. E. Mitchem. Judgment for plaintiff for nominal damages only, and he brings error. Reversed.

M. C. Few, of Madison, for plaintiff in error.

BECK, J. J. W. S. Cochran brought suit against C. E. Mitchem, to recover damages for an alleged assault and battery committed by the defendant upon the plaintiff. Upon the trial of the case the jury returned a verdict for $1 in favor of the plaintiff. He made a motion for a new trial; and, this having been overruled, the case was brought here for review. In his petition the plaintiff alleges both general and special damages; the claim for damages being based upon an alleged assault and battery made upon him by the defendant without provocation. It is alleged in the petition, that the defendant, without cause or provocation, while petitioner was testifying in a case in which plaintiff was interested, applied to the latter an opprobrious epithet, rushed immediately upon him, and with his fist violently struck petitioner several blows in the face and other parts of the body, and that petitioner, in order to protect and defend himself from the violent and unprovoked assault, grappled with the defendant, and in the struggle which ensued brought on by the plaintiff's attempts to defend himself he was thrown to the floor, and in the fall his left arm was broken. The defendant in his plea merely denied the allegations of the petition. There was no plea of justification or mitigation. The evidence introduced by the plaintiff fully sustained the allegations of the petition, and it was not controverted, as the defendant introduced no evidence.

[1] 1. In the course of his instructions to the jury the court gave the following charge:

"If you should conclude under the principles of law given you in charge, if any assault and battery was committed upon the plaintiff by the defendant, that he is justifiable under some rule of law, the plaintiff would not be entitled to recover any damages in the case."

The plaintiff excepted to this charge, and the exception is well taken. The charge is clearly erroneous under the pleadings and evidence in the case. There was no plea of justification or mitigation filed by the defendant. He merely denied the allegations in the plaintiff's petition. Not only was there no plea of justification or mitigation, but there was not the slightest evidence of justification, nor a particle of evidence to mitigate the conduct of the defendant on the occasion of his unprovoked assault upon the plaintiff. There is nothing in the record to suggest that the plaintiff, in giving the testimony in the case upon trial when he was assaulted, was not absolutely within his rights when the defendant in this case rushed upon him, after calling him a liar, and struck him in the face. The plaintiff himself testified to these facts, and his testimony is corroborated by the magistrate who was presiding at the trial in the course of which the plaintiff was giving the testimony which provoked the assault on the part of the defendant. With no plea of mitigation or justification, and no evidence to justify or mitigate the conduct of the defendant, the charge upon the subject of justification was out of place in the court's instructions to the jury. And what we have just said above, in discussing the ground of the motion under consideration, is applicable to the last three grounds of the motion for a new trial.

[2] 2. The court should not have charged the jury upon the theory that the breaking of the plaintiff's arm was a mere accident. The uncontradicted evidence showed that the breaking of the arm was the direct consequence of the struggle between the parties which ensued in consequence of an unprovoked assault made by the defendant upon the plaintiff.

[3] 3. Complaint is made of the following charge of the court:

"If the plaintiff is entitled to recover any damages in this case, the court charges you that the damages he would be entitled to recover in the case would be what the law calls direct and general damages."

Taken by itself, this would have been erroneous; but, as the court subsequently in his charge instructed the jury that they could allow damages for pain and suffering and for wounded feelings, and correctly informed the jury in that connection that the only measure of damages for pain and suffering and wounded feelings was the enlightened consciences of impartial jurors, and also gave them in charge the section of the Civil Code relating to additional damages which the jury may give in cases where there are aggravating circumstances, the charge complained of is not ground for a new trial.

[4] 4. The petition alleged, and the uncontradicted evidence showed, that a violent, unprovoked, and serious assault and battery was committed by the defendant upon the plaintiff, and there was no evidence to even mitigate the conduct of the defendant. Under these facts the jury were not authorized to return a verdict in favor of the plaintiff for nominal damages. The evidence demanded a verdict for a substantial amount, and the verdict rendered must be set aside upon the ground, among others, that it is contrary to the evidence.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 61)

EVANS v. THOMPSON et al. (No. 149.)

(Supreme Court of Georgia. Jan. 18, 1915.)

*(Syllabus by Editorial Staff.)*

1. STIPULATIONS ⟸14 — ISSUES — AGREEMENTS FOR SUBMISSION—EFFECT.

An agreement by the parties to the submission to the jury of a single issue operates to eliminate all other issues.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24–37; Dec. Dig. ⟸14.]

2. JUDGMENT ⟸252 — PLEADING — DEMAND FOR RELIEF.

A money judgment for defendant not praying for a judgment is unauthorized.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. ⟸252.]

3. LANDLORD AND TENANT ⟸296—DISPOSSESS PROCEEDINGS — EXISTENCE OF RELATION.

Where the relation of landlord and tenant does not exist between the parties, the court must enjoin the further progress of the warrant to dispossess a party as a tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1272, 1275, 1283; Dec. Dig. ⟸296.]

Error from Superior Court, De Kalb County; C. S. Reid, Judge.

Action by W. P. Evans against C. S. Thompson and others. Judgment for defendants, and plaintiff brings error. Reversed.

J. B. Stewart, of Atlanta, for plaintiff in error. R. W. Milner, of Covington, for defendants in error.

EVANS, P. J. The plaintiff, W. P. Evans, filed an equitable petition against C. S. Thompson to restrain the execution of a warrant to dispossess him as a tenant holding over, alleging that the deed to the premises which he executed to the defendant was infected with usury, and that the defendant was to make or procure a loan for him in a sum of money sufficient to pay the plaintiff's indebtedness to the defendant, which loan was to be evidenced by two notes of equal amounts, due in one and two years respectively, bearing interest at the rate of 8 per

cent. per annum. A copy of the deed was attached, and it purported to be on a consideration of $6,000. The prayer was for an injunction against the further prosecution of the dispossessory warrant; for an accounting; for specific performance of the contract respecting the loan; and for general relief. The defendant denied that there was any usury in the consideration of the deed; denied making the agreement alleged in the petition; and averred that he purchased the land from the plaintiff, who rented it from him, and that the plaintiff was insolvent, and the premises were deteriorating in value, and, by way of cross-relief, prayed for the appointment of a receiver to take charge of and rent the property, and "do such other things as may be necessary to protect the interest of the parties to this suit." The case came on to be tried, and upon the close of the evidence the court stated to counsel that he would submit only three issues to the jury, namely: (1) Was the deed given as a fee simple deed or as a security deed? (2) Was there any usury in the indebtedness to Thompson? (3) Did the defendant contract with the plaintiff that he would make him a loan of $6,000, to be evidenced by two notes each for $3,000, to mature one and two years, respectively, after the date of the loan? After the plaintiff's attorney had made the opening argument, and while the defendant's attorney was addressing the jury, the court asked the plaintiff's attorney if he insisted that the questions as to usury and as to the contract be submitted, and he replied that he did not. Whereupon the court said that he would submit only the first question to the jury. The plaintiff's attorney replied that that would be satisfactory. The court then announced to the defendant's attorney, who had paused in his address, that only the first question would be submitted to the jury. The court submitted that issue, and the jury answered that the deed was given only as security for debt. The plaintiff's counsel moved that the court enter up a decree declaring that the deed from plaintiff to defendant was given to secure a debt, and was not an absolute deed, and restraining the defendant from further proceeding with the dispossessory warrant, and directing the receiver, after deducting $50 for his compensation, to turn over all property, money, and choses in action in his hands to the plaintiff. The court refused to enter up this decree, but did enter up a decree reciting that the plaintiff's counsel stated, in the trial of the case, that he did not wish the issues of fact specified in the last two questions formulated by the court submitted to the jury; reciting the finding of the jury on the first question; and adjudicating that the deed attached to the plaintiff's petition, which recited a consideration of $6,000, was given as security for debt, that the debt was not infected with usury, and that the plaintiff have judgment for $6,000 principal, and $447.33 interest, and future interest at 8 per cent. Error is assigned upon the decree, and upon the refusal of the court to enter up a decree in manner and form as moved by the plaintiff.

[1-3] Held, that the pleadings did not authorize the decree which the court entered up. The effect of the agreement to submit the single issue in the form of a question was to eliminate all others. The plaintiff prayed for an accounting, but no accounting was had. The defendant did not pray for a judgment against the plaintiff; so the pleadings did not authorize any judgment against the plaintiff in favor of the defendant. The jury having found that the relation of landlord and tenant did not exist between the parties, the court should have enjoined the further progress of the warrant issued at the instance of the defendant against the plaintiff as a tenant holding over.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 48)

## HEARD v. NATIONAL BANK OF WILKES.

(No. 144.)

(Supreme Court of Georgia. Jan. 16, 1915.)

*(Syllabus by the Court.)*

1. BILLS AND NOTES ⟸375—NOTE FOR CORPORATE STOCK—RECITAL OF CONSIDERATION—BONA FIDE PURCHASER.

While Civil Code 1910, § 4293, requires that a note or other evidence of debt given for the purchase price of stock in any incorporated company, sold by any peddler, agent, or traveling salesman or promoter, traveling for the purpose of making such sale, shall have expressed on its face the consideration thereof (not including sales after the original purchase price has been paid and the certificates of stock have been issued), it further declares that any person who may purchase any such note or evidence of debt, "when the consideration is expressed in the face of the note or contract," shall take it subject to all the equities between the original parties. It follows that, where a negotiable note is given for such stock, but does not express on its face the consideration, a bona fide purchaser for value before due and without notice takes free from any defense by the maker on account of equities between the original parties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 971–981; Dec. Dig. ⟸375.]

2. BILLS AND NOTES ⟸525—NEGOTIATION—NOTICE TO PURCHASER—SUFFICIENCY OF EVIDENCE.

Aside from the provisions of the Code section above cited, there was no sufficient evidence to show notice to the purchaser of the negotiable note sued on, who purchased it for value before it was due. Accordingly, there was no error in directing a verdict for the plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832–1839; Dec. Dig. ⟸525.]

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action by the National Bank of Wilkes

against J. E. Heard. Judgment for plaintiff, and defendant brings error. Affirmed.

Colley & Colley, of Washington, for plaintiff in error. J. M. Pitner, of Washington, for defendant in error.

LUMPKIN, J. The National Bank of Wilkes brought suit against J. E. Heard on a promissory note dated September 3, 1912, for $200, with interest at 8 per cent., due April 1, 1913, payable to the order of the maker and indorsed by him. The defendant pleaded that the note was given for ten shares of stock in a corporation known as the Southern Beverage Company of Augusta, Ga.; that it was sold to the defendant by traveling salesmen traveling for the purpose of making such sales; that it did not have expressed upon its face the consideration or kind of stock for which it was given, as required by the act of 1912 (Acts 1912, p. 153), and was therefore void. He also pleaded want of consideration and failure of consideration; that the note was obtained from him by fraudulent representations; and that the plaintiff was not a purchaser bona fide, for value, and without notice. On the trial the presiding judge directed a verdict for the plaintiff. The defendant's motion for a new trial was overruled, and he excepted.

[1] The act of August 17, 1912, declares that all promissory notes, contracts, or other evidences of debt given for the purchase price of stock in any incorporated company, and sold by any peddler, agent, or traveling salesman or promoter, traveling for the purpose of making sales, shall have expressed on the face of such notes, contracts, or other evidences of debt the consideration thereof. It is provided that the act shall not apply to sales after the original purchase price has been paid and certificates of stock have been issued. It is further declared that any person who may purchase any note, contract, or other evidence of debt given for such stock, "when the consideration is expressed in the face of the note or contract as required in section 1, whether before due and without notice or otherwise, where the consideration is so expressed, shall take the same with all the equities existing between the original parties and the maker of such note, contract, or other evidence of debt, and the maker shall have the right to make any defense to the payment of same as against such purchasers that could have been made against the original payee." It is made a misdemeanor to sell stock without expressing the consideration in the face of the note, contract, or other evidence of debt taken therefor. While this act requires the sellers of such stock to express the consideration on the face of the note or contract taken therefor, and makes it a misdemeanor to fail to do so, it does not declare that the note shall be void in the hands of an innocent purchaser before due and without notice. It declares that the purchaser of such a note, contract, or evidence of debt shall take subject to the equities between the original parties, and with the right to make any defense against the holder that could have been made against the original payee, "where the consideration is expressed in the face of the note or contract." This clearly contemplates that an innocent purchaser of a negotiable instrument before due and without notice will be protected, except where the consideration is stated in the face of the instrument.

In 1897 (Acts 1897, p. 81) a somewhat similar act was passed in regard to promissory notes or other evidences of debt, taken for the purchase price of any patent, copy, or proprietary right, or territory for the sale thereof, or for the sale of any patented or copyrighted article or thing. Civil Code 1910, § 4293. It was held by this court that a promissory note given for the purchase price of a patent right, which failed to comply with the act in not expressing upon its face the consideration therefor, or stating the thing or article for which it was given, was not void in the hands of a bona fide holder. Smith v. Wood, 111 Ga. 221, 36 S. E. 649; Parr v. Erickson, 115 Ga. 873, 42 S. E. 240; Hunt v. Davenport, 138 Ga. 622, 75 S. E. 644. The rulings made in these cases practically control that now under consideration as to the point above mentioned.

[2] 2. It was contended that, aside from the act, the sellers made fraudulent representations to the defendant to induce him to buy; that the stock was worthless; and that the plaintiff was not an innocent purchaser for value and without notice. There was some evidence tending to sustain the contention as to the fraudulent representations and the worthlessness of the stock. The evidence relied on to show notice to the bank was the testimony of the defendant, in substance, as follows: In order to induce him to buy the stock, the sellers represented that the vice president of the bank, which is the present plaintiff, had taken $500 of the stock, and was treasurer of the company, and showed him a note for that amount purporting to be signed by the vice president in his individual capacity; that, about a week or two after making the purchase and giving the note, he met the vice president of the bank, and asked him why he sent the sellers of the stock out to the defendant's house; that the vice president said that he did not send them, "that he merely gave them a list of names, as long as his arm, of good people for them to see; that the defendant told him about the representation as to his having taken $500 of the stock, and he denied having made such subscription or having given any note therefor, and said that, if the sellers had such a note, it was forgery; that defendant asked him what he thought of the stock, and he said that he did not have the money to buy any of it, but thought well of it and believed it would pay. It was shown by the

uncontradicted evidence of the cashier of the bank that the note was purchased by him for it September 4th, the day after it was given; that the bank paid $185 therefor; that he had no notice of any defenses to it; that he supposed that the persons from whom he purchased the note were selling something to citizens of the county, as "we" discounted several notes for them on farmers and business men, but he did not know that they were selling stock in a corporation. The cashier was the officer who acted for the bank in making the purchase, and there is nothing in the evidence to show that the vice president represented the bank in connection with the transaction, or that he was acting otherwise than in his individual capacity at the time when he gave the sellers the list of names. Under the evidence, his knowledge at that time was not sufficient to charge the bank with notice subsequently when it bought the note in due course of trade. While generally the question of what would put a prudent man on his guard is a question for the jury, in this case there was nothing on which the jury could base a finding that the bank was charged with notice; and accordingly there was no error in directing a verdict for the plaintiff.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 51)

## FRANKLIN et al. v. BANK OF COLBERT. (No. 140.)

(Supreme Court of Georgia. Jan. 16, 1915.)

*(Syllabus by the Court.)*

BILLS AND NOTES ⊜329—NOTE GIVEN FOR CORPORATE STOCK—CONSTRUCTION OF STATUTE.

The act of 1912 (Acts 1912, p. 153) relating to notes given for the sale of stock in incorporated companies, being a substantial reproduction of the act of 1897 (Civil Code 1910, §§ 4293, 4294) relating to notes given for the sale of patent rights, is to be similarly construed, and, being thus construed, is controlled by the decisions in the cases of Smith v. Wood, 111 Ga. 221, 36 S. E. 649; Parr v. Erickson, 115 Ga. 873, 42 S. E. 240; Hunt v. Davenport, 138 Ga. 622, 75 S. E. 644; Heard v. National Bank of Wilkes, ante, 84 S. E. 129.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 789; Dec. Dig. ⊜329.]

2. DIRECTION OF VERDICT.

There was no error in directing a verdict for the plaintiff.

Error from Superior Court, Newton County; C. S. Reid, Judge.

Action by Bank of Colbert against R. G. Franklin and others. Judgment for plaintiff on directed verdict, and defendants bring error. Affirmed.

R. W. Milner, of Covington, for plaintiffs in error. Rogers & Knox, of Covington, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 52)

## BECKWORTH v. BANK OF COLBERT. (No. 139.)

(Supreme Court of Georgia. Jan. 16, 1915.)

*(Syllabus by the Court.)*

NOTES GIVEN FOR CORPORATE STOCK.

Under the pleadings and evidence, this case is controlled by the ruling announced in Franklin v. Bank of Colbert, ante, 84 S. E. 131.

Error from Superior Court, Newton County; C. S. Reid, Judge.

Action by the Bank of Colbert against W. B. Beckworth. Judgment for plaintiff, and defendant brings error. Affirmed.

A. D. Meador, of Covington, for plaintiff in error. Rogers & Knox, of Covington, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(16 Ga. App. 6)

## BRANTLEY v. STATE. (No. 6056.)

(Court of Appeals of Georgia. Jan. 20, 1915. Rehearing Denied Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. WITNESSES ⊜392—IMPEACHMENT OF WITNESSES—CONTRADICTORY STATEMENTS.

In our opinion, the provisions of section 5881 of the Civil Code of 1910 do not apply to contradictory affidavits made by alleged newly discovered witnesses and used in the countershowing in a motion for a new trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1249–1251, 1257; Dec. Dig. ⊜392.]

2. CRIMINAL LAW ⊜1156—NEW TRIAL.

In a motion for a new trial on the ground of newly discovered evidence, the trial judge has a very broad discretion, and his refusal to grant a new trial will not be controlled, unless his discretion has been abused; and especially is this true when the alleged newly discovered evidence is cumulative and impeaching in character, and is met with a countershowing contradicting it. Moody v. State, 1 Ga. App. 772 (9), 58 S. E. 262; Clark v. State, 5 Ga. App. 605 (5), 63 S. E. 606; Brown v. State, 8 Ga. App. 691, 70 S. E. 40; Rivers v. State, 8 Ga. App. 703, 70 S. E. 50; Wilcher v. State, 118 Ga. 196, 44 S. E. 995; Jordan v. State, 120 Ga. 864 (5), 48 S. E. 352; Washington v. State, 124 Ga. 424 (13), 52 S. E. 910; Young v. State, 131 Ga. 498, 62 S. E. 707; Bowers v. State, 135 Ga. 310 (1), 68 S. E. 1095; Reeves v. State, 135 Ga. 311, 69 S. E. 536.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067–3071; Dec. Dig. ⊜1156.]

3. CRIMINAL LAW ⊜938—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered evidence is cumulative and impeaching in character, and does not require the grant of a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306–2315, 2317; Dec. Dig. ⊜938.]

4. REVIEW OF EVIDENCE.
The evidence authorized the verdict.

5. REFUSAL OF NEW TRIAL.
No error was committed by the court in overruling the defendant's objection to the state's countershowing, or in refusing to grant a new trial.

Russell, C. J., dissenting.

Error from Superior Court, Campbell County; R. W. Freeman, Judge.

S. H. Brantley was convicted of crime, and brings error. Affirmed.

J. F. Golightly, of Atlanta, for plaintiff in error. Geo. M. Napier, Sol. Gen., and Claude C. Smith, both of Atlanta, for the State.

BROYLES, J. Judgment affirmed.

RUSSELL, C. J. (dissenting). Under the rulings in Dale v. State, 88 Ga. 552, 15 S. E. 287, Cooper v. State, 91 Ga. 366, 18 S. E. 303, and Fellows v. State, 114 Ga. 233, 39 S. E. 885, as well as the ruling of this court in Saylors v. State, 9 Ga. App. 227, 229, 230, 70 S. E. 975, it is my opinion that the court erred in overruling the motion for a new trial based upon the alleged newly discovered evidence.

(15 Ga. App. 660)

ROWE v. STATE. (No. 5621.)

(Court of Appeals of Georgia. Feb. 8, 1915.)

*(Syllabus by the Court.)*

CRIMINAL LAW ⟸304—JURY ⟸83; 97—EVIDENCE—JUDICIAL NOTICE—QUALIFICATIONS OF JURORS—"PREJUDICE"—"BIAS."
The prime test of the disqualification of jurors is the probability of interest, prejudice, or bias, as ascertained and determined by the application of the court's judicial knowledge of the particular facts which may indicate prejudice or bias or the absence thereof. Temples v. Central of Ga. Ry. Co., 15 Ga. App. —, 82 S. E. 777. Prejudice does not necessarily denote ill feeling, and may indicate only prejudgment; and bias is a mere leaning to one side of an issue rather than to the other. Judicial knowledge does not extend to facts which are not included within universal common knowledge and experience; and since it does not rest within the universal experience of mankind that a person will naturally prejudge a cause in favor of one who is engaged in the same occupation with himself, and be naturally inclined to lean towards him, it cannot be said to be a matter of judicial knowledge that a road commissioner or overseer is disqualified, by either prejudice or bias, from serving as a juror upon the trial of one accused of assaulting and beating another road overseer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700–717, 2951½; Dec. Dig. ⟸304; Jury, Cent. Dig. §§ 400, 402–404, 431–433, 435–437; Dec. Dig. ⟸83, 97.

For other definitions, see Words and Phrases, First and Second Series, Prejudice; Bias.]

Error from City Court of Monroe; A. C. Stone, Judge.

James Rowe, Jr., was convicted of crime, and brings error. Affirmed.

J. H. Felker, of Monroe, for plaintiff in error. Hal. G. Nowell, Sol., of Monroe, for the State.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

(15 Ga. App. 601)

IMPROVED FERTILIZER CO. v. SWIFT & CO. (No. 5690.)

(Court of Appeals of Georgia. Jan. 20, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⟸997—REFUSAL OF NONSUIT—EVIDENCE.
A judgment refusing a nonsuit will not be reversed, if, from an examination of the record, it appears that the evidence, as a whole, was sufficient to support the verdict returned in favor of the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4023, 4024; Dec. Dig. ⟸997.]

2. SALES ⟸383—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE.
The evidence was sufficient to authorize the verdict returned, and there is no substantial merit in any of the assignments of error.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1097; Dec. Dig. ⟸383.]

Error from City Court of Eastman; J. A. Neese, Judge.

Action by Swift & Co. against the Improved Fertilizer Company. Judgment for plaintiff, and defendant brings error. Affirmed.

An action for damages was brought by Swift & Co. against the Improved Fertilizer Company, for the alleged breach of two contracts for fertilizer material purchased from the plaintiff by the defendant. The contracts dated, respectively, June 25 and June 26, 1911, were for 300 tons of tankage and 50 tons of ground blood. The 100 tons of tankage to be delivered "first week in February," a like amount to be delivered "first week in March," and the 25 tons of blood to be delivered "first week in March," are alone involved in the suit, since the remainder was shipped and received. The contract for the tankage (Exhibit A, designated as "No. C–118") fixes a price of "$3.53½ per unit of ammonia, and 10 cents per unit of bone phosphate, per ton of 2,000 pounds, c. a. f. Eastman, Ga.," and the contract for the dried blood (Exhibit B, designated as "No. C–119") fixes a price of "$3.58½ per unit of ammonia, per ton of 2,000 pounds, c. a. f. Eastman, Ga." Both contracts are absolute by their terms.

The petition alleges in paragraph 4 that the plaintiff faithfully performed all its obligations under the two contracts, but that the Improved Fertilizer Company "failed and refused to accept part of the goods ordered, to wit, 200 tons of the tankage in Exhibit A, and 25 tons of blood as ordered in Exhibit B; that the said defendant refused to or-

der out said goods and notified your petitioner not to ship same."

Paragraph 5 alleges that the plaintiff "made the said contracts in good faith and was prepared to fill same, but that defendant refused to comply with the said contract."

Paragraph 6 alleges:

"At the time said contract was to be fulfilled, the price of the tankage had fallen from the contract price, 66½ cents per unit, which, at a basis of 11 units per ton, makes a decrease of $7.31⅓ per ton. This makes the net loss on the 200 tons amount to $1,463."

Paragraph 7 alleges:

"At the time for the performance of the contract for the shipment of the 25 tons of blood, the price of the same had fallen 36¾ cents per unit, and, on the basis of 17 units per ton, would make a loss of $6.24¾ per ton, and the loss on the 25 tons equals $156.19."

Paragraph 8 alleges:

"That by reason of the defendant refusing to carry out its said contract as aforesaid, and the falling market in the prices of the materials contracted for, * * * petitioner has been injured and damaged in the sum of $1,800, or other large sum"

—for which judgment is prayed.

The defendant, in its answer, admitted the allegations contained in paragraphs 1, 2, and 3 of the petition (as to the corporate existence of the defendant and its principal office and place of business), and also the allegations in paragraph 4, set out above, and admitted that the allegation in paragraph 5 that the plaintiff entered into the contract in good faith was "probably true," but denied "that this defendant refused to comply with its part of the contract." For want of information it alleged inability to admit or deny the allegations in paragraph 6; it denied the allegations in paragraph 8 (as to damages and the amount thereof); and it expressly admitted the execution of the contract and "the title thereof in the plaintiff." Three amendments to the answer were made at the term at which the case was tried, several months after the original answer was filed. The first amendment is as follows:

"For want of sufficient information, defendant can neither admit nor deny the allegations contained in said fifth paragraph, but demands strict proof thereof."

And the second amendment states that:

"For want of sufficient information, defendant can neither admit nor deny that portion of paragraph 4 wherein it is alleged that plaintiff faithfully performed its part of the contract, and denies that portion of said petition wherein it is alleged that defendant refused to accept part of the goods offered, but, on the contrary, avers that it was ready to live up to its contract, but the goods were never shipped out as contemplated in its said contract."

The third amendment withdrew "that part of paragraph 1 of defendant's plea which admits apparently that this defendant notified the plaintiff not to ship the goods, the subject-matter of this suit," and added the further statement that, "under the contract between plaintiff and defendant, there was no obligation resting on this defendant to order out said goods from the plaintiff."

The plaintiff introduced in evidence those parts of the original answer of the defendant in which the defendant admitted the allegations in paragraphs 4 and 5 of the petition, and also introduced the two contracts, referred to in the petition. H. H. Rogers testified, for the plaintiff, that he was manager of the Swift Fertilizer Works, and had been for 14½ years, and that Swift & Co. was a different corporation, but that both companies had the same officers; that Swift Fertilizer Works is engaged in the manufacture and sale of commercial fertilizers, and purchases its materials from Swift & Co. and various other dealers; that the terms "c. a. f.," as used in the contract sued on, meant the cost of the goods "f. o. b. cars" at the point of shipment, plus freight thereon to destination; that, when a seller delivered goods "c. a. f.," his liability ceased when the goods were placed on board the cars; that as manager of the Swift Fertilizer Works he had dealt in the Chicago market in "blood" and "tankage," and was so dealing in the months of January, February, and March, 1912; that he was familiar with the price of blood and tankage, getting his information in regard thereto from Swift & Co., from A. A. Smith, a broker in Atlanta, and from other brokers; that in the spring of 1912 the freight from Chicago to Eastman, Ga., on blood and tankage, was $6.75 per ton of 2,000 pounds, and the rate on blood would be 40 cents per unit, and the rate on tankage 61 cents; that all blood and tankage are sold on the unit basis, there being 17 units of ammonia per ton in the blood and 11 units of ammonia and 10 units bone phosphate per ton in the tankage. He further testified that Chicago is the controlling market for blood and tankage, and that on February 3, 1912 (the first week in February), Swift Fertilizer Works purchased from Swift & Co. blood at $2.81½ per unit of ammonia, at Chicago, "which c. a. f. Eastman, Ga., would be $3.21½," and that, taking these figures as the market price (and they are the market price), blood had declined 37 cents per unit, or $6.29 per ton, from the time of the contracts sued on to the time of delivery under them, and "the difference on the 25 tons of blood which were not delivered, in contract C-119, amounted to $157.25, the same being the difference between the contract price and the market price at the time for delivery under the contract in Chicago"; that the price of tankage had declined from the time of the contract to the time for delivery under it, and the difference on the 200 tons of tankage which were not delivered, in contract C-118, amounted to approximately $1,340, the same being the difference between the contract price and the market price at the time for delivery under the contract in Chicago, based on the values of January 30 and February 6, 1912.

M. C. King testified, for the plaintiff, that he was a cotton oil and fertilizer broker in Atlanta, Ga., and dealt in blood and tankage in 1911 and 1912, though not connected with Swift & Co.; that Chicago was the recognized market for blood and tankage, and these goods had declined from the summer of 1911 to the first part of the year 1912; that he was testifying from information gathered from competitive sources and from his familiarity with the market; and that in February, 1912, blood was worth $3.11^{7}/_{10}$ per unit at Chicago, "c. a. f. Eastman, Ga.," and in the following month of March the market price was $3.02^{7}/_{10}$ and the freight on the same was 39.7 cents per unit, Chicago to Eastman, Ga.

Julian Field testified, for the plaintiff, that he was a broker in fertilizer materials in Atlanta, Ga., and during the years 1911, 1912, and 1913 his firm bought and sold blood and tankage as brokers; that Chicago was the basis market for the goods, and there was a decline in the price thereof in the market from the summer of 1911 to the spring of 1912; that his firm bought and sold blood and tankage as brokers for the following prices: March 13, 1912, sold blood $3 per unit "c. a. f. Waverly Hall, Ga.," and $3.26 "c. a. f. Bainbridge, Ga.," and on February 29, 1912, sold tankage $2.76 per unit "c. a. f. Hartwell, Ga."

George S. Ober testified, for the plaintiff, that he was a fertilizer broker in Atlanta, Ga., and the market for blood and tankage was based on Chicago; that "c. a. f." in a contract meant cost and freight added to destination, and a seller completed such a contract when he loaded and shipped the goods. He further testified that as a broker he bought and sold blood from February 21, 1912, to March 20, 1912, for $3.02½, $3, $2.97, $2.97½, and $2.95 per unit "c. a. f. Atlanta, Ga." Also that he bought tankage on February 12, 1912, for $2.70; on February 8, 1912, for $2.75; and on February 28, 1912, $2.71—all per unit "c. a. f. Atlanta, Ga."; and that, to get the values of these goods at Chicago, there should be deducted 33 cents per unit on the blood and 51 cents per unit on the tankage.

At the conclusion of the foregoing evidence, the plaintiff announced closed, and the defendant made a motion for a nonsuit, "because the plaintiff's evidence failed to show that there had been a breach of contract by the defendant, or that plaintiff had complied with its part of the contract." This motion was overruled, and the defendant filed exceptions pendente lite, and assigns error on this ground.

The defendant introduced in evidence the following letter of January 26, 1912:

"Messrs. Swift & Co., Chicago—Gents: Your letter received to-day. Since you refuse to cancel our contract for the 200 tons of tankage and 25 tons of blood, we are compelled to ask you to hold up all our February shipment until the first week in March. When we receive the blood and tankage now on the road our storage room will be filled. We are having so much bad weather that crops in this section will be late starting, and furthermore we will have to have some time to make arrangements for money to take care of same, and also place to store. Thanking you in advance to grant our request.

"Yours very truly,

"Improved Fertilizer Company.

"Eastman, Ga., 1/26/12."

D. M. Bush testified, in behalf of the defendant, that he was general manager of the defendant company, and on its part had made the contracts with the plaintiff; that a part of the blood under contract C–119, and a part of the tankage under contract C–118, had been shipped by the plaintiff and received and paid for by the defendant; that the plaintiff never did ship the remainder of the goods called for by the contracts; that the defendant never had refused to comply with the contracts; that it had not refused to take and pay for the goods; that, if the plaintiff had shipped the goods, the defendant would have taken them; that the defendant had requested the plaintiff to cancel a portion of the contracts, but had never directed the plaintiff not to ship the goods, and had never written to the plaintiff that the defendant would not receive the goods, but had requested the plaintiff to hold up shipment for further instructions; that this request had been made of the plaintiff because the defendant was at the time loaded up with the first shipment; that he did not know what reply he made to the telegram of April 1, 1912; that he never did tell them to ship the stuff.

The defendant then closed, and the plaintiff offered in rebuttal various letters and telegrams between the parties, from which it appeared that on December 23, 1911, the defendant requested the plaintiff to delay shipment of tankage until "second week in January, February, and March, instead of first week." On January 3, 1912, the defendant wrote to the plaintiff and stated that its "tankage contract calls for 100 tons first week in February," and requested, on account of the fact that collections were bad and money tight, that the plaintiff "hold up this shipment until 15 inst. [evidently meaning 15 prox.], so it will not reach us until the 25th inst," and aded: "We will give shipping instructions later as we need it." On January 20th the defendant wrote that on account of bad collections, etc., it was compelled to cut its tonnage "at least one-half this season," since the company did not have the money to pay for the goods, and concluded as follows:

"Now, we are compelled to ask you to cancel 200 tons tankage on order C–118, and 25 tons blood on order C–119, for we just can't pay for it."

On February 6th the plaintiff (referring possibly to the letter of January 20th from the defendant) wrote or wired thus:

"Cannot use blood and tankage. Selling freely, basis 2.95½, Eastman, Ga. Will cancel sale 200 tons tankage for 48 cents per unit, basis 11 per cent. ammonia. Wire."

It does not appear from the record that any reply to this suggestion was made by wire, but on February 13th the defendant wrote to the plaintiff explaining business conditions and concluding its letter as follows:

"We are compelled to cut our output this season to about half from last season's output, as we don't see any chance just now to pay for the goods, and still insist that you release us from the contract."

To this letter the plaintiff replied on February 17th as follows:

"Your letter 13th received. There is due you February shipment, contract 118, one hundred tons tankage; contract 119, twenty-five tons blood; contract 122, fifty tons tankage. Do you refuse to accept this material for February shipment?"

On February 19th plaintiff wrote or wired to the defendant:

"Will ship 50 tons tankage to Milan, Ga. Do you refuse to accept balance of blood and tankage sold you for February delivery? Telegraph answer."

It does not appear that the defendant replied to this until February 26th, when it either wrote or wired to the plaintiff as follows:

"Cotton seed meal has advanced two twenty-five per ton. Hold our blood and tankage for our instructions, or cancel all our contracts."

In reply to this last communication, the plaintiff wired to the defendant, on March 2d:

"Answering telegram February 26, forward shipping instructions February and March quota blood and tankage. Cannot cancel contract. Wire."

On the same date the defendant replied:

"Your telegram received. When we bought the tankage and blood, cotton was 12 and 13 cents a pound, but the big crop and the bad weather ran the price down, so our crop sold for 5 or 6 cents. We contend that we are not able to pay for it, so you had better relieve us and save trouble and expense."

The next communication in the record is a telegram of March 26th, from the plaintiff to the defendant, as follows:

"Please wire answer our letter 18th regarding shipment tankage and blood due you."

On April 1st the plaintiff wired to the defendant:

"Must have immediate shipping instructions blood and tankage, if you do not accept our proposition letter of March 18. Wire."

These last two telegrams evidently relate to some compromise proposition made by the plaintiff to the defendant in a letter of March 18, 1912, which does not appear in the record.

With the introduction of this correspondence, the plaintiff again closed. The case was submitted to the jury, and they rendered a verdict against the defendant for $1,000. A motion for a new trial was made by the defendant, on the usual general grounds and on the following additional grounds:

(1) Because the court erred in not granting a nonsuit, upon motion of defendant's counsel, made at the close of the plaintiff's evidence in chief, for the reasons, urged at the time, that the plaintiff's evidence failed to show that there had been any breach of the contract by the defendant, or that the plaintiff had complied with its obligations therein.

(2) Because the following material evidence of the witness H. H. Rogers was admitted by the court, over the objection of the defendant, to wit:

"As to the market price on tankage in Chicago the first week in February, I have two dates. The Swift Fertilizer Works have two contracts dated January 30 and February 6, 1912. I priced the same price 6.21½ Chicago"

—this evidence being objected to on the ground that the witness was testifying as to special contracts made on certain dates, and because there may have been some special reason moving the parties in the special contracts made, and which would not affect the price of the goods in the market.

(3) Because an opinion as to what had been proved was intimated in the charge of the court to the jury by the following statement:

"Though an executory contract of purchase and sale may not be subject to countermand under its terms, except by mutual consent, still, so long as it is executory on both sides, notice by the purchaser to the seller that he will not take the goods amounts to a breach of contract."

The plaintiff in error insists that the court thereby assumed that the defendant had given notice to the plaintiff that the former would not accept the goods, notwithstanding the allegation in the second paragraph of its original plea expressly denying that the defendant "refused to comply with its part of the contract," and although the amendment to the original plea also expressly denied the allegation in the petition that the defendant refused to accept part of the goods, and the witness Bush testified that the defendant had not directed the plaintiff not to ship the goods, and had not refused to take the same.

(4) Because an opinion that the defendant had refused to take and pay for the goods was intimated by the court in the following three excerpts from the charge:

"If a purchaser refuses to take and pay for goods bought, the seller may retain them and recover the difference between the contract price and the market price at the time and place of delivery."

"If a purchaser notifies a seller, before the delivery of the goods, that he refuses to accept them and will not accept them if delivered, this would amount to a breach of the contract of the purchase and sale, and would entitle the seller to recover of the purchaser the difference, if any, in the cost price of the goods bought and the prevailing market price of the same goods at the time and place of delivery, provided

the seller had been damaged by the breach of the contract on the part of the purchaser."

"Though an executory contract of purchase and sale may not be subject to countermand under its terms, except by mutual consent, still, so long as it is executory on both sides, notice by the purchaser to the seller that he will not take the goods amounts to a breach of the contract."

Clements & Girardeau, of Eastman, for plaintiff in error. W. A. Wooten and Chas. W. Griffin, both of Eastman, for defendant in error.

WADE, J. (after stating the facts as above). [1, 2] Since, under the well-settled rule, a judgment refusing a nonsuit will not be reversed, if, from an examination of the record, it appears that the evidence, as a whole, was sufficient to support the verdict returned in favor of the plaintiff (Atlantic & Birmingham Railway Co. v. Sumner, 134 Ga. 673, 68 S. E. 593), and it has been further held that "an exception to the refusal to order a nonsuit will not be considered, where, in the motion for a new trial, which was overruled, error is assigned on the ground that the verdict is contrary to evidence and without evidence to support it" (Duncan v. Redd, 14 Ga. App. 306, 80 S. E. 726), it is unnecessary to consider the exceptions in this case based upon the refusal of the trial judge to order a nonsuit when the plaintiff closed its evidence in chief. See, also, Henderson v. Maysville Guano Co., 15 Ga. App. —, 82 S. E. 588; Weller v. Davis & Sanford Co., 15 Ga. App. —, 82 S. E. 593, and cases there cited.

The original plea filed by the defendant admitted as true the allegations contained in the fourth paragraph of the petition, which were, in effect, that the plaintiff had faithfully performed all its obligations under the two contracts which formed the basis of the suit, and that the defendant had failed and refused to accept a portion of the goods contracted for, to wit, 200 tons of tankage and 25 tons of blood, and had refused to order out these goods and had notified the plaintiff not to ship the same, though it is also true that in the second paragraph of the answer the defendant denied that it had refused to comply with its part of the contract, and later, by an amendment, the admission originally made was withdrawn.

"A defendant may file inconsistent and contradictory pleas, but the plaintiff may take advantage of the contradictory nature of the defenses and may use, as an admission against the defendant, a statement made in one of the pleas, though in another part of the defense there is set up a contradictory state of facts." White Sewing Machine Co. v. Horkan, 7 Ga. App. 283 (2), 66 S. E. 811.

Even "an admission contained in an answer of the defendant, filed by him in another case, is admissible in evidence against him when pertinent to an issue involved in the case on trial." Sons & Daughters of Job v. Wilson, 4 Ga. App. 235 (1), 61 S. E. 134; Watkins v. Fountain, 14 Ga. App. 321, 80 S. E. 694.

Even the admissions in a bill in equity, filed only by counsel and not sworn to by the complainant, may be given in evidence. Lamar v. Pearre, 90 Ga. 377, 17 S. E. 92.

"Admissions of fact in a pleading can always be taken advantage of by the opposite party, even though the pleading should be stricken or withdrawn." McElmurray v. Blodgett, 120 Ga. 9, 16, 47 S. E. 531, 535, and cases there cited. "This rule, however, has no application where the admission is simply an opinion on the part of the party making it as to the legal effect of a paper." Id.

If admissions are made, they are to be taken as true, "because they are asserted by the party himself; and, while he may withdraw them formally from the pleadings, he cannot by mere withdrawal avoid the affect of the admissions made." Cooley v. Abbey, 111 Ga. 439, 443, 36 S. E. 786, 787. See, also, Lydia Pinkham Medicine Co. v. Gibbs, 108 Ga. 138, 33 S. E. 945.

It has been held that:

"The defendant may invoke and use allegations beneficial to himself made in plaintiff's declaration, without offering the declaration itself in evidence or otherwise proving the admissions contained in such allegations." East Tenn. Railway Co. v. Kane, 92 Ga. 187 (5), 18 S. E. 18, 22 L. R. A. 315.

And of course it is equally true that the plaintiff can use admissions made in the defendant's answer in the same case without actually offering the answer itself in evidence. In the case now before us the admissions in the answer (which had been previously withdrawn) were formally placed in evidence. Under the present law as to pleading any averment distinctly and plainly made in the plaintiff's petition, which is not denied by the defendant's answer, shall be taken as prima facie true, unless the defendant states in his answer that he can neither admit nor deny such averment, because of the want of sufficient information. Civil Code, § 5539. Also under a statute now existing (Civil Code, § 5775), "without offering the same in evidence, either party may avail himself of allegations or admissions made in the pleadings of the other." Admissions of this character are only prima facie true, however, and may be withdrawn and the contrary shown by proof. Nevertheless, the jury may undoubtedly elect to believe the admissions originally made in a plea, even after the same have been formally withdrawn, where tendered in evidence and supported by other proof, as in this case, notwithstanding evidence to the contrary in behalf of the defendant. It appears, therefore, that, under the general grounds of the motion, the question for solution is whether the entire evidence in behalf of the plaintiff, as finally put before the jury, together with the admissions made in the original plea of the defendant, and placed in evidence after having been withdrawn, would authorize the verdict returned by the jury.

We have set out practically the entire evidence, and from an examination thereof it

may be said generally that some of the communications from the defendant to the plaintiff might be interpreted as merely a request for the cancellation of the two contracts upon which the suit was based; or, on the other hand, they might be construed, in connection with the related circumstances, and especially when taken in connection with the admission made in the original plea, as a cancellation on the part of the defendant. In other words, whether there was or was not a cancellation intended by the defendant company and communicated to the plaintiff was a question of evidence entirely for determination by the jury, and, notwithstanding the express assertion on the part of Bush, the manager of the defendant company, that the company never refused to comply with the contract and did not refuse to take and pay for the goods, the jury could have reached a different conclusion, not only from the admission in the original plea, but from the language employed in several of the letters and telegrams, the substance of which has been given, and also from the fact that the plaintiff was unable to obtain a definite response from the defendant to numerous communications asking in effect or in so many words the direct question whether or not the defendant proposed to accept the goods, and requesting shipping instructions. It will be observed that the plaintiff wired the defendant, even as late as March 26th and again on April 1, 1912, in regard to the blood and tankage; and so far as the record discloses, though these communications would seem to demand an answer, absolutely no response was elicited from the defendant. Previous letters, as will appear from the statement of facts, equally urgent and equally requiring an answer, appear also to have been quietly ignored.

"Acquiescence or silence, when the circumstances require an answer or denial or other conduct, may amount to an admission." Civil Code, § 5782.

"In the ordinary course of business, when good faith requires an answer, it is the duty of a party receiving a letter from the other to answer within a reasonable time. Otherwise he is presumed to admit the propriety of the acts mentioned in the letter of his correspondent, and to adopt them." Civil Code, § 5741.

That "silence gives consent" is an adage which has become axiomatic. The jury may have considered the failure on the part of the defendant to reply frankly and candidly to the question propounded by the plaintiff in its letter or telegram of February 17, 1912 ("Do you refuse to accept this material for February shipment?"), and the question propounded in the telegram or letter from plaintiff on February 19th ("Do you refuse to accept balance of blood and tankage sold you for February delivery?"), to have been in effect an answer in the affirmative, since good faith and business candor would alike seem to demand an explicit reply. Especially would this conclusion be warranted when it is considered that prior to the date of these telegrams or letters, which apparently remained unanswered, the defendant had stated to the plaintiff, on January 20th, that it was compelled to ask for a cancellation of the two contracts and could not pay for the goods, and, on February 13th, that it did not see any chance just now to pay for the goods, and still "insisted on a release" from the contracts, and on March 2d stated to the plaintiff that it would be impossible to pay for the goods, and advised that "you had better release us and save trouble and expense." Then, too, the jury might have taken into consideration the fact that the original admission made by the defendant, that the contract had been canceled and it had refused to accept the goods, was not withdrawn until several months thereafter, at the actual trial of the case, and not then until after two other amendments had been offered and allowed by the court. Otherwise it is not contended, except in the general terms of the original grounds of the motion for the new trial, that the evidence as a whole was not sufficient to warrant the verdict. The market value of the goods purchased appears definitely to have been shown on the date fixed by the contracts, and the contracts themselves state the price to be paid, and the measure of damages can easily be arrived at. The jury passed on all the questions of fact coming legitimately within their province, and, since there was evidence sufficient to support the verdict, we may not disturb their finding, unless for some of the special assignments of error set out in the motion, which we will briefly discuss in their proper order.

The assignment of error as to the refusal of the court to grant a nonsuit has in effect been already discussed. The second special ground of the motion for a new trial assigns error because the court allowed the witness Rogers to testify, as set out in the statement of facts, what the market price of tankage in Chicago was in the first week of February, based on two contracts made by the Swift Fertilizer Works on January 30th and February 6th. The evidence set out in this ground, certified to by the court, does not appear in the identical words of the brief of evidence itself. Taking the testimony complained of, in connection with the entire evidence of this witness, it will be seen that his testimony as to the market price of blood and tankage does not appear to have been based exclusively on any special contracts of the Swift Fertilizer Works. The witness said that on February 3, 1912, the Swift Fertilizer Works purchased from Swift & Co. blood at $2.81½ per unit of ammonia at Chicago, which, c. a. f. Eastman, Ga., would be $3.21½, and that, "taking these figures at the market price (and they are the market price), blood had declined 37 cents per unit, or $6.29 per ton, from the time of the contracts sued on to the time for delivery under them," and that "the difference on the 25 tons of blood

which were not delivered, in contract C–119, amounted to $157.25, the same being the difference between the contract price and the market price at the time for delivery under the contract in Chicago." Also, this witness testified that the price of tankage had declined from the time of the contract therefor to the time for delivery thereunder, and the difference on the 200 tons of tankage not delivered in contract C–118 amounted to approximately $1,340; "the same being the difference between the contract price and the market price at the time for delivery under the contract in Chicago, based on the values of January 30th and February 6th." It may be that the witness based his statement as to the market price of blood and tankage during the first week in February on two dates only, but, taking the evidence altogether, it does not necessarily appear that his statement as to market values was based exclusively on the contracts made between the Swift Fertilizer Works and Swift & Co. Besides, no material harm could have resulted to the defendant, even had the testimony of Rogers as to the market value of blood and tankage during the first week in February, 1912, been based entirely on the price paid by the Swift Fertilizer Works on two or more special contracts, since the defendant did not undertake to dispute the testimony introduced by the plaintiff as to the market values of blood and tankage, and these values were shown with sufficient clearness and certainty by other testimony from King, Field, and Ober, which was by itself amply sufficient to support and authorize the verdict returned by the jury.

We think that the instructions complained of in the third and fourth special grounds of the motion for a new trial contained no intimation of opinion that the defendant had refused to comply with its part of the contract, and had refused to take and pay for the goods bought, and had thereby made a breach of the contract, as is insisted by the plaintiff in error. The judge undertook therein merely to define to the jury an "executory contract," and instruct them as to what would amount to a breach thereof, and to inform them what would be the proper measure of damages "if a purchaser refuses to take and pay for goods bought" and notifies the plaintiff before shipment that the goods will not be accepted, etc. The charge was adapted to the issues raised by the pleadings and the evidence, and it appears to us to have been fair and impartial, and not properly subject to the criticism made thereof.

The assignments of error are without substantial merit, and, the evidence being sufficient to warrant the verdict, the judgment overruling the motion for a new trial is affirmed.

BROYLES, J., not presiding.

(15 Ga. App. 620)

## HAVERTY FURNITURE CO. v. CALHOUN

(No. 5723.)

(Court of Appeals of Georgia. Jan. 20, 1915.)

*(Syllabus by the Court.)*

1. EVIDENCE ⟸568 — OPINIONS — PROBATIVE EFFECT.

The rule that "a defense established by the positive and uncontradicted testimony of unimpeached witnesses cannot lawfully be arbitrarily disregarded" does not mean that the jury are obliged to believe testimony which they in fact discredit, but means that they are to consider the testimony of every witness who is sworn, and not arbitrarily disregard the testimony of any witness on account of his employment, business affiliations, or environment; and it does not require the jury to believe testimony which is purely opinionative. As to opinionative evidence, the opinion of the jury at last is conclusive.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2392–2394; Dec. Dig. ⟸568.]

2. SALES ⟸397—CONDITIONAL SALES—RECOVERY OF PAYMENTS MADE—SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict in favor of the plaintiff, and the judge of the superior court did not err in overruling the certiorari.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1136; Dec. Dig. ⟸397.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Irene Calhoun against the Haverty Furniture Company. Judgment for plaintiff, and defendant brings certiorari. Overruled, and defendant brings error. Affirmed.

Daniel MacDougald, of Atlanta, for plaintiff in error. Gober & Jackson, of Atlanta, for defendant in error.

RUSSELL, C. J. The plaintiff brought a suit to recover $85, which she had paid in various sums to the defendant company, upon an account for certain household furniture; and the jury rendered a verdict in her favor. The defendant sued out certiorari; and exception is taken to the judgment overruling the certiorari. The case presents no novel feature, either as to the facts or the law. There are various assignments of error in the petition for certiorari, but, in the brief of counsel for plaintiff in error, the only exceptions insisted upon are that the verdict is contrary to law and to the evidence, and that the jury, in finding for the plaintiff, totally disregarded evidence introduced by the defendant, to the effect that the reasonable value for the use of the furniture purchased by the plaintiff amounted to $80, and that, this evidence being uncontradicted, the jury should not, in any event, have found a verdict for the plaintiff in excess of $5.

[1, 2] The plaintiff in error relies on the general rule stated in the case of Western & Atlantic Railroad Co. v. Beason, 112 Ga. 553, 37 S. E. 863, that "a defense established by the positive and uncontradicted testimony of unimpeached witnesses cannot lawfully be

arbitrarily disregarded." It is to be borne in mind, however, that the use of the words "arbitrarily disregarded," in the rule stated by the Supreme Court, was not fortuitous. And since it is plain, from the evidence as a whole, that the furniture company, in the present case, were endeavoring to get both the furniture and the money (a state of facts similar to that disclosed by the record in Rhodes & Son Furniture Co. v. Freeman, 2 Ga. App. 473, 58 S. E. 696, and Rhodes & Son Furniture Co. v. Jenkins, 2 Ga. App. 475, 58 S. E. 897), and especially in view of the fact that the evidence, in regard to the kind and value of the furniture during the time it was in the possession of the plaintiff, was purely opinionative, we are not prepared to say that the learned judge of the superior court was required to find that the jury did disregard any evidence in the case. The Supreme Court, by qualifying the word "disregarded" by the term "arbitrarily," did not assume to invade the province of the jury or to curtail its prerogative, but meant only to say that a jury should not captiously dismiss from its consideration or capriciously impeach the testimony of any witness on account of his business, or employment, or surroundings; but it has never been held, and never can be held, that it is not within the power of a jury, after considering testimony of a particular witness, to disbelieve it, although it may be uncontradicted, either from his appearance, his demeanor or manner upon the stand, or from the inherent nature of the facts testified to by him.

In Brunswick & Western Railroad Co. v. Wiggins, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513, the rule stated in Western Atlantic Railroad Co. v. Beason (which is cited) was explained, and Justice Little, delivering the opinion of the court and ruling upon the refusal to charge the jury that the evidence of persons in the employment of a railroad company, in the absence of anything to discredit or contradict such evidence, cannot be arbitrarily disregarded, said:

"Undoubtedly this is a sound proposition of law. The jury cannot arbitrarily disregard the evidence of any witness, which is not contradicted or discredited by other evidence or circumstances. The jury should regard the testimony of every witness sworn. They are not obliged to believe it, but it is their duty to give to the evidence of witnesses the weight to which, in their opinion as conscientious men seeking after the truth, they believe it is entitled; but the employment or business of a witness affords no reason why his evidence should arbitrarily or without reason be disregarded." Western & Atlantic Railroad Co. v. Robinson, 114 Ga. 159, 39 S. E. 950; White v. Southern Railway Co., 123 Ga. 353, 358, 360, 51 S. E. 411; Rylander v. Allen, 125 Ga. 206, 214, 53 S. E. 1032, 6 L. R. A. (N. S.) 128, 5 Ann. Cas. 355; McBride v. Georgia Railway & Electric Co., 125 Ga. 515, 517, 54 S. E. 674.

The evidence disclosed that in the first contract the plaintiff purchased and had delivered to her $260.48 worth of household furniture, upon which she made a payment by the delivery of a cabinet of hers. In this purchase there was no retention of the title; and without this, when the furniture was delivered to the plaintiff, it became her absolute property, though she was a debtor of the former owner of the furniture. After the plaintiff had made several payments, and during her absence from the city, without legal process, so far as appears from the record, the property was seized by agents of the furniture company and conveyed to its warehouse. Upon the plaintiff's return to the city, they agreed to deliver her certain similar articles of furniture, but it appears from uncontradicted evidence that, instead of receiving four chairs of the kind purchased in the first contract, she received only one chair in the second purchase, and the total value of the articles to be received by her in the second contract (in which the title was reserved by the furniture company) was only $200.48 instead of $260.48.

In view of all the circumstances in the case, we cannot say the jury were not authorized, under the facts, to disregard the testimony of the defendant's witness as to the set-off in its favor, as they were entitled, under the law, to disregard it if this opinionative evidence did not conform with the jury's opinion as to value, for the criterion by which the value of opinionative evidence is at last determined is the opinion of the jury upon the facts stated. Minchew v. Mahunta Lumber Co., 5 Ga. App. 154, 62 S. E. 716; Martin v. Martin, 135 Ga. 162, 68 S. E. 1095.

Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 654)

## CITY OF ATLANTA v. WILLIAMS.

(No. 5553.)

(Court of Appeals of Georgia. Feb. 8, 1915.)

*(Syllabus by the Court.)*

1. IMPROVEMENTS OF STREET—SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to authorize a finding that the street upon which the plaintiff alleged his lot abutted had been dedicated to the public and accepted by the municipal corporation as a public street, and that the damage suffered by him in the improvement of the street exceeded any enhancement in the value of his property resulting from the public improvement.

2. MUNICIPAL CORPORATIONS ⟸383—STREETS—DAMAGES—LIABILITY OF CITY.

If a municipal corporation, to which has been delegated the control of all public highways within its municipal limits, knowingly permits the working or grading of any of its streets by county authorities or others, and as a result of this work (which the municipality is empowered to prevent) the private property of a citizen is injured, he is not confined to his remedy against the actual tort-feasor, but may hold the municipal corporation liable for the dam-

age consequent upon and resulting from the tort of the real wrongdoer, who will be held to have acted as the agent of the municipality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 923; Dec. Dig. ⊂⊃ 383.]

3. MUNICIPAL CORPORATIONS ⊂⊃404—STREETS —DAMAGES—EVIDENCE.

Testimony to the effect that the witness had known the street in question to be a prominent, well-defined, inhabited thoroughfare since he was a bare-foot boy, was not objectionable upon the ground of irrelevancy, or for the reason that "the condition or improvements put on their property by somebody else, at another portion of the alleged street, was not admissible." Upon the issue as to whether an alleged street is in fact a public highway, evidence as to the character and duration of the public use of the alleged highway, upon any portion thereof, is relevant as a circumstance illustrative of the use of any particular portion of the alleged highway, or of its appropriation to the public use as a whole.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 989–991, 993–999; Dec. Dig. ⊂⊃404.]

4. MUNICIPAL CORPORATIONS ⊂⊃404—STREETS —DAMAGES—EVIDENCE.

The erection of numerous and valuable buildings along a public highway, or the failure to erect any improvements or buildings upon it, for a long period of time after an alleged municipal improvement upon it, may tend to illustrate whether the value of the property of one who claims to have been injured by the municipal improvement was enhanced or not. For this reason the testimony of a witness, introduced as a real estate expert, to the effect that in his opinion the circumstance that an owner of property upon that portion of the street alleged to have been improved had not platted or put his property upon the market for four years subsequent to the alleged improvement indicated that the benefits were more prospective than real, was not subject to the objection that what had been done to the property along the street by other property owners, since the time of the grading, was immaterial and irrelevant.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 989–991, 993–999; Dec. Dig. ⊂⊃404.]

5. MUNICIPAL CORPORATIONS ⊂⊃377 — GRADING OF STREETS — DAMAGES — LIABILITY OF CITY.

The court did not err in ruling that municipal ordinances purporting to provide for the doing of work by the county and the city were immaterial, for the reason that, if the city authorities permitted the county authorities to grade or repair the streets, the city would be liable to any one damaged thereby, even though, at the time the city authorities permitted such work to be done, the ordinance had been passed which provided that the county authorities might work on the streets within the city at such places as the street committee and the board of county commissioners might agree, and that, where the county did such work, it was as much public work as other public work done in the county outside of the municipality. It was not within the power of the municipality to relieve itself from the liability imposed by law, or by ordinance to deprive one injured by the grading of a street of his right to proceed against both tort-feasors, or either one of them, as he might prefer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 914, 915; Dec. Dig. ⊂⊃377.]

6. TRIAL ⊂⊃295—INSTRUCTIONS—INTIMATION OF OPINION—"BEING ACCEPTED."

In view of the testimony to the effect that the alleged street abutting the plaintiff's property had been dedicated and used as a public highway of the city, it was not error for the court to charge the jury that: "If the county authorities did the work actually done by its convicts, it would nevertheless, in a legal sense, be the work of the city, so far as the property owner on the street is concerned. That is, the grading and opening of the street would be the work of the city, although the actual work done may have been performed by convicts under the direction of the county commissioners. Being accepted by the city, and upon a street of the city, it would be in legal effect just the same as if the city, by its own convicts or employés, had the work done."

(a) Nor is the excerpt from the charge above quoted, when read in connection with the context, objectionable upon the ground that the court intimated or expressed an opinion upon the issue of fact as to whether the alleged street was in fact a public street of the city. Special exception is taken upon the ground that the language, "being accepted by the city and upon a street of the city," is a clear expression of opinion; but in the connection in which it was used, and considering the court's instruction as a whole, it is manifest that this participial term was intended by the court, and understood by the jury, as the equivalent of the words, "if accepted." In narrative as well as in argumentative expression the use of the present participle frequently implies the conditional existence of the fact referred to.

(b) Though there was no express evidence of the acceptance of the street or of the work as performed by the county authorities, the circumstances in evidence were sufficient to authorize the inference that the street as platted in the original subdivision of the land had been accepted; and the character of the grading, and the period of time required therefor by the county authorities, charged the municipal authorities with knowledge of the fact that the work was being done by the county, and authorized the conclusion that it was being done with their acquiescence and direction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 708–717; Dec. Dig. ⊂⊃295.]

7. MUNICIPAL CORPORATIONS ⊂⊃654—STREETS —EXISTENCE—PROOF.

While the failure of the proper authorities to work a highway which has been dedicated to the public may be a pregnant circumstance in rebuttal of the contention that the alleged highway is in fact a public highway, the fact that a portion of it has been neglected by the proper public authorities, or work upon a portion of it delayed or postponed, will not contradict evidence tending to show the existence of the highway as a public street or road, afforded by proof that the land within the lines which had theretofore been understood to include the street was taken charge of by the public authorities and worked as a street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1428; Dec. Dig. ⊂⊃654.]

8. DEDICATION ⊂⊃35—MUNICIPAL CORPORATIONS ⊂⊃379 — STREETS — INJURY FROM WORKING—ACCEPTANCE — DEFENSES — ESTOPPEL.

The working of the street would be an acceptance as of the date when the work began, even if there had been no prior acceptance of the dedication proposed by the former owners of the land, and, if the entry upon land which is graded and opened for a street was unauthorized and tortious, the tort-feasor would be estopped to defend, as against the action of one who had

been injured, upon the ground that the action of the municipal authorities was unauthorized.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 68–71, 75, 76; Dec. Dig. ⟸35; Municipal Corporations, Cent. Dig. §§ 917–919; Dec. Dig. ⟸379.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by R. S. Williams against the City of Atlanta. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for plaintiff in error. Moore & Pomeroy, of Atlanta, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

(15 Ga. App. 668)

MEWBORN v. WEITZER. (No. 5647.)

(Court of Appeals of Georgia. Feb. 8, 1915.)

*(Syllabus by the Court.)*

1. COURTS ⟸42—MUNICIPAL COURTS—CREATION—VALIDITY OF STATUTE.

The Supreme Court has upheld the constitutionality of the act approved August 20, 1913 (Acts 1913, p. 145), creating the municipal court of Atlanta, and the appellate division thereof.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 163–170, 181–183; Dec. Dig. ⟸42.]

2. APPEAL AND ERROR ⟸169—PRESENTATION BELOW—NECESSITY.

A question of law which was neither raised nor passed upon in the lower court cannot be considered by a reviewing court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018–1034; Dec. Dig. ⟸169.]

3. APPEAL AND ERROR ⟸588—PRESENTATION FOR REVIEW—BRIEF OF EVIDENCE—NECESSITY.

Where there is no proper brief of evidence, and apparently no bona fide effort to prepare one, this court will not consider assignments of error which are dependent upon a consideration of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2607–2610; Dec. Dig. ⟸588.]

Error from Municipal Court of Atlanta.

Action by Mrs. H. A. Mewborn against Lizzie Weitzer. Judgment for defendant, and plaintiff brings error. Affirmed.

John W. Cox, of Atlanta, for plaintiff in error. Hughes Roberts, of Atlanta, for defendant in error.

BROYLES, J. Mrs. Mewborn brought a bail-trover action, in the municipal court of Atlanta, against Lizzie Weitzer, to recover a diamond ring. A judgment was given to the latter by the trial judge, sitting without a jury, and, the plaintiff's motion for a new trial being denied by the trial judge, and by the appellate division of the court, to which she had appealed, she brings error.

[1] 1. In McWilliams v. Smith, 142 Ga. 209, 82 S. E. 569, and in Cooney v. Foote, 83 S. E. 539, the Supreme Court held that the act creating the municipal court of Atlanta and the appellate division thereof was constitutional.

[2] 2. It is contended by the plaintiff in error that paragraph "b" of section 42 of the act establishing the municipal court of Atlanta is unconstitutional so far as it excludes from the grounds of appeal the two grounds for a new trial stated in that paragraph, because the exception thus made is violative of the rules of uniformity laid down in paragraph 1 of section 9 of article 6 of the Constitution. The act amending the Constitution for the purpose of establishing courts such as the municipal court of Atlanta, in lieu of justice courts, approved July 30, 1912 (Acts 1912, p. 30), and ratified October 2, 1912, expressly provides that:

"Any court so established shall not be subject to the rules of uniformity laid down in paragraph 1, section 9, article 6, of the Constitution of Georgia."

And the Supreme Court in the McWilliams Case, supra, specifically held that while in that case it was not necessary to decide whether or not the amending act just referred to changed or amended paragraph 1 of section 9 of article 6 of the Constitution (Civil Code, § 6527), yet, whether it did or not:

"The amendment is the last expression of the sovereign will of the people; and under the ruling in the Hammond Case [Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77], * * * the amendment will prevail as an implied modification of the former provision."

So it would seem that this ruling is directly contrary to the contention of the plaintiff in error. But it is not necessary for us to pass on this point, for the record shows that the plaintiff's motion for a new trial did not contain either of the grounds forbidden in the act, and hence she cannot now raise the question that the benefit of those grounds was denied her in her motion for a new trial. If she had included those grounds in her motion, and if the court had then ordered them stricken, her assignment of error on that ruling would be relevant. As it stands, however, it is irrelevant, and without merit, and will not be considered. See Duren v. City of Thomasville, 125 Ga. 1 (3), 53 S. E. 814, and Hardy v. Mayor and Council of Eatonton, 128 Ga. 27 (2), 57 S. E. 99.

3. Through an inadvertence of the court, an order signed by it on March 18, 1914, recited that the judgment was dated February 10, 1914, when in truth and in fact it was dated February 16, 1914. It was not error for the court (but was right and proper) to pass an order on March 28, 1914, at the same term of court, amending and correcting the former order, so as to make it speak the truth. Civil Code, § 4644(6).

[3] 4. On a motion for a new trial, a proper brief of evidence is as necessary as the approval of the brief by the trial judge. We regret that no such brief was sent up, for we

much prefer to decide a case on its intrinsic merits; but the rule of law requires that:

"The brief of evidence * * * shall be a condensed and succinct brief of the material portions of the oral testimony, including a similar brief of interrogatories read on the trial. In such brief there shall be included the substance of the material portions of all documentary evidence. Documentary evidence copied as an exhibit or set out in the pleadings, and introduced in evidence, shall not be set out in the brief except by reference to the same. In all cases in which the testimony has been stenographically reported, the same may be reduced to narrative form, or the stenographic report may be used in whole or in part in making up the brief, with immaterial questions and answers and parts thereof stricken, so as in every case to shorten the brief, and include therein only material evidence." Civil Code, § 6093.

See, also, Civil Code, §§ 6141, 6142, 6143; Cotton v. Cotton, 136 Ga. 138, 70 S. E. 1015; Albany & Northern R. Co. v. Wheeler, 6 Ga. App. 270, 64 S. E. 1114; Huntley Manufacturing Co. v. Nixon Grocery Co., 6 Ga. App. 46, 64 S. E. 279; Mayor, etc., of Cordele v. Williams, 7 Ga. App. 445, 67 S. E. 116; Cunningham v. Strom, 8 Ga. App. 87, 68 S. E. 616.

The above provisions of the Code were not followed, and apparently there was no attempt to follow them, in this case; but instead we have a purported brief of the evidence, consisting of 44 typewritten pages, containing all the testimony in extenso, and including much immaterial and irrelevant matter. We confess, however, that we have discarded this purported brief of evidence with less reluctance, since a cursory examination of it is sufficient to show that this case is nothing but an unseemly and a disgraceful wrangle between two ladies of "easy virtue" for the possession of a diamond ring, bestowed upon each of them, on different occasions (and no doubt for value [?] received), by their common and generous admirer—a federal convict. And a curious coincidence is that this ring (as described in the record) has upon it "the figures of two women." It is not disclosed whether or not these figures are nude; but considering their environment, we do not imagine that their charms are concealed by excessive drapery. No doubt, our gallant convict lover and his two fair lady friends agreed in thinking that "beauty when unadorned is adorned the most." From having to wade through such another nauseating mess, may the good Lord deliver us!

Judgment affirmed.

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(15 Ga. App. 674)

## WOODHAM v. CASH. (No. 5654.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. TROVER AND CONVERSION ⇐46—MEASURE OF DAMAGES—"TIME OF THE CONVERSION."

"In estimating the value of personalty unlawfully detained, the plaintiff may recover the highest amount which he can prove between the time of the conversion and the trial." Civil Code 1910, § 4514. The time of the conversion referred to in this section is the time when the defendant himself converted to his own use the property sued for.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 263; Dec. Dig. ⇐ 46.]

*(Additional Syllabus by Editorial Staff.)*

2. TROVER AND CONVERSION ⇐40—MEASURE OF DAMAGES—"HIGHEST PROVED VALUE."

The phrase the "highest proved value," as used in the rule that the plaintiff in an action for conversion may recover the "highest proved value" of the property between the time when it was converted and the time of the trial, means the highest value which the jury, under the proofs, may fix, and not the highest estimate given by any witness as to the value during that period.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 232–244; Dec. Dig. ⇐40.]

Error from City Court of Tifton; R. Eve, Judge.

Action by L. V. Cash against R. V. Woodham. Judgment for plaintiff, and defendant brings error. Reversed.

Ridgdill & Mitchell and C. C. Hall, all of Tifton, and Perry-Foy & Monk, of Sylvester, for plaintiff in error. H. S. Murray and Fulwood & Skeen, all of Tifton, for defendant in error.

WADE, J. [1] L. V. Cash, the owner of an automobile, which he left at a certain garage in Tifton, found, on his return to that place after an absence of several weeks, that the machine had been levied upon by the bailiff of a justice's court, under and by virtue of a pretended writ of attachment, and that, at an invalid and void sale had thereunder, it was purchased by one G. S. Nelson (in good faith, so far as the record discloses) for $100. It further appeared from the evidence that after Nelson had kept and used the car, replacing burst tires and making various repairs, he sold it to Woodham, the plaintiff in error, for $110, having expended altogether $30 or $40 on the machine without making it run successfully. The evidence showed that Woodham expended $129 in repairing the car, in addition to $110 which he paid Nelson therefor, before the car could be made to run; that he bought the car some time in August, 1912, and, after expending altogether $416 thereon, finally sold it to one Perry; that Perry failed to pay for the car, and it was put up and sold for auction in Albany, and brought $65. There was evidence that the car was worth, at the time it was sold by the bailiff, under the void attachment process, from $800 to $100 or less; and Woodham testified that, had he known as much about the car when he purchased it as he did at the time of the trial, he would not have paid $5 therefor. There was evidence from various experts and near-experts as to the condition of the car, its

various ailments and constitutional defects, as well as testimony tending to show that the machine not only had a perfect constitution (metaphorically speaking), but was in perfect health at the time the bailiff seized it without proper warrant or authority, and attempted to convey title thereto to Nelson.

The plaintiff elected to take a money verdict, and the jury found in his favor the sum of $335, without hire. The defendant made a motion for a new trial, and, besides the general grounds thereof, complains that the court erred in charging the jury, as to the measure of damages to be adopted by them, as follows:

"You are to determine, from all the evidence before you, first, the value of the property alleged to have been converted, to wit, the automobile, at and upon the day of the conversion, which the court charges you was the day upon which the car was levied upon."

The plaintiff in error insists that this instruction did not "fix the right and legal date of conversion," since the evidence showed that the car was levied upon some time before its purchase by the defendant; and that this charge was not authorized by the evidence, since there was nothing whatever to show that the defendant was in any way connected with or responsible for the levy upon the car, and he was not in fact even the purchaser thereof at the sale which was had under the void levy.

There was evidence from which the verdict rendered, or from which perhaps various different verdicts, would be authorized, according to the testimony which the jury might have elected to believe; so it is unnecessary to discuss the general grounds of the motion for a new trial, even if it were here insisted that the verdict was without sufficient evidence to support it. The only point for decision, then, is whether the court gave to the jury the correct rule as to the measure of damages they should use in arriving at the amount of the verdict.

The Civil Code, § 4514, provides that:

"In estimating the value of personalty unlawfully detained the plaintiff may recover the highest amount which he can prove between the time of the conversion and the trial."

It does not appear that it has ever been decided in this state definitely and clearly that the expression "the time of the conversion" relates to the time when the property, the value of which the plaintiff is seeking to recover, was converted to his own use by the defendant in the particular cause.

[2] It appears to us, however, to be perfectly plain that the meaning of the statute is that the plaintiff may recover the highest amount which he can prove between the time when the property was converted by the defendant in the cause there proceeding, and the trial of that cause; the "highest proved value" meaning the highest value which the jury, under the proof, may fix for the property during the period between the conversion and the trial, and not the highest estimate given by any witness as to its value during that period. Elder v. Woodruff Hardware & Manufacturing Co., 9 Ga. App. 484, 71 S. E. 806. If the Code section meant that the highest value shown from the time when the property was originally converted by a person from whom the plaintiff ultimately acquired title might be recovered, even where the proof failed to show that the defendant was a party to the original conversion or had such knowledge thereof as to bind him along with the original tortfeasor, manifest injustice would often result.

In the instant case, we may assume, for the sake of the argument, that the automobile in question was actually worth at the time it was converted, by the illegal levy of the bailiff, $800, as estimated by the plaintiff Cash, and yet, even had the original purchaser at the constable's sale (Nelson) acted in bad faith in making the purchase, why should Woodham, who bought from him in good faith 30 days later, be held to account in a suit brought against Woodham alone for the full sum of $800, where his predecessor, Nelson, had decreased the value of the machine during the 30 days he had it in his possession, and in point of fact it was actually worth only $110 at the time Woodham acquired the possession or converted the automobile to his own use? In other words, conceding that the machine had deteriorated between the time it was unlawfully seized by the constable and the time when Woodham in good faith purchased the same from one whom he supposed had the legal title, why should he be held liable for such deterioration? The conversion sued for by the plaintiff in an action against Woodham was necessarily the conversion for which Woodham was responsible, or in which he had at least participated, and it would be contrary to any rule of reason to hold him responsible for something with which he had absolutely nothing to do, and about which he had no knowledge which might subject him to the consequences flowing from the unlawful seizure of the property by the constable, and antecedent to his own purchase thereof.

This view appears to be recognized as correct in Elder v. Woodruff Hardware & Manufacturing Co., 9 Ga. App. 484, 486, 71 S. E. 806, though no discussion of the question is there given. In that case, one holding a purchase-money note with retention of title in the vendor, signed by one Maddox, who had sold the property to one Elder, who in turn sold it to another, brought suit in trover against Elder; and in the decision Judge Powell said:

"In this case the proof as to the value of the property at the time of the *defendant's* [italics ours] conversion and subsequently was in decided conflict, and therefore presented a jury question."

Suppose that Nelson acquired possession of this automobile in the manner that he

did, and thereafter the automobile had been wrecked by him and its value practically diminished thereby to what it might bring merely as scrap iron (though still bearing the semblance of an automobile), and that some machinist or the proprietor of an automobile garage had purchased the broken remains from Nelson in perfect good faith and believing that Nelson had the title thereto, and had paid therefor the sum of $10, and suit in trover should thereafter be brought against the purchaser of the wrecked machine, how manifestly unreasonable and unjust would be a rule which directed or empowered the jury to find a verdict against this last purchaser for the full value of the machine at the time Nelson originally obtained possession thereof?

In our opinion the court erred in giving the measure of damages set out in the excerpt complained of.

Judgment reversed.

BROYLES, J., not presiding.

(15 Ga. App. 805)

## MAYOR, ETC., OF CITY OF AMERICUS v. GAMMAGE. (No. 5589.)

(Court of Appeals of Georgia. Nov. 4, 1914. Rehearing Denied Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. TRIAL ⟸252—INSTRUCTIONS—EVIDENCE.
The court in charging the jury did not err in the statement of the plaintiff's contentions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. ⟸252.]

2. TRIAL ⟸129, 133—ARGUMENT OF COUNSEL—CURE BY INSTRUCTION—MISTRIAL.
In view of the improper argument of counsel, in which the statement was made that the ultimate liability for any damages that might be awarded by the jury would fall upon others than the nominal parties in the case, the instructions to the jury to which exception is taken in the fifth ground of the motion for a new trial were warranted and appropriate. If the remarks made by counsel had been such as tended to inflame the passion or to prejudice the minds of the jury, the court might have used a more immediate and drastic remedy; but, since the only possible effect of the remarks of counsel would have been to withdraw the minds of the jury from the real issues in the case, the court properly refused to order a mistrial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 310, 316; Dec. Dig. ⟸129, 133.]

3. TRIAL ⟸194—INSTRUCTIONS—WEIGHT OF EVIDENCE.
The amount of compensation for pain and suffering is determinable only by the enlightened consciences of impartial jurors, and the court correctly instructed the jury that if they found there was an injury, and that there was pain and suffering, it was for the jury to ascertain from the evidence the exact injury and the nature of the pain and suffering, whether extreme or slight, and, after they had determined the nature, extent, and duration of the pain and suffering, to fix such an amount as compensation as their enlightened consciences as fair and impartial jurors might dictate. This instruction is not subject to exception as suggesting to the jury to find for permanent injuries.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439–441, 446–454, 456–466; Dec. Dig. ⟸194.]

4. DAMAGES ⟸132—EXCESSIVE RECOVERY.
A verdict for damages based on personal injuries and pain and suffering cannot be said to be legally excessive, unless it is manifestly the result of bias or prejudice or improper influence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385, 396; Dec. Dig. ⟸132.]

Error from City Court of Americus; W. M. Harper, Judge.

Action by L. O. Gammage against the Mayor and Council of the City of Americus. Judgment for plaintiff, and defendants bring error. Affirmed.

J. B. Hudson and Hollis Fort, both of Americus, for plaintiffs in error. J. A. Hixon and L. J. Blalock, both of Americus, and R. L. Berner, of Macon, for defendant in error.

RUSSELL, C. J. L. O. Gammage brought suit against the mayor and council of the city of Americus, in the city court of Americus, alleging damages for personal injuries occasioned by the plaintiff's having fallen into an open ditch in one of the streets of the city on the night of January 15, 1912. The plaintiff's petition alleged that he was an engineer in the switchyards, working at night, and that while en route from his home to his work, and while passing along Dodson street, he fell into a deep ditch which had been left open and unguarded by the employés of the city; that the ditch into which he fell was sunk in the street sometime during the day, and between the time he passed along the street returning from his work in the morning and the time of his injury at 7 o'clock p. m.; that his injury was caused by the negligence of the city and its employés in failing to place lights or guards over and around the excavation, and was in no wise caused by want of due diligence on his part; that the night was dark, the street unlighted, and he was unable to see the excavation before falling; that he was 37 years old, and had a reasonable expectancy of 30 years to live; that he had an average income of $170 per month; that he had undergone great pain and suffering by reason of the injuries received from the fall, and that such pain and suffering would likely be permanent. He further alleged that he had given the city due notice of his claim in writing as required by law. Damages were laid in the petition in the sum of $3,500, including loss of time for 3 months and 20 days and doctor's bill of $150, incurred for treatment of the injuries. The defendants filed a general denial of the plaintiff's petition, and pleaded that they had used all ordinary care and diligence in the construction of the work complained of, and

had not failed to perform any duty owing by them to the plaintiff, and that, if ordinary care and diligence had been exercised on the part of the plaintiff, no damage would have accrued.

The plaintiff testified that, as was his custom, he started from his house on Lee street in the city of Americus about 7 o'clock p. m., on January 15, 1912, to go to his work in the switchyard; that while passing down Dodson street, and in attempting to cross Alice avenue, which there intersected Dodson street, he suddenly fell into a ditch in the center of Alice avenue, which was being dug for the purpose of placing a sewer. It was a dark night and drizzling rain was falling. The ditch was deeper than the plaintiff's head, and there was no light of any kind in the vicinity that shed any light on the place where he fell. The night was so dark that it was impossible to see the ditch, or even his hand before his face. He did not know how long he lay in the ditch before he regained consciousness, which he lost when he fell. Finally some parties came and tried to get him out of the ditch, but could not. Later he walked down the ditch and crawled out by means of the engine that was used for ditching. An employé of the city came to him with a light, and was asked by him, "Why haven't you got a light on this ditch?" The employé replied, "We have got more ditches than we have lights; we haven't got enough to go round." The plaintiff further testified that his knee was wrenched; that he was hurt in his side and in his groins, and was unable to work for nearly three months after the injury; that he was still weak in the back, and could not lift anything at all. The only way he can work is by wearing a brace and by having a helper to do the heavy part of his work. There is a chain of knots from the center of his stomach to his backbone, and when the brace is removed the knots enlarge. Before he was injured he was capable of earning $170 monthly, but the injury from the fall has decreased his capacity to perform labor. He testified that he had lost 95 days' time from his work at $5 per day, and that his doctor's bill and expense for medicine to the time of filing suit was $177. One of the physicians who treated the plaintiff testified that plaintiff had a chain of enlarged glands on his left side and also in his back, and that:

"He suffers a great deal. There is no doubt about that. * * * I would say that he suffered a great deal from the time of the injury to the time of the filing of the suit. He suffered severe pain. He was more or less bruised all over. It is liable to be permanent; I cannot tell."

Another physician who had treated plaintiff's injuries testified that the injuries were severe and "will probably be permanent." There was some evidence, introduced on the part of the defendant, tending to deny the plaintiff's testimony as to the absence of light near the street intersection where he claimed to have been injured, and also some evidence tending to show that his injuries were not so severe as claimed by him.

The jury returned a verdict for the full amount sued for, $3,500. The defendant filed a motion for a new trial, and excepted to the judgment overruling this motion.

[1] 1. The plaintiff in error insists that the court erred in submitting to the jury certain of the contentions of the plaintiff, in that:

"It was calculated to and did mislead the jury as to the true issues involved in the case. It was but the submission of issues to the jury which involved permanent injury, and in this case the sole issue was that of damages for temporary injuries."

There is no merit in this assignment of error, for two reasons. Upon reading the charge as a whole, it appears that the court, in the part to which exceptions are taken, was (as stated by the court at the time) merely giving to the jury the contentions of the plaintiff as "contained in his petition," and that this part was followed by very fair and correct instructions as to the law applicable to the petition, the answer, and the evidence in the case, and the part complained of was not in fact a charge, but a mere reading to the jury of what the petition contained, preliminary to the real charge as to the law of the case. There is no merit in the contention of the plaintiff in error as to this portion of the charge, because there was evidence which would have authorized a recovery for permanent injuries. The plaintiff alleged that his injuries were permanent and that his earning capacity had been decreased 50 per cent. He testified that his capacity to perform labor had been decreased, and that he was unable to perform his duties properly at the time of the trial. In addition to this, one of the physicians testified:

"He suffers a great deal. There is no doubt about that. * * * It is liable to be permanent."

Still another physician testified that his injuries would "probably be permanent." It is the right and duty of the judge to charge the several contentions of the parties (City & Suburban Railway v. Findley, 76 Ga. 311), and when a party alleges permanent injuries, and introduces testimony in support of the allegation, it certainly is one of his contentions.

[2] 2. In the motion for a new trial error is assigned upon the following instruction:

"A municipal corporation is created by legislative authority and vested with certain powers, and is subject to certain liabilities as prescribed by law, and wherever in its operations or conduct or dealings it becomes liable to a citizen or member of the public in damages, it is immaterial, and is no concern of the jury, whether the taxpayers of the city must ultimately bear that burden, or whether the city must raise the revenue to pay such liability from any other source. For the purpose of civil liability a municipal corporation stands in the same relation as an individual, not of course with the

void, as being in violation of section 3465 of the Civil Code? (2) Is the right to assert that a contract is void a mere personal privilege, conferred upon the maker of the assignment, and the assertion of this privilege confined solely to him, or has the defendant also the right to attack the validity of the contract and to refuse to recognize an assignment which, for reasons of public policy, the General Assembly has outlawed? We will consider these two propositions in inverse order, for the reason that, if the right to assert the invalidity of a contract is confined to the maker alone, it is very clear that the judgment in favor of the defendant was wrong, and there would be no necessity for a ruling upon any other feature of the case. As a general rule, any chose in action is assignable in writing; and, so far as appears from the record, the defendant would be liable if the assignment in the present case is valid, as it appears to be; but, on the other hand, even if it be void, the defendant would be none the less liable if any one other than the maker of an assignment cannot assert its invalidity. For these reasons it is plain to us that the first question to be considered is whether the Southern Railway Company can defend this action upon the ground that Clark's purported assignment of his wages was void.

[1] 1. We see no reason why the invalidity of a contract may not be asserted by any one whose interests are affected by the provisions of the contract. Suppose that, from familiarity with the handwriting of Clark, the defendant in the present case had perceived, when the assignment was presented, that what purported to be the signature of Clark was, in fact, a forgery, or suppose that the contract had borne the date of April 23, 1913, instead of June 30, 1913; would the defendant have been compelled to pay the order for wages, and be precluded from setting up any of the facts stated as defense? Certain it is that one who owes an account to another will not be discharged from liability to his creditor by making payment in pursuance of an assignment which he knows to be a forgery, and that under such circumstances, he would not be protected against having to pay the account to the real creditor. It is undisputed in the present case that the Southern Railway Company knew that this assignment was only signed in blank on April 23, 1913, and knew that Rosenbusch subsequently filled in all the material stipulations of the contract. Having notice of all these facts, demand for payment by the assignee imposed upon the debtor the responsibility to pay at its peril. If, under such circumstances, the contract was a valid assignment, the debtor should pay. If he paid an account which was invalid, with knowledge of all the facts, his payment would not protect him from the necessity of subsequently paying the original creditor. In such a contingency, what more proper course is there to take than to ask the direction of the court, as the defendant did by its plea in which it asserted that Clark's attempt to assign a portion of his wages for the purpose of securing his debt was void. Nothing can be more absolute than voidness; and, if Clark's assignment was void, for the reasons alleged by the defendant in its plea, there would be nothing to prevent Clark from requiring the railway company to pay the account a second time. The proposition of learned counsel that a plea of the invalidity of the contract is a personal one does not seem to us to be meritorious, and we attach no significance to the fact that Clark gave no testimony indicating that he had repudiated the assignment. If an answer on this point was pertinent, counsel for the plaintiff could have elicited an answer as easily as counsel for the defendant; but the fact that Clark had already collected the money is a significant circumstance indicating repudiation as a matter of fact; and, as a matter of law, a void contract could not be 'vitalized by Clark's mere assertion that he had not repudiated it, nor deprive Clark of his right of suing to recover his wages if he had not been paid them, nor prevent him from retaining any money which might have been paid him; and it appears that, in fact, he had been paid in full. The provisions of section 3465 of the Civil Code are based upon considerations of sound public policy, and there are no other reasons why this statute limiting the contractual rights of citizens should have been passed. The Legislature saw that debt, extravagance, distress, and penury, each following in the footsteps of the other, was likely to ensue if contracts involving so large an element of chance as the transfer of wages which were unearned, and might never be earned, were permitted. It is doubtful if an account which had no actual existence, and which necessarily depended upon the eventualities of the future, was ever within the scope of legitimate assignment as provided by sections 3653 and 3655 of the Civil Code. But, however this may be, it was within the power of the Legislature to declare totally void all contracts purporting to assign wages which had not been earned at the time of the alleged assignment. Generally the consideration received by a transferee of a contract of transfer is a matter of no concern to the obligor, and yet he can avail himself of the invalidity of the contract whenever it is necessary for the purpose of letting in a meritorius defense of which he could not otherwise avail himself. A contract which is absolutely void upon grounds of public policy is subject to attack by any person whose interests are affected thereby; and, since it appears that the employer of the assignor knew that the assignment was signed in April, and that payment to the assignee might not protect

him against a subsequent assertion on the part of the assignor of his right to retain the amount already paid him as wages, the employer of the assignor was authorized to interpose the invalidity of the assignment as a defense against the action brought by the assignee to recover wages of the employé, assigned before they had been earned. If they were, in fact, assigned before they were earned, the contract was void. If the assignment was made after they had been earned, the contract of assignment was authorized by law.

[2] 2. We come then to consider whether the undisputed facts show that the contract was one involving unearned wages, or whether it related to wages whose very existence depended upon the developments of the future. In arriving at the intention of the parties the two papers which were contemporaneously executed are to be construed together, and we think that the authority conferred in the power of attorney to execute "a salary order on any time that I may have at any time" clearly shows that at the time the assignment was made the parties to the contract were dealing with wages to be earned, instead of wages which had already been earned. It is true that Clark did nothing more than sign the contract of assignment, and that he authorized the Atlanta Finance Company, whenever he had wages due him, to draw an assignment or salary order, as it is called. But the purpose of the law would be wholly defeated if such a power of attorney as this could be construed to authorize a creditor to determine at his pleasure when he should make demand upon a debtor of his debtor, the amount for which demand should be made, and to select the particular debtor of his debtor whose indebtedness he would transfer to himself; and so it is plain that none of the authorities appertaining to contracts not in contravention of public policy (and all of which contracts, so far as appears, perfectly legal) are in point. The signing of a blank assignment of wages, in which the date, amount, and all other blanks were left unfilled on April 23, 1913, on which date the person who signed the blank assignment executed also a written authority to the assignee to fill in the blanks left in the printed form of assignment, was a mere device to avoid the provisions of section 3465 of the Civil Code; and, since the assignment itself, as well as the authority to fill in the blanks, necessarily relates back to the date on which the assignor originally signed these instruments, the contract of assignment must be treated as an attempt to assign or pledge unearned wages, if it appears that, in pursuance of the authority conveyed by the purported assignor, the blanks were filled so as to transfer and assign his wages for the month of June, 1913, or his wages for any month subsequent to the date when he originally signed the instrument in blank. Consequently, the assignment in the present case was void.

Judgment affirmed.

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(15 Ga. App. 652)

## WILLIAMS v. ALABAMA GREAT SOUTHERN RY. CO. (No. 5544.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ⟸101, 102, 124, 240—INJURY TO SERVANT—SAFE APPLIANCES—DUTY OF MASTER—CONTRIBUTORY NEGLIGENCE.

Ordinary diligence requires a master to furnish to his servant appliances reasonably suited for the uses intended; but the law does not exact extraordinary diligence by requiring of the master that instrumentalities intended for one use should be safe for every unintended use to which they might be casually or unexpectedly applied. And the master is not chargeable with contributory negligence either because an appliance fails to serve a purpose not intended, or because the instrumentality was not inspected so as to discover that it was not suited for such unexpected and unintended use. The injury must be attributed to the fault of the servant when he is hurt by using a lamp for a handhold.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178–184, 192, 235–242, 751–756; Dec. Dig. ⟸ 101, 102, 124, 240.]

2. TRIAL ⟸165—WITNESSES ⟸271—CROSS-EXAMINATION—PHOTOGRAPHS.

In the exercise of his right to subject witnesses against him to thorough and sifting cross-examination, a party has the right to exhibit to a witness upon the stand photographs or any other visible or tangible article which is relevant to the issue, and in passing upon a motion for nonsuit the court may consider the testimony of the witness with reference to the photograph or other pertinent object, although it may not have been formally tendered or introduced in evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 378, 374; Dec. Dig. ⟸165; Witnesses, Cent. Dig. §§ 958–962; Dec. Dig. ⟸ 271.]

3. MASTER AND SERVANT ⟸286—INJURY TO SERVANT—NONSUIT—EVIDENCE.

The evidence failed to sustain the allegations of negligence set out in the petition, and therefore the court did not err in awarding a nonsuit at the conclusion of the evidence for the plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. ⟸286.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. H. Williams against the Alabama Great Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Hewlett, Dennis & Whitman, of Atlanta, for plaintiff in error. McDaniel & Black and E. A. Neely, all of Atlanta, for defendant in error.

RUSSELL, C. J. [1] 1. The negligence upon which the plaintiff predicates his claim

for damages is that the engine on which the plaintiff was working was not equipped with handholds for use by the fireman in going from his cab toward the front of his engine in order to light the headlight; that, in the absence of these handholds, there projected from the engine a certain piece of iron upon which was usually placed a light, the top of which was used by the defendant's servants as a handhold and as a means of moving around in front of the engine for the purpose of lighting the headlight, no handhold being furnished by the defendant upon the front of the engine; and that in using this pilot light to steady himself (as he went to return to the cab after lighting the light) the top thereof broke off, and he fell from the engine to the ground, and thereby sustained the injuries complained of. The evidence produced by the plaintiff fails to sustain the allegations of negligence set out in his petition. On the contrary, instead of proving that the defendant had failed to equip the engine with sufficient handholds for the firemen in performing their duty of lighting the headlight, or that the pilot light was intended to be used as a handhold by its employés, or that it was customary for them to use it, the plaintiff himself testified that he could not be sure whether the handholds ran clear around the engine as far as they ought to have gone or not. Conceding that it was the duty of the defendant to have supplied proper handholds, the testimony does not show that the lamp which the plaintiff seized to keep himself from falling was designed or supplied by the master to be used for that purpose, and the photograph of engine No. 215, which the plaintiff identified upon his cross-examination, and which is in the record, shows that a handhold runs practically around the entire path taken by the plaintiff at the time he fell. The plaintiff was not entitled to a recovery upon his testimony that:

"I don't remember any handholds on 215 going around and up over the top of the boiler. I remember that the handhold did start back at the cab going up towards the front. As to whether there was a handhold right below the lamp on the side of the engine, I will be frank, I cannot tell. I didn't take and examine the engine, and it has been so long I can't say at this time."

If the engine was equipped with proper handholds, then it was the duty of the plaintiff to use them for the purposes for which they were designed, and not to use the pilot light for a purpose for which it was not intended. Ordinary diligence requires a master to furnish to his servant appliances reasonably suited for the uses intended; but the law does not exact extraordinary diligence by requiring of the master that instrumentalities intended for one use should be safe for every unintended use to which they might be casually or unexpectedly applied. And the master is not chargeable with contributory negligence either because an appliance fails to serve a purpose not intended, or because the instrumentality was not inspected so as to discover that it was not suited for such unexpected and unintended use. The injury must be attributed to the fault of the servant when he is hurt by using a mere lamp for a handhold. Hamilton v. Railroad Co., 83 Ga. 346, 9 S. E. 670; Quirouet v. Alabama Great Sou. Ry. Co., 111 Ga. 315, 36 S. E. 599; Babcock Lumber Co. v. Johnson, 120 Ga. 1030, 48 S. E. 438.

[2] 2. It is insisted in the bill of exceptions that the court should not have allowed the defendant's counsel to exhibit to the plaintiff and to cross-examine him as to certain photographs of locomotive engines, including engine No. 215 (which was the engine from which plaintiff fell and was hurt); the contention being that the photographs had not been introduced in evidence. The photographs were properly used to aid in the examination of the witness as any other exhibit or diagram would be used. In the exercise of his right of thorough and sifting cross-examination, a party has the right to exhibit to a witness upon the stand photographs or any other visible or tangible article which is relevant to the issue, and in passing upon a motion for nonsuit the court may consider the testimony of the witness with reference to the photograph or other pertinent object, although it may not have been formally tendered or introduced in evidence.

[3] 3. The court committed no error in sustaining the motion of defendant's counsel for a nonsuit upon the close of the plaintiff's testimony, since the evidence for the plaintiff failed entirely to sustain the allegations of negligence set out in the petition. See Kelly v. Strouse, 116 Ga. 882, 43 S. E. 280; Box v. Atlantic & Birmingham R. Co., 120 Ga. 1050, 48 S. E. 427, and citations.

Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 718)

BELL v. STATE. (No. 6129.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸327—BURDEN OF PROOF—IDENTITY OF ACCUSED.

There being no evidence in this case to establish the fact (necessary for a legal conviction) that it was the defendant who had been on a public highway in an intoxicated condition "manifested by boisterousness, indecent acting," etc., it was error for the trial judge to refuse to grant a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 773, 774; Dec. Dig. ⟸327.]

2. CRIMINAL LAW ⟸741 — DIRECTION OF VERDICT—EVIDENCE—APPEAL.

A court's refusal to direct a verdict is never a ground for the assignment of error.

The trial judge may, in a criminal case, direct a verdict whenever, after all the state's evidence is in, a verdict of acquittal is the only legal finding possible; but, while this is true, his refusal to direct a verdict of "not guilty" is not a proper ground for an assignment of error in the reviewing court. The only question which this court can consider is whether or not, upon an examination of the evidence as a whole, including the statement of the accused, there was any evidence to sustain the verdict of guilty. Nalley v. State, 11 Ga. App. 15, 74 S. E. 567; Harvey v. State, 8 Ga. App. 660, 70 S. E. 141.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1221, 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. ⊂⊃741.]

Error from City Court of Forsyth; G. O. Persons, Judge.

Adolphus Bell was convicted of crime, and brings error. Reversed.

A. M. Zellner, of Forsyth, for plaintiff in error. H. M. Fletcher, Sol., of Jackson, for the State.

BROYLES, J. Judgment reversed.

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(15 Ga. App. 656)

## CITY OF SPARTA v. SMITH. (No. 5564.)

(Court of Appeals of Georgia. Feb. 8, 1915.)

*(Syllabus by the Court.)*

1. TRIAL ⊂⊃256, 296 — INSTRUCTIONS — BURDEN OF PROOF—CURE BY OTHER INSTRUCTIONS.

When viewed in connection with other portions of the court's instructions upon the subject of the preponderance of proof, the error of the court in charging the jury that they would determine the case in favor of that party with whom the evidence preponderated is not of sufficient materiality to require the grant of a new trial. When the court has correctly instructed the jury that the burden rests upon the plaintiff to establish his case by a preponderance of proof, a timely and appropriate request is necessary to invoke fuller and more specific instructions as to the burden of proof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628–641, 705–713, 715, 716, 718; Dec. Dig. ⊂⊃256, 296.]

2. TRIAL ⊂⊃241—INSTRUCTIONS—CODE DEFINITION.

Although a municipal ordinance may prescribe the method of and the causes for the removal of an obstruction from a street, it is not error for the court to give in charge to the jury the Code definition of a nuisance, to aid the jury in correctly understanding the relative rights of the parties. Since the jury in the present case were properly instructed as to the force and effect of the ordinance, it is manifest that the application of the Code definition of a nuisance was not harmful.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 562, 563; Dec. Dig. ⊂⊃241.]

3. TRIAL ⊂⊃241—INSTRUCTIONS—SUBMISSION OF CITY ORDINANCE.

The instructions of the court to which exceptions are taken on the ground that the court submitted the reasonableness of the municipal ordinance to the jury, and upon the further ground that it was immaterial whether the ordinance referred to unreasonable or inconvenient obstructions or not, are not meritorious. The language of the court did not submit the reasonableness of the ordinance to the jury, and the plaintiff in error cannot complain that the court, after instructing the jury that the control and general supervision of the streets was in the mayor and aldermen of the city of Sparta, further instructed the jury that, if the use or obstruction of a highway by any person was a material inconvenience to the public or an inconvenience to their safety and travel, the legal definition of a nuisance would apply to it. Furthermore, since it was issuable whether the fence referred to in the testimony was removed as a nuisance or taken down by the city in pursuance of certain municipal improvements in altering and grading the abutting street, the bona fides of the city's act was in question, and the instructions of the court were therefore pertinent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 562, 563; Dec. Dig. ⊂⊃241.]

4. INSTRUCTIONS.

Though some of the dissevered excerpts from the charge disclose error, the instructions of the court, when analyzed and considered as a whole, were very favorable to the municipality, and afford it no just ground for complaint.

5. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence would have authorized a larger verdict in favor of the plaintiff in the lower court, and the court did not err in overruling the motion for new trial.

Error from City Court of Sparta; R. W. Moore, Judge.

Action by James Smith against the City of Sparta. Judgment for plaintiff, and defendant brings error. Affirmed.

Burwell & Fleming, of Sparta, for plaintiff in error. Allen & Pottle, of Milledgeville, and Lewis & Culver, of Sparta, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 650)

## BENNETT v. GILMER. (No. 5452.)

(Court of Appeals of Georgia. Feb. 8, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⊂⊃1062—HARMLESS ERROR—DIRECTION OF VERDICT—EVIDENCE.

The plaintiff, by the introduction of the promissory note, the execution of which had not been denied, made out a prima facie case, and, in the absence of any legal defense on the part of the defendant, the error of the court in directing a verdict for the amount of the principal of the note and the interest was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212–4218; Dec. Dig. ⊂⊃1062.]

2. BILLS AND NOTES ⊂⊃537 — ATTORNEY'S FEES — NOTICE — DIRECTION OF VERDICT—EVIDENCE.

There being no positive evidence that the notice of intention to bring suit on the note was given ten days before the suit was brought, as required by law, it was error to direct a verdict for the plaintiff for the amount of attorney's fees claimed, and direction is given that this amount be written off by the plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862–1893; Dec. Dig. ⊂⊃537.]

for damages is that the engine on which the plaintiff was working was not equipped with handholds for use by the fireman in going from his cab toward the front of his engine in order to light the headlight; that, in the absence of these handholds, there projected from the engine a certain piece of iron upon which was usually placed a light, the top of which was used by the defendant's servants as a handhold and as a means of moving around in front of the engine for the purpose of lighting the headlight, no handhold being furnished by the defendant upon the front of the engine; and that in using this pilot light to steady himself (as he went to return to the cab after lighting the light) the top thereof broke off, and he fell from the engine to the ground, and thereby sustained the injuries complained of. The evidence produced by the plaintiff fails to sustain the allegations of negligence set out in his petition. On the contrary, instead of proving that the defendant had failed to equip the engine with sufficient handholds for the firemen in performing their duty of lighting the headlight, or that the pilot light was intended to be used as a handhold by its employés, or that it was customary for them to use it, the plaintiff himself testified that he could not be sure whether the handholds ran clear around the engine as far as they ought to have gone or not. Conceding that it was the duty of the defendant to have supplied proper handholds, the testimony does not show that the lamp which the plaintiff seized to keep himself from falling was designed or supplied by the master to be used for that purpose, and the photograph of engine No. 215, which the plaintiff identified upon his cross-examination, and which is in the record, shows that a handhold runs practically around the entire path taken by the plaintiff at the time he fell. The plaintiff was not entitled to a recovery upon his testimony that:

"I don't remember any handholds on 215 going around and up over the top of the boiler. I remember that the handhold did start back at the cab going up towards the front. As to whether there was a handhold right below the lamp on the side of the engine, I will be frank, I cannot tell. I didn't take and examine the engine, and it has been so long I can't say at this time."

If the engine was equipped with proper handholds, then it was the duty of the plaintiff to use them for the purposes for which they were designed, and not to use the pilot light for a purpose for which it was not intended. Ordinary diligence requires a master to furnish to his servant appliances reasonably suited for the uses intended; but the law does not exact extraordinary diligence by requiring of the master that instrumentalities intended for one use should be safe for every unintended use to which they might be casually or unexpectedly applied. And the master is not chargeable with contributory negligence either because an appliance fails to serve a purpose not intended, or because the instrumentality was not inspected so as to discover that it was not suited for such unexpected and unintended use. The injury must be attributed to the fault of the servant when he is hurt by using a mere lamp for a handhold. Hamilton v. Railroad Co., 83 Ga. 346, 9 S. E. 670; Quirouet v. Alabama Great Sou. Ry. Co., 111 Ga. 315, 36 S. E. 599; Babcock Lumber Co. v. Johnson, 120 Ga. 1030, 48 S. E. 438.

[2] 2. It is insisted in the bill of exceptions that the court should not have allowed the defendant's counsel to exhibit to the plaintiff and to cross-examine him as to certain photographs of locomotive engines, including engine No. 215 (which was the engine from which plaintiff fell and was hurt); the contention being that the photographs had not been introduced in evidence. The photographs were properly used to aid in the examination of the witness as any other exhibit or diagram would be used. In the exercise of his right of thorough and sifting cross-examination, a party has the right to exhibit to a witness upon the stand photographs or any other visible or tangible article which is relevant to the issue, and in passing upon a motion for nonsuit the court may consider the testimony of the witness with reference to the photograph or other pertinent object, although it may not have been formally tendered or introduced in evidence.

[3] 3. The court committed no error in sustaining the motion of defendant's counsel for a nonsuit upon the close of the plaintiff's testimony, since the evidence for the plaintiff failed entirely to sustain the allegations of negligence set out in the petition. See Kelly v. Strouse, 116 Ga. 882, 43 S. E. 280; Box v. Atlantic & Birmingham R. Co., 120 Ga. 1050, 48 S. E. 427, and citations.

Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 718)

## BELL v. STATE. (No. 6129.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸327—BURDEN OF PROOF—IDENTITY OF ACCUSED.

There being no evidence in this case to establish the fact (necessary for a legal conviction) that it was the defendant who had been on a public highway in an intoxicated condition "manifested by boisterousness, indecent acting," etc., it was error for the trial judge to refuse to grant a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 773, 774; Dec. Dig. ⟸ 327.]

2. CRIMINAL LAW ⟸741 — DIRECTION OF VERDICT—EVIDENCE—APPEAL.

A court's refusal to direct a verdict is never a ground for the assignment of error.

The trial judge may, in a criminal case, direct a verdict whenever, after all the state's evidence is in, a verdict of acquittal is the only legal finding possible; but, while this is true, his refusal to direct a verdict of "not guilty" is not a proper ground for an assignment of error in the reviewing court. The only question which this court can consider is whether or not, upon an examination of the evidence as a whole, including the statement of the accused, there was any evidence to sustain the verdict of guilty. Nalley v. State, 11 Ga. App. 15, 74 S. E. 567; Harvey v. State, 8 Ga. App. 660, 70 S. E. 141.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1221, 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. ⟸741.]

Error from City Court of Forsyth; G. O. Persons, Judge.

Adolphus Bell was convicted of crime, and brings error. Reversed.

A. M. Zellner, of Forsyth, for plaintiff in error. H. M. Fletcher, Sol., of Jackson, for the State.

BROYLES, J. Judgment reversed.

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(15 Ga. App. 656)

CITY OF SPARTA v. SMITH. (No. 5564.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. TRIAL ⟸256, 296 — INSTRUCTIONS — BURDEN OF PROOF—CURE BY OTHER INSTRUCTIONS.

When viewed in connection with other portions of the court's instructions upon the subject of the preponderance of proof, the error of the court in charging the jury that they would determine the case in favor of that party with whom the evidence preponderated is not of sufficient materiality to require the grant of a new trial. When the court has correctly instructed the jury that the burden rests upon the plaintiff to establish his case by a preponderance of proof, a timely and appropriate request is necessary to invoke fuller and more specific instructions as to the burden of proof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628–641, 705–713, 715, 716, 718; Dec. Dig. ⟸256, 296.]

2. TRIAL ⟸241—INSTRUCTIONS—CODE DEFINITION.

Although a municipal ordinance may prescribe the method of and the causes for the removal of an obstruction from a street, it is not error for the court to give in charge to the jury the Code definition of a nuisance, to aid the jury in correctly understanding the relative rights of the parties. Since the jury in the present case were properly instructed as to the force and effect of the ordinance, it is manifest that the application of the Code definition of a nuisance was not harmful.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 562, 563; Dec. Dig. ⟸241.]

3. TRIAL ⟸241—INSTRUCTIONS—SUBMISSION OF CITY ORDINANCE.

The instructions of the court to which exceptions are taken on the ground that the court submitted the reasonableness of the municipal ordinance to the jury, and upon the further ground that it was immaterial whether the ordinance referred to unreasonable or inconvenient obstructions or not, are not meritorious. The language of the court did not submit the reasonableness of the ordinance to the jury, and the plaintiff in error cannot complain that the court, after instructing the jury that the control and general supervision of the streets was in the mayor and aldermen of the city of Sparta, further instructed the jury that, if the use or obstruction of a highway by any person was a material inconvenience to the public or an inconvenience to their safety and travel, the legal definition of a nuisance would apply to it. Furthermore, since it was issuable whether the fence referred to in the testimony was removed as a nuisance or taken down by the city in pursuance of certain municipal improvements in altering and grading the abutting street, the bona fides of the city's act was in question, and the instructions of the court were therefore pertinent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 562, 563; Dec. Dig. ⟸241.]

4. INSTRUCTIONS.

Though some of the dissevered excerpts from the charge disclose error, the instructions of the court, when analyzed and considered as a whole, were very favorable to the municipality, and afford it no just ground for complaint.

5. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence would have authorized a larger verdict in favor of the plaintiff in the lower court, and the court did not err in overruling the motion for new trial.

Error from City Court of Sparta; R. W. Moore, Judge.

Action by James Smith against the City of Sparta. Judgment for plaintiff, and defendant brings error. Affirmed.

Burwell & Fleming, of Sparta, for plaintiff in error. Allen & Pottle, of Milledgeville, and Lewis & Culver, of Sparta, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 650)

BENNETT v. GILMER. (No. 5452.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⟸1062—HARMLESS ERROR—DIRECTION OF VERDICT—EVIDENCE.

The plaintiff, by the introduction of the promissory note, the execution of which had not been denied, made out a prima facie case, and, in the absence of any legal defense on the part of the defendant, the error of the court in directing a verdict for the amount of the principal of the note and the interest was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212–4218; Dec. Dig. ⟸1062.]

2. BILLS AND NOTES ⟸537 — ATTORNEY'S FEES — NOTICE — DIRECTION OF VERDICT—EVIDENCE.

There being no positive evidence that the notice of intention to bring suit on the note was given ten days before the suit was brought, as required by law, it was error to direct a verdict for the plaintiff for the amount of attorney's fees claimed, and direction is given that this amount be written off by the plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862–1893; Dec. Dig. ⟸537.]

Error from City Court of Carrollton; James Beall, Judge.

Action by M. W. Gilmer against O. P. Bennett. Judgment for plaintiff, and defendant brings error. Affirmed, with direction.

Hood & Strickland, of Carrollton, for plaintiff in error. S. Holderness, of Carrollton, for defendant in error.

RUSSELL, C. J. Gilmer brought suit against Bennett upon a negotiable promissory note, dated February 26, 1912, for $165.50; the note being made payable by Bennett to himself and indorsed on the back thereof by himself and one W. C. Sanders. The plaintiff asked also for judgment for ten per cent. of the amount of principal and interest due on the note as attorney's fees, alleging that the ten days' notice required by law had been given.

The defendant in his answer admitted the execution of the note and his refusal to pay it, but denied that he owed the amount thereof, and also denied that ten days' notice of intention to bring suit thereon had been given him. He alleged that the note was given W. C. Sanders in payment of a premium on a life insurance policy, and that in November, 1912, he settled the note in full by paying Sanders $82.25 in a cashier's check; also that there was due the defendant on the life insurance policy $48.60 as dividends, for which he had signed a release to Sanders, and for which he had received no benefit. It was also alleged that plaintiff was not a bona fide holder of the note for value.

[1] 1. Upon the trial the plaintiff introduced in evidence, without objection, the original note sued on. It being admitted by the defendant that he executed the note, this made a prima facie case for the plaintiff, and, in the absence of any evidence on the part of the defendant tending to establish the truth of the matters alleged in his plea, entitled him to judgment for the amount of the note. The only evidence introduced by the defendant was the cashier's check for $82.25 (produced by the plaintiff under notice), payable to R. F. Shedden, manager, dated October 21, 1912, and signed, "A. E. Flemming, Cashier." On the margin of the check was entered, "Given in payment of O. P. Bennett note for $165," and stamped across its face was "Indorsements canceled." There was no entry of payment on the check, nor any other evidence tending to show that the check had been paid, or to show what connection, if any, the check had with the note in question; and there was no attempt to introduce evidence to show that plaintiff was not a bona fide holder of the note for value (as he must be presumed to be in the absence of evidence to the contrary, Civil Code, § 4288), nor is there any other evidence in the record which would afford the defendant a semblance of a defense to the action.

[2] 2. The only evidence as to notice given to the defendant in regard to the plaintiff's intention to bring suit on the note was the testimony of the plaintiff's attorney that prior to the filing of the suit he had given to a friend a copy of the notice attached to the petition, with a request that he hand it to the defendant, and the defendant admitted to the witness that this had been done, and also said he had instructed his (the defendant's) attorney to make no defense as to attorney's fees. The attorney nowhere in his testimony, however, gave any dates, nor did he say that the notice was given as much as ten days before the last return day as required by law, nor did he say that the defendant admitted receiving the notice more than ten days prior to the filing of the suit. Civil Code, § 4252. In the absence of any positive testimony whatever in support of this material allegation, we think the court erred in directing that the attorney's fees be included in the verdict. It is therefore ordered that the plaintiff write off the attorney's fees from the judgment in this case, and, when this is done, that the judgment be affirmed.

Judgment affirmed, with direction.

BROYLES, J., not presiding.

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(15 Ga. App. 661)

## NATIONAL LIFE INS. CO. v. BEAN.

(No. 5635.)

(Court of Appeals of Georgia. Feb. 8, 1915.)

*(Syllabus by the Court.)*

1. INSURANCE ⟸668—HEALTH POLICY—NOTICE OF SICKNESS—REASONABLE TIME—QUESTION FOR JURY.

A policy of health insurance provided for the payment of an indemnity "for the period of not less than one week nor more than six consecutive weeks, during which the assured shall be continuously confined within his house and called upon regularly by a licensed physician, and continuously and wholly disabled, solely by" various diseases named, including peritonitis "(and no other diseases), from transacting any and every kind of business and labor," etc., and contained the following stipulation: "Written notice of any injury, fatal or nonfatal, or sickness covered hereunder must be given to the company at its home office, 29 South La Salle street, Chicago, Illinois, or to a licensed agent of the company in the county in which the assured shall reside at the time of giving such notice, within twenty days from date of accident or beginning of illness upon which claim is based, unless such notice may be shown not to have been reasonably possible, and failure to give such notice shall invalidate all claims under this policy." There was evidence that the plaintiff was treated by a physician for malaria resulting in peritonitis, and was confined to his room and bed, and was unable to attend to any business for about 30 days; that information as to the nature of the disease or sickness from which he suffered was withheld from him by his physician until after his recovery; that he did not know he had an attack of peritonitis, or that this was one of the diseases covered by his policy, until he recovered sufficiently to go to his place of business and examine his policy, which was deposited there, and thereafter interviewed his

physician; that he was confined to his bed and room from August 15, 1912, to September 17, 1912, was unable to attend to any business whatever during that time, was in great pain and seriously ill, part of the time out of his head, and was visited daily, and sometimes twice a day, during this entire period, by a physician; that written notice of his illness was not given to the insurance company within 20 days from the beginning of the illness upon which the claim was based, but was given within 20 days from the date when the plaintiff discovered what had been the nature of his illness; that from the original report of the attending physician, dated September 20, 1912 (introduced by the defendant), the claimant suffered from stomatetis and peritonitis, and "the above-named illness" was "the sole cause of his * * * confinement," and in the final statement of the physician (also introduced by the defendant), dated October 15, 1912, a severe attack of peritonitis is named as the disease with which the claimant was afflicted, and the attending physician testified at the trial that the claimant had "a high temperature first, then stomach trouble, of course, and, following, peritonitis." *Held*, under the evidence and the stipulation in the policy allowing the notice to be given after the expiration of 20 days from the beginning of the illness upon which the claim is based, where "such notice may be shown not to have been reasonably possible," the policy was not, as a matter of law, forfeited because of the failure to give the notice within the time limit of 20 days, but it was for the jury to say "whether the plaintiff had given the required notice as soon as reasonably possible under all the facts and circumstances." Columbian Nat. Life Ins. Co. v. Miller, 140 Ga. 346, 78 S. E. 1079, Ann. Cas. 1914D, 408.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732–1770; Dec. Dig. ⟸ 668.]

2. VERDICT SUSTAINED.

There was evidence sufficient to authorize the verdict returned.

3. TRIAL ⟸256, 296—ACTION ON POLICY—INSTRUCTIONS.

There was no material error, for any of the reasons assigned, in the charge of the court that if the notice given by the plaintiff, if the jury should find that notice had been given, was given within a reasonable time, considering all the circumstances of the case and the condition of the plaintiff at the time, and the jury should further find that the plaintiff was confined to his bed or room for any period of time with peritonitis, he would be entitled to recover at the rate of $15 per week for the time he was so confined with peritonitis, during the period alleged in his suit, especially when this instruction is taken in connection with the following additional charge: "The defendant contends that the plaintiff cannot recover because the notice of sickness was not given within the time mentioned in the policy. Now, whether or not the plaintiff had complied with that provision of the contract, and, if not, whether or not a reasonable excuse has been given for a failure to comply with the terms thereof, is submitted to you along with the case, and you will take all the evidence and circumstances of the case and say by your verdict whether the plaintiff is entitled to recover." If any fuller charge had been desired, a written request therefor should have been made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628–641, 705–713, 715, 716, 718; Dec. Dig. ⟸256, 296.]

4. INSURANCE ⟸454—HEALTH POLICY—CONSTRUCTION.

The judge did not err in failing to charge the jury that, "should they find that the plaintiff had more than peritonitis at the time he had it or pre-existing the peritonitis, and that such other sickness was partly the cause of the plaintiff's being confined to his home, he could not then recover," since he did instruct the jury that, if they found that the plaintiff was confined to his bed and room with peritonitis, "he would be entitled to recover at the rate of $15 per week for the time so confined with peritonitis, during the period alleged in the plaintiff's suit." The issue was: Did the plaintiff have peritonitis? And, if so, how long was he confined to his house and continuously and wholly disabled solely by that disease, and by no other disease? Seldom does one have a serious physical ailment not complicated by other diseases or physical disturbances; and if proof of a pre-existing disease, or of some concurrent ailment, would prevent recovery for disability caused solely by another disease flowing therefrom and a consequence thereof, for and during the period when the last disease was the sole then existing cause of the disability of the claimant, a policy insuring one against certain specific diseases would be worse than valueless.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1177, 1178; Dec. Dig. ⟸454.]

Error from Municipal Court of Atlanta.

Action by R. O. Bean against the National Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lawton Nalley, of Atlanta, for plaintiff in error. H. Watkins and Thos. J. Lewis, both of Atlanta, for defendant in error.

WADE, J. Judgment affirmed.

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(15 Ga. App. 684)

KENNEDY v. MADDOX et al. (No. 5740.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. BILLS AND NOTES ⟸94—CONSIDERATION—ACCORD AND SATISFACTION.

That the sole consideration of the note upon which the plaintiff's suit was based was an agreement that this note was to be given and accepted in accord and satisfaction of another note, upon which the defendants were liable to the plaintiff, is undisputed; and there is sufficient evidence in behalf of the defendant to authorize a finding that the attempted accord, by the terms of which the defendants' note for $450 was to be satisfied by the defendants' delivering to the plaintiff in exchange for it, certain mules, and a new note for $112, was never executed, for the reason that the plaintiff failed and refused to deliver the first note to the defendants as he agreed, and that, on the contrary, the plaintiff placed it in the control of the surety thereon, with the result that this surety was subrogated to the rights of the plaintiff, and that thereby the defendants were subjected to liability to the surety. This evidence fully supported the defendants' plea of failure of consideration, for unless it appeared that the plaintiff's agreement or promise to deliver the $450 note instead of actual performance by delivery of the note, had been accepted by the defendants in satisfaction, the accord was merely executory. Proof that there was no such completed accord and satisfaction as was essential to supply a consideration for the note in suit authorized a finding for the defendants, because (according to the precise concept of the term itself) nothing pertaining to an alleged accord and satisfaction

must be left unsettled; and, if either the giving or the acceptance in satisfaction be lacking, there can be no accord and satisfaction.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166–173, 175–181, 185–189, 192, 193, 196–198, 200, 202–207, 212; Dec. Dig. ⟸94.]

2. ACCORD AND SATISFACTION ⟸16 — PERFORMANCE—CONSIDERATION.

There is no assignment that any error of law was committed upon the trial; and, though there is conflict in the testimony, the evidence warrants the conclusion that, since the plaintiff did not comply with his contract to deliver the previous note, the accord was not satisfied, and therefore the court did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 116–122; Dec. Dig. ⟸16.]

*(Additional Syllabus by Editorial Staff.)*

3. ACCORD AND SATISFACTION ⟸16 — "ACCORD."

An "accord" is merely an agreement, and there can be no such thing as an accord and satisfaction in contemplation of law unless the accord is satisfied by an exact compliance with and completion of the agreement; the accord being merely executory until there is a complete satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 116–122; Dec. Dig. ⟸16.

For other definitions, see Words and Phrases, First and Second Series, Accord.]

Error from City Court of Dublin; James B. Hicks, Judge.

Action by J. O. Kennedy against G. M. Maddox and others. Judgment for defendants, and plaintiff brings error. Affirmed.

T. E. Hightower, of Dublin, for plaintiff in error. Davis & Sturgis, of Dublin, for defendants in error.

RUSSELL, C. J. [1] The suit was upon a note for $112. The defendants pleaded failure of consideration. It appears from the record that the defendants had previously given the plaintiff a note for $450, upon which one J. J. Branch was their surety. Some time after the maturity of the $450 note, which was for the purchase money of two mules, the plaintiff and the defendants made an agreement by which the defendants agreed to deliver up the two mules and to pay the plaintiff $112 as rental for the mules for the year in which the mules had been in their possession, and the plaintiff upon his part agreed to surrender the $450 purchase-money note for the mules to the defendants as soon as he could get it out of a certain bank. In pursuance of this attempted accord and satisfaction, the defendants delivered the mules to the plaintiff, and executed and delivered to him a note for $112, which is the basis of this suit. But the plaintiff, although he was frequently requested by the defendants to deliver up to them their $450 note, never did so, but put them off from time to time, according to their testimony, with one excuse and another relating to his inability to get possession of the paper. According to the defendants' testimony, it finally developed that the note was delivered into the possession of J. J. Branch, the surety for the defendants upon the $450 note; and, in a subsequent suit between the defendants and J. J. Branch with reference to an alleged indebtedness by Branch to the defendants for guano, this note was set off by Branch against the defendants' demand for the guano. The plaintiff testified that he left the note with Branch inadvertently in making some other settlements with him, but the evidence is undisputed that he had never made any demand upon Branch for the return of the $450 note. It further appears, in support of the testimony of the defendants upon this point, that the plaintiff Kennedy, in taking a new note from Branch for $800, included the entire amount of the $450 represented by the defendants' former note in the new note executed by Branch.

[3] Of course, if the jury had given the preference to the testimony in behalf of the plaintiff, such an accord and satisfaction as would have supplied consideration for the note now before us might have been established; but, since there was testimony to show that the note for $112 here involved was given upon an express understanding that upon the delivery of the mules and this note the former outstanding note of the defendants was to be delivered up to them, it cannot be said that the plea of failure of consideration was not supported by proof. An "accord" is merely an agreement, and there can be no such thing as an accord and satisfaction in contemplation of law unless the accord is satisfied by an exact compliance with and completion of the agreement. Until there is complete satisfaction, the accord is merely executory. It may be argued that the delivery of the old note for $450 by Kennedy was not essential to the extinguishment of this demand, and that therefore the accord and satisfaction was completed even if he did not deliver the note to the defendants as he had agreed to do, and that under his theory of the case he was not responsible for the misuse of the note by Branch as a defense upon Branch's part to Maddox's suit against him for guano. It is true that sometimes the delivery of a promissory note which evidences a debt is not necessary as evidence that the debt has been extinguished. But, according to the testimony for the defendants in this case, the delivery of the note was an essential term in the proposed accord and satisfaction, and, "to constitute a bar to an action on the original claim or demand, the accord must be fully executed, unless the agreement or promise, instead of the performance thereof, is accepted in satisfaction." 1 Corpus Juris, 530, § 17. Each party is alike entitled to satisfaction of the opposite party's undertaking; otherwise there would be an accord without satisfaction, and in this

event there would be no consideration and no mutuality to support it. See Lowry v. Sloan, 51 Ga. 633; English v. Reid, 55 Ga. 241; Brunswick R. Co. v. Clem, 80 Ga. 534, 7 S. E. 84; Chamblee v. Davie, 88 Ga. 205, 14 S. E. 195; Long v. Scanlon, 105 Ga. 424, 31 S. E. 436.

[2] 2. There is no assignment that any error of law was committed on the trial. There is conflict in the testimony, but there was sufficient evidence to authorize the jury to find that the note upon which the suit is based was given in attempted accord and satisfaction of a previous indebtedness on the part of the defendant, evidenced by a promissory note by which the defendant's liability was to be extinguished, and it appears from some of the testimony that the paper itself, which, in pursuance of the accord, was to be delivered to the defendant, was nevertheless delivered to the security upon the original note, who was thus by the plaintiff's act subrogated to all the rights of the original payee. For this reason, and since the plaintiff did not comply with his contract to deliver the pre-existing note, the accord was not satisfied, and the note sued upon was without consideration. The court therefore did not err in overruling the motion for a new trial.

Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 747)

## ATLANTIC COMPRESS CO. v. CHAMBLISS. (No. 5649.)

(Court of Appeals of Georgia. Feb. 6, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⟸274 — EXCEPTION PENDENTE LITE—SUFFICIENCY.

The exception pendente lite does not contain a sufficient assignment of error as to the disallowance of the proposed amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1591, 1592, 1605, 1606, 1607, 1624, 1631–1645; Dec. Dig. ⟸274.]

2. APPEAL AND ERROR ⟸728—EVIDENCE ⟸ 121, 202—REPLEVIN—RES GESTÆ—ASSIGNMENT OF ERROR—SUFFICIENCY — ADMISSION OF EVIDENCE.

"That evidence was admitted over the objection of the party complaining affords no reason for the grant of a new trial, when it does not appear that any specific objection to its admission was made at the trial." Stewart v. Bank, 100 Ga. 496, 28 S. E. 249. Moreover, the testimony with relation to what was said by the plaintiff's tenant in delivering cotton to him in payment of rent was competent as a part of the res gestæ of the delivery of the cotton, and to illustrate whether it was intended to pass constructive possession of the cotton to the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3010–3012; Dec. Dig. ⟸ 728; Evidence, Cent. Dig. §§ 303, 307–338, 693–696, 1117, 1119; Dec. Dig. ⟸121, 202.]

3. EVIDENCE ⟸229 — ADMISSIONS AGAINST INTEREST—ADMISSIBILITY.

Admissions made by a third person against his interest, as to a fact collateral to the main issues between the litigants, but essential to the adjudication of the cause, as well as the admissions of privies in estate at the time title is passing, are admissible as against the parties themselves, though the declarations of privies in estate, after the title has passed out of him, cannot be received. Civ. Code 1910, §§ 5778, 5780.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 822–834; Dec. Dig. ⟸229.]

4. EVIDENCE ⟸353—WAREHOUSE RECEIPTS—COMPETENCY.

The plaintiff having testified that he saw five bales of cotton loaded at a named warehouse and afterwards unloaded on the platform of the defendant's compress, and there being other evidence to identify it as the same cotton, the warehouse receipts, giving the weight of the cotton, were competent evidence as to the weight of the cotton received at the defendant's compress. It was immaterial that the receipts did not alone and of themselves show title in the plaintiff, their contents were admissible in support of other testimony of title.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404–1428, 1430, 1431; Dec. Dig. ⟸353.]

5. TROVER AND CONVERSION ⟸3—CONVERSION BY AGENT.

The charge of the court, to the effect that an agent who takes property of another in behalf of his principal without the owner's consent is guilty of a conversion as to the latter, although the agent may be ignorant of the true owner's title and may have acted in perfect good faith, was a correct statement of the law, and was justified by some of the evidence in the case.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 21–24; Dec. Dig. ⟸3.]

6. APPEAL AND ERROR ⟸722, 724—ASSIGNMENT OF ERROR—SUFFICIENCY—APPROVAL.

Several of the assignments of error fail to point out the error complained of, and one is not approved by the court; and therefore these grounds present nothing for determination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2990–2996, 2997–3001, 3022; Dec. Dig. ⟸722, 724.]

7. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence warranted the verdict, and there was no error in refusing a new trial.

Error from City Court of Dawson; M. C. Edwards, Judge.

Action by J. M. Chambliss against the Atlantic Compress Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. A. Wilkinson and M. J. Yeomans, both of Dawson, for plaintiff in error. W. H. Gurr, J. G. Parks, and R. R. Marlin, all of Dawson, for defendant in error.

RUSSELL, C. J. J. M. Chambliss brought suit in trover against the Atlantic Compress Company, for the recovery of five bales of cotton. The defendant filed a general denial at the first term, and at the trial term offered an amendment setting up that it was a nominal party acting as agent for the Georgia Cotton Company and the Central of Georgia Railway Company, and asking that they be made parties defendant. The court refus-

ed to allow the amendment, and to this ruling the defendant excepted pendente lite. Upon the trial the jury found for the plaintiff, and exception is taken to the judgment refusing the defendant a new trial.

[1] 1. The general language of the exception pendente lite—"to which order and ruling the defendant excepts, and assigns the same as error"—is not a sufficient assignment of error as to the refusal to allow the amendment. It has been repeatedly held that such an assignment of error does not properly present anything for the consideration of a reviewing court. See Willingham v. Cedartown Supply Co., 11 Ga. App. 464, 75 S. E. 823, and cases there cited. However, the court was clearly correct in the ruling disallowing the amendment. The proposed amendment contained no defense to the action. It sought to set up that the defendant, acting in good faith, received the cotton as agent for other parties, and was holding it as such. Under the ruling in McConnell v. Prince, 12 Ga. App. 54, 76 S. E. 754, such an amendment would not, even if the facts were as set out therein, afford the defendant any defense to the action.

[2] 2. In the first special ground of the motion for a new trial error is assigned because the plaintiff was allowed to testify to a certain conversation between himself and Will Anderson, "over the objections of defendant then and there urged." It does not appear that any specific objection to the testimony was presented at the time it was admitted. This court therefore cannot consider the assignment of error as made. Stewart v. Bank of Social Circle, 100 Ga. 496, 28 S. E. 249. However, the testimony objected to was clearly admissible. The plaintiff was seeking to show constructive possession of the cotton in himself. It was contended by the defendant that the plaintiff had never had possession, and that the party through whom the cotton came to them had never parted with title or possession except to the plaintiff's principal. It was therefore necessary for the plaintiff to prove that the property was actually or constructively delivered to him, and it is a well-settled rule of evidence, as applied to civil cases, that, where the making of a statement assists to constitute the transaction or to prove per se a relevant fact, the declaration is competent. 16 Cyc. 1152. The statements made by the plaintiff's tenant at the time of the alleged delivery by him was certainly a part of the res gestæ of the delivery, and was admissible as such.

[3] 3. It is alleged that the court erred in allowing the plaintiff to testify, over the defendant's objection to a conversation between the plaintiff and his tenant Will Anderson, at the time of the alleged delivery of the cotton to him by the tenant, as follows:

"Will Anderson told me I could have this cotton for rent and turned over this five bales to me for rent, and I instructed him to carry the cotton to A. J. Hill's warehouse, and told him I expected to apply this cotton on the rent, and told him to carry it to A. J. Hill's warehouse, and I would look after them Monday morning and credit his notes."

The court, in ruling upon the admissibility of the evidence, said:

"I will let that remain, to explain the conduct and to show whether this man had possession of the cotton or not."

We think the court ruled correctly. These statements of both parties, coming, as they did, at the time of the alleged delivery, were relevant and admissible as a part of the res gestæ as stated in the foregoing paragraph, and as such, not only tended to show delivery, but acceptance of the cotton.

[4] 4. Error is assigned, also, because the court allowed in evidence certain cotton receipts and tickets, to which the defendant objected upon the ground that they were irrelevant and showed no title in the plaintiff. It was shown that the cotton sued for was removed from the warehouse of Kennedy & Brim to the defendant's compress. It was shown by an employé of the warehousemen that the receipts introduced in evidence represented the five bales in question, and the tickets which had been attached to the cotton contained the same numbers, so that the tickets and receipts corresponded. The receipts contained the weight of each bale and the price the cotton brought. Having thus identified the cotton by the numbers, it was not error to allow the receipts in evidence, in support of the plaintiff's testimony that the title to this identical cotton was in him. The plaintiff having shown that the identical cotton sued for was received by the warehouse at the weights and for the price shown by the receipts, the receipts were admissible as evidence of the weight and value of the cotton.

[5] 5. Exception is taken to the following charge of the court:

"An agent who, for and in behalf of his principal, takes the property of another without the latter's consent, is, as to him, guilty of conversion, although, being ignorant of the true owner's title, the agent may have acted in good faith; and such agent may be sued in trover for the property, even after his delivery of it to his principal."

This was not error. In a number of decisions of this court and of the Supreme Court it has been held to be the law. See McConnell v. Prince, 12 Ga. App. 54, 76 S. E. 754, and the cases there cited.

[6] 6. Several of the assignments of error fail to point out the error complained of, and for this reason they will not be considered. See Willingham v. Cedartown Supply Co., supra. There is also an assignment of error with a notation as follows "The court approves this not as a recital of fact." The assignment of error is in the following language:

"Because the court erred in his charge in unduly stressing the various contentions of the plaintiff, and failing to charge the jury fully as to the contentions of the defendant, especially in

the court's failure to charge the jury whether or not a demand had been made by the plaintiff, and whether or not plaintiff had released the cotton as defendant insisted had been done."

Even if we could consider such an assignment of error (which we cannot do because of the refusal of the judge to certify the facts set out therein as true), we would not do so, for the assignment of error is too general and indefinite. Baynes v. Allison, 108 Ga. 782, 33 S. E. 682. No parts of the charge are pointed out as being erroneous, and the attempted exception to the failure of the judge to charge the contentions of the defendant is disposed of by the certificate of the judge, as being untrue.

[7] 7. The verdict was fully supported by the evidence. The plaintiff introduced evidence tending to show delivery of the cotton to him, either actual or constructive, by his tenant, in payment of a rent note calling for cotton, and that he received the cotton in payment on the note. If this was true, as the jury evidently believed, the tenant had no right to again sell the cotton, and the person who received it from the tenant had no more title than the tenant himself; and, he having sold the cotton to the plaintiff and delivered it, had no title whatever. The court did not err in overruling the motion for a new trial.

Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 772)

## CITIZENS' BANK OF TIFTON v. WILLIS et al. (No. 5770.)

(Court of Appeals of Georgia. Feb. 6, 1915.)

*(Syllabus by the Court.)*

1. BANKS AND BANKING ⟸118—CONTRACTS ⟸22—ACT OF CASHIER—RATIFICATION.

The circumstances in evidence were sufficient to authorize the jury to infer that the bank ratified the cashier's acceptance of certain notes and collateral in lieu of the note sued on, and in full accord and satisfaction thereof, and to rebut the presumption raised by the plaintiff's retention of the original note. The case is controlled by the ruling of the Supreme Court in Hamilton v. Stewart, 105 Ga. 302, 31 S. E. 184, and cases there cited.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1726–1738; Dec. Dig. ⟸118; Contracts, Cent. Dig. §§ 67, 82–92, 104–108; Dec. Dig. ⟸22.]

2. ACCORD AND SATISFACTION ⟸26 — PRESUMPTION—NOVATION.

While it is true that "a bill, acceptance, or promissory note, either of the debtor, or of a third person, is no payment or extinguishment of the original demand, unless it is expressly agreed to receive it as payment" (Weaver v. Nixon, 69 Ga. 699), still, where the holder of a promissory note takes possession of new promissory notes for the same amount, with collateral notes and a mortgage delivered to it for the express purpose of securing the new notes and for no other purpose, and thereafter records the mortgage and proceeds to collect the collateral notes, the inference that there was complete accord and satisfaction is authorized.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 162–165; Dec. Dig. ⟸26.]

3. BANKS AND BANKING ⟸113, 116—DIRECTORS—ACT OF CASHIER—ESTOPPEL—ACCORD AND SATISFACTION.

Though the cashier of the bank may have had no authority to accept the new notes in accord and satisfaction of the note which is the basis of the suit, and such authority was confined to the directors, still the directors are charged with knowledge of the conduct of the bank's business; and from the lapse of time, the nature of the transaction, and the use of the collateral, it is to be presumed that the act of the cashier, even though originally unauthorized, was ratified by the bank, and the bank was thereby estopped to assert the original lack of authority on the part of the cashier.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 273–276, 282–287; Dec. Dig. ⟸113, 116.]

Error from City Court of Tifton; R. Eve, Judge.

Action by Citizens' Bank of Tifton against W. H. Willis and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Fulwood & Skeen, of Tifton, for plaintiff in error. J. S. Ridgdill and R. D. Smith, both of Tifton, for defendant in error.

RUSSELL, C. J. The Citizens' Bank of Tifton brought suit against W. H. Willis and others, as sureties on a note dated October 20, 1909, and due January 20, 1910, given it by the Farmers' Supply Company, which had failed and ceased to do business. The defendants admitted the execution of the note, but filed a plea of accord and satisfaction. The plea set up that on January 11, 1910, one of the defendants, who was also president of the Farmers' Supply Company, delivered to W. L. Yeomans, cashier of the plaintiff bank, in lieu of the $3,000 note sued on and another note for $2,000, two notes for $2,500 each, executed by the Farmers' Supply Company to the bank and secured by a mortgage or deed to certain realty owned by the Farmers' Supply Company, and notes of customers of that company, for approximately $6,000, "which were expressly accepted in lieu of the note sued upon and in lieu of the personal security of the accommodation indorsement of said defendants, and in full accord and satisfaction and extinguishment of said note sued upon." The plea further alleged that, after so accepting the last-mentioned notes in lieu of the note sued upon, the bank "caused the deed or mortgage given as security therefor to be recorded in the clerk's office, later hypothecated and used said notes as collateral without the state, and finally * * * proved said two $2,500 notes in bankruptcy as a then existing claim against said Farmers' Supply Company, and later collected thereon substantial payments in dividends from the bankrupt court." The

defendants denied ever having made any payments on the note as shown by the credits. By amendment the defendants amplified their original plea, and alleged an agreement on the part of the cashier of the bank to surrender the note sued upon, and alleged that he had failed and neglected to keep his promise.

On the trial Frank Scarboro, one of the defendants, testified as follows:

The Citizens' Bank held two notes of the Farmers' Supply Company, aggregating $5,000, one of which is the note sued upon. I was president of the Farmers' Supply Company. I was anxious to adjust and get rid of the two notes, and proposed to Mr. Yeomans, who was cashier of the plaintiff bank, to give him two notes of the Farmers' Supply Company, for $2,500 each, together with a third mortgage on the building of the Farmers' Supply Company. Yeomans took the two new notes and the mortgage, but said that he would have to see Mr. Buck, was was president of the bank, or the directors, before he could accept them. Later he told me that Mr. Buck would not agree to the arrangement unless I would put up more collateral. I then gave him a number of collateral notes, amounting to about $6,000, in an effort to satisfy him, and thought I had done so. Mr. Yeomans told me that he had seen Mr. Buck in regard to the matter, and that it was all right. I do not know why I did not get the old notes. I was trying all the while to satisfy the bank, and I did not know why the notes, when satisfied, were not delivered up. I did not get the notes at that time. Mr. Yeomans stated that he would either mail them to me or hand them to me. I was a business man and knew that when an obligation was satisfied it was usual to surrender it. All the defendant indorsers were directors of the Farmers' Supply Company.

W. H. Willis, C. L. Parker, and W. E. Farmer, defendants, each testified that they had been told by Yeomans, cashier, that the note sued on had been satisfactorily arranged, and that their liability was at an end.

W. L. Yeomans testified for the plaintiff as follows:

I was cashier of the plaintiff bank, which at the time held two notes of the Farmers' Supply Company, one for $3,000 and the other for $2,000, indorsed by persons connected as directors with the Farmers' Supply Company, and one of which is sued on here. Frank Scarboro, who had charge of the supply company, came to the bank and proposed to take up the two notes by giving two other notes, of $2,500 each, of the Farmers' Supply Company and a third mortgage upon its buildings. I told him I could not take them myself, but would submit them to Mr. Buck, the president, and the board of directors. I did this, but Mr. Buck declined to accept them unless they would put up more collateral. I had some idea things were in bad shape with the Farmers' Supply Company. I reported to Frank Scarboro that we could not accept the notes and mortgage unless he would satisfy us with more collateral. He then gave us a batch of notes which the Farmers' Supply Company held against various farmers, amounting to about $6,000, but never did furnish us enough to satisfy us, and we did not surrender the old note, the one sued on. I never considered it satisfied, because Scarboro never furnished us with enough collateral to satisfy us. It is true that the two notes for $2,500 each, and the mortgage, were left at the bank, and it is also true that the mortgage was either by me or the Farmers' Supply Company put on record, and it is also true that I charged out on the books of the bank the notes sued on; but, on Scarboro's failure to furnish us with sufficient collateral to satisfy us, I re-entered it on the books of the bank. I sent one of the new notes left by Scarboro with me to a bank in Baltimore or Philadelphia for discount, but wired for its return. I have never discussed the matter with W. H. Willis, but did state to C. L. Parker that the matter had been arranged. As a matter of fact, however, it had not. The $6,000 collateral notes were placed with the plaintiff bank for the purpose of securing the two notes of $2,500 each that the Farmers' Supply Company had offered in satisfaction of the notes sued on, and for no other purpose. It is true that, as a representative of the bank and as its cashier, I entered into an agreement with Judge Eve, trustee in bankruptcy for the Farmers' Supply Company, by which we agreed upon a valuation of $2,000 for these notes. I had right and authority to act for the bank in this respect. Under the general rules of the bank, I was limited in authority to make loans of $100 or less, but as a matter of practice I had general charge of the bank, because of the fact that the directors met very seldom. It was my practice to submit all matters amounting to more than $100 to Mr. Buck, the president.

E. A. Buck testified for the plaintiff as follows:

I am president of the plaintiff bank. Mr. Yeomans, the cashier, had no authority beyond transactions up to $100. Yeomans came to me with the proposition of Scarboro to give two notes of $2,500 each and a mortgage of some kind. I told Yeomans not to settle the old notes that way, but go back to Scarboro and get more collateral. I knew that the Farmers' Supply Company was in bad shape, and that the notes already held as indorsed were good. I wanted to get all the collateral I could. Scarboro never furnished enough to satisfy us in surrendering what we had.

The jury returned a verdict for the defendants. The plaintiff filed a motion for a new trial upon the usual general grounds and upon the ground that the evidence demanded a verdict for the plaintiff. To the judgment overruling this motion, the bank excepted.

[1] 1. As said in the first headnote to this decision, we are of the opinion that the circumstances in evidence were sufficient to authorize the jury to infer that the bank ratified the cashier's acceptance of certain notes and collateral in lieu of the note sued on, and in full accord and satisfaction thereof, and to rebut the presumption raised by the plaintiff's retention of the original notes. As was said in Hamilton v. Stewart, 105 Ga. 302, 31 S. E. 184:

"While, of course, a party cannot be bound by a settlement unless he assents to its terms, still this assent may be implied from the circumstances, and conduct inconsistent with a refusal would raise a presumption of assent, upon which the other party would have a right to act. Nothing could be clearer than the proposition that where one person delivers to another property, to be retained upon a condition stated, the party receiving it cannot retain the property and repudiate the condition."

Certainly it cannot be doubted that it was the intention of the defendants, when they delivered the second notes to the plaintiff, that it should be in settlement of the original notes, and especially when they later delivered to the plaintiff further collateral, which they also accepted, and retained for more

than two years. Indeed, the cashier of the bank testified that the notes and collateral were delivered to the bank solely for the purpose of extinguishing the note sued upon. The note sued on had been past due for more than two years, and, according to the evidence, no demand had ever been made for payment prior to the filing of the suit. After the bank had for so long a period retained the old notes and had performed acts of ownership and control over the new notes, which, according to its cashier's evidence, "were offered in satisfaction of the note sued on and for no other purpose," and its governing body had acquiesced in the cashier's acceptance of the new notes and the collateral and made no attempt to repudiate the cashier's acceptance and retention or to notify the defendants that the notes and securities were not being held in accord and satisfaction of the original notes, as they certainly had a right to believe, the bank could not successfully assert that the notes were received and held for any other purpose than in accord and satisfaction of the original notes. Where one, having the right to accept or reject a transaction, takes and retains benefits thereunder, he becomes bound by the transaction, and cannot avoid its obligation or effect by taking a position inconsistent therewith. 16 Cyc. 787. The jury had the right, from the facts and circumstances in evidence, to believe that the credits on the note sued upon, which were made subsequent to the attempt of the defendants to satisfy the note, and which they denied having made, were amounts collected from the collateral left with the bank as security for the notes last given (Civil Code, § 5743); and, this being true, the bank was not in a position to reject the transaction. The directors were charged with knowledge of the bank's affairs, and certainly could not, after a lapse of more than two years, and after having received benefits from the transaction, take advantage of the nonauthority of its agent to enter into an agreement in which they had acquiesced wholly and without any evidence of attempted refutation.

[2, 3] 2, 3. One of the defendants testified that the cashier told him that he had seen Mr. Buck, the bank's president, in regard to the matter, after the delivery of the second collateral, and that "it was all right." From this, then, the jury were authorized to believe that the cashier, acting as agent for the bank, expressly agreed to receive the notes and collateral as furnished by the supply company, in accord and satisfaction of the note sued on. Conceding, then, that Yeomans, the cashier, even though under his own testimony he "had general charge of the bank," was not authorized to agree to the acceptance of the settlement thus offered, still, as said above, by the adoption of Yeomans' acts as their acts, through failure to object thereto after his acts came to their knowledge (and they were charged with knowledge), they were bound by this express agreement on his part. Having accepted the valuable collateral which was delivered to them for a certain purpose, to wit, in satisfaction of the note sued on "and for no other purpose," and having collected a portion thereof (as the jury were authorized to believe they had), they thus became bound by all the acts and agreements of the cashier in and about the transaction and were estopped to assert the original lack of authority on his part, or to adopt a part of his acts and refute others.

No errors of law are alleged. The facts were sufficient to authorize the verdict rendered, and we are not in a position to say that it was erroneous.

Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 713)

## SMITH v. STATE. (No. 6124.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸1169—APPEAL—HARMLESS ERROR—EVIDENCE.

The admission, over timely objection, of immaterial and irrelevant testimony is error, but is not cause for a new trial, when it is apparent that no real injury was thereby done to the accused, and that, without such testimony, the verdict would have been the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. ⟸1169.]

2. CRIMINAL LAW ⟸665 — RECEPTION OF EVIDENCE—SEQUESTRATION OF WITNESSES.

Where witnesses have been put "under the rule," at the request of counsel, it is not error for the court to receive testimony from a witness who was not sworn and sequestered, but who remained in the courtroom and heard the testimony of the other witnesses and the defendant's statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1549–1566½; Dec. Dig. ⟸665.]

3. CRIMINAL LAW ⟸686 — REOPENING OF CASE—DISCRETION.

It is within the sound discretion of the court, in the interest of truth and justice, to allow a case to be reopened, for the purpose of receiving additional material evidence, at any time before the rendition of the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1619, 1620, 1625, 1626; Dec. Dig. ⟸686.]

4. CONVICTION SUSTAINED.

The evidence authorized the verdict.

5. CRIMINAL LAW ⟸742—TESTIMONY—CREDIBILITY—QUESTION FOR JURY.

The fact that a witness is employed by a city, at a salary of $5 per day to catch "blind tigers" is a circumstance to be considered by the jury in passing upon the credibility of his testimony, but it is entirely within their discretion to believe it or to disbelieve it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1719–1721; Dec. Dig. ⟸742.]

Russell, C. J., dissenting.

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Error from City Court of Floyd County; J. H. Reece, Judge.

John Smith was convicted of selling whisky, and brings error. Affirmed.

John W. Bale, of Rome, for plaintiff in error. C. H. Porter, Sol., of Rome, for the State.

BROYLES, J. John Smith was convicted in the city court of Floyd county of the offense of selling whisky, and he excepts to the judgment overruling his motion for a new trial. In addition to the usual general grounds, there are two special grounds in the motion.

[1] 1. It is contended that the court erred in the admission of the evidence of C. I. Harris, chief of police, who testified:

"I have not known of his [the accused] doing any work this year. I have seen him standing around on the streets, and around the stable near his house on Second avenue. If he works any, I don't know it. So far as I know, he don't do anything."

It is contended that this evidence was immaterial, irrelevant, and prejudicial to the accused, and that it was an attempt to prove a different offense—to wit, vagrancy. In our opinion, this evidence was immaterial and irrelevant, but not prejudicial to the accused; and, the trial being otherwise free from error, and the evidence strongly indicative of guilt, this court would not be justified in reversing this case because of such harmless error. The relevant evidence strongly authorized the conviction of the defendant. In Griffin v. State, 15 Ga. App. ——, 83 S. E. 872, where the defendant was being tried for keeping intoxicating liquors on hand at a place of business, this court held that:

"On the trial of a criminal case, as a general rule, it is error to allow proof tending to establish the defendant's guilt of a different crime from that with which he is charged in the indictment or accusation; but the testimony in this case, to the effect that the defendant had not done any work 'for some time,' to which the defendant objected, on the ground that 'it virtually placed him upon trial on the charge of vagrancy,' and tended to prejudice the minds of the jurors against him, was not sufficient to create the inference that he was guilty of that crime, in the absence of evidence that he had no property or other means of support and was able to work. Penal Code, 1910, § 449. * * * If the admission of this testimony was error, the error was not of such materiality as to require a new trial."

See, also, Turner v. State, 138 Ga. 808(3), 76 S. E. 349; Watson v. State, 136 Ga. 236(2), 71 S. E. 122; Mixon v. State, 7 Ga. App. 805(6), 68 S. E. 315; Whitley v. State, 8 Ga. App. 165(2), 68 S. E. 863; Garnett v. State, 10 Ga. App. 109(5), 72 S. E. 951.

[2, 3] 2, 3. It is also insisted that the court erred in allowing, over the objection of the accused, the case to be reopened, after both sides had closed, and the opening argument for the state had been made, and after the court had taken a recess overnight, and after the defendant had discharged all of his witnesses; and also, because, while, upon the calling of the case for trial, at the request of counsel, all the witnesses had been sworn and put "under the rule," the witness Broach, who testified after the reopening of the case, had not been so sworn or sequestered, but had remained in the courtroom, and had heard part of the testimony and the statement of the accused. It does not appear from the record that the plaintiff in error made any motion to the court for time to recall his witnesses, or to meet this new evidence. The court not having denied him this right (to which, in our opinion, he was clearly entitled), there was no error in allowing the case to be reopened and Broach's testimony to be received. It is always proper for the court to permit a witness to testify, although he was not sworn and sequestered with the other witnesses, but remained in the courtroom and heard the testimony and the defendant's statement. See Thomas v. State, 7 Ga. App. 615, 67 S. E. 707; Dennis v. State, 10 Ga. App. 219, 73 S. E. 35; Merritt v. State, 134 Ga. 263, 67 S. E. 797. And it is within the sound discretion of the court, in the interest of truth and justice, to permit a case to be reopened at any stage of the trial before the rendition of the verdict for the purpose of receiving further material evidence, but he should, of course, give either side, if requested so to do, reasonable opportunity to meet and rebut, if possible, such new testimony. Glasco v. State, 137 Ga. 336, 73 S. E. 578; Caswell v. State, 5 Ga. App. 483 (3), 83 S. E. 566; Abbott v. State, 11 Ga. App. 44 (5), 74 S. E. 621; Chatman v. State, 8 Ga. App. 842 (2), 70 S. E. 188. In the Chatman Case, supra, it was well said that "a case should be reopened whenever it is necessary in order to obtain the truth."

[4, 5] 4, 5. The evidence authorized the verdict. The fact that Charles Johnson, the main witness for the prosecution, was employed by the city of Rome to catch "bootleggers" or "blind tigers" at a salary of $5 per day (which he admitted was the largest wages he ever received) was a circumstance to be considered by the jury in passing upon the credibility of his testimony; but, as he was unimpeached, and his evidence, if true, clearly established the defendant's guilt, and the jury, as appears from their verdict, having evidently believed him, the court did not err in refusing a new trial on the ground that the verdict was contrary to the law and the evidence and without evidence to support it. Ford v. State, 13 Ga. App. 68, 78 S. E. 782; Walker v. City of Atlanta, 10 Ga. App. 28, 72 S. E. 511; Dewberry v. State, 9 Ga. App. 822, 72 S. E. 282; Chatman v. State, 8 Ga. App. 843 (1), 70 S. E. 188; Waycaster v. State, 136 Ga. 95, 70 S. E. 883; Solomon v State, 10 Ga. App. 469 (3), 73 S. E. 623; Williams v. State, 9 Ga. App. 818 (1), 72 S. E.

301; Widener v. State, 9 Ga. App. 302, 70 S. E. 1119.

Judgment affirmed.

RUSSELL, C. J. (dissenting). I concur, of course, unhesitatingly in the general principle announced in the first headnote, that harmless error should never work a new trial, but I do not think it is at all applicable to the facts of this case. It rests in all human observation that proof of bad character tends to confirm, as sufficient, circumstances indicating guilt which otherwise would be doubtful. It may render unimpeachable positive proof of guilt which, but for this evidence as to bad character of the accused, would probably be, and might properly be, discredited by a jury. For this reason the law will not allow the prosecution to put the defendant's character in issue. In Griffin's Case, cited by the majority, this court held merely, as I understand it, that the proof that the defendant never worked did not support the inference of his guilt of the crime of vagrancy, and that, even if the admission of testimony to that effect was error, it was cured (under a well-settled rule) by the fact that "there was testimony of another witness for the defendant to the same effect, to which no objection appears to have been made." Based upon what is said in Griffin's Case, I might consent to hold that so much of the exception to the evidence in this case as related to the complaint that the proof showed a violation of another criminal law is not sustained. But I do not think that, in the interest of fair and impartial trials, it can be safely held that irrelevant and immaterial testimony which is bound to prejudice a defendant on trial for his liberty should be admitted in the face of an appropriate and timely objection. It is elementary that the record with which a defendant charged with crime enters upon his trial is a clean sheet, and unseen and invisible are any marks of approval or disapproval which time and the judgment of his acquaintances have entered as the history of his past. The law of our state very wisely attempts to afford every safeguard which will prevent any citizen from being deprived of his liberty by any means except facts which satisfy the minds and consciences of the jury of his guilt of the offense with which he stands charged. The books are full of decisions in which verdicts of guilty have been set aside for prejudicial remarks on the part of the court, counsel, or bystanders. To my mind, to allow a witness to testify that a defendant is of bad character as to any particular trait which may make him in the eyes of all mankind a common reprobate may be just as prejudicial as to allow proof that he had been guilty of a crime. Bad character can as well be shown by the habit of committing some acts recognized as base and contemptible (but not penalized by law) as by the commission of some other acts which the law has declared to be criminal. Mankind is so constituted that they readily seize and act upon a "bad name." To prove, as was done in this case, that the defendant never worked certainly presented to the jury evidence that the accused was a trifling character, and, as a natural consequence, the defendant and his statement would receive but slight shrift at the hands of the jury; and, furthermore, this irrelevant and prejudicial testimony created an atmosphere in which every favorable circumstance which might have been derived from other evidence or other proceedings in the trial would be distorted to the disadvantage of the accused. Not only is all honest labor honorable, but idleness, unless absolutely enforced, is always dishonorable and contemptible—a menace to society and an evidence of ingratitude to the Creator. Regardless of the fact that the defendant's mode of life in the present case was insufficient to establish all of the essential ingredients of our statutory offense of vagrancy, a mere reference to the testimony of the officers, to the effect that they never knew of the defendant working, suffices to show an indirect attempt to substitute suspicion for proof of guilt, and to bolster testimony which should have found its proper support in its inherent verity by an appeal to prejudice. The true law abhors a finding tinctured with either doubt or prejudice. Proof that the defendant was a notorious scandal-monger or a Rangey Sniffles, or proof that a defendant charged with cheating and swindling was a notorious liar in the community where he lived, would not involve the commission of a crime made penal by the laws of this state, but it rests in the experience of every practitioner that the introduction of such matter would be so extremely prejudicial to the accused as to greatly minimize his chances for an acquittal, which the law intends shall be equal with the chances afforded the prosecution for conviction.

(15 Ga. App. 758)

## GRANT v. F. S. ROYSTER GUANO CO.

(No. 5678.)

(Court of Appeals of Georgia. Feb. 6, 1915.)

*(Syllabus by the Court.)*

1. PLEADING ⇐248 — AMENDMENT — NEW CAUSE OF ACTION.

"An amendment which sets forth an act of negligence additional to others originally pleaded as being a concurring and contributing cause of the injury, for which damages are asked in the original petition, does not add a new and distinct cause of action." Bowen v. Adams, 129 Ga. 688 (2), 59 S. E. 795. "An amendment to the petition, which merely varies the acts of negligence, but which does not complain of any different wrong or injury from that set forth in the original petition, is not subject to the objection that it sets forth a 'new cause of action.'" King v. Seaboard Air-Line Railway, 1 Ga. App. 88 (4), 58 S. E. 252.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689–706, 708½, 709; Dec. Dig. ⇐248.]

2. MASTER AND SERVANT ⟸245, 256—INJURY TO SERVANT—CARE REQUIRED—PLEADING—AMENDMENT.

"The direct order of the master to do an act, in the performance of which the servant is injured, may be shown by the servant as a circumstance tending to excuse him from the exercise of that degree of caution which would lawfully be expected of him in the absence of such command." Southern Cotton-Oil Co. v. Gladman, 1 Ga. App. 259 (5), 58 S. E. 249. Where a suit against a master by a servant for damages was based upon injuries received by the servant in handling a heavy iron casting, and caused in part by the presence of certain "loose timbers" over which the servant stumbled, it was error not to allow an amendment alleging that the master negligently gave an order to the servant which, to prevent the casting from falling, required him "to move around under great strain in the immediate presence of said timbers," the presence of which and danger from which it was further alleged the master knew, or could have known in the exercise of ordinary diligence. The amendment should have been allowed as setting up facts tending to excuse the servant from that degree of caution which would otherwise be expected of him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 778–788, 809–812, 815; Dec. Dig. ⟸245, 256.]

3. MASTER AND SERVANT ⟸256—INJURY TO SERVANT—PLEADING—AMENDMENT.

A suit for damages, alleging injury caused by the fall of a heavy casting which the plaintiff undertook to steady or maintain in an upright position in obedience to an express order from his master, addressed to him notwithstanding the knowledge of the master as to the presence of certain dangerous "loose timbers" unseen by him, and over which he fell, thereby precipitating the casting upon himself, may be so amended as to charge, as an additional reason why the plaintiff stumbled and fell over the timbers, the negligent failure of the master to provide a sufficient number of laborers to properly support the casting, and thus prevent the injury which resulted from his stumble over the obstructing timbers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809–812, 815; Dec. Dig. ⟸256.]

4. MASTER AND SERVANT ⟸286, 288, 289—PLEADING — DEMURRER — QUESTIONS FOR JURY.

"Questions of diligence and negligence, including contributory negligence, address themselves peculiarly to the jury, and a court properly declines to solve them by decision on demurrer, except in plain, undisputable cases." Southern Cotton-Oil Co. v. Gladman, supra. Whether the plaintiff could or could not see certain loose timbers over which he stumbled, and did or did not exercise proper care; whether or not the danger was obvious and as easily known to the servant as to the master; whether or not warning was necessary and the failure of the master to give such warning to the plaintiff was negligence; whether the presence of the loose timbers was to be expected, and the risk was one which the servant assumed in consequence of the employment; whether or not he was aware of the danger of complying with the order of the master and was justified in obeying such order—are all questions for determination by a jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050, 1068–1090, 1092–1132; Dec. Dig. ⟸286, 288, 289.]

5. REJECTION OF AMENDMENT — SUSTAINING DEMURRER.

The court erred in rejecting the proffered amendment, as it did not set up a new and distinct cause of action; and the court erred, also, in sustaining the general demurrer and dismissing the petition.

Error from Municipal Court of Macon; Augustin Daly, Judge.

Action by John Grant against the F. S. Royster Guano Company. Judgment for defendant, and plaintiff brings error. Reversed.

Newman & Newman, of Macon, for plaintiff in error. Harris & Harris, of Macon, for defendant in error.

WADE, J. Judgment reversed.

BROYLES, J., not presiding.

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(15 Ga. App. 687)

## SALTER v. DECATUR COUNTY.

(No. 5477.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

BRIDGES ⟸46 — COUNTIES ⟸208 — HIGHWAYS ⟸187—DEFECTIVE BRIDGE OR HIGHWAY—PERSONAL INJURIES.

A county is not liable for suit for any cause of action, unless made so by statute. Civ. Code 1910, § 384. From the allegations of the plaintiff's petition it appears that the injury alleged to have been suffered by him occurred upon an approach to a public bridge, and it must be considered as if it had occurred on the bridge itself (Howington v. Madison County, 126 Ga. 700, 701, 55 S. E. 941); but since there is no allegation, either in the original petition or in the amendments, distinctly alleging that the public bridge crossing the Flint river on the Bainbridge and Brinson road was constructed subsequently to the year 1888, the petition did not disclose a right of action in the plaintiff, and the trial judge did not err in sustaining the written motion to dismiss the cause of action. Floyd County v. Baker, 11 Ga. App. 188, 74 S. E. 936; Seymore v. Elbert County, 116 Ga. 371, 42 S. E. 727; Butts v. Johnson, 136 Ga. 354, 71 S. E. 428. A county is not liable for any injury received by a traveler in consequence of defects in a public road not caused by a defective bridge (Brunson v. Caskie, 127 Ga. 502, 56 S. E. 621, 9 L. R. A. [N. S.] 1002); and it appears from the plaintiff's petition that the causeway which was being constructed or was in course of construction to enable the passage of overflows from the river was a bridge, but merely a portion of the approach to the bridge which spanned the river; the purpose of its construction, as alleged, being confined to the necessity caused by extraordinary freshets.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 108, 110–122; Dec. Dig. ⟸46; Counties, Cent. Dig. § 338; Dec. Dig. ⟸208; Highways, Cent. Dig. §§ 326, 327, 478–480, 482, 505; Dec. Dig. ⟸187.]

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by T. W. Salter against Decatur County. Judgment for defendant, and plaintiff brings error. Affirmed.

W. V. Custer, of Bainbridge, for plaintiff in error. R. G. Hartsfield, of Bainbridge, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

(15 Ga. App. 688)

## ME YERE v. WITHERS. (No. 5750.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. LANDLORD AND TENANT ⟸125, 150 — APARTMENTS—REPAIR.

It is the duty of a landlord, when he rents a tenement for a time to begin in the future, to have it, on the day when the term is to begin, in a condition reasonably suited for the purposes for which it was rented. Thompson v. Walker, 6 Ga. App. 80, 64 S. E. 336. Should there be a change in the condition of the tenement during its occupancy by the tenant, the landlord is bound to repair such defects as may be brought to his attention. If the tenant is in exclusive possession of an apartment, it is his duty to give the landlord notice of the necessity for repairs; for the landlord's duty to repair arises only when he has either notice or actual knowledge of the necessity for repairs. The mere fact that the landlord himself occupies one of the apartments in an apartment house is not of itself sufficient to compel the inference that the landlord has actual knowledge that the radiators in another apartment, occupied by his tenant, are defective in their operation.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 441–443, 536, 538, 544–548, 555, 556; Dec. Dig. ⟸125, 150.]

2. LANDLORD AND TENANT ⟸150—REPAIRS —INSTRUCTIONS.

In view of the evidence in the record, it was not error in the present case to charge the jury: "If you find that the furnace was in proper condition when the term of the defendant's lease began, and that the condition changed during the term of the lease, without fault of the plaintiff, then the plaintiff was entitled to notice from the defendant of such change in condition, and would have a reasonable time in which to fix the same."

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 536, 538, 544–548, 555, 556; Dec. Dig. ⟸150.]

3. ADMISSIBILITY OF TESTIMONY — VERDICT — JUDGMENT.

There was no error in the rulings upon the admissibility of testimony, and the verdict and judgment of the municipal court are supported by the evidence.

Error from Municipal Court of Atlanta.

Action between Oscar Me Yere and W. H. Withers. From a municipal court judgment in favor of the latter, the former brings error. Affirmed.

J. W. Bachman, of Atlanta, for plaintiff in error. Alvin L. Richards and Mayson & Johnson, all of Atlanta, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

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(15 Ga. App. 658)

## W. H. MILES SHOE CO. v. ALMAND. (No. 5600.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. RULINGS ON EVIDENCE.

There was no error in the rulings upon the admissibility of testimony.

2. BAILMENT ⟸14 — CONTRACT — CONSTRUCTION—PROTECTION OF GOODS.

Where goods were delivered to a bailee to be sold and returns made to the bailor, under a contract providing that at the expiration of the bailment the remaining stock shall be returned, and that during the existence of the bailment the bailee shall "keep the stock in good, clean condition, and pay special attention to forcing the sale of the oldest goods on hand, thus making every effort to prevent the accumulation of old or shelf-worn goods," the bailee was authorized to expose and handle the goods according to the approved methods usually adopted to facilitate the sale of the particular kind of goods, and in accordance with the custom of the particular trade, and was not expected to keep the goods covered or concealed from view, stored in safety deposit vaults, shielded from light, or hermetically sealed, until the day of reckoning with the bailor.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 45–55; Dec. Dig. ⟸14.]

3. BAILMENT ⟸14—CONTRACT — DAMAGES — LIABILITY OF BAILEE.

The instructions of the court in regard to the measure of diligence required of the defendant was correct. So far as the preservation of the property was concerned, under the terms of the contract the defendant was bound as a bailee to only ordinary care, subject to the necessity for its display and to inspection by customers and probable purchasers, and he was not liable for such damages to any portion of the stock of goods as would be naturally and necessarily incident to efforts to sell in accordance with the custom of the trade.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 45–55; Dec. Dig. ⟸14.]

4. CONDITION OF GOODS—BAILMENT.

The testimony was in conflict as to the general condition of the stock when it was returned to the bailor, but there was ample evidence from which the jury was authorized to find that the stock was kept in a "good, clean condition" by the defendant, as required by his contract. Several witnesses testified that the condition of the stock as a whole, about the time it was returned, was good and clean, and from the testimony of the defendant himself the jury was authorized to infer that this was its condition when the goods were actually returned by him, regardless of what may have been their condition on arrival at destination.

5. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

There is no substantial merit in any of the assignments of error, the evidence authorized the verdict returned, and the court did not err in overruling the motion for a new trial.

Error from City Court of Elberton; Geo. C. Grogan, Judge.

Action by the W. H. Miles Shoe Company against C. J. Almand. Judgment for defendant, and plaintiff brings error. Affirmed.

Jas. T. Sisk, of Elberton, for plaintiff in error. Worley & Nall, of Elberton, for defendant in error.

WADE, J. Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 680)

## PATTERSON & CO. et al. v. PETERSON. (No. 5696.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. BILLS AND NOTES ⟸302 — WRONGFUL TRANSFER—DAMAGES—RIGHT OF ACTION.

The wrongful transfer of a negotiable note to a bona fide purchaser, thereby cutting off the

maker's valid defense, gives rise to a cause of action for the damages resulting therefrom.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 622, 643–646; Dec. Dig. ⊂⊃302.]

2. BILLS AND NOTES ⊂⊃358—DEFENSES—COLLATERAL SECURITY—"HOLDER FOR VALUE."

One who takes negotiable paper as collateral security for a pre-existing debt is a holder for value, and, if not chargeable with notice of equities, he is as much entitled to protection as one who has parted with a money consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 913–923, 961; Dec. Dig. ⊂⊃358.

For other definitions, see Words and Phrases, First and Second Series, Holder for Value.]

3. FRAUD ⊂⊃59 — DAMAGES — ACTION — DEFENSES.

One has no right to complain at anything which obviously inured to his benefit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60–62, 64; Dec. Dig. ⊂⊃59.]

4. DAMAGES ⊂⊃208—ACTIONS—EXPENSES OF LITIGATION—DIRECTION OF VERDICT—QUESTION FOR JURY.

In suits where the expenses of litigation might properly be recovered as a part of the damages, it is error for the court to direct a verdict therefor. Whether the plaintiff is entitled to recover such expenses is a matter solely for the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. ⊂⊃208.]

Error from City Court of Douglas; J. C. McDonald, Judge.

Action by D. M. Peterson against W. S. Patterson & Co. and others. Judgment for plaintiff, and defendants bring error. Affirmed, with direction.

Levi O'Steen, of Douglas, for plaintiffs in error. McDonald & Willingham, and Dickerson, Kelley & Roberts, all of Douglas, for defendant in error.

RUSSELL, C. J. Peterson sought to recover from Patterson & Co. certain damages because of his having been forced to pay a certain promissory note, signed by one Sam Story and himself, and payable to the defendants, to which he alleged he had a good and valid legal defense, which he was prevented from urging by reason of its having been fraudulently transferred by the defendants to a bona fide purchaser for value, before maturity, without notice of the plaintiff's defense thereto. The plaintiff alleged and proved that after having signed the note in question as security for Sam Story, and before Story and one other person, who was also to sign the note as surety had signed it, and before its delivery to or acceptance by Patterson & Co., the payees, he notified Patterson & Co. not to accept the note, and was thereupon, by Patterson's assent, released from any liability thereon, and was assured by the defendants that they would not accept the note. Subsequently Patterson & Co. did accept the note, and immediately transferred it for a valuable consideration to the Union Banking Company, without notice of Peterson's release. Upon being sued by the Union Banking Company, Peterson was forced to pay $157 in settlement of the note, and had to pay the additional sum of $25 as attorney's fees of counsel employed by him in an attempt to urge his defense against the suit brought by the Union Banking Company. The defendants, by their testimony, admitted the truth of all the material averments of the plaintiff, and the court directed a verdict for both the $157 paid to the Union Banking Company and the $25 paid to the plaintiff's attorneys. The defendants filed a demurrer to the plaintiff's petition; and to the judgment overruling the demurrer, and to the direction of a verdict in favor of the plaintiff, exceptions were taken.

[1] 1. As we view the case, it comes directly within the ruling laid down in Detwiler v. Bainbridge Grocery Co., 119 Ga. 982, 47 S. E. 553, in which Justice Lamar, speaking for the court, said:

"Where one has a perfect defense to a negotiable note, he does not owe the sum represented thereby. In spite of the written promise, it is the mere equivalent of a piece of blank paper. If it is fraudulently or improperly transferred to one who, because of a right granted to bona fide holders, may force the maker to pay what he does not owe, there is wrong followed by damage, which gives rise to a cause of action."

Without any denial on the part of the defendants of the facts alleged and proved by the plaintiff, no other legal verdict could have been rendered in the case than that which was rendered. At the time of the release the signed note had not been accepted, no consideration had passed, and the contract had not been completed. The plaintiff had rescinded his action in signing the note as a surety, and had sought and obtained the consent of the defendants to this rescission, and had their promise that they would not accept his note. After this the note was accepted by the defendants, and was immediately thereafter transferred to an innocent purchaser for value, thus binding the plaintiff to pay the amount of the note to which he had a good and valid legal defense, and for which he had received no consideration. Under these facts the plaintiff had a complete cause of action and was entitled to recover the damages suffered by reason of the wrongful acts of the defendants.

[2] 2. It is insisted by the plaintiff in error that because it was shown that the note in question was transferred to the Union Banking Company for a pre-existing debt, rather than a present consideration, the plaintiff was not shut off from his defense to the note, and was therefore not in position to proceed against Patterson & Co. because of their alleged wrongful transfer. There is no merit in this contention.

"A note in the hands of a holder for a valuable consideration, transferred before due, and without notice of any equities between the

maker and the payee, *as collateral security for an existing debt*, is not liable to the equities between the maker and the payee." Gibson v. Conner, 3 Ga. 47.

Perhaps no principle of commercial law is better established in Georgia than that which declares that one who takes a negotiable paper as collateral security for a pre-existing debt is a holder for value. If such a holder is not chargeable with notice of equities, he is as much entitled to protection as one who has parted with a money consideration. This principle has been laid down and followed throughout the history of the jurisprudence of the state as the law of the land. Bond v. Central Bank, 2 Ga. 92; Hall v. Page, 4 Ga. 445, 48 Am. Dec. 235; Ellis v. Carhart, 18 Ga. 660; Wilkinson v. Jeffers, 30 Ga. 153; Exchange Bank v. Butner, 60 Ga. 654; Gibson v. Hawkins, 69 Ga. 357, 47 Am. Rep. 757; Laster v. Stewart, 89 Ga. 181, 15 S. E. 42; Lee v. Johnson, 110 Ga. 286, 34 S. E. 568; Harrell v. Nat. Bank of Commerce, 128 Ga. 504, 57 S. E. 869; Kaiser v. U. S. Nat. Bank, 99 Ga. 259, 25 S. E. 620.

[3] 3. The plaintiff in error contends that because of the fact that Peterson was able to compromise upon a verdict in the suit of the Union Banking Company against him, and was thus enabled to make settlement of the note for a less sum than the original amount of the note, he was bound by the compromise and was thereby prevented from proceeding against the defendant for the amount actually paid by him in settlement of the note. We see no merit in this contention. If the plaintiff was able, through the efforts of skilled counsel or otherwise, to reduce to less than its face value a valid claim against himself, which, under the evidence, he was legally bound to pay to the last dollar, and, having made such settlement, seeks only to recover from one who, without authority of law, and, as he contends, through fraud, caused him to make such expenditure, such defrauding party has no cause for complaint. Under the undisputed evidence the Union Banking Company was entitled to recover the full value of the note, but, having seen fit to accept a verdict and judgment and a settlement thereon for less than the full face value of the note, the defendant in this suit has no right to object thereto, especially since the plaintiff is seeking to recover no more from the defendant than he actually paid to the Union Banking Company. Such action on the part of the plaintiff in securing a settlement for a smaller sum than he was legally bound to pay inured to the benefit of the defendant; and the defendants are not in a position to say that because of this act on the part of the plaintiff, which admittedly was of material benefit to them in case the plaintiff was entitled to recover at all, the plaintiff is precluded from proceeding against the defendants. One has no right to complain at anything which shows on its face to have inured to his benefit. Baker v. Central Grocery Co., 83 S. E. 504.

[4] 4. We think the court erred, however, in directing the jury to find any sum for attorney's fees. It is true that the plaintiff showed that he had expended the sum of $25 in payment of counsel who represented him in the action of the Union Banking Company against him, and this is not denied by the defendant; still the jury were not bound by this evidence as to the value of the services rendered by the plaintiff's attorneys. A very able opinion by Presiding Justice Lumpkin will be found in the case of Baker v. Richmond City Mill Works, 105 Ga. 225, 31 S. E. 426, upon the subject of the right of a jury to use their "own knowledge and ideas" in cases where the value of attorney's fees is involved. The plaintiff, by merely paying a given amount to his attorney, could not bind the defendant for this amount, unless there were some evidence that the amount so paid were reasonable and thus computed so to be by the jury trying the case. Aside from all this, however, we are of the opinion that a court, under the Code section (Civil Code, § 4392) allowing the recovery of the expenses of litigation in certain cases therein named, would never have the right to direct a verdict for any given sum as attorney's fees. The Code section reads:

"The expenses of litigation are not generally allowed as a part of the damages; but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, *the jury may allow them.*"

We are of the opinion that the intent of the law, in the absence of a contract, is to leave the matter of expenses of litigation in all such cases as those mentioned therein solely to the jury trying the case.

Other than the court's instruction that the jury find for attorney's fees, we see no material error in the record. It is therefore ordered that the plaintiff write off the attorneys from the judgment in this case, and, when this is done, that the judgment be affirmed.

Judgment affirmed, with direction.

BROYLES, J., not presiding.

(15 Ga. App. 678)

YOUNG v. DURHAM. (No. 5655.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. PLEDGES ⟸37—REPLEVIN ⟸69, 72—TROVER AND CONVERSION ⟸40—MEASURE OF DAMAGES—PLEADING AND PROOF—VALUE.

"Where the title of a plaintiff in a trover suit is held by him as security for purchase money or other debt, and he elects to take a money verdict, he is entitled to recover either the highest value of the property between the date of the conversion and the date of the trial, or the value of the property at the date of the conversion with interest thereon, subject,

however, to the condition that under neither choice can he recover more than the amount of the debt for which the property stands as security." Elder v. Woodruff Hardware & Manufacturing Co., 9 Ga. App. 484 (2), 71 S. E. 806. "As between the original seller and the original purchaser, the agreed price, as stated in the contract of sale, is prima facie, but not conclusive, evidence of the actual value of the property." 9 Ga. App. 486, 71 S. E. 807. "The damages recovered cannot exceed the debt with interest thereon. If partial payment has been made, the amount of such payment should be deducted. Any alternative verdict rendered should conform to these limitations." Bradley v. Burkett, 82 Ga. 255 (2), 11 S. E. 492. See, also, Ross v. McDuffie & Armstrong, 91 Ga. 120 (3), 16 S. E. 648. "Where suit was brought for property, and not for its value, but the value was alleged in the declaration, it was not necessary to prove it." White v. White, 71 Ga. 670 (2). See, also, Gordon v. Atlantic Coast Line Railroad Co., 7 Ga. App. 354, 356, 66 S. E. 988. However, "to authorize a money verdict in a trover suit, there must be some evidence to show the value of the personal property converted by the defendant." Oglesby v. Hanson, 7 Ga. App. 318, 66 S. E. 802, and cases cited. The contract of conditional sale was in evidence and set forth an agreed price for the article sued for in trover, which furnished prima facie evidence of the actual value of the property, sufficient, in the absence of any evidence to the contrary to prove the value of the property at the time of conversion, after deducting all credits to which the court found the defendant entitled.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 95, 96; Dec. Dig. ⟸37; Replevin, Cent. Dig. §§ 257–279, 292–295; Dec. Dig. ⟸69, 72; Trover and Conversion, Cent. Dig. §§ 232–244; Dec. Dig. ⟸40.]

2. Sales ⟸479—Conditional Sale—Trover—Condition Precedent—Notice.

Where one sells to another personal property under a retention of title contract, for a definite fixed sum, which the seller agrees to accept in installments of $2 per week, the contract is executed as to the seller, and the failure of the purchaser to pay some of the agreed installments when due, or the further fact that the seller, on more than one occasion and without any express agreement to modify the original contract, or additional consideration moving him to do so, accepts from the purchaser several payments of $1 only, would not be such a departure from the terms of the contract as to necessitate notice from the vendor to the vendee of the intention of the former to rely upon the exact terms of the original contract relating to payments (Civ. Code 1910, § 4227), as a condition precedent to the bringing of a suit in trover to recover the property.

(a) Especially is this true where, as in this case, the undisputed evidence shows that the entire balance of the purchase price was long since past due before the suit was filed, even had the defendant paid at the rate of $1 per week only until the debt was satisfied. According to the verdict, $34 was still unpaid, and this amount was long past due (either at the rate of $1 or $2 per week) before the suit was brought—more than three years after the making of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418–1432, 1434–1438; Dec. Dig. ⟸479.]

3. Courts ⟸189—Municipal Courts—Credibility of Evidence—Question for Court.

The failure of the judge of the municipal court of Atlanta, sitting without a jury, to allow the defendant certain credits about which there was a conflict in the evidence, is not proper subject for complaint in this court, since the court had the privilege of accepting as true that evidence which most commended itself to his approval.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 458; Dec. Dig. ⟸189.]

4. Replevin ⟸106—Money Judgment—Election—Time.

In a trover suit, an election to take a money judgment for the value of the property sued for may be made by the plaintiff at any time during the progress of the trial and before the case is submitted to the jury, or (where tried without the intervention of a jury) prior to the rendition of a judgment by the presiding judge.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 416–423; Dec. Dig. ⟸106.]

5. Sales ⟸479—Trover and Conversion ⟸4, 9, 33 — Conditional Sale — Demand — "Conversion" — Pleading — Construction.

The purpose of a demand in a trover suit is to furnish evidence of a conversion. "The action of trover being founded on a concurrent right of property and possession, any act of the defendant which negatives or is inconsistent with such right amounts in law to a 'conversion.'" Roper Grocery Co. v. Faver, 8 Ga. App. 178, 68 S. E. 883. See, also, Citizens' Bank of Valdosta v. Peeples, 10 Ga. App. 703, 74 S. E. 303. "As to what constitutes a conversion, this court has repeatedly held that possession, with a claim of title adverse to that of the true owner, is sufficient." Maxwell v. Harrison, 8 Ga. 61, 67 (6), 52 Am. Dec. 385. And see Scarboro v. Goethe, 118 Ga. 543, 45 S. E. 413, where it was held that "no demand was necessary where it appeared that the defendant was in possession of the property, claiming title thereto, at the time of the action; his defense being that, owing to payments made and partial failure of consideration, he was due only a small balance of the purchase money, of which he made tender."

(a) The petition filed in this case explicitly alleged, in the first paragraph, that the defendant was in possession of the property sued for, and the defendant in response thereto denied that he was in possession of the property (a ring), "for the reason that he has paid plaintiff in full for the ring"; and in the second paragraph the plaintiff alleged that the defendant refused to deliver the property to him or to pay him the profits thereof; and to this defendant replied as follows: "In answer to paragraph 2 of petition, this defendant had a right to refuse to deliver the ring described in the petition, for the reason that he did not have any ring belonging to the plaintiff, as he had paid plaintiff in full for the ring." Measured by the rule laid down in section 5637 of the Civil Code of 1910, as to the effect of an evasive answer where knowledge must necessarily be presumed, this answer might fairly be construed to mean, not only that the defendant had refused to deliver the ring in response to a demand (since he could not "refuse" until a demand was made), but also that the defendant did have a ring, and in fact the particular ring sued for; but to this ring he asserted title adverse to that of the plaintiff, for the alleged reason that he had paid the plaintiff in full therefor, and under the rule in Maxwell v. Harrison, supra, that possession with a claim of title adverse to that of the true owner is sufficient to show conversion, this claim of title on the part of the

defendant would dispense with proof of demand and would suffice to show a legal conversion.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418–1432, 1434–1438; Dec. Dig. ⊂⊃ 479: Trover and Conversion, Cent. Dig. §§ 25–37, 58–83, 203–206; Dec. Dig. ⊂⊃4, 9, 33.

For other definitions, see Words and Phrases, First and Second Series, Conversion.]

Russell, C. J., dissenting.

Error from Municipal Court of Atlanta.

Action by E. B. Durham against Joe Young. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank L. Haralson and B. L. Milling, both of Atlanta, for plaintiff in error. D. K. Johnston, of Atlanta, for defendant in error.

WADE, J. Judgment affirmed.

RUSSELL, C. J., dissents.

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(15 Ga. App. 707)

## ATLANTIC COAST LINE R. CO. v. CHASTAIN. (No. 5826.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

RAILROADS ⊂⊃441, 446—TRIAL ⊂⊃140—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.

Where the killing of the plaintiff's cow by a train of the defendant was shown, and the plaintiff relied entirely upon the legal presumption of negligence against the railroad company, a recovery was authorized, unless this presumption was fully overcome by the proof. Where there were seeming conflicts or contradictions, as to material facts in the case, between the opinionative testimony of the defendant's engineer and the physical facts as disclosed by his testimony, and where Chastain, the owner of the cow, testified that the defendant's track was straight for several hundred yards from where the cow was killed, back toward Albany, and that the train coming from Albany had killed the cow, and that the right of way of the defendant at this point was such that the cow could have been readily seen for several hundred yards by the engineer of the train, and where it appeared from the testimony of the engineer of the defendant, who sought to explain the killing and to show the absence of negligence, that he made no effort to stop the train, because he thought it impossible to do so, and that, although he saw the cow when it was 50 or 60 yards distant, it was so close that, in his judgment, it was impossible for him to do anything toward stopping the train before reaching the point where the cow was, and that he did not blow the whistle, or cut off the steam, or make any attempt to keep from hitting the cow, because when he first saw the cow he thought it useless to make an effort to keep from striking it, *held*, it was for the jury to determine whether or not the explanation offered in behalf of the defendant completely rebutted the presumption of negligence created by the killing of the cow, and they might legitimately have concluded that the explanation of the killing was insufficient; the credibility of the witnesses as well as the question of negligence being exclusively for them.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1575–1595, 1627–1641; Dec. Dig. ⊂⊃441, 446; Trial, Cent. Dig. §§ 334, 335; Dec. Dig. ⊂⊃140.]

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Action by S. A. Chastain against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bennet & Branch, of Quitman, and J. H. Merrill, of Thomasville, for plaintiff in error. Fondren Mitchell, of Thomasville, for defendant in error.

BROYLES, J. S. A. Chastain sued the Atlantic Coast Line Railroad Company in a justice's court for the value of a cow killed by the running of one of its trains. The jury found a verdict in his favor, which, upon certiorari, was sustained by the judge of the superior court; and the defendant excepted to the judgment overruling the certiorari. The only question involved is whether, under the facts and the law applicable thereto, the recovery was authorized.

It is insisted by the plaintiff in error that the presumption of negligence raised by the killing was fully rebutted by the evidence of its engineer, who testified that he was the engineer operating the train that killed the cow; that at the time the cow was struck it was about dark (a little after 6 o'clock on November 6, 1912); that he was running his engine on the regular passenger train from Albany to Thomasville; that the engine was equipped with the best headlight in regular use on passenger trains, and that by its light he could have seen from 15 to 20 feet beyond the sides of the track; that as he was approaching this place his fireman was firing the engine and was not looking out; that he (the engineer) was sitting on his engineer's seat and was looking out, but did not see the cow until the engine was from within 50 or 60 yards of her, and it was so close that, in his judgment, it was impossible for him to do anything toward stopping the train before he got to where the cow was; that he made no effort to stop the train, because he thought it was impossible to do so, nor did he blow his whistle, or cut off his steam, or make any attempt to keep from hitting the cow, because, when he saw the cow, he thought it useless to make an effort to keep from hitting it; that when he saw the cow she was not where the engine could have struck her, but that, after reaching the end of his run (Thomasville) he discovered cow hair on one of the projecting parts of the engine, and the next morning, as he was going upon his run, he saw the cow lying on the track and was satisfied that the projecting part of his engine had killed her.

S. A. Chastain, owner of the cow, testified that the defendant's track was straight for several hundred yards from the point where the cow was killed back toward Albany, and that the train which killed the cow was coming from Albany; that the right of way of the defendant at this point was such that

the cow could have been readily seen for several hundred yards by the engineer of the train going toward Thomasville.

The defendant waived any issue as to the fact that the cow was killed by the running of the train, that it was worth the amount of the judgment, that it was owned by the plaintiff, or as to anything else testified by the plaintiff, and assigned error solely upon the ground that, under the circumstances as outlined by the testimony of the engineer, the defendant was not liable for the killing of the cow.

The facts in the instant case are different from those in any of the cases cited by the learned counsel for plaintiff in error.

In the case of Macon & Augusta R. Co. v. Vaughn, 48 Ga. 465, it appeared affirmatively from the evidence (without contradiction) that there was no negligence or want of care on the part of the railroad company. There a mule was killed by the railroad company, and the Supreme Court said:

"The evidence of the absence of any negligence in running the train at the moment of the killing of this mule is very strong, and is wholly uncontradicted. * * * It was night, and the driver testifies positively to the use of the greatest care. A railroad company is not liable for an unavoidable accident, even under our statute in relation to stock. If, with every reasonable precaution, proper lookout, and proper speed and proper attention, an unavoidable damage ensues, a company which has by law a right, under such precautions, to run its trains, is not responsible."

In Georgia Southern & Florida R. Co. v. Sanders, 111 Ga. 128, 36 S. E. 458, the cow came *suddenly* upon the track, in front of the engine, and the engineer *put on his brakes* and otherwise used all ordinary care and reasonable diligence to stop the train.

In Macon, Dublin & Savannah R. Co. v. Hamilton, 9 Ga. App. 254, 70 S. E. 1126, a cow grazing near the railroad track suddenly ran on the track, a *few feet* in front of the engine, which was running at a speed of from 25 to 30 miles an hour, and was killed. The undisputed evidence of the engineer and the fireman in that case fully rebutted the statutory presumption of negligence.

In Macon & Birmingham R. Co. v. Revis, 119 Ga. 332, 46 S. E. 418, the train was running 35 or 40 miles an hour, and the engineer first saw the horse about 25 or 30 feet from the track. The horse suddenly walked to the edge of a cut and jumped down upon the track. The engineer immediately *shut off steam, applied his emergency brakes* and *sounded the "cattle alarm,"* but all to no avail. And the court held in that case that the presumption of negligence was fully rebutted.

In Macon, Dublin & Savannah R. Co. v. Wood, 3 Ga. App. 197, 59 S. E. 595, a mule was hit *just at the time he got upon the track*, and the engineer *checked the engine* and *applied the emergency brakes*. He could not see the mule, because of a cut and scrub trees growing on each side of the cut, and because he was sitting on the right of the engine and the mule came from the left. It was struck the moment he saw it.

In Macon, Dublin & Savannah R. Co. v. Barfield, 10 Ga. App. 104, 72 S. E. 936, the engineer testified that he was so *close* upon the mule before he discovered it that he could *not* have stopped his train in time to prevent striking it, and yet he *threw on the brakes, sounded the "cattle alarm,"* and *slackened the speed* of the train; and Judge Powell said:

"The testimony of the engineer that he threw on the brakes and brought about a slackening of the speed of the train, and that he sounded the 'cattle alarm,' related to the res gestæ of the transaction."

In Georgia R. Co. v. Wall, 80 Ga. 202, 7 S. E. 639, the testimony was that the train was going downgrade, and some mules were seen upon the track, about 40 yards ahead, and the engineer *applied the brakes* and *blew the whistle*. This was early in the morning, before daylight, and a fog was prevailing at the time, which prevented the mules from being seen at a greater distance.

In Western & Atlantic R. Co. v. Trimmier, 84 Ga. 112, 10 S. E. 503, the Supreme Court said:

"The railroad company showed by its witnesses—who were uncontradicted—that they saw the cow a little distance off from the track, when the train was running downgrade and very rapidly; that the cow turned and came upon the track; and that everything was done that they could do to prevent the injury, but that it was impossible to stop the train in time to prevent it."

In Augusta Southern R. Co. v. Carroll, 7 Ga. App. 138, 66 S. E. 403, a horse and a colt were grazing about 50 yards from a cut in the track, and, as the train (running about 30 to 35 miles an hour) got a little nearer to the horse, the engineer testified it raised its head and started toward the track, and immediately upon seeing this, he applied the emergency brakes, reversed the engine, and reached for the whistle cord, but, before he could get it another employé of the company, upon the engine, had commenced sounding the cattle alarm, and continued to do so.

It is true that in all of these cases cited, where the engineer put on his brakes, blew his whistle, and sounded the cattle alarm, the killing of the cow, or other animal, was not prevented. If it had been, there would have been no case brought. On the other hand, there is no record of, and no means of knowing, how many hundreds or thousands of cows, mules, and horses *have* been "headed off" and prevented from being killed by similar prompt, precautionary, and reasonable acts of diligence by railroad engineers.

Of all the cases in the reports which we have been able to find, we think that Western & Atlantic R. Co. v. Smith, 15 Ga. App. —, 82 S. E. 906, is most nearly on "all fours" with the instant case. In that case the fireman of the defendant testified that

he first saw the cow when it was *25 or 30 feet* distant from the train, coming from behind some cars which were standing on the third or fourth track from that on which the train was running, and that he did not have time, from the moment he saw the cow until she was hit, to tell the engineer to stop, or to apply brakes, and that in fact no brakes were applied, no bell was rung, no whistle blown, and no effort was made to stop the train, because he did not *think* it necessary, and nothing was done to prevent the accident. The engineer in that case testified that he was sitting on his engineer's box on the right of the engine, and that he did not see the cow at all, and could not see it from where he was. The fireman also swore that the cow came from the left of the train, and that the train could not have been stopped in time to prevent the killing of the cow; and yet in that case this court held that, under the facts—

"it was for the jury to determine whether or not the explanation offered in behalf of the defendant completely rebutted the presumption of negligence created by the killing of the cow, and they might legitimately have concluded that the explanation was insufficient; the credibility of the witnesses, as well as the question of negligence, being so exclusively for them."

In Central of Ga. R. Co. v. Harden, 118 Ga. 456, 38 S. E. 950 (another "cow" case), the Supreme Court said:

"It is a settled doctrine of this court that where a jury has passed upon a case, and there was evidence to support their finding, and that finding has been approved by the trial judge, in the absence of any error of law on the part of the trial judge, this court will not set aside the verdict, although satisfied that the preponderance of the evidence was against the finding made."

About the only difference between the Smith Case, supra, and the instant case, is that in the former the engineer did not see the cow at all, and the fireman testified to the material facts, and there were apparent contradictions in his testimony, while in the case at bar the fireman did not see the cow, and the engineer testified to the material facts, and there were apparent contradictions between the opinionative parts of his testimony and the physical facts as disclosed by his testimony. In this case the engineer's statement that the cow was so close to the train, when he first saw it (within 50 or 60 yards), that, in his judgment, it was impossible for him to do anything toward stopping the train before he "got to where the cow was," is, of course, a mere conclusion of the witness. He further swore that he made no effort to stop the train because he *thought* it impossible to do so, nor did he blow the whistle, or cut off the steam, or make any attempt to keep from hitting the cow, because when he saw the cow he *thought* it useless to make this effort. If the engineer had even blown his whistle (which, as shown by the physical facts, he could have done), this might have frightened the cow away and prevented the killing.

In Atlantic Coast Line R. Co. v. Whitaker, 10 Ga. App. 207, 73 S. E. 34, the engineer testified that his train was running 35 or 40 miles an hour when he first saw the cow, about 50 yards from it and running toward the track, and that he immediately *applied the brakes* and *blew the whistle.*

"I tried to head her off by blowing the whistle [he swore], but could not." "I put on the service brakes and checked the speed of my engine to about twenty miles an hour when I struck the cow. I did not have time to stop my engine."

So we think that in the instant case the jury might reasonably have found that the engineer should at least have blown his whistle and "tried to head the cow off." Here the engineer, under circumstances almost similar to those in the Whitaker Case, swore that he did nothing toward stopping the train, and did not even blow his whistle, which might have prevented the accident by heading off the cow from the track. The engineer states he did nothing toward stopping the train because he *thought* it useless to make an effort to keep from hitting the cow. In our opinion, he should at least have made an *effort* to stop or slow up the train, or, as we have said before, he should at least have *blown his whistle* or sounded the "cattle alarm." The judgment of all men "born of woman" is fallible, and in an emergency, no matter what we think, we should make all efforts possible, even though we deem them useless, to prevent injury to another, or to his property. How could the engineer know that if he blew a sharp blast upon his whistle the cow would not have been frightened away to safety?

We think, under the facts in this case, that it was a question for the jury as to whether or not the testimony for the defendant completely rebutted the presumption of negligence created by the killing of the cow, and the judgment overruling the certiorari is sustained.

Judgment affirmed.

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(15 Ga. App. 697)

KNOX et al. v. CRUMP et al. (No. 5762.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. DRAINS ⟸14—DRAINAGE DISTRICT—PROCEEDINGS TO ESTABLISH—RIGHT OF APPEAL. Under the drainage act (Acts 1911, pp. 108–132), within 10 days after the report of the viewers or assessors provided for by the act has been confirmed, or has been rejected and the proceeding dismissed by the drainage court, any party aggrieved may enter an appeal to the superior court of the county, which appeal shall be "taken and prosecuted as now provided in civil proceedings." The petitioners and the objectors have, under the express provisions of the act, the same right of appeal.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 5, 6; Dec. Dig. ⟸14.]

2. DRAINS ⟸14—DRAINAGE DISTRICTS—ESTABLISHMENT—APPEAL—PROCEEDINGS.

On an appeal involving the establishment of a drainage district under the act of 1911, brought either by those favoring or those opposing a drainage project, the jury in the superior court may determine the broad question as to the feasibility or economic value of the project, and judgment may be entered accordingly in favor of or against the project, and be transmitted to the drainage court; and, if the verdict and judgment be favorable thereto, the drainage court shall proceed thereafter as if this had been its original award or judgment.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 5, 6; Dec. Dig. ⟸14.]

*(Additional Syllabus by Editorial Staff.)*

3. DRAINS ⟸14—DRAINAGE DISTRICT—ESTABLISHMENT — PROCEEDINGS — "DISMISSAL."

The "dismissal" authorized by the drainage act (Acts 1911, p. 118, § 16), providing that, if the court find that the cost of construction is greater than the resulting benefit, the proceedings shall be dismissed, is only nominally a dismissal, and, in fact and in law, is a judgment on the merits.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 5, 6; Dec. Dig. ⟸14.

For other definitions, see Words and Phrases, First and Second Series, Dismissal.]

Error from Superior Court, Franklin County; D. W. Meadow, Judge.

Petition by T. H. Knox and others to the drainage court of Franklin county praying for the creation of a drainage district, and to the final report of the board of viewers, Mrs. J. W. Crump and others filed objections. From an order of the superior court dismissing an appeal from an order dismissing the proceedings, petitioners bring error. Reversed.

J. H. Skelton, of Hartwell, H. H. Chandler, of Lavonia, and W. R. Little, of Carnesville, for plaintiffs in error. Geo. L. Goode and W. S. McDaniel, both of Carnesville, for defendants in error.

WADE, J. This case originated under the act of 1911 establishing drainage courts, fixing their powers, etc. Acts 1911, pp. 108–132. T. H. Knox and others presented their petition to the drainage court of Franklin county, praying for the creation of a drainage district in the counties of Franklin and Stephens. It appears from the record that all the necessary preliminary orders were passed, and such other proceedings had in accordance with the requirements of the act as to bring the case properly before that court for a final hearing on December 29, 1913. On this date Mrs. J. W. Crump and a number of others owning lands in the supposed drainage district filed objections to the final report of "the board of viewers," and the court, after considering the report made by the board and the objections thereto, passed an order on December 31, 1913, dismissing the entire proceedings. From this order of dismissal the petitioners entered their appeal, within the period of 4 days (omitting Sunday), from the drainage court to the superior court of Franklin county, and, upon motion of the defendants, when the case was called in its order in the superior court, the appeal was dismissed. The petitioners filed their bill of exceptions to the judgment of the superior court, and the sole question for determination is whether or not the superior court erred in refusing to entertain the appeal from the order of the drainage court dismissing the entire drainage proceedings.

[1] The act of 1911 (section 16) provides that, if at the final hearing objections in writing to the report of the "viewers" are filed by the landowner, it shall be the duty of the court to carefully review the report of the viewers, as well as the objections filed thereto, and make such changes as are necessary to render substantial and equal justice to all the landowners in the district, and—

"if in the opinion of the court the cost of construction, together with the amount of damages assessed is not greater than the benefits that will accrue to the land affected, the court shall confirm the report of the viewers. If, however, the court finds that the cost of construction, together with the damages assessed, is greater than the resulting benefit that will accrue to the lands affected, the court shall dismiss the proceedings at the cost of the petitioners."

Section 17 is as follows:

"Any party aggrieved may, within ten days after the confirmation of the assessors' report, appeal to the superior court. Such appeal shall be taken and prosecuted as now provided in civil proceedings. Provided, that the right of appeal shall obtain in all cases of dispute as now provided by law, and in accordance with this act."

It appears from the record that the grounds insisted upon by the defendants in error in their motion to dismiss the appeal in the superior court were, in substance, as follows: (1) That there can be no appeal to the superior court, because the proceedings in the drainage court were dismissed; (2) that the judgment of the drainage court was final and conclusive against all the parties plaintiff; (3) that no appeal to the superior court could be had, except from a judgment of the drainage court confirming the report of the assessors; (4) that the act of 1911 vests no jurisdiction in the superior court to render a judgment establishing a drainage district as contemplated by that act, and no legal and enforceable judgment could be molded upon a verdict in the superior court in behalf of the petitioners in such a case; (5) that there is no appellate jurisdiction in the superior court to hear and determine the issues raised by the pleadings in the case.

"The technical right of appeal was unknown to the common law, and exists only by statute or constitutional provision." Davison v. Bush, 8 Ga. App. 34, 36, 68 S. E. 495, 496.

In Roser v. Marlow, R. M. Charlt. 543, it was held by Judge Charlton:

"That an appeal can only be had when it is expressly given, and a certiorari always lies, unless it has been expressly taken away."

"An appeal from an inferior court to a superior court for another trial, as an original case, was unknown to the common law. Such appeals are of statutory origin, and the practice and mode of procedure are prescribed by statute." Robinson v. McAlpin, 130 Ga. 489, 490, 61 S. E. 115.

"The Constitution provides that the superior court shall have appellate jurisdiction 'in all such cases as may be provided by law.' Civil Code [of 1895] § 5845. In construing a similar provision in reference to appeals of cases in the justice's court, it was held that the provision in the Constitution was not self-executing, and therefore did not become operative until legislative action regulating the mode and manner of appeal. Hendrix v. Mason, 70 Ga. 523. The appellate jurisdiction of the superior court must be exercised, and can only be exercised, in such cases as are provided by law." De Lamar v. Dollar, 128 Ga. 66 (3), 57 S. E. 89; Id., 1 Ga. App. 687, 696, 57 S. E. 85, 89.

"The Constitution declares that: 'The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate.' But the preservation of the right 'inviolate' did not operate to confer a right of trial by jury in all proceedings of whatsoever character, where no such right had ever existed. * * * In a proceeding to validate bonds, no judgment for money or land is entered against the present complainants or any other citizens or taxpayers; no direct judgment for immediate recovery of money is even entered against the municipality. The proceeding is not one of the class, either in terms or by analogy, in which jury trials have ever existed as matter of right, and it does not fall within the constitutional provision above quoted." Lippitt v. Albany, 131 Ga. 629, 631, 632, 63 S. E. 33, 34.

It is apparent from these and from numerous other decisions of the Supreme Court that the determination of the question whether or not the plaintiffs in error were entitled to an appeal to the superior court must rest primarily upon whether or not the statute itself provides for or authorizes such an appeal, since the right to such an appeal is neither guaranteed by the Constitution nor provided for under general law relating to like appeals to the superior court. It will be observed that section 17, supra, provides that an appeal to the superior court may be had "within 10 days after the confirmation of the assessors' report," and further declares that the right of appeal "shall obtain in all cases of dispute *as now provided by law, and in accordance with this act*" (Italics ours). A reasonable interpretation must always be given to any act of the Legislature where possible, and, bearing this in mind, we cannot rationally reach the conclusion that in this act the Legislature, while allowing the right of appeal to those resisting the confirmation of a report from drainage assessors, intended to withhold this right from those seeking such confirmation. We may not assume that the Legislature would deny to one class what was duly and in terms accorded another, or that any discrimination between different citizens would be intentionally created, unless perhaps for paramount reasons of public policy; and in this instance it cannot be maintained that it would be against public policy to extend to those attempting to put into effect an act adopted for the public good the same right of appeal to a higher tribunal which is by the express terms of the statute granted to those who interpose objections thereto, prompted by personal considerations alone. Again, if the drainage court is a court from whose finding on the facts against a particular drainage plan no appeal can be taken, it might easily be possible that the court, if inimical to the drainage law, would conscientiously, and ofttimes mistakenly, disapprove of every drainage project presented for its consideration, as not being of sufficient prospective value to authorize the necessary cost, and thus nullify the act entirely.

Section 17 provides that:

"Any party aggrieved may, within ten days after the confirmation of the assessors' report, appeal to the superior court."

That section does not say any party aggrieved *by* confirmation of the report, but any party aggrieved, presumably in *any* way, either by the confirmation of the report, or by the refusal of the drainage court to confirm the same. Construing section 17 altogether, it is clear that the Legislature intended to confer upon "any party aggrieved" the right of appeal to the superior court, since the last clause of that section declares explicitly:

"That the right of appeal shall obtain in all cases of dispute as now provided by law, and in accordance with this act."

This broad and sweeping provision must be construed to literally cover "all cases of dispute," or else it would amount to mere idle statement and would be surplusage only.

It is true this clause provides that the right of appeal shall obtain "as now provided by law, and in accordance with this act," and at the time the act was passed there was no general provision of law guaranteeing or providing for such a right of appeal, so that the right of appeal referred to must exist "in accordance with this act," or not at all. Taking the section as a whole, it appears to us that the evident intention of the Legislature was to allow the right of appeal in all cases of dispute to any party aggrieved, "within 10 days after the confirmation of the assessors' report," which we construe to mean within ten days from the time the court rendered judgment upon the question of confirming the assessors' report, irrespective of whether that judgment was for or against confirmation; and we further conclude that the language in the last clause of this section, "as now provided by law, and in accordance with this act," means that the right of appeal shall be exercised as provided under the existing general law, except in so far as that law may be modified by this act; for instance, the right of appeal to be exercised within ten days, instead of within four days, as provided by the Civil Code, §§ 5000, 5001.

It is urged with much force in behalf of the defendants in error that, inasmuch as section 16 of the act provides that in the event "the court finds that the cost of construction, together with the damages assessed, is greater than the resulting benefit that will accrue to the lands affected, the court shall dismiss the proceedings at the cost of the petitioners," that it was the intention of the Legislature to make the action of the drainage court in refusing to confirm the report of the "viewers" and in dismissing the petition for the establishment of a drainage district absolutely final and conclusive. The act provides that the clerk of the superior court, together with the board of commissioners of roads and revenues, or, if there be no such board, with the ordinary of any county of the state of Georgia, shall constitute the drainage court. The original act of 1911 further provided (section 25) that, where any public ditch, drain, or public water course established under the provisions thereof crosses a public highway, the actual cost of constructing the same across the highway, "or removing old bridges or building new ones," should be paid from the fund of the drainage district; but by the amendment of 1913 (Acts 1913, pp. 85, 86, § 3) it is provided that the cost of building all new bridges under the act of 1911 "shall be borne and paid for by the county." So it appears that when the drainage board, under the law as amended, has under advisement the question of whether the benefits from a particular drainage project will exceed the cost thereof, the court (composed partly of the county officers having in charge its fiscal affairs) must in many cases consider the advisability of building new bridges at the cost of the county which may or may not be of general advantage to the citizens of the county. It might happen that the cost of certain new bridges made necessary by the adoption of some drainage project would far exceed the gross value of all the lands to be benefited by new canals, ditches, etc., and in such a case the county authorities constituting the drainage court, and especially the particular members of that court upon whom devolved the management of the revenue of the county, might well hesitate to approve such a project, and might dismiss the petition for this reason.

Generally speaking, the county commissioners (or the ordinary, where there are no such commissioners) have a very broad discretion in determining whether or not they will build bridges, erect courthouses, or construct other public improvements; and this discretion, as well as their discretion in levying taxes for any such purpose, will not be disturbed by the superior court, unless plainly and manifestly abused, notwithstanding that court has express authority to review the levy of taxes for such purposes by mandamus or injunction, as the nature of the case may require, as provided in section 505 of the Civil Code. Gaines v. Dyer, 128 Ga. 585, 58 S. E. 175. In reference to the erection of public buildings in the various counties of this state, the Supreme Court said, in the case of Commissioners v. Porter Mfg. Company, 103 Ga. 613, 617, 30 S. E. 547, 549:

"The discretion vested in the county authorities must be, from the nature of the case, a broad one, and therefore the reviewing power of the judge of the superior court must be exercised with caution, and no interference had unless it is clear and manifest that the county authorities are abusing the discretion vested in them by law."

Again, in Anderson v. Newton, 123 Ga. 512, 521, 51 S. E. 508, 512, the court said:

"Equally clear is it that the court correctly held that the board of county commissioners was vested with discretionary power with respect to deciding whether or not the erection of a new courthouse was a present and urgent public necessity, and, if so, upon what side it should be built."

So, it would seem, by analogy of reasoning, that the question whether or not a drainage project which carried with it the necessity for new bridges to be erected in the drainage district at the expense of the county should be approved and confirmed, or altogether rejected and dismissed, by the drainage court, composed of county officials, would be a county matter coming perhaps within their discretion, and that such discretion would not be subject to review, unless palpably abused. We think undoubtedly this would be correct if it were not for the express declaration in the act of 1911 providing for an appeal to the superior court, whereby the entire issue as to the comparative cost and benefit of a drainage plan, including all necessary bridges, etc., can be settled in a de novo investigation.

Giving section 17 the construction we have given it, another connected question remains to be determined. Section 16 provided that, if the court finds that the cost of construction, etc., is greater than the resulting benefits which will accrue to the lands affected, the court shall "dismiss" the proceedings, and the query naturally suggests itself: How may a case which has been dismissed, and therefore entirely thrown out of court, be appealed to another tribunal? In other words, What is there to appeal from, if, in consequence of the judgment dismissing the case, nothing remains in court? It has been many times decided, however, by the Supreme Court that, where a decision in a justice's court is to the effect that the plaintiff's evidence is insufficient to uphold the action, notwithstanding the judgment be one dismissing the suit, it is, in fact, an adjudication upon the merits as to the matter of fact involved in the trial, and the plaintiff is entitled nevertheless to an appeal to a jury. See Savannah, Florida & Western Ry. Co. v. McMillan, 95 Ga. 504, 22 S. E. 273. It is true that in Toole v. Edmondson, 104 Ga. 776, 783, 31 S. E. 25, 28, Justice Cobb said:

"When the effect of the ruling is to dismiss the case or entire proceeding, the exclusive remedy is certiorari, without regard to the amount involved."

But as to that case the Supreme Court, in Hollis v. Doster, 113 Ga. 115, 118, 38 S. S. 308, 309, said:

"In Toole v. Edmondson, 104 Ga. 783 [31 S. E. 28], Mr. Justice Cobb laid down certain 'rules to determine whether certiorari or appeal is the proper remedy.' In formulating these rules, he used several expressions, the substance of which was that there could be no appeal where the effect of the decision appealed from was to dismiss the case. These expressions must, in the light of the ruling in McMillan's Case and the principle which underlies it, be understood as conveying the idea that an appeal will not lie where the case is, without trial, disposed of by a judgment of dismissal based *upon a view of law or practice entertained by the trial judge or justice* [italics ours], the logical result of which, whether the view itself be correct or incorrect, is to take the case out of court by the dismissal route. Dismissal by the court before or without trial leaves no case to be dealt with by appeal, but dismissal after trial, whether as the result of evidence or for lack of evidence, will not cut off or impair the right of appeal."

Again, the court says in the same case:

"When a case involving a disputed issue of fact is tried by a justice of the peace in a justice's court, and he decides that, under the evidence submitted, the plaintiff is not entitled to recover, he should render a judgment for the defendant; but if, instead of so doing, he dismisses the action, the plaintiff may nevertheless enter an appeal, for the decision, notwithstanding the form of the judgment, is, in substance, an adjudication on the merits as to the matter of fact in controversy at the trial."

In the same case the whole subject is very fully and lucidly discussed, and in Neal v. Fox, 114 Ga. 164, 39 S. E. 860, the ruling in that case is referred to and approved.

From the very nature of the case it is apparent that, before the drainage court could determine whether the particular drainage project would be beneficial or not, it was necessary for that court to consider the particular evidence affecting this question, which the law itself authorizes the court to receive; and it is made the express duty of the court, before confirming the report of the assessors or dismissing the proceeding at the cost of the petitioners "to carefully review the report of the viewers and the objections filed thereto"; so that a dismissal under such circumstances is, after all, an adjudication on the merits of the question before the court for solution; and hence, under the rules suggested in the various cases above referred to relating to dismissals in justice's courts where the evidence was considered, the judgment of the drainage court in dismissing such a petition is necessarily an adjudication on the merits, and is therefore subject to appeal.

[3] The only embarrassment here arises from the use of the word "dismissal" in the act itself, but, when we consider section 17, providing, as we hold, for the right of appeal in all cases of dispute, and expressly authorizing "any party aggrieved to enter his appeal to the superior court," we are constrained to the view that the "dismissal" contemplated and authorized in section 16 is, after all, only nominally a dismissal, and, in fact and in law, is a judgment on the merits.

We see no reason why a jury, composed of citizens who may be assumed to have at heart the interest of their home county, who, under every view of section 17 of the act of 1911, would be authorized to pass upon the contentions of one objecting to the confirmation of a drainage report affecting his interest, could not equally well be trusted to determine an appeal brought by those seeking to establish such a district; and it is clear to us that the intention of the Legislature was to accord to all parties equal rights, and we therefore hold that the trial judge erred in dismissing the appeal.

[2] One of the objections urged by the defendants was that the superior court was not vested with appellate jurisdiction to hear and determine the issues raised by the pleadings in the case, or to render any judgment establishing such a drainage district as is contemplated by the act of 1911, and no legal and enforceable judgment could be molded upon a verdict in behalf of petitioners seeking the drainage district. The superior court, on appeal, would take up the only question passed upon by the drainage court and the only question to be determined in the de novo investigation in the superior court—to wit, the feasibility of the drainage scheme, its economic value, etc.; and, if a jury found in favor of the project and against the judgment of the drainage board (where the petition had been dismissed by that board), a judgment might be there entered up accordingly, and, upon the transmission of this judgment to the drainage court, that court could thereupon proceed to appoint a board of drainage commissioners, and do such other acts as it would have been authorized to do had its original decision been in favor of confirmation. So, also, if the drainage court confirmed any particular drainage project, any party aggrieved by the confirmation might take a judgment of the drainage court to the superior court by appeal, and, upon a verdict of a jury against the project, judgment might be entered up in the superior court and transmitted to the drainage court, which could then proceed to collect, by proper proceedings, any costs, etc., outstanding.

Judgment reversed.

BROYLES, J., not presiding.

(15 Ga. App. 657)

CLEVELAND-MANNING PIANO CO. v. STEWART. (No. 5594.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. ATTACHMENT ⇐125 — APPLICATION—SUFFICIENCY AGAINST DEMURRER — INVALID GROUND.

An attachment is not subject to general demurrer if it contains one valid ground of attachment, although it contains another ground which affords no basis for attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 344–350; Dec. Dig. ⇐125.]

2. APPEAL AND ERROR ⇐1078—ASSIGNMENT OF ERROR—ABANDONMENT.

The ruling upon the defendant's plea to the jurisdiction, not being argued in the brief, must be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. ⇐1078.]

3. LANDLORD AND TENANT ⇐23, 42—PRINCIPAL AND AGENT ⇐100—AUTHORITY OF AGENT — RENTAL CONTRACT — EXECUTION—CONSTRUCTION.

In the absence of an express understanding to the contrary, a contract for the rental of a storehouse is to be presumed to extend for a period of one year (Civ. Code 1910, § 3708); and, since a contract of rental for a period not exceeding 12 months may rest in parol, an agent in general charge of his principal's business may make a binding contract of rental with another person for a period of 12 months, although authority to make the contract has not been conferred in writing, and although the agent is employed only by the month.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 60, 106; Dec. Dig. ⇐23, 42; Principal and Agent, Cent. Dig. §§ 262–273, 345, 364, 368–373; Dec. Dig. ⇐100.]

4. TRIAL ⇐141 — DIRECTION OF VERDICT — EVIDENCE.

When, upon a review of all the evidence, with the reasonable deductions therefrom, it is manifest that there is but one finding which can be legally supported, it is not reversible error to direct a verdict. Davis v. Kirkland, 1 Ga. App. 5–10, 58 S. E. 209.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. ⇐141.]

Error from City Court of Carrollton; James Beall, Judge.

Action between the Cleveland-Manning Piano Company and W. J. Stewart. From the judgment the Piano Company brings error. Affirmed.

J. O. Newell and Roop & Fielder, all of Carrollton, for plaintiff in error. S. Holderness, of Carrollton, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

(15 Ga. App. 659)

HALL v. HOLMAN et al. (No. 5610.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⇐957—JUDGMENT ⇐139 — DISCRETIONARY RULING — DEFAULT — SETTING ASIDE.

Whether a judgment by default will be set aside or not is a question addressed to the sound discretion of the court by which it was rendered, and this court will not, as a general rule, interfere, unless such discretion has been grossly abused. Lambert v. Smith, 57 Ga. 25.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. ⇐957; Judgment, Cent. Dig. §§ 265–268; Dec. Dig. ⇐139.]

2. JUDGMENT ⇐143 — DEFAULT — SETTING ASIDE—GROUNDS.

That the defendant failed to file a plea at the appearance term "on account of a misunderstanding between client and counsel is unfortunate, but the fact presents no legal reason why the plaintiff, who acted but in the exercise of his right, should have the legal results of his suit set aside and again enter the field of litigation." Moore v. Kelly, 109 Ga. 798, 802, 35 S. E. 168, 169.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272–291; Dec. Dig. ⇐143.]

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action by J. C. Holman and another against W. A. Hall. Judgment for plaintiffs, and from a refusal to set same aside, defendant brings error. Affirmed.

Rambo & Wright, of Blakely, for plaintiff in error. Byron R. Collins, of Blakely, for defendants in error.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

(15 Ga. App. 706)

MATHEWSON v. SHEWMAKE. (No. 5773.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. EXEMPTIONS ⇐48—LABORERS' WAGES—"LABORER."

Primarily, a photographer employed by a newspaper to take pictures, in company with and under the direction of a reporter, is not a "laborer" in the sense in which that word is used in section 5298 of the Civil Code of 1910, even though, in the discharge of his duties, he may do some amount of manual labor in carrying his camera, and otherwise, and although, when not engaged in taking pictures, he is employed in repair work on all of the cameras used by the employés of the newspaper. Oliver v. Macon Hardware Co., 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300; McPherson v. Stroup, 100 Ga. 228, 28 S. E. 157; Kline v. Russell, 113 Ga. 1085, 39 S. E. 477; Ensel v. Adler, 110 Ga. 326, 35 S. E. 334; Howell v. Atkinson, 3 Ga. App. 58, 59 S. E. 316.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 64–72; Dec. Dig. ⇐48.

For other definitions, see Words and Phrases, First and Second Series, Laborer.]

2. APPEAL AND ERROR ⇐1002—REVIEW—VERDICT—EVIDENCE.

There was some evidence to authorize a finding that the services of the plaintiff in error consisted mainly in doing work requiring mental skill, rather than work demanding merely physical power; and that being so, even if the preponderance of the evidence was on the side of the plaintiff in error, this court has no jurisdiction to grant a new trial on the ground that the verdict was contrary to the evidence.

Blackshear Manufacturing Co. v. Stone, 8 Ga. App. 661 (1), 70 S. E. 29.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. ⟸ 1002.]

3. DENIAL OF NEW TRIAL APPROVED.

There was no error of law committed by the trial court, and the overruling of the motion for a new trial is affirmed.

Error from Municipal Court of Atlanta.

Action between T. R. Mathewson and Claude Shewmake. From the judgment, Mathewson brings error. Affirmed.

Geo. G. Osborne, and R. H. Lindsay, both of Atlanta, for plaintiff in error. Horton Bros., of Atlanta, for defendant in error.

BROYLES, J. Affirmed.

(15 Ga. App. 660)

## CENTRAL OF GEORGIA RY. CO. v. DOZIER. (No. 5630.)

(Court of Appeals of Georgia. Feb. 8, 1915.)

*(Syllabus by the Court.)*

REVIEW ON APPEAL.

Viewing the charge of the court as a whole, there is no substantial merit in any of the assignments of error. A verdict in favor of the plaintiff was authorized by the evidence as the allegations of the petition were substantially proved as laid (Dozier v. Central of Georgia Ry. Co., 12 Ga. App. 753, 78 S. E. 469), and the verdict returned was not excessive. The court therefore did not err in overruling the motion for a new trial.

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by J. S. Dozier against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Saffold & Jordan, of Swainsboro, for plaintiff in error. Horace M. Holden, of Athens, and T. N. Brown, of Swainsboro, for defendant in error.

WADE, J. Judgment affirmed.

BROYLES, J., not presiding.

(15 Ga. App. 680)

## BELL v. ATLANTA TELEPHONE & TELEGRAPH CO. (No. 5675.)

(Court of Appeals of Georgia. Feb. 8, 1915.)

*(Syllabus by the Court.)*

1. EXECUTION ⟸168—VALIDITY — AFFIDAVIT OF ILLEGALITY.

A second affidavit of illegality is not maintainable, if based on the same facts that the first affidavit was based upon; and the fact that the first affidavit was dismissed, without a trial of the issues raised or attempted to be raised by it, does not make an exception to the rule. Civ. Code 1910, § 6288; Hurt v. Mason, 2 Ga. 367; Leonard v. Collier, 53 Ga. 388 [illegible]; Burnett v. Fouche, 77 Ga. 550; Fuller v. Vining, 87 Ga. 600, 13 S. E. 635; Baker v. Smith, 91 Ga. 143 (2), 16 S. E. 967; Binder v. Ragsdale, 100 Ga. 400, 28 S. E. 165; Cone Export & Commission Co. v. McCalla, 113 Ga. 17, 38 S. E. 336.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 487, 490–496; Dec. Dig. ⟸168.]

2. AFFIDAVIT OF ILLEGALITY—DISMISSAL.

There was no error in dismissing the second affidavit of illegality, nor in overruling the motion for a new trial.

Error from Municipal Court of Atlanta.

Action by J. R. Bell against the Atlanta Telephone & Telegraph Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Chas. Montgomery, Jr., of Atlanta, for plaintiff in error. Dillon, Burress & Kobat, of Atlanta, for defendant in error.

BROYLES, J. Judgment affirmed.

(15 Ga. App. 671)

## GARTRELL et al. v. JOHNS. (No. 5648.)

(Court of Appeals of Georgia. Feb. 8, 1915.)

*(Syllabus by the Court.)*

1. PLEDGES ⟸30—COLLATERAL—COLLECTION —QUESTION FOR JURY.

The mere fact that one who receives a promissory note as collateral security is bound to use ordinary diligence to collect it did not authorize the trial judge to direct a verdict for the full amount of the note sued on, where the evidence showed that the note was given solely as collateral security, and that the debt secured thereby had been reduced below the amount of the note. Where the evidence as to the amount due is contradictory, the amount of the judgment is for the jury to determine.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 75–85; Dec. Dig. ⟸30.]

2. PRINCIPAL AND SURETY ⟸112—OBLIGATION OF SURETY—TERMINATION OF INDEBTEDNESS.

The obligation of the surety is accessory to that of his principal, and, if the obligation of the principal becomes extinct, that of the surety ceases of course. Civ. Code 1910, § 3589. Hence the balance due by a principal on a contract of suretyship must determine the amount due by the surety thereon. Norris v. Pollard, 75 Ga. 358.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 226–234; Dec. Dig. ⟸112.]

Error from City Court of Washington; W. A. Slaton, Judge Pro Hac.

Action by E. S. Johns against J. L. Gartrell and others. Judgment for plaintiff, and defendants bring error. Reversed.

F. W. Gilbert and I. T. Irvin, Jr., both of Washington, Ga., for plaintiffs in error. Colley & Colley, of Washington, Ga., for defendant in error.

RUSSELL, C. J. [1, 2] Under the well-settled principle ruled in Mauck v. Atlanta Trust & Bkg. Co., 113 Ga. 242, 38 S. E. 845, one who receives promissory notes or other choses in action as collateral security is bound to use ordinary diligence to collect them, and "where an indorser of a note is sued upon it, if the plaintiff has received any

collateral security for its payment, the burden of proof is on the party sued to show that such collateral security has been improperly disposed of." Vose v. Yulee, 4 Hun (N. Y.) 629. But we think the court erred in the present case in directing a verdict against the defendant sureties for the full amount of the contract. It is true that there was no proof to show that the collateral security was improperly disposed of, but the error of the court consisted in directing a verdict against the sureties for the full amount of the promissory note, when the sureties had limited their indorsement by an express stipulation, which was not disputed, to an amount which the evidence disclosed to be less than the $100 evidenced by the note in suit. According to the evidence, D. C. Gartrell owed E. S. Johns a certain sum of money. Johns represented to J. L. Gartrell and B. W. Gartrell that this amount was $153.90, and upon his express statement they contracted to secure D. C. Gartrell's indebtedness of $153.90 and expressly limited their obligation of suretyship to that amount. Under the rulings in Matheson v. Jones, 30 Ga. 306, 76 Am. Dec. 647, and Underwood v. Bass & Heard, 1 Ga. App. 623, 57 S. E. 953, the court properly admitted evidence upon the subject, both written and parol, and it was clearly shown that, in becoming sureties, J. L. and B. W. Gartrell did not undertake or promise to pay more than $153.90. The plaintiff himself concedes this to be true, and, of course, his testimony that he afterwards ascertained that D. C. Gartrell owed him a larger amount, and his attempt upon that ground to increase the liability of the sureties, is not important; for the contract could not be altered by any mistake which he himself made, nor their contract amplified because he ascertained that D. C. Gartrell did owe him a larger sum than he supposed at the time he contracted with the sureties.

A contract of suretyship is stricti juris. The evidence as to an agreement that any overplus after the payment of the $153.90 should be paid to F. E. Gartrell, personally or as agent for D. C. Gartrell, was entirely irrelevant and immaterial, because there is no evidence that J. L. and B. W. Gartrell were parties to this agreement. There was no evidence that the sureties were interested in the payment of any overplus after the $153.90 was discharged, and certainly no evidence to indicate that they assumed any liability for the payment of the overplus in excess of the $153.90 to F. E. Gartrell, personally or as agent for D. C. Gartrell. The case then stands thus: It was the duty of the plaintiff to collect from the maker of the collateral note, for the benefit of whoever might be concerned, the entire amount of principal and interest due thereon; but the plaintiff was entitled to recover from the sureties only so much as would discharge their limited contract of suretyship and enable him to enjoy the fruits of his contract as originally made. The sureties assumed no liability to secure the collection of the remainder due on the note sued upon, after the debt of D. C. Gartrell, amounting to $153.90, was discharged, and certainly did not undertake to guarantee the collection of the balance should the maker of the note default in payment thereof. The sureties were induced to sign this note, which had been previously executed, by the statement that their liability would be confined to $153.90. And, from the statements made, it was apparently anticipated that the other notes, amounting to $135, would be easily collected, because it was uncontradicted that the plaintiff stated to each of the sureties that, when the notes for $135 were paid, they would only have to pay $15 or $20 on the note here involved. It is not contradicted that the plaintiff has received $135 from the other notes, thereby leaving a balance of $18.90 as principal upon the original obligation of the sureties. Under the express statements made by the plaintiff to induce the sureties to indorse the note, they were never at any time liable for $100 upon the note signed by Horton, if the other two notes, also given as collateral, were paid. The notes amounting to $135 having been paid, the liability of the sureties, under the contract, was only $18.90 upon the note sued on. Under the explanation afforded by the parol evidence, the indorsement of these sureties amounted to nothing more, in the event the $135 was paid, than an indorsement in the sum of $18.90. In this view of the matter, the court, under the undisputed evidence, might have safely directed a verdict in favor of the plaintiff against the principal defendant, Horton, for the full amount of the note, and against the sureties for $18.90, with interest, but erred in directing the verdict to which exception is taken.

Judgment reversed.

BROYLES, J., not presiding.

(75 W. Va. 468)

## MORRISON et al. v. LEACH et al.

(Supreme Court of Appeals of West Virginia. Jan. 12, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⟸356—TIME FOR APPEAL.

An appeal in a cause, though within time as to some decrees, cannot bring up for review any appealable decree as to which the time fixed by law for appeal has expired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. ⟸356.]

2. EVIDENCE ⟸332—JUDICIAL PROCEEDINGS—RECORD.

Where a petition is by leave filed in a cause as between co-defendants, for the assertion of an equitable right arising from former proceedings and decrees therein, the preceding record may be looked to in support of the petition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1237–1246; Dec. Dig. ⟸332.]

3. EVIDENCE ⟸208—ADMISSIONS—PLEADINGS.

On the hearing of an issue in chancery between co-defendants to a cause, made by pleadings allowed subsequent to a final determination of the main issues, the answer of either of the parties on the former issues may be read as an admission against him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713–725; Dec. Dig. ⟸208.]

Appeal from Circuit Court, Ritchie County.

Suit by C. P. Morrison and others, partners, etc., against Minerva Leach, executrix, etc., and others. From the decrees, defendant Parkersburg National Bank appeals. Appeal dismissed as to one decree, and other decrees affirmed.

See, also, 55 W. Va. 126, 47 S. E. 237.

Van Winkle & Ambler, of Parkersburg, for appellant. Wm. Beard, of Parkersburg, for appellees.

ROBINSON, J. By this appeal the Parkersburg National Bank complains of a decree whereby it was restrained from collecting a certain note through the enforcement of a vendor's lien and was ordered to surrender the note to Minerva Leach, the owner of the property on which the lien existed.

The note was one executed by Anna Leach to Minerva Leach as executrix under the will of Thompson Leach, deceased. It represented a part of the consideration for real estate sold by the executrix to Anna Leach in the administration of the estate. This same real estate, the Home Place, was afterwards conveyed by Anna Leach to Minerva Leach individually, and the latter assumed to pay the note.

Thompson Leach at the time of his death was indebted to the Parkersburg National Bank. Johnson and Buckley were endorsers for him on the paper representing the indebtedness. They and the executrix estimated that the estate would pay seventy-five per cent. of the decedent's debts. To arrange the indebtedness due to the bank, the executrix turned over to Johnson and Buckley a number of land notes in her hands as assets of the estate, among them the Anna Leach note. Seventy-five per cent. of the indebtedness, which it was supposed the estate was sufficient to pay, was apportioned to the estate, and the executrix executed a note covering the same. The remaining twenty-five per cent. was apportioned to Johnson and Buckley, who were endorsers on the original notes, and as such liable for the remaining twenty-five per cent. They executed notes covering this remaining twenty-five per cent. As to this liability on them, they were of course creditors of the estate. The notes, assets of the estate, which the executrix had turned over to Johnson and Buckley, were deposited by them with the bank as collaterals to all this indebtedness in its new shape. Collections were made by the bank on these notes, and the proceeds applied to the indebtedness. It will be observed later, however, that the bank claims that the Anna Leach note, which remains uncollected, passed to Buckley from the executrix as a payment on a judgment lien debt which he held against the estate, and as to which he was entitled to priority, and that this particular note was taken over by the bank from Buckley on his part of the indebtedness in its new form.

After these transactions, in 1897, Morrison and others, creditors of Thompson Leach, brought suit charging the executrix with a devastavit, and seeking a proper settlement of the estate. The Parkersburg National Bank, Johnson, and Buckley were made parties to this suit, and it was charged that the executrix had paid to them sums largely in excess of their proper pro rata shares as creditors of the estate. The cause proceeded to a decree, entered on February 23, 1899, adjudging that the executrix was liable to the creditors in the sum of $3,878.72 with interest; that the Parkersburg National Bank had received $1,668.36 more than its pro rata share, which, with interest, should be refunded by it, in the amount of $2,122.38, as a credit on the amount found due from the executrix; and that Johnson and Buckley jointly should pay the sum of $843.04, and Johnson individually the sum of $788.02, as a further credit on the amount decreed against the executrix. The decree was based on the report of a commissioner, made in the cause, wherein it had been ascertained that the estate would pay only sixty per cent. of the indebtedness instead of seventy-five per cent. The decree, therefore, in effect held that the bank, Johnson and Buckley jointly, and Johnson individually should account for the excess of fifteen per cent. which they had received as creditors from the assets of the estate.

The decree of February 23, 1899, contained the following provision:

"Leave is given to the defendant Minerva Leach to apply to this court in this cause for

such relief as may be proper upon her claim for an equitable set off against the note of Anna Leach for purchase money assumed by said Minerva Leach, upon the Home Place."

Minerva Leach had been charged, in the settlement of the estate made by the commissioner, with the Anna Leach note as assets. The same was therefore embraced in the finding of the amount against her as due to the creditors. When the amount found due from the executrix should be paid to the creditors, as it afterwards was, the Anna Leach note would be paid to the estate. Minerva Leach having individually assumed the obligation to pay the Anna Leach note to the estate, in equity she was entitled to set off her individual obligation to pay this note with the amount of the same charged against her as assets, whenever those assets were duly accounted for by payments to the creditors of the estate. The chancellor noticed that this right to Minerva Leach would arise when the amount decreed against her as executrix was duly paid. It was a right contingent upon compliance with the decree. Necessarily, therefore, it could not be vindicated and enforced in the decree itself, and the assertion of the right was properly postponed by the leave granted until Minerva Leach should show that the equity matured to her by full compliance with the terms of the decree.

The decree being one against the Parkersburg National Bank as on a bill taken for confessed, the bank moved to set aside the same under chapter 134 of the Code (secs. 4975–4980). In July, 1900, the motion was sustained and the decree set aside. The bank then demurred, answered, and filed exceptions to the report of the commissioner, and the cause proceeded to a decree in October, 1901, denying the plaintiffs in the cause, creditors of the estate, any such relief against the bank as had been given by the decree which was set aside.

From the decree setting aside the decree of February 23, 1899, Minerva Leach appealed, assigning that she had been given no notice of the motion to set aside the decree. This court reversed the decree which set aside the former decree. 55 W. Va. 126, 47 S. E. 287. The decree of February 23, 1899, was thus reinstated. Later the bank was compelled to comply with the terms of that decree. It paid back to the estate the amount in the decree adjudged against it. It may be that the decree was wrong. Though the decree recites that the bank was served with process, the bank insists that it was never so served, and that the bill could not be taken for confessed and a decree entered thereon. But, by the decision of this court, the motion to reverse the decree proved abortive, because the bank had failed to give notice of that motion to Minerva Leach, an opposite party to the motion. Before this was determined, unfortunately for the bank, the time had gone when any error in the decree could be reached and any wrong therein corrected. By the decision of this court upon the appeal to which we have referred, and by the force of circumstances as to limitations under the law, the decree of February 23, 1899, was left standing as valid and final.

The amount decreed against the executrix was fully paid by the bank, Buckley, and herself to the special commissioner to whom the decree directed it to be paid, and was disbursed to the creditors. The bank later sought to collect the Anna Leach note, by a suit for the enforcement of the vendor's lien securing the same. Thereupon, Minerva Leach filed her petition in the Morrison suit under the leave given her by the decree of February 23, 1899, praying that the bank's suit on the note be restrained and that she be relieved from the payment of the note, out of the equitable considerations in her favor pertaining to the same, which we have hereinbefore stated. The bank answered the petition, asserting that it took the note free from any such equity as Minerva Leach claimed. It alleged that the note was assigned to it by Buckley, and that the note had been assigned to him by the executrix as part payment of his preferred claim against the estate. Its answer went further and sought to surcharge and falsify the accounts of the executrix and to call her to account for assets which it alleged she had never accounted for. On November 19, 1909, certain exceptions by Minerva Leach to the bank's answer were sustained, and portions of the answer were rejected. Besides a general replication to the answer, the allegations therein for affirmative relief were met by a special reply.

The proceeding on the petition of Minerva Leach thus stood from the November Term, 1909, until the 14th day of February, 1913, on which latter date the court decreed the relief sought by Minerva Leach on her petition and denied the relief prayed for by the bank in its answer.

[1] This appeal seeks to bring up for review the decree of February 23, 1899, granting relief to the plaintiff creditors on their bill, the decree of November 19, 1909, sustaining the exceptions to the bank's answer to the petition of Minerva Leach, and the decree of February 14, 1913, finally adjudicating the issues raised by that petition. The decree of February 23, 1899, is not appealable herein. It is a final decree resting upon the determination of wholly different issues than those involved in the proceeding on the petition of Minerva Leach. As to the issues settled by that decree, it is final. The petition of Minerva Leach, though filed in the cause by leave granted therein, was not a continuation of the litigation of the issues settled and determined by the decree of February 23, 1899. Neither could the filing of that petition nor the bank's answer thereto reopen those issues. The finality of

the decree of February 23, 1899, might have been affected in due time by a proper motion to reverse in the court below, other appellate process, or bill of review, but it could not be affected by the institution of a proceeding under the leave granted Minerva Leach as to a wholly independent matter from any determined by the decree. All matters determined by the decree were foreclosed, except as to bill of review or appellate process.

Now, the decree of February 23, 1899, was final in the sense that it was appealable. About this there can be no question. It adjudicated the principles of the cause, rightly or wrongly. No appeal therefrom having been taken by the bank within the two years limitation for appeal, as the law then was, this appeal can not bring up for review that decree. An appeal in a cause, though within time as to some decrees, can not bring up for review any appealable decree as to which the time fixed by law for appeal has expired. Hoy v. Hughes, 27 W. Va. 778; Tiernan's Adm'r v. Minghini's Adm'r, 28 W. Va. 314; Shumate's Ex'rs v. Crockett, 43 W. Va. 491, 27 S. E. 240. A bar is fixed by the law as to appeals from appealable decrees. After the time fixed for an appeal has expired, the appellate court has no jurisdiction to review. The appeal herein was improvidently awarded as to the decree of February 23, 1899.

[2] In the briefs there is discussion as to whether the petition proceeding was a continuation of the original Morrison suit. In a way it was a continuation thereof. It was a continuation of the cause between codefendants thereto, independently of what had been theretofore finally decreed upon issues entirely distinct from those that afterwards arose and were presented by the petition proceeding. It was a proceeding on an alleged equitable claim to which Minerva Leach became entitled in view of the satisfaction of the decree of February 23, 1899. It therefore grew out of and was based on the former proceedings in the cause. It was connected with those former proceedings by the leave given for its institution in the final decree by which the former issues were determined. But, as we have indicated, it was a tangent from the former proceedings in the cause, affecting nothing by them decided. The adjudication and compliance with it, both shown by the former record, are pointed to by the petitioner as vouching the equity which the petitioner claims. Thus it is proper to look to the preceding record, to which both the petitioner and the bank were parties, in ascertaining whether such equity as petitioner asserts actually arises.

These considerations bring us near to the end of this case. For, the record of the Morrison cause plainly establishes that Minerva Leach is entitled to the equity which she claims. It proves the case made by her petition. The decree of February 23, 1899, the settlement of the estate on which it was based, and the receipts and disbursements under the decree prove that Minerva Leach as executrix accounted to the estate for the Anna Leach note just as if she individually had paid the same to herself as executrix. In equity she should not be made to pay it again.

[3] We do not overlook the allegation of the bank that the executrix had assigned the note to Buckley as a payment on his preferred debt due from the estate and that Buckley had then assigned it to the bank. The record of the former proceedings to which we may look—and nothing additional on this score was offered by the bank—does not sustain the allegation. Besides, it is inconsistent with the former answer of the bank in the cause. The bank, in answering the original Morrison bill, after the decree of February 23, 1899, had been set aside and before the same was reinstated by the force of the decision of this court, upon issues then material as between it and the creditors, plaintiffs in the cause, averred that the Anna Leach note was transferred to it, not by Buckley as it now claims, but by Johnson and Buckley in part discharge of the indebtedness of Thompson Leach. If the note so came to the hands of the bank, it certainly did not come thereto in discharge of Buckley's debt to the bank as the answer in the petition proceeding asserts. As between the plaintiff creditors and the bank this admission was conclusive. Hogg's Eq. Pro. 449. As between the bank and Minerva Leach, upon the subsequent issue, it is at least evidence. The bank seems to have made the admission advisedly. It offers not a word of evidence in explanation thereof, or to show that the same was made through mistake or inadvertence. An admission in an answer may be evidence in a wholly different cause. 2 Wigmore on Evidence, sec. 1064; 11 Amer. & Eng. Enc. of Law, 449. Certainly on the hearing of an issue in chancery between co-defendants, arising by proper pleadings filed subsequent to a final determination of the main issues, the answer of either of the parties on the former issues may be read as an admission against him.

By the decree of February 23, 1899, the bank was adjudged to have received, from the notes which the executrix through Johnson and Buckley turned over to it, more than its pro rata share as a creditor, and was made to pay back the excess, all of which may have been wrong, but has long been foreclosed. It can not, after having received its proper share of the estate as adjudged by the foreclosed decree, now appropriate to its use the Anna Leach note and thereby get more than was adjudged to it.

We have stated that the bank's answer to the petition of Minerva Leach sought to surcharge and falsify her accounts as executrix and to call her to further and proper account-

ing for the estate. But the allegations for affirmative relief in this particular were fully met by the special reply, and, though the cause rested more than three years thereafter, the bank offered nothing in support of the allegations.

It has seemed unnecessary to review the decree of November 19, 1909, brought up by the appeal, since nothing is urged against it, and upon the whole the sustaining of the exceptions to the answer was immaterial.

The appeal in so far as it relates to the decree of February 23, 1899, will be dismissed as improvidently awarded. The other decrees complained of will be affirmed.

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(100 S. C. 517

## HUNTER v. HUNTER. (No. 9099.)

(Supreme Court of South Carolina. May 7, 1915.)

INSURANCE ⊂⊃784—FRATERNAL INSURANCE—BENEFICIARIES.

Under Civ. Code 1912, § 2752, requiring that payment of death benefits be confined to wife, husband, or relatives by blood, and permitting members to change beneficiaries in accordance with regulations of benefit associations, a member, designating in the certificate a beneficiary, may, by will and declaration in extremis, name his mother as sole beneficiary, the one named having no vested interest in the certificate before it became payable, and the association not regulating the manner of designating or changing the beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1950–1954; Dec. Dig. ⊂⊃784.]

Appeal from Common Pleas Circuit Court of Laurens County; F. B. Gary, Judge.

Actions by Carrie Hunter and by Laura Hunter against the Grand Lodge, Knights of Pythias, of South Carolina, in which, on defendant depositing in court the amount demanded, it was absolved from further connection in the case, and an order passed directing issue between Carrie Hunter, designated as plaintiff, and Laura Hunter, as defendant. From a judgment for Laura Hunter, Carrie Hunter appeals. Affirmed.

The following is the opinion of Presiding Judge F. B. Gary:

These two cases were, by agreement of counsel, tried together before me; a jury trial being waived. The defendant filed answers to both complaints admitting its obligation to pay some one. The defendant deposited with the clerk of this court the amount for which the several plaintiffs contend, to be paid by order of court to whom it should be paid. The defendant was thereupon, by a consent order of the court, absolved from further connection with the case. The order likewise directs that the issues be passed upon by me, and that in the trial Carrie Hunter shall be regarded as the plaintiff or moving party, and that Laura Hunter is regarded as the defendant.

The evidence was presented in open court. There were several objections to the relevancy or admissibility of some of it. The objections were not then passed upon, but I have since indicated, on the margin of the testimony furnished me by the stenographer, whether the objection was sustained or overruled.

Carrie Hunter, the wife of Tom Hunter, deceased, claims that she is the beneficiary under a policy of insurance issued to Tom Hunter by the Grand Lodge, Knights of Pythias, of South Carolina, a fraternal benefit order whose membership is confined to the colored people. She claims that she should receive the money deposited with the clerk of this court. Laura Hunter, the mother of Tom Hunter, claims that she is the beneficiary by the terms of Tom Hunter's will, and she claims that she should be paid the amount deposited with the clerk. The question for determination is: To whom should the money be awarded?

Section 2752 of the Civil Code of South Carolina provides to whom death benefits may be paid by Fraternal Benefit Associations as follows: "The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, ascending or descending, stepfather, stepmother," etc. Within the above restrictions, each shall have a right to designate his beneficiary, and from time to time have the same changed in accordance with the laws, rules, or regulations of the association, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member. * * *"

Section 1 of the Endowment Laws of the Grand Lodge of Knights of Pythias of South Carolina provides for an endowment department whereby upon proof of the death of a knight in good standing, who has complied with all the requirements of the order, there shall be paid *to his widow, heirs, or legal representatives* a certain amount.

Section 6 of the same laws provides that upon receipt of proof of the death of such knight, the Grand Chancellor shall, after 90 days, if not sooner paid, proceed to pay the certain amount to *the widow, heirs, or legal representatives.*

Section 10 of the same laws defines "legal representatives" as designated in section 1 as intended to apply to the family or relatives of deceased members, or some one dependent on him for support, to wit, *widow, children, mother, and father, sisters or brothers of the half blood.*

The policy introduced in evidence provides that the said benefit will be paid to the *widow, legal heirs, or representatives of Thomas Hunter.* If the definition of "legal representatives" should be substituted for the terms "legal representatives," it would be seen that the mother has been named as beneficiary under the policy quite as definitely as has been the widow, the only difference being that the widow was first named. According to the view which I take of the matter, the widow was not specifically named as the sole beneficiary under the policy, but was named as one of a class from which the assured might select a beneficiary, this class having been limited by the statute law, and having been further limited by the endowment law. The assured did not make this designation at the time the policy was issued, but afterward designated his mother as the beneficiary, by his will. But, even if I am wrong in this conclusion, and even if it should be held that the widow was named as beneficiary under the policy, she had no vested interest until the policy became due and payable, and the assured could, at any time, change the beneficiary by complying with the regulations of the order. No specific regulation as to the manner of designating a beneficiary in the first instance, or of changing a beneficiary already named, has been pointed out to me. The assured has, in a solemn manner, to wit, by his last will and testament, and by his declaration when in "extremis," undertaken to name his mother as sole beneficiary under the policy. In the absence of any specific regulation as to when and how one who is to receive the benefits under a policy is to be named in the first instance, or how substituted after one has been named, I hold that the plan pursued by Tom Hunter was a sufficient and valid designation of his mother as

such beneficiary, whether it was an original appointment, or a substitution for one previously named.

The plaintiffs rely upon the case of Speegle v. Woodmen of the World, 77 S. C. 517, 58 S. E. 435, but the facts in that case and the issues to be determined are so entirely different from the case under consideration that the case is inapplicable as an authority. The case is authority, however, for this proposition, viz.: That until the death of the assured—until he was no longer able to change his mind as to who would be his beneficiary—no one could be said to have a vested interest in the benefit.

The assured has attempted to name his mother as the party who should receive the benefits under the policy. Has he made a valid and effective designation? I hold that he has.

It is therefore ordered, adjudged, and decreed that Laura Hunter, the mother of Thomas Hunter, is entitled to be paid the amount deposited with the clerk of this court to await the judgment of the court. It is further ordered that the said Laura Hunter have the right to apply for and receive such further orders as may be deemed necessary to carry this decree into effect.

Simpson, Cooper & Babb, of Laurens, for appellant. F. P. McGowan, of Laurens, for respondent.

HYDRICK, J. The decision of the circuit court is affirmed, for the reasons therein stated.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

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(75 W. Va. 476)

## STATE ex rel. AULTMAN v. ICE et al.

(No. 2152.)

(Supreme Court of Appeals of West Virginia. Jan. 12, 1915.)

*(Syllabus by the Court.)*

1. MANDAMUS ⇐160 — CLERICAL ERROR — CURE BY AMENDMENT.
A clerical error in the date of the issuance of a mandamus nisi may be cured by an amendment.
[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 326–335; Dec. Dig. ⇐160.]

2. MANDAMUS ⇐160—ALTERNATIVE WRIT—RECITALS—PETITION.
An alternative writ of mandamus need not recite the filing of a petition for award thereof.
[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 326–335; Dec. Dig. ⇐160.]

3. MANDAMUS ⇐151—NECESSARY PARTIES—INSPECTION—CORPORATIONS.
In a proceeding to compel the officers of a private corporation to allow one of its directors to inspect its books, papers, records, and correspondence the corporation itself is not a necessary party.
[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 291, 292; Dec. Dig. ⇐151.]

4. MANDAMUS ⇐160—ALTERNATIVE WRIT — VALIDITY—CORPORATIONS.
An alternative writ of mandamus sued out for such purpose is not vitiated by recital of the relator's dual status of stockholder and director and failure formally to claim the right of inspection in one of the two capacities indicated by the recitals.
[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 326–335; Dec. Dig. ⇐160.]

5. MANDAMUS ⇐181 — PEREMPTORY WRIT — MOTION—DEMURRER.
A motion for the award of a peremptory writ of mandamus, unaccompanied by a replication to the return to the alternative writ, is equivalent to a demurrer to the return.
[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 401–404, 406, 408, 409, 418; Dec. Dig. ⇐181.]

6. CORPORATIONS ⇐311—DIRECTORS—RIGHT TO INSPECT CORPORATE RECORDS.
That the inspection sought by a director may disclose a right of action in him against the corporation or some of its agents does not preclude his right to inspect the books, papers, and records of the corporation.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1374–1375½; Dec. Dig. ⇐311.]

7. MANDAMUS ⇐164—INSPECTION OF CORPORATE BOOKS—DEFENSE.
An averment, in general terms, that respondents are advised that one of the purposes of the relator, in seeking such inspection, is to enable him to obtain knowledge of the corporate business for communication to rival or competing concerns, unsupported by any allegation of facts, indicating the source of such information, the identity of such rival concerns or connection of the relator therewith, is too indefinite, and therefore insufficient as a defense to the writ.
[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 344–360; Dec. Dig. ⇐164.]

8. CORPORATIONS ⇐311 — DIRECTORS — INSPECTION OF RECORDS — RIGHT TO ASSISTANCE.
A director of a corporation is entitled to have the assistance of his attorney or agent, in the exercise of his right to inspect its books, papers, and records, provided the latter has no interest adverse to the corporation, rendering his employment therein improper.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1374–1375½; Dec. Dig. ⇐311.]

Error to Circuit Court, Marion County.

Mandamus by the State, on the relation of Thomas G. Aultman, against C. F. Ice, president, etc., and another. Judgment for relator, and defendants bring error. Affirmed.

Geo. M. Alexander, Charles Powell, and A. J. Colborn, all of Fairmont, for plaintiffs in error. Charles B. Johnson, of Clarksburg, for defendant in error.

POFFENBARGER, J. The judgment of the intermediate court of Marion county, affirmed by the circuit court of that county and brought here for review, awarded a peremptory writ of mandamus, commanding the respondents, president and secretary and treasurer of a corporation known as the Fairmont Box Car Loader Company, to permit the relator, a stockholder in the company and a director thereof, to inspect the records, books, papers, contracts, and other documents belonging to it and in their custody, and allow him the privilege of assistance by his agent in so doing.

Waged with vigor, skill, and ability on both sides, the contest developed, in the court of its initiation, several questions of procedure and reliance, in the appellate courts, upon technical grounds for both affirmance and reversal.

One exception is based on an adverse ruling on a motion to quash the alternative writ, because: (1) Its date was two days earlier than that of the order awarding it; (2) it did not show the filing of a petition for issuance thereof; (3) the corporation was not made a party; and (4) although averring the relator to be both a stockholder and a director, it failed to set forth the capacity in which he desired relief.

[1] An amendment, the propriety of which seems to be clear beyond doubt, cured the first one of these alleged defects. It was shown by affidavits to have been a mere misprision of the clerk of the court.

[2] No recital of the petition was necessary. The writ itself constitutes the declaration in this form of action. Town of Mason v. Railroad Co., 51 W. Va. 183, 41 S. E. 418; Fisher v. Charleston, 17 W. Va. 628. The petition is, in law, a mere memorandum or affidavit, supplying the materials for the recitals of fact in the mandamus nisi.

[3] No corporate interest in the litigation, not adequately represented by the governing officers proceeded against, is perceived. Through them, the corporation has notice, and they act for it, just as effectually as if it were a formal party. The situation differs radically from that in which the interests of a person having no notice and not in any sense represented are to be affected, as in Armstrong v. County Court, 15 W. Va. 190.

[4] The remaining ground of the motion is likewise untenable. Under some circumstances, the relator has admitted right of inspection in either and both capacities, and the same relief would be granted in either case. If the facts set forth in addition to the averment of his character as a stockholder do not confer such right upon him as a stockholder, but do give it to him as a director the averment of his ownership of stock can be treated as harmless surplusage. Sprinkle v. Duty, 54 W. Va. 559, 46 S. E. 557. If, on the contrary, he has the right in both capacities, relief could not be denied him because he has unnecessarily shown himself to be doubly entitled to it.

Recital here of the contents of the pleadings, or even of the substance thereof, would not materially aid in the solution of the questions raised. The writ, return, and amended return all cover unnecessary ground and partake largely of the character of the pleadings in an equity suit. Right of personal inspection is not denied. On the contrary, it is distinctly admitted and had been formally invited. Only the alleged right of inspection by an agent or attorney is denied, and this denial is supplemented by the assertion of impropriety in the purpose for which the inspection is demanded. A few days before the writ was obtained, the relator caused a written demand for the right of inspection by himself and his agent or attorney to be served on the respondents. The president responded thereto by a letter, conceding in the most comprehensive terms the right to inspect as a director and tendering for such purpose all books, papers, and records of the company; but the letter was silent as to the admission of an agent or attorney for such purpose. On the occasion of the delivery of the notice or demand, however, the right of inspection by agent or attorney was expressly denied and has never been conceded or admitted and is not now.

[5] Deeming the return and the amended return insufficient, the relator moved the court to grant the peremptory writ and neither formally demurred nor replied. All parties treat the motion as the equivalent of a demurrer to the return and the amended return. Courts generally so regard it. Fisher v. Charleston, 17 W. Va. 628; People v. San Francisco, 27 Cal. 655; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; Beard v. Board Sup'rs, 51 Miss. 542; State ex rel. v. Smith, 104 Mo. 661, 16 S. W. 503.

The corporation was organized in November, 1905, under a charter issued under the laws of this state in October, 1905, to A. W. Rapp, Chas. L. Merrifield, C. D. Fleming, A. C. Ice, and S. A. Boehm; but Geo. T. Watson, Chas. F. Ice, and John H. Huhn took the bulk of the capital stock, in consideration of their assignments to the corporation of certain United States patents and applications for such patents then pending, all of which were for box car loaders and improvements upon such machines. Each of them so obtained 65 shares of the par value of $100 each. Only seven additional shares were issued. There is some controversy as to equitable interests and rights in the patents and applications for patents, but they are of minor importance, if at all material. The corporation does not manufacture any of the patented machines. They are made, exploited, and marketed by the Fairmont Mining Machinery Company, under a verbal contract, and the net profits divided between the two corporations. They are used by the Fairmont Coal Company and the Consolidation Coal Company, allied concerns, and unfairness to the Box Car Loader Company and its stockholders, in the relations of these companies, is charged. The relator seems to be of the opinion that the Box Car Loader Company should erect a plant and manufacture and market its own machines. Little, if any, materiality in the contentions respecting these matters is perceived. Aultman, the relator, purchased Huhn's stock and such other rights and interests as he had in and against the company, on the 15th day of June, 1909, and was subsequently elected a director. At the date of the award of the mandamus nisi, Aultman was prosecuting an action of debt against Huhn for the recovery of $400 which he claimed had been wrongfully paid to Huhn by the corporation or some of its agents. Dismissing

said action, he commenced another action, one of assumpsit, against Huhn on the same demand, which seems to have been still pending at the date of the judgment here complained of. These facts, suggesting the possibility of a claim by the relator, against the company or some of its agents, on account of transactions with Huhn, constitute the basis of a charge of improper motive or purpose in the demand for inspection. They are supplemented by an averment, in general terms, of the existence of keen and active competition in the business of supplying car loading machines and purpose on the part of the relator to obtain knowledge of the methods of the company and facts in its possession, for communication to its competitors, to its injury and damage. The alternative writ disclaims and disavows purpose and intent to make any improper use of any information that may be obtained.

Both sides base the right to relief on the state of the pleadings. The return admits the right of inspection, denying only right to the assistance of an agent or attorney, wherefore the relator says the writ must issue if the law accords such right of assistance. On the other hand, it is said admission of the improper motive or purpose arises from lack of a replication to the return, wherefore the writ must be denied. Replying to this contention, the relator, not denying the sufficiency of impropriety of motive as an objection to the demand for inspection, claims the charge made in the return is not sufficiently pleaded, because of its generality and meagerness of inculpating facts.

[6] That the relator may suspect right in himself of a cause of action against the corporation or some of its agents and may find revelation thereof in the records or documents inspection whereof is sought is not inconsistent with his right of inspection, because it does not relieve him from duty as a director, nor excuse nonperformance thereof. As such, he is a trustee of the property and interests of the corporation and entitled to full and complete information as to its affairs, to the end that he may be able properly to execute his trust. An interest hostile to the corporation does not bar a director's right of inspection. People ex rel. v. Central Fish Co., 117 App. Div. 77, 101 N. Y. Supp. 1108.

[7] The charge of purpose to obtain information for disclosure to rivals or competitors in the business in which the company is engaged is entirely too general and indefinite. It is founded upon mere information and belief, without a single specification of fact. No interest in any rival concern is charged or shown, nor is any such concern specified, named, or suggested. The name of no alleged informant is given or indicated. A legal right ought no more to be withheld, upon such an allegation, than property should be seized under an attachment issued upon an indefinite and general charge of fraud, unless authorized by a statute.

[8] It remains only to inquire whether, in the exercise of his right of inspection, a director is entitled to the assistance of an agent or attorney, having no adverse interests or connections, rendering his employment therein improper. An affirmative answer is given by the authorities. People ex rel. v. Columbia Paper Bag Co., 103 App. Div. 208, 92 N. Y. Supp. 1084. Reason accords with authority. A director needs the same kind of assistance from specialists in law, accounting, and mechanical and scientific matters, in the exercise of this right, as are requisite to an efficient investigation pertaining to his individual business, and he is clearly entitled to whatever he needs to make his investigation full, complete, and intelligent.

Perceiving no error in the judgment, we affirm it.

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(143 Ga. 52)

## BROWN BANK & TRUST CO. v. HOLT et al. (No. 145.)

(Supreme Court of Georgia. Jan. 16, 1915.)

*(Syllabus by the Court.)*

1. BANKS AND BANKING ⟸118—AUTHORITY OF OFFICERS — TRANSFER OF CORPORATE STOCK—INFORMALITY.

Under the facts of this case, it was erroneous to charge as follows: "I also charge you, as a principle of law, that in order for one person to transfer stock held by that person to another person in a corporate bank, as to whether or not they would have a right to transfer it would depend upon the certificate of the stock, and if the certificate of the stock that was issued to Mrs. Brown stated how it should be transferred, then, under the law, those provisions and stipulations would have to be complied with."

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1726–1738; Dec. Dig. ⟸118.]

2. BANKS AND BANKING ⟸228—CORPORATE STOCK — SALE — REPRESENTATIONS OF OFFICERS—QUESTION FOR JURY.

There was sufficient evidence to authorize the submission to the jury of the question whether the plaintiff bank became bound by the acts and representations of its officers in connection with the sale of certain stock bought by the principal defendant.

(a) There may have been inaccuracies in some of the charges complained of and not specially discussed; but, if so, they were not grave, and will doubtless be corrected on another trial.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 841, 874; Dec. Dig. ⟸228.]

3. BANKS AND BANKING ⟸118 — SALE OF STOCK—REPRESENTATIONS.

There was no error in admitting the evidence of the husband of the purchaser of the stock, who acted as her agent in making the purchase, in regard to the representations made by the president and cashier of the bank in making the sale.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1726–1738; Dec. Dig. ⟸118.]

4. Defects in Proof.

The evidence was meager and unsatisfactory as to when the purchaser of the stock discovered the fraud which had been perpetrated upon her, if there was any, and whether, after notice thereof, she acted with due promptness to obtain a rescission, or whether thereafter she continued to act as a stockholder. On another hearing this can be more fully developed.

Error from Superior Court, Gwinnett County; J. B. Park, Judge.

Action by the Brown Bank & Trust Company against Mrs. R. S. Holt and others. Judgment for defendants, and plaintiff brings error. Reversed.

J. A. Perry, of Lawrenceville, for plaintiff in error. J. L. Oakes and O. A. Nix, both of Lawrenceville, for defendants in error.

LUMPKIN, J. The Brown Bank & Trust Company brought suit on a promissory note for $1,620 principal, payable to the order of the plaintiff, against Mrs. R. S. Holt as maker, and R. S. Holt as indorser. The defendants pleaded that the president and cashier of the bank sold to Mrs. Holt, through her husband as her agent, certain shares of stock in the bank, represented to be treasury stock, and took the note in suit for the purchase price thereof; that the officers made false and fraudulent representations as to the condition of the bank and the value of the stock; and that she did not discover the real condition of the bank until about the time of its failure, some time after the purchase. They sought to have rescission. The plaintiff contended that the stock was not sold for it, but that the president and cashier acted as the agents of their mother, who was another stockholder, in making the sale; and also denied fraud. The jury found for the defendants. The plaintiff moved for a new trial, which was refused, and it excepted.

[1] 1. One ground of the motion for a new trial requires a reversal. The presiding judge charged:

"I also charge you, as a principle of law, that in order for one person to transfer stock held by that person to another person in a corporate bank, as to whether or not they would have a right to transfer it would depend upon the certificate of the stock; and, if the certificate of the stock that was issued to Mrs. Brown stated how it should be transferred, then under the law those provisions and stipulations would have to be complied with."

This was said in connection with instructions as to whether the transaction was in fact a loan of money by the bank to the purchaser of the stock, and whether the latter bought, not from the bank, but from the mother of the president and cashier, or whether those officers of the bank sold the stock as its stock and took the note in suit for the purchase money. While the mode in which the stock of Mrs. Brown, the mother of the two bank officers, was claimed to have been transferred, was a circumstance which the jury might consider in arriving at the truth, and while in a controversy involving the legality or regularity of the transfer the rule laid down might have been applicable, yet if the purchaser bought from Mrs. Brown, and the note was given to the bank for money borrowed from it, as the plaintiff contended, and Mrs. Brown, having a certificate of stock which included 59 shares, surrendered it to the bank, caused it to be canceled on the books of the company, and had issued to the purchaser a certificate for 15 shares, received payment therefor, and has made no complaint, the mere fact that the blank form of transfer on the back of the certificate was not filled out as to any number of shares transferred would not invalidate the transaction. In the connection in which this charge was given, and without explanation, it might have misled the jury.

[2] 2. There may have been slight inaccuracies in some of the charges complained of in other grounds of the motion; but, when taken in connection with the context, they were not serious. There was evidence authorizing the submission to the jury of the question whether the bank became bound by the action of its officers in connection with the transaction. The charge complained of in the tenth ground of the motion was probably a little broader than the issues required, and the use of the expression "absolutely void" was somewhat stronger than desirable in a case involving an issue of rescission of a contract on account of fraud. The charge complained of in the ninth ground is not framed with exact accuracy. We take it that the expression, "if they did afterward sell the stock," means as stock of the bank. The mere issuing of a new certificate might apply to a sale by one stockholder to another, where the original certificate was delivered up and canceled and new certificates issued. But if the bank's officers sold the stock as the bank's stock, not as that of another stockholder, though this may have been unauthorized, yet if the bank issued a certificate for such stock to the purchaser who so bought, took the purchaser's note for the purchase price payable to itself, and has brought and with knowledge of the facts is pressing suit to enforce the payment, this would operate as a ratification of the acts of its officers in the transaction. It could not ratify in part by claiming the benefit of such a trade, and at the same time repudiate representations which may have been made by its officers as to the condition of the bank and the value of the stock or the like, if any were made to the purchaser or her agent in the progress of the transaction, and induced the purchase.

[3] 8. There was no error in admitting the evidence of R. S. Holt, the husband of the purchaser, who acted as her agent in making the purchase, as to the representations made

by the president and cashier of the bank in making the sale.

[4] 4. The evidence was meager and unsatisfactory as to when the purchaser discovered that the representations made to her agent were fraudulent, if they were so, and what action she took upon making such discovery, whether she took steps to rescind with due promptness, or whether, after notice of the fraud, she continued to act as a stockholder. Considering the date of the discovery as pleaded and the evidence as to her giving a proxy some time after the failure, she may have so acted as to prevent a rescission. On another trial this can be fully investigated.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

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(15 Ga. App. 736)

## FETNER et al. v. AMERICAN NAT. BANK. (No. 5530.)

(Court of Appeals of Georgia. Feb. 6, 1915.)

*(Syllabus by the Court.)*

1. TESTIMONY AND INSTRUCTIONS.
There was no error in the rulings on testimony, or in the instructions to the jury to which exceptions were taken.

2. PARTNERSHIP ⟸128—PARTNER—POWERS—SCOPE OF BUSINESS.
The court did not err in not charging the jury that the defendants would not be liable unless they had, after joining the voluntary association, delegated to the signer of the note power and authority to bind them. The would-be promoters of the proposed corporation could, under the evidence submitted, be properly considered as partners in a joint undertaking, and, where the relation of partners exists, any partner may bind all the others by his acts within the scope of the partnership business.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 193; Dec. Dig. ⟸128.]

3. INSTRUCTIONS—LAW OF PARTNERSHIP.
The request for the court to charge the law of partnership, as embodied in sections 3155 to 3158 of the Civil Code, was too general and indefinite, even if the principles embodied in these sections of the Code were applicable to the issues and the evidence.

4. ASSOCIATIONS ⟸16—PROMOTERS—LIABILITY FOR DEBTS—EVIDENCE.
The controlling issues of fact were as to whether the several defendants each and all jointly agreed to establish a social club known as the Seminole Club, and whether the debt which was the subject of the suit was contracted for the benefit of that club. Each of the defendants was a witness in the case, and no one of them denied having agreed to become a member of the club, and there was proof that one of the defendants admitted that he was a silent partner in the business conducted by it. All of them knew the club was conducting business and patronized it. All the defendants were present at a meeting called for the purpose of organizing the club, and a statement was made in their hearing that a charter could not be obtained. None of them abandoned the pursuit of the original undertaking, and the fact that they would not have entered the association but for the fact that they were influenced by the advice and belief that they would not be liable for any of its debts is immaterial.

[Ed. Note.—For other cases, see Associations, Cent. Dig. §§ 26–28; Dec. Dig. ⟸16.]

5. NEW TRIAL.
There was no error in refusing a new trial.

Error from City Court of Macon; H. A. Mathews, Judge.

Action between W. C. Fetner and others and the American National Bank. From the judgment the parties first mentioned bring error. Affirmed.

C. A. Glawson, J. E. Hall, and Walter De Fore, all of Macon, for plaintiffs in error. Hardeman, Jones, Park & Johnston, of Macon, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 698)

## ELLIS v. HEWITT. (No. 5761.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

1. PARENT AND CHILD ⟸8—SUPPORT OF CHILD—LIABILITY OF PARENT—DIVORCED WOMAN.
Where a woman has been lawfully divorced from her husband, and the court has awarded to her the custody of their minor child, and she has since had the entire care and control of the child, the father failing to contribute to its support and abandoning it altogether and disappearing to parts unknown, she has a legal right to its services and earnings, and may recover for a tortious injury to the child, which deprives her of such services; and a corresponding legal obligation rests upon her to support the child in a manner in accord with her means and ability.
(a) When such a mother becomes non compos mentis, and has been committed to the state sanitarium, her individual estate, in the hands of her guardian, is responsible for necessaries furnished for the support of the child.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33–62; Dec. Dig. ⟸3.]

2. PARENT AND CHILD ⟸3 — SUPPORT OF CHILD — LIABILITY OF PARENT — INSANE PERSON.
In such a case the fact that, under Civ. Code 1910, § 1607, the state may be entitled to a lien, which is not foreclosed or asserted, against the property of an insane person in its charge, will not prevent one, who has furnished the minor child with necessaries, proper to its condition, from recovering therefor in a proceeding brought against the guardian of the insane person; the state not being in any way a party to the proceeding.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33–62; Dec. Dig. ⟸3.]

*(Additional Syllabus by Editorial Staff.)*

3. PARENT AND CHILD ⟸1—"PARENT."
The word "parent" is connected with no trade and is not a word of art; it means ordinarily mother as well as father, and must be so construed. "Parent" has often been held to include the word "mother" (citing Words and Phrases, Parent).

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 1–3; Dec. Dig. ⟸1.]

Error from Municipal Court of Atlanta.

Action by E. C. Hewitt against F. E. Ellis, guardian. Judgment for plaintiff, and defendant brings error. Affirmed.

Evins, Spence & Moore, of Atlanta, for plaintiff in error. Hewlett, Dennis & Whitman, of Atlanta, for defendant in error.

WADE, J. Julia B. Hoyal and her husband were divorced when their infant daughter was about one year of age, and the court then awarded the custody of the child to her, and the child remained continuously in her care and custody from that time up to a comparatively recent date, when Mrs. Hoyal was committed to the state sanitarium. The father is not a resident of Georgia, and his present whereabouts are unknown. He has never in any way contributed to the support of this daughter (now about 15 years old) since her infancy, but she has been entirely dependent upon her mother, having no estate of her own. Frampton E. Ellis, county administrator, was duly appointed guardian of the estate of Mrs. Hoyal, on account of her insanity, and is now guardian of that estate, amounting (according to the admission of the defendant) to more than $1,500. Mrs. Eva C. Hewitt, the sister of Julia B. Hoyal, furnished the child with board and clothing during the months of September, October, and November, 1912, and October, November, and December, 1913, and January, 1914, and such board and necessaries were agreed by both parties to be reasonably worth $20 per month. Mrs. Hewitt brought suit in the municipal court of Atlanta against Ellis as guardian for Mrs. Hoyal, to recover the value of the board and necessaries so furnished, and the court rendered judgment in favor of the plaintiff for $140. The defendant moved for a new trial, on the ground that the judgment was against the law and evidence, and also incorporated in the motion (as is allowable under the provisions of the act establishing the municipal court of Atlanta [Acts of 1913, p. 145]) certain grounds based upon two points precisely raised by a demurrer, which had been overruled, to wit: (1) That the movant is the guardian of an insane married woman, and under the law her property would not be subject to the debts of her minor child for necessaries; and (2) that the state of Georgia has, under the law, a prior lien upon the property in the hands of the defendant. The motion for a new trial was overruled, and the defendant brought the case to this court for review.

As stated in the brief of counsel for the plaintiff in error:

"The question of the father's liability in this case is eliminated, as it is admitted that the insane mother and the father have long since been divorced; that the custody of this child has been awarded to the mother; and that the father is in parts unknown."

[1] 1. The first question to be decided is whether or not the estate of a divorced woman, who is a lunatic committed to the state sanitarium, is liable for necessaries furnished to her minor child, where her former husband, the father of the child, is in parts unknown, and has contributed nothing to the support of the child and exercised no control over it since the granting of the divorce. It appears to us that, under the admitted facts, the father has lost all parental power over the child, and all rights to its services or the proceeds of its labor. Under the Civil Code, § 3021 (3), the father may lose his parental power "by the failure of the father to provide necessaries for his child, or his abandonment of his family." Where the father abandons his family and fails to provide necessaries for his child, left in the care and custody of the mother, she is entitled to the services and earnings of the child. Amos v. Atlanta Railway Co., 104 Ga. 809 (2), 31 S. E. 42; Savannah, Florida & Western Ry. Co. v. Smith, 93 Ga. 742, 21 S. E. 157. Even one standing in loco parentis is entitled to recover for the value of the services of a minor child (City of Albany v. Lindsey, 11 Ga. App. 573[1]), and has been held to be "subject to the liabilities of an actual parent" (Williams v. Hutchinson, 3 N. Y. 312, 53 Am. Dec. 301). Admitting, then, that, where the father abandons his family, the mother is entitled to the services and earnings of their child, it would appear that a resulting duty to maintain and support the child would rest upon her, and that, where she has a separate estate, her estate would be properly chargeable for necessaries supplied to the child suitable to its condition in life, and notwithstanding "the father is not relieved from his legal obligation for the support of the child" (Hall v. Hall, 141 Ga. 361, 80 S. E. 992), when a decree of divorce awards her its custody and fails to determine the question of its support. The right of a father to the custody, and the value of the labor and services, of his minor child is said (2 Kent's Comm. 193) to arise as a consequence of his obligation for support and maintenance. And in Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101, it is said:

"The father, and, in case of his death, the mother, is entitled to the earnings of their minor children. This right must be founded upon the obligation of the parents to nurture and support their children, which obligation is compensated by a right to their services."

In Newton v. Cooper, 13 Ga. App. 458, 79 S. E. 356, it was held that a mother who had the custody and care of a minor child, who had been abandoned by his father, was entitled to the services of the child and to the proceeds of the child's labor; and, where the mother sued for the value of the child's services, the employer had the right to set off the value of necessaries supplied by him to the minor child during the term of his employment.

In this case there is no evidence that the

[1] 75 S. E. 911.

child was emancipated by any voluntary act of the mother, and no provision in our statute law declares that a child becomes emancipated on account of insanity of the parent. Under the facts in this case, the earnings of the child would, under the law of this state, belong to the mother, if the mother were sane; and we do not see why the child's filial or legal obligation should be lighter on account of the unfortunate affliction which has overtaken the mother. Also, the resulting or concurrent abstract obligation on the part of the mother, to support and maintain the child to whose services and earnings she is entitled, has apparently not been destroyed or lessened because of the insanity of the mother; and, where it appears that the mother has an estate in her own name, there is no reason why the abstract obligation should not find concrete expression.

[3] To approach the subject from another direction, it has been held in Atlanta & West Point Railroad Co. v. Venable, 65 Ga. 55, 56, that:

"The word 'parent' is connected with no trade and is not a word of art. It means ordinarily mother as well as father, and must be so construed."

"Parent" has often been held to include the mother. Words and Phrases, vol. 6, p. 5173.

The legal duty of a parent to provide for the maintenance, protection, and education of minor children is too well established to require more than casual mention. See 1 Blackstone, Com. c. 16; Nicholson v. Spencer, 11 Ga. 607-611.

"We learn, however, in our elementary lessons, that parents are legally and in duty bound to maintain their infant children." Burns v. Hill, 19 Ga. 22, 25.

Mrs. Hoyal is the "parent" of Minnie Hoyal, the minor child, and the custody of the child was awarded to her by the court. The father long since abandoned the child, and thereby lost his parental control and his right to the child's services or earnings. The mother would be entitled to recover the value of the services of the child under contract or on account of injury inflicted upon the child. As a consequence of her legal right to control the child and enjoy the services and earnings of the child, the mother is under a corresponding duty to maintain and provide for the child, if it is in her power to do so. The insanity of the mother may release her from the obligation of personal service in behalf of her minor child, but will not discharge her estate from the legal obligation for necessaries supplied to the child.

[2] 2. The second question raised by the motion for a new trial is whether or not the fact that, under the law, the state of Georgia has a prior lien upon the property of an insane person committed to the state sanitarium would in this case bar the plaintiff from recovering judgment against the estate in the hands of the guardian of Mrs. Hoyal. There is no evidence to the effect that the state has asserted any lien against the property of Mrs. Hoyal or is now endeavoring to set up any such lien; and, in the absence of any steps to enforce such a lien, the guardian would be protected from liability in paying just charges against the estate of his insane ward, which have been legally established. If it were otherwise, the commitment to the state sanitarium of one possessing a large estate, and correspondingly large outstanding obligations, would defeat the payment of his lawful debts and work hardship on innocent creditors. Furthermore, if, on account of an unasserted lien to which the state may be entitled under the Civil Code, § 1607, against property of an insane person committed to the state sanitarium, legal claims against the insane person cannot be adjusted, for what reason would it be necessary to appoint a guardian for such a person, except to collect and hold the assets of the estate, to ultimately pay off the state's lien, or against the day when the insane person may be restored to sanity and require a reckoning?

Judgment affirmed.

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(15 Ga. App. 718)

GRAVES v. DENNY et al. (No. 5461.)

(Court of Appeals of Georgia. Feb. 6, 1915.)

*(Syllabus by the Court.)*

1. CORPORATIONS ⟸561, 562—JUDGMENT ⟸478 — INSOLVENCY — RECEIVERS — UNPAID STOCK SUBSCRIPTIONS—RIGHT TO SUE—COLLATERAL ATTACK.

Where a decree of the chancellor clothed with jurisdiction to administer the estate of an insolvent corporation directs that its debtors be sued by the receivers appointed by the court of equity, the decree confers upon the receivers full authority to maintain an action against a subscriber to the capital stock of the corporation for the recovery of an unpaid balance of the subscription. Such a decree can be set aside only in a court of equity, and is not subject to collateral attack in another court. Nor is the validity of the decree affected by the fact that it is interlocutory (for the purpose of marshaling the assets), and not a final decree concluding the administration of the estate of the insolvent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2261-2266, 2268-2271; Dec. Dig. ⟸561, 562; Judgment, Cent. Dig. § 912; Dec. Dig. ⟸478.]

2. CORPORATIONS ⟸228, 562—INSOLVENCY—RECEIVERS — UNPAID SUBSCRIPTIONS — ACTIONS—DISCRETION—EQUITY JURISDICTION—DELEGATION.

Whether a subscription to the capital stock of a defunct corporation shall be enforced for the purpose of equalizing by contribution stockholders who have paid their subscriptions in full is a matter addressed solely to the discretion of the court charged with the duty of administering the estate of the corporation. The exercise of the chancellor's discretion upon an equitable petition, in directing the receivers to sue, and authorizing them to recover unpaid stock subscriptions, leaving the appropriation of the fund when collected to the determination of the court of equity, cannot be brought in question in

a suit to recover a subscription to the capital stock, brought in pursuance of the order.

(a) A direction by the judge of a superior court to receivers appointed by him to collect such stock subscriptions as, in the receivers' opinion, were legally liable, is not a delegation of the court's equitable powers to the receivers, but a mandatory direction to the court's servants and officers not to proceed against any apparent debtor where investigation has developed that he had a legal defense which would defeat recovery.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 874, 878, 2265, 2266, 2268–2271; Dec. Dig. ⟸228, 562.]

8. CORPORATIONS ⟸259, 562—INSOLVENCY—"ASSETS"—UNPAID STOCK SUBSCRIPTIONS—MARSHALING ASSETS—DEBTOR'S LIABILITY—AMOUNT.

Upon the dissolution of a corporation, its property and assets constitute a fund for the payment of its debts and for distribution among its stockholders, and the individual liability of stockholders is an "asset" of the corporation which may be enforced by a receiver for the corporation. And if a court of equity, in the exercise of its powers and in its sound discretion, determines that the assets of a defunct corporation should be marshaled, a judicial ascertainment of the amount due by a debtor of the corporation is not an essential preliminary to the bringing of an action by the receivers to recover upon the alleged indebtedness, for the suit itself, when authorized by the court of equity, is a proper means of ascertaining the amount of the debtor's liability to the corporation. A suit by the receiver on unpaid stock subscriptions is the same thing as a suit by the corporation itself.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1050, 1052–1067, 2265, 2266, 2268–2272; Dec. Dig. ⟸259, 562.

For other definitions, see Words and Phrases, First and Second Series, Assets.]

4. CORPORATIONS ⟸561 — INSOLVENCY — ADMINISTRATION OF ASSETS — COLLECTION OF UNPAID SUBSCRIPTIONS.

The fact that a court of equity in the exercise of its powers and discretion, is administering the estate of a corporation by the hands of a receiver, and that the distribution of the fund, when collected, can only be effected in a court of equitable jurisdiction, affords no bar to the collection of the assets by the processes of the common law.

[Ed. Note.—For other cases see Corporations, Cent. Dig. §§ 2261–2264; Dec. Dig. ⟸561.]

5. CONTRACTS ⟸346—ACTION—GENERAL ISSUE—UNCONDITIONAL CONTRACT.

A plea of general issue raises no issuable defense to a suit brought upon an unconditional contract in writing.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1714, 1718–1751; Dec. Dig. ⟸346.]

6. CORPORATIONS ⟸262 — STOCK SUBSCRIPTIONS — DEFENSES — EXTENSION OF TIME — CONSIDERATION.

A plea alleging that the time of payment of an unconditional subscription to the capital stock of a corporation has been extended by its directors presents no bar to an action on the contract of subscription, when it is not alleged in the plea either that there was any consideration for the alleged extension or that the directors were authorized by the stockholders to extend the time of payment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1076–1083, 2273; Dec. Dig. ⟸262.]

7. CORPORATIONS ⟸259, 268—STOCKHOLDERS—UNPAID SUBSCRIPTION—REMEDIES—PLEADING.

A plea alleging that a subscriber to the capital stock of an insurance company was relieved from liability because the remedy of the company was to cancel his stock and forfeit all previous payments to the company, but which failed to allege that the requisite notice prescribed by section 2396 of the Civil Code 1910 had been given to the delinquent subscriber, or that the stock had, in fact, ever been canceled, is subject to demurrer, not only for these reasons, but also upon the ground that the remedy provided of cancellation of the stock and forfeiture of payments is cumulative only, and does not prevent the corporation from proceeding to collect the unpaid subscription by a suit upon the original contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1050, 1052–1067, 1129, 1131, 1133–1147, 2272, 2276; Dec. Dig. ⟸259, 268.]

8. CORPORATIONS ⟸259—EQUITY ⟸39—UNPAID STOCK—SUIT BY CREDITOR—COMPLETE RELIEF.

The provisions of section 2251 of the Civil Code 1910, which gives any citizen the right to sue either the association or a member of the corporation, etc., and to recover from the member or members sued the amount due for unpaid stock and which properly limits in such a case the amount of the plaintiff's recovery to the amount actually due him by the delinquent member does not impose any limitation upon the power of a court of equity to require a complete adjudication of the rights of all parties interested in the subject-matter, nor abridge the court's power to prevent a multiplicity of suits by determining the respective rights of all parties interested who may be before the court. This Code section has no application to a suit in which the receiver is endeavoring to enforce, for the benefit of fully paid subscribers to the capital stock of the corporation, contribution on the part of those subscribers who have not paid their subscriptions to the capital stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1050, 1052–1067, 2272; Dec. Dig. ⟸259; Equity, Cent. Dig. §§ 104–114; Dec. Dig. ⟸39.]

Error from City Court of Floyd; J. H. Reece, Judge.

Action by R. A. Denny and others, as receivers of the Rome Insurance Company, against R. W. Graves. Judgment for plaintiffs, and defendant brings error. Affirmed.

Barry Wright and Dean & Dean, all of Rome, for plaintiff in error. Maddox & Doyal, of Rome, for defendants in error.

RUSSELL, C. J. R. A. Denny, E. W. Butler, and T. K. Scott, as receivers of the Rome Insurance Company, brought an action in the city court of Floyd county against Robert W. Graves, to recover the unpaid balance alleged to be due upon an unconditional stock subscription for $94,500 to the increased capital stock of the Rome Insurance Company. The contract of subscription attached to the petition shows that the original capital stock of the company was $100,000, and states that the increase is to be first offered to its stockholders at par, and that the subscribers to the increased capital stock shall have the privilege of pay-

ing therefor in equal annual installments of one, two, three, and four years. The petition alleges, in the first paragraph, that the petitioners are the duly appointed receivers of the insurance company, and have duly qualified as such. The second paragraph alleges the execution and delivery of the contract of subscription referred to above. The third, fourth, and fifth paragraphs set out separately the amounts due, according to the terms of the contract, on the 1st day of January, 1911, 1912, and 1913, respectively. In the answer to the petition it is admitted that the plaintiffs were appointed receivers, but it is alleged that they were appointed prior to the appearance term in the case of Miles v. Rome Insurance Company; that the appointment was interlocutory; and that the receivers have no legal power to bring this suit. The defendant admits the subscription, but pleads that, by the action of the board of directors of the insurance company, the time of payment of the subscription was extended, and the balance owing to the company on account of the subscription as of January 1, 1911, was made payable on a basis of 10 per cent. per annum, 10 per cent. being payable on the 1st day of June, 1912, and a like amount on the 1st day of June thereafter. The third, fourth, and fifth paragraphs of the petition are denied, and for further answer the defendant alleges that the plaintiffs have no legal right or authority to bring the suit, for the reason that the right to sue upon the subscription contract exists solely in the name and behalf of the Rome Insurance Company. It is further alleged in the answer (though the reason for the statement is not given) that neither the receivers nor the Rome Insurance Company have a right to sue the defendant on account of the subscription agreement, and that the only legal remedy for the enforcement of the contract in behalf of the Rome Insurance Company or its representatives is the right to cancel the stock on account of the failure to pay subscriptions when they become due, and to forfeit all payments made thereon.

The defendant demurred to the petition generally, on the ground that no cause of action is set forth, and specially on the grounds: (1) That the petition does not show that the receivers have authority from the court to sue upon said claim; (2) that the petition does not show for what purpose the receivers were appointed, or what powers were given them under the order of appointment; (3) that it does not appear whether the receivers were appointed by interlocutory order prior to the trial term of the case or after the facts alleged in the petition under which the receivers were appointed had been passed upon by a jury and final decree entered; (4) that it does not appear what is the character or nature of the petition under which the receivers were appointed, or what its prayers or purposes, or what property of the Rome Insurance Company the receivers were authorized to take possession of, or what choses in action they were authorized to collect.

The petition was amended by attaching to it a copy of an order of the judge of the superior court of the Rome circuit in the case of John M. Miles v. Rome Insurance Company et al., in which the plaintiffs were appointed receivers of the property and effects of the Rome Insurance Company, and directed to take and retain possession of all its property of every kind and character until further order of the court. The order authorizes the receivers to institute and prosecute any action in favor of the Rome Insurance Company, to realize and collect its assets, including actions to recover the balance due upon all stock subscriptions upon which, in their opinion, the persons making such subscriptions are legally liable. The amendment to the petition recites also, that there is $245,000 of the capital stock of the Rome Insurance Company which has been fully paid for, and that the remainder of the $1,000,000 of capital stock is represented by subscriptions of nine named individuals, of whom the defendant Graves is one.

The plaintiffs demurred to the defendant's answer, upon the ground that it set up no legal or equitable defense. They demurred to the first paragraph of the answer upon the ground that it was immaterial that the appointment was interlocutory or that the cause has not been heard in term time, or that the appointment of the receivers has not been made permanent, and that the allegation that the receivers have no legal power or authority to bring the suit is a conclusion of the pleader, and fails to show why or wherein they are lacking in power and authority. The second paragraph of the answer was demurred to on the ground that there was no allegation that there was a good or valuable consideration for the alleged extension of time of payment to the stockholders, or that the alleged extension was approved by the stockholders, or that the directors were fully authorized or given power by the stockholders to make such an extension. The third, fourth, and fifth paragraphs of the answer were demurred to upon the ground that they set up no defense, and the sixth, seventh, and eighth paragraphs were demurred to upon the ground that they set up incorrect conclusions of law, and especially that the facts alleged in the eighth paragraph of the answer failed to present any defense, for the reason that the provisions of section 2396 of the Civil Code merely gives a board of directors the option to forfeit and cancel stock subscriptions, and there are no allegations showing that the board of directors of the Rome Insurance Company ever

complied with, or attempted to comply with, any of the requirements of that section of the Code.

There appears in the record an amendment to the defendant's answer, setting up that the suit was not in behalf of the creditors, but a suit filed by and in behalf of the stockholders; that the creditors have no interest in the cause, and the receivers have no right to sue upon the subscription contract in behalf of the stockholders, because the Rome Insurance Company has sufficient assets with which to pay all its creditors without calling upon any subscriber to the capital stock to contribute to the payment of creditors; and that, even if it were necessary to collect a part of the stock subscription, there has been no proceeding by the receivers to determine the amount necessary to be collected from the various stock subscribers. So far as appears from the record, this amendment was not allowed by the court, and there is no exception to a refusal on the part of the court to allow it, but it is transmitted in the record as being material to a clear understanding of the errors complained of, and will be dealt with, because the same points are raised in an amendment to the demurrer of the defendant which was allowed by the court. In the amended demurrer of the defendant it is insisted: (1) That the plaintiff's petition fails to set forth any legal necessity for a suit upon the stock subscription; (2) that there is no allegation in the petition that there are any debts owing by the insurance company which make the collection of the stock subscription necessary; (3) that there is no allegation that there has been any judicial ascertainment of the amount of the company's debts; (4) that there is no allegation of a judicial ascertainment of the amount due on the subscription, either for the purpose of paying debts or for the purpose of contribution among the stockholders of the company; (5) that the petition fails to show that the receivers have been granted any legal authority from the court of their appointment to bring the suit; (6) that the court's order attached to the petition as amended shows that the court attempted to delegate to the receivers and to an auditor the duty of determining the amount of the company's indebtedness and the liability of the stockholders on their subscriptions, and that there has been no judicial determination on this question by the court; (7) that the city court of Floyd county has no jurisdiction to hear and determine equitable questions, and the right to sue upon the subscription agreement is only cognizable in a court of equity; (8) that the petition does not allege that there are not sufficient assets of the insurance company to pay the debts of the company without calling upon the stockholders upon their subscriptions; and (9) that it does not appear that the assets of the company are insufficient, after paying its debts, to pay all of its stockholders their shares without collecting the stock subscriptions.

The trial judge overruled the demurrer to the petition as amended, and struck the answer. The pleadings and the demurrers raise the following questions, the determination of which control the case: (1) Did the receivers have the right to maintain the suit? (2) If the receivers were proper parties plaintiff, was it essential to their maintaining the suit that there should appear a necessity that the unpaid subscriptions to the stock should be paid, either for the purpose of paying creditors or for the purpose of requiring delinquent stockholders to contribute to stockholders who had paid their subscriptions in full? (3) Was a judicial ascertainment of the amount due on the defendant's subscription, either for the purpose of paying debts or for the purpose of contribution, an essential preliminary to the bringing of the action by the receivers? (4) Was the city court of Floyd county without jurisdiction of the suit to enforce the collection of defendant's subscription to the capital stock, for the reason that that court has no equitable jurisdiction, and "because the right to sue upon subscription agreements is only cognizable in a court of equity?" Incidental or subsidiary to these leading questions are several minor points which will be ruled upon in the adjudication of the four leading propositions.

[1] 1. It was asserted in the demurrers that, if the present action can be maintained, the receivers are not proper parties to bring the suit. By attaching a copy of the order of the superior court to their petition, the plaintiffs clearly met the grounds of demurrer as originally set forth, because the order of the judge of the superior court expressly directed the receivers to sue upon all stock subscriptions due the Rome Insurance Company; and this order likewise disclosed the character and nature of the petition under which the receivers were appointed, and the prayers, purposes, and object of the petition filed by Miles, and the authority of the receivers to take possession of all the property of the insurance company. In our opinion, it was unnecessary for the petition to show whether the receivers were appointed under an interlocutory order, or after a final decree had been entered on the petition; for, if the arm of equity is not long enough to reach the assets of an insolvent debtor and to hold them for the benefit of suffering creditors before a decree, then equity would fail to supply a remedy where, by reason of its inversality, the law is deficient, and the court of equity could afford no relief against an impending loss until after a final decree had been rendered. Besides, as we see it, a decree of the chancellor is conclusive until it is set aside in a court of equity. It is certainly not subject to collateral attack by demurrer in a court of inferior jurisdiction. The fifth

ground of the amendment to the demurrer merely charges generally that the plaintiffs' petition fails to set forth any legal authority granted by the court of their appointment authorizing the receivers to bring the suit, and what we have just said in regard to the grounds of the original demurrer applies to it, of course.

[2] 2. The plaintiff in error, however, strenuously insists that an action for the collection of an unpaid stock subscription to the capital stock of the insurance company cannot be maintained unless it is made to appear that the amount necessary to be collected, either for the payment of the debts of the corporation or for purposes of contribution, has been judicially ascertained. To our minds this would be putting the cart before the horse; for, where there are a number of unpaid subscriptions to stock, the only way in which it can be ascertained what amount would be necessary to pay the creditors, especially what amount would be necessary to enable stockholders who failed to pay their subscriptions to contribute to stockholders who paid theirs, would be to ascertain by collection how many of the stockholders are insolvent, and therefore unable to contribute either to the payment of debts or to equalizing the burdens of the stockholders. We hold that the judge of the superior court, as a chancellor, had the undoubted right, in administering the assets of the Rome Insurance Company, to provide for the marshaling of all its assets, and his order attached to the plaintiff's petition is neither extraordinary nor at variance with the usual practice in equity in the administration of ordinary insolvent estates. Is there any reason why an unconditional contract of subscription to stock of a corporation should stand upon a higher or different footing than a debt of any other class? The subscription to the stock of a corporation, until it is paid, is a debt to the corporation—nothing more, nothing less. It sometimes happens that one who has made, but who has not paid in, a very large subscription to the capital stock of a corporation assumes himself to be entitled to greater privileges and immunities than a subscriber to a small amount of the stock, and assumes to direct the affairs of the corporation in which he has, in fact, but little money invested. But this assumption finds no warrant in law or in equity, and, we may add, at least none in good morals. One who owns a majority of the paid capital stock of a corporation is legally entitled to exercise a controlling influence in the direction of its affairs; and therefore one who assumes to direct the affairs of a corporation without having paid for his stock is under all the greater obligation not to refuse to make payment, and, if he does refuse, either law or equity should afford prompt means by which his obligation may be enforced. The argument that the subscription to the capital stock of a corporation cannot be enforced except to pay debts of the corporation, or that the subscriber should not be compelled to do so unless it is necessary for him to contribute to stockholders who have paid their subscriptions in full, not only is an argument ab inconvenienti, and is addressed solely to the discretion of the court charged with the duty of administering the assets of the corporation, but which has no force whatever in the face of the positive order of that court, where it has exercised its discretion by requiring the collection of all the assets as a preliminary to distribution. In the present case the judge of the superior court of Floyd county, for apparently good and sufficient reasons, required a suit to be brought on all the unpaid stock subscriptions, because it is not denied in the defendant's answer that $245,000 of the capital stock of $1,000,000 was paid in full, and that all the remaining stock not paid (to wit, $755,000) was held by nine persons, of whom the defendant was one. The appointment of the receiver, only circumstantially it is true, but eloquently enough, bespeaks the insolvency of the Rome Insurance Company. If the $755,000, of which the defendant subscribed for $94,500, were all collected, granting that the insurance company owes no debts, and that nothing more has happened than that the $245,000 paid in by stockholders in various states, as alleged in the petition, has been spent in carrying on the business, then each one of these paid-up stockholders would be entitled to a contribution of over 75 per cent. in order to repay him the money expended by him in enabling the large stockholders to carry on the business, and the amount involved would be something over $185,000. But, if the whole amount is not collected, it is clear that the proportional contribution to the stockholders who have paid in the $245,000 would be less, and if several of them were insolvent, and the necessary expenses of the receivership and of collecting the claims were great, the result would be entirely different. If only one of the subscriptions of the nine remaining unpaid or partly paid should be small or only partially collectible, it might happen that the fund thus received would be required to meet the expenses of the receivership and be consumed thereby. This would at least relieve that much those stockholders who have already paid in full their stock subscriptions. Conceding that this suit, as insisted by counsel for the plaintiff in error, is, in effect, a suit filed by and in behalf of the stockholders against the insurance company, and that the recovery, if any, will be applied solely for the benefit of the stockholders who have paid their subscriptions in full, we still deem that the order of the chancellor conferred upon the receivers the perfect right to sue, and authorized them to recover any indebtedness for

unpaid stock subscription, leaving the appropriation of the fund thus raised to the determination of the court of equity, where the questions which it is here sought to raise are properly cognizable. To our minds, there is no force in the suggestion presented by each of the demurrers that the judge of the superior court, by the language directing the receivers to collect from such as, in their opinion, were legally liable, delegated to the receivers the duty of ascertaining the necessity for collecting the unpaid subscriptions of $755,000. This was no delegation of authority, but inasmuch as the order authorized the receivers to employ counsel, and gave them permission to seek further direction from time to time from the court, the language used was of itself in the nature of a direction not to bring suits, where, after due investigation, the receivers were satisfied the apparent debtor was not legally liable. It was not a delegation of the court's right to apportion the liability of the several debtors as compared with each other, but a mandatory direction not to proceed at all against an apparent debtor who was not clearly liable. We construe the order as an unequivocal direction to sue all subscribers to the unpaid capital stock, unless upon an audit of the books or by an ascertainment of the facts in any other way it was clear to the receivers that the subscription had not been legally made or accepted, or that the subscription had been paid.

[3] 3. The third question presented is: Was a judicial ascertainment of the amount due on the defendant's subscription, either for the purpose of paying debts, or for the purpose of contribution, an essential preliminary to the bringing of the action by the receivers? If so, section 2245 of the Civil Code, which provides that upon the dissolution of a corporation its property and assets constitute a fund for the payment of its debts and for distribution among its stockholders, and section 2249, which provides that the individual liability of stockholders is an asset of the corporation, and, as such, is to be enforced by the receiver, trustee, etc., are meaningless, because there is no provision to the effect that the liability of the stockholder is to be apportioned or diminished upon any consideration or under any circumstances, nor is it declared that the "assets" shall be determined by anything other than the subscription. Certainly the corporation, if not dissolved, might sue upon the unpaid subscription to its capital stock without the necessity of showing the purposes to which the fund, when collected, was to be applied, and "a suit by the receiver on unpaid stock subscriptions is the same thing as suit by the corporation itself." Moore v. Ripley, 106 Ga. 556, 32 S. E. 647; Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626; Walters v. Porter, 3 Ga. App. 73, 59 S. E. 452. It was held in Wheatley v. Glover, supra, 125 Ga. 730, 54 S. E. 626, that in a receiver's suit for unpaid stock subscriptions it is only necessary to allege and prove that the suit is brought by authority of the court under which the receiver is appointed. "A stockholder occupies a threefold relation: * * * To the corporation; * * * to other stockholders; and * * * to the creditors." Gress v. Knight, 135 Ga. 62, 68 S. E. 834, 31 L. R. A. (N. S.) 900. "Subscribers" to capital "stock may be compelled to pay it * * * whenever the interests of the corporation or" other stockholders or "creditors so require." Rosenheim Shoe Co. v. Horne, 10 Ga. App. 582, 73 S. E. 953. And it seems clearly held in Commercial Bank v. Warthen, 119 Ga. 990, 47 S. E. 536, that the right to recover for unpaid stock subscriptions passes to the receiver as it did by the order of the judge in the present case, and must be enforced by the receiver. If, as we think, the chancellor had the right to order the receivers, as his servants, to take charge of all the assets, including the unpaid subscriptions to the capital stock, and safely keep them, subject to his future orders, an ascertainment of the exact amount necessary to be collected for the benefit of the stockholders or of the creditors was not essential to enable the receivers to carry out the orders of the court, for the reason, among others, that the chancellor could not foresee what amount would be collected, and, if this had been attempted, and the receivers had been ordered to sue each subscriber for a certain proportionate part which would have been the correct amount if all the assets had been collected, the purposes of the court would have been defeated, and second suits would have been necessary if there had been a failure to collect as to any one of the stockholders.

[4] 4. The collection of a stock subscription in this action is not prevented upon the ground that such demands are cognizable only in courts of equity, as insisted by learned counsel for plaintiff in error. It is true that a court of equity alone has jurisdiction to marshal assets and administer estates of insolvent debtors for the benefit of creditors and others interested in the fund, but a suit upon a promissory note which happens to be one of the assets of an insolvent trader would not in any sense be an equitable proceeding, although the suit might be an incident in the equitable administration of the insolvent estate. We cannot see how an unconditional promise to pay so many dollars at fixed times, in satisfaction of a certain subscription to capital stock of a corporation, differs in any wise from an unconditional promise to pay an equal number of dollars stipulated in a promissory note. The fact that the city court of Floyd county has no equity jurisdiction to distribute the fund does not deprive it of its undoubted right to entertain a suit and issue a common-law

judgment and execution to raise the fund which may thereafter be distributed by the appropriate court of equity.

[5] 5. Having disposed of the main contentions of the plaintiff in error, we come now to deal with rulings in which it is insisted that the court committed error, even if the suit was properly brought and the plaintiffs were prima facie entitled to recover. It is insisted by counsel for the plaintiff in error that at least the fifth, sixth, and seventh paragraphs of the answer of defendant, which categorically denied the fifth, sixth, and seventh paragraphs of the plaintiffs' petition, in accordance with the "Neal Act," should not have been stricken, but that the issue raised by these paragraphs of the answer should have been submitted to a jury. Nothing is better settled than that the plea of general issue raises no issuable defense in a suit upon an unconditional contract in writing. The defendant having in his answer admitted the execution and delivery of the contract, the fifth, sixth, and seventh paragraphs of his answer, as pleaded, presented no defense to a recovery upon the contract according to its terms. It amounted to a statement simply that: "I promised to pay the plaintiff; I have not paid him; but I do not owe him."

[6] 6. The demurrer to the second paragraph of the answer was properly sustained. In this paragraph of the answer the defendant sought to set up, in bar of the action, an extension of time of payment alleged to have been granted by the directors of the corporation. There was no allegation that the extension of time of payment was supported by a consideration, nor any allegation that the directors were authorized to alter the contract by extending the time of payment, or that the extension was approved by the stockholders. Clearly the directors were not authorized to extend the time of payment of the stock subscription, without a consideration which would be equal to the value of the use of its money in its business, and in any event an extension which would spin out for ten years the time for the collection of the amount due on the capital stock of the corporation would not be effectual, unless approved by the stockholders, for the alleged agreement amounted pro tanto to a release, inasmuch as the subscription contract bore no interest, and it is not averred in the answer that the principal of the subscription was to bear interest for the period of ten years for which it was extended, and for this period of time the interest and its compound would amount to as much as the original subscription. The alleged release therefore amounted, in effect, to a donation to the defendant of an amount equal to his original subscription, which must necessarily have been a charge during the period of ten years on those stockholders who had paid for their stock in full. The court was right to strike this paragraph of the plea. See 1 Thompson on Corporations, §§ 760, 761, 763, 766; Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Cartwright v. Dickinson, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706, 17 Am. St. Rep. 910; Putnam v. New Albany R. Co., 16 Wall. 390, 21 L. Ed. 361; Beam v. Floyd County Farmer's Union, 8 Ga. App. 399, 69 S. E. 225.

[7] 7. The eighth paragraph of the defendant's answer sets up that a forfeiture of the stock is the sole remedy in this case. It is to be borne in mind that the defendant's indebtedness evidenced by a contract of subscription for the insurance company's stock was not for the original stock, but was created by a subscription to an increase in the capital stock. For this reason section 2396 of the Civil Code has no bearing, and the defendant's plea was without merit. In the next place, this paragraph of the answer was properly stricken because, under the provisions of section 2396, the cancellation of stock for nonpayment of the subscription, and the forfeiture of payments previously made, is a matter altogether optional with the board of directors of the corporation; and in the defendant's answer there was no allegation that the directors had ever declared the defendant's stock and all previous payments made thereon forfeited, or that the directors complied or attempted to comply with the provisions of the section by giving the defendant notice as required thereby. Aside from all this, the right of forfeiture is merely an accumulative remedy, and does not impair the right to enforce payment by suit. After their appointment, the receivers stood in the place of the corporation and its directors, and, if the right to cancel longer existed, it was dependent for its operation and exercise upon the option of the receivers. 1 Thompson on Corporations § 772, and citations; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412.

As we view this case, the amendment to the petition plainly identified the action as a demand on the part of the receivers in behalf of the paid-up stockholders, who in order that they might have their pro rata share of the assets, had paid $245,000 of their money into the corporation, which had gone out of business. Section 2249 of the Civil Code declares that:

"Such individual liability shall be an asset of such corporation, to be enforced by the assignee, receiver, or other officer having the legal right to collect, marshal and distribute the assets of such failed corporation."

To enforce the liability upon the contract of subscription it was not necessary to apply to a court of equity, although the direction of such a court was essential to the marshaling and distribution of the assets of the failed corporation as a whole. The assets of a corporation of every description constitute a fund, first for the payment of debts, and then for equal distribution among its members; and to this end the superior court of

the county where the corporation was located had authority to appoint receivers to properly administer such assets under its direction. Civil Code, § 2245. Certainly this section would be without meaning if the superior court could not direct the receivers to sue debtors of the corporation (who refused to pay voluntarily), in order that the fund—as to which ordinary creditors are preferred creditors, and stockholders secondary creditors—may be raised. The statute is silent as to the manner in which unpaid stock subscriptions are to be collected, but it authorizes the superior court to appoint a receiver, and, under proper restrictions, the receiver is to administer the assets under the direction of the court.

[8] Section 2251 of the Civil Code, which authorizes suit against members of a private association, joint-stock company, or existing or dissolved corporation, to recover a debt due by the association or corporation of which they are, or may have been, members, or for the appropriation of money or funds in their hands to the payment of such debt, has no application to a case like the present. That section gives any citizen the right to sue either the association or a member of the corporation, or any other person liable, and to recover of the member sued the amount due for unpaid stock in his hands or other indebtedness. The statute confers upon a creditor of a corporation the right to hold any member of the corporation who has not fully paid up his stock liable for the debt of corporation to the extent (and justly to no greater extent) that the defendant was indebted to the corporation on unpaid subscription to stock; and, of course, in such a case the law carefully guards the rights of all parties by providing that, if the debt of the member to the corporation was greater than the plaintiff's demand, the plaintiff could recover only so much as would discharge the obligation of the corporation to himself. This just limitation upon the right of the creditor of a corporation to charge the subscriber to the capital stock with no more than was necessary has no pertinence to the exercise by a court of equity of its prerogative of marshaling the assets of a debtor in a complete and final administration of his assets.

Learned counsel for the plaintiff in error insists that section 2251 of the Civil Code provides how receivers can sue on unpaid subscriptions, and that the provisions of that section limit the amount that can be recovered by receivers to an amount sufficient to satisfy such debts. We cannot concur in this opinion. True, no more than this amount could be equitably retained, but it is for the court, upon a full adjudication of the case, to determine what amount will be necessary in order to equalize all stockholders; and, for reasons heretofore stated in this opinion, these facts cannot be ascertained in advance of a final decree by the court of equity distributing the fund, and it is to be presumed that the court, in molding the decree, will do equity.

It seems that no case identical with that at bar, in the respect that the suit by the receiver was brought on behalf of fully paid stockholders against another stockholder whose subscription was not fully paid, has been adjudicated in this state; but in Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412, it was held that unpaid subscriptions to the capital stock of a corporation are corporate property which can be reached by the creditors in a court of equity, and this right exists independently of any statutory provision. Since the decision in that case sections 2245 to 2249 have been embodied in the Civil Code, and the statement that unpaid subscriptions may be reached in a court of equity does not amount to a denial of the proposition that a court of equity, by means of a receiver, may use a court of law in aid of the collection of the assets which are to be distributed. The suit in Robinson v. Bank of Darien, 18 Ga. 65, was an equitable proceeding, and in that case the plaintiffs were naturally confined to the precise amount of the debt, because the suit was against the state of Georgia as a stockholder, and was maintainable only by consent of the state and upon terms proposed by the state, when, "disrobing herself of her sovereignty, she gracefully and magnanimously pledged her faith to pay to the claimants whatever sums they should be found legally and justly entitled to." Stinson v. Williams, 35 Ga. 170, was a suit under the provisions of section 2251, by a creditor against a stockholder, and so was Beck v. Henderson, 76 Ga. 360, and, of course, in both those cases the single plaintiff was not permitted to collect more than the amount due him, and thus impair the ability of other creditors to collect their claims. In King v. Sullivan, 93 Ga. 621, 20 S. E. 76, and Brobston v. Downing, 95 Ga. 508, 22 S. E. 277, it was held that unpaid stock subscriptions are assets of a insolvent creditor which may be applied for the benefit of its creditors. It seems to follow, under the provisions of section 2245, that these assets might have been applied by equitable distribution among the members of the corporation in equalizing their comparative losses, if there had been no creditors, or after satisfying the creditors, if there were any. Fouche v. Bank, 110 Ga. 827, 36 S. E. 256, Harrell v. Blount, 112 Ga. 711, 38 S. E. 56, and Morgan v. Gibian, 115 Ga. 145, 41 S. E. 495, which are cited by counsel for the plaintiff in error, are each of them cases in which the creditors brought suit either against the corporation and the subscribers to the capital stock, or against stockholders whose subscriptions were unpaid, to recover from the unpaid subscribers a specific amount, and these cases fall under the provisions of sec-

tion 2251, which, as we have already said, has no reference to suits brought by a receiver to recover unpaid subscriptions to the stock, to the end that the assets of the corporation may be marshaled in a court of equity. We do not think our views in the present case are in conflict with the rulings of the Supreme Court in the case of Tichenor v. Williams Block Pavement Co., 116 Ga. 303, 42 S. E. 505, upon which counsel for plaintiff in error rely as conclusive authority to support their contentions. It was held in that case that a court of equity will not authorize or direct a receiver of a business corporation to sue for and collect unpaid subscriptions when it appears that there is no existing creditor who has an unsatisfied debt against the corporation, and the only purpose for which such authority is sought is to provide a fund for meeting obligations on the part of the corporation which will arise in the future and at a time when the corporation will have no solvent stockholders. The purpose of the suit brought by the receivers against Graves was to provide a fund for meeting obligations on the part of the corporation, and the proceeding was merely ancillary to the proceeding in equity, by which it was sought to finally administer the assets of a defunct corporation, paying creditors, if necessary, equalizing stockholders, if necessary, and distributing the remaining assets, if any, among those entitled to receive them. And it is well settled that equity, having assumed jurisdiction, is disposed to administer complete justice, and not grant relief by piecemeal only. In Tichenor's Case there were no fully paid stockholders, and all of the stockholders had paid in the same amount. So that any collection, so far as the stockholders were concerned, would have been the raising of a fund to meet an eventuality or contingency which could not arise (if it was ever possible for it to occur) until after the corporation was dissolved. The present case deals with a condition which already exists, in which $245,000 belonging to one set of stockholders had been expended for the benefit of the nonpaying stockholders, as well as in behalf of themselves. There is respectable authority to the effect that, before a court of equity authorizes a receiver to collect unpaid subscriptions to the capital stock of a corporation, there must be a judicial ascertainment of the corporate debts (7 Cook on Corporations, §§ 207, 208), but the proposition stated has no application in this state, in view of the provisions of sections 2245 and 2249 of the Civil Code. In this state all the debts, including subcriptions to the capital stock of the corporation, are assets to be administered by the receiver, and each subscription is a debt to the corporation, and by express statute a court of equity may exercise its discretion in ascertaining the amount of the corporate debts either before or after the corporate assets have been marshaled and collected.

Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 767)

## WALKER v. LOTT-LEWIS CO. (No. 5741.)

(Court of Appeals of Georgia. Feb. 6, 1915.)

*(Syllabus by the Court.)*

1. EXECUTION ⟸177—STAY BOND—LIABILITY OF SURETY—ESTOPPEL.

A surety on a stay bond is estopped to assert that, because the stay bond was not given within the time prescribed by law, he should be discharged from his obligation as surety.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 381, 460–465; Dec. Dig. ⟸177.]

2. EXECUTION ⟸177—STAY BOND—LIABILITY OF SURETY—RELEASE.

A contract of suretyship on a stay bond imposes upon the surety the single, simple, and unqualified obligation of paying the amount of the judgment which has been rendered against his principal in the event that his principal does not pay it within the prescribed time. Since the purpose of the stay bond is to relieve the debtor and free his property, the surety upon a stay bond cannot claim a release from his obligation because of any lack of diligence on the part of the judgment creditor in not enforcing the fi. fa., and consequently an affidavit of illegality, which sets up that the security on a stay bond was discharged because the plaintiff in fi. fa., by dismissing his levy upon certain property of his principal, increased his risk as a surety upon the stay bond, imposes no obstacle to a levy of the fi. fa. issued against the surety which issued in conformity with law upon the breach of the stay bond.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 381, 460–465; Dec. Dig. ⟸177.]

Error from City Court of Baxley; D. M. Parker, Judge pro hac.

Action between H. A. Walker and the Lott-Lewis Company. From the judgment, Walker brings error. Affirmed.

S. D. Dell, of Hazlehurst, for plaintiff in error. Padgett & Watson, of Baxley, for defendant in error.

RUSSELL, C. J. On February 12, 1913, a judgment was rendered by default in the city court of Baxley in favor of Lott-Lewis Company against Graham Mercantile Company and others. An execution was issued upon the judgment, and on March 6, 1913, was levied upon certain property of the defendants in fi. fa. On March 11, 1913, the defendants undertook to stay the execution for 60 days as provided by law, and H. A. Walker (the plaintiff in error), with others, under the provisions of section 6044 of the Civil Code, signed a bond for that purpose. On May 15, 1913, the attorneys for the plaintiff in fi. fa. caused the execution to be canceled of record, and on the same day a new execution was issued against the parties named in the original execution and the sureties on the stay bond. On September 13, 1913, the new execution was levied upon

certain property of the plaintiff in error. To this levy an affidavit of illegality was interposed, alleging that the stay bond upon which the execution was based was illegal, because it undertook to stay a judgment upon which an execution had already issued, which had been levied, because there was no entry on the original execution to show that a sale was not had under the levy entered thereon, because the plaintiff had canceled the original judgment of record, and the same being so canceled, no legal execution could issue as against the plaintiff in error as a bondsman, and no legal levy could be made thereunder, and because the city court of Baxley, from which the execution issued, had been adjourned more than four days at the time of the filing of the stay bond, and hence the stay bond, upon which the execution against the plaintiff in error was issued, was illegal. The affidavit of illegality was properly traversed, and when the same came on for trial the plaintiff in error moved to amend the affidavit of illegality by alleging that the levy of the original execution and the seizure of certain property thereunder prior to the giving of the stay bond, which property was of more value than the amount of the execution, and the release of that levy by direction of the plaintiff after the giving of the stay bond, tended to increase the liability of the plaintiff in error on the bond, and the fact that the original levy and the entry thereof remained unexplained amounted to a discharge of the plaintiff in error pro tanto. This amendment was disallowed by the court, and exceptions pendente lite were taken. The case, upon its issues of fact as well as of law, was submitted for trial to the court without the intervention of a jury. The court found in favor of the plaintiff in execution, and ordered the execution to proceed.

We find no error in the judgment of the lower court. The decision in the case turns upon the solution of two questions which control all the issues raised: (1) Can a surety, who has voluntarily signed a stay bond, take advantage of the fact that the bond was not executed within the time provided by law or of any other failure to comply with the provisions of section 6044 of the Civil Code, of which he had notice at the time he executed the obligation, by means of which his principal's property was released from the processes in favor of the plaintiff in execution? (2) Can a surety upon a stay bond claim a release from his obligation because of any lack of diligence on the part of the judgment creditor in not enforcing his execution after the execution of the stay bond, or can he claim a release pro tanto in case the judgment creditor, after the execution of the stay bond, dismisses the levy of his execution upon the property of the defendant in fi. fa., who is principal in the stay bond?

[1] 1. Section 6044 of the Civil Code provides that:

"In all cases in the superior court where a verdict or judgment shall be rendered, the party against whom the same may be may, either in open court or in the clerk's office, within four days after the adjournment thereof, enter into bond, with good and sufficient security, for the payment of such verdict or judgment and costs, within sixty days."

The contention of the plaintiff in error, as embodied in one of the grounds of his affidavit of illegality, in which he insists that he should be discharged from liability, is that the stay bond was void because it was not issued within four days after the adjournment of the city court of Baxley, and because bond was given after the prescribed time for staying executions had expired. It appears, from the evidence, that the court should have convened on the first Monday in February, 1913, and that upon that day the judge of the court was unable to attend on account of sickness, and that the clerk, acting under direction from the judge, and presumably under the provisions of section 4343 of the Code, adjourned the court until the second Monday in February, at which time the court was held by his honor, Judge Krauss. The act creating the city court of Baxley provides that the judge shall have the power to hold the court in session from day to day for a period not longer than four weeks from the beginning of the term; and it is insisted that, as the stay bond was not given until the 11th of March, it was not given "during the term," nor within the four days after adjournment which are allowed by law. It would seem to us that the only purpose which the General Assembly, in the act creating the city court of Baxley (Acts 1897, p. 423), had in enacting the section to which we have referred, was to limit all terms of the court to four weeks from the actual beginning of the term, no matter whether it begins on the date fixed by the act, or at a later date, fixed by an order of adjournment, which may defer the session in accordance with law. Consequently it perhaps might be held that as the actual session of the court in the present instance began on February 10, 1913, and the bond was given on March 11, 1913, and the court was not automatically adjourned until March 10, 1913, the defendant in fi. fa. could have given a stay bond on March 11th or at any time prior to March 14th. It is not necessary, however, that we rule upon this point, and we therefore do not at this time decide that that the city court of Baxley must remain open for a period of four weeks consecutively, or may sit for a period of four weeks during any term, even though a part of the term may be held later than four weeks from the beginning of the term.

Treating the stay bond as having been given more than four days after the adjournment of the court, and conceding, for argument's sake, that the February term,

1913, of the city court of Baxley was held for a longer period than by law permitted, we still hold, unequivocally, that the plaintiff in error is estopped to assert that he should be discharged from his obligation as a surety upon the ground that the stay bond was not given within the time prescribed by law. We have been unable to find, in the form of precise adjudication, any lamp of authority by which our feet might be guided. But a consideration of the nature of the obligation into which the surety on a stay bond enters, and of the inevitable results which follow the execution of a stay bond "with good and sufficient security," satisfies us that it would be unconscionable to permit one who, for the very purpose of staying the processes of the law, assumes the obligation to pay the judgment debt of another, and thus paralyzes the progress of the law's processes to set up, as an excuse for the failure to perform his solemn obligation, facts which in no wise affect the sanctity of his undertaking. The surety in the present case was legally bound to know all the facts in regard to the February term of the city court of Baxley, upon the potency of which he now relies; and it follows that he is now estopped to assert these facts as a defense. The stay bond which was given in this case is not subject to any conditions. After reciting that the defendants have paid the cost and demand stay of execution for 60 days, the bond recites:

"And the defendant and the undersigned securities acknowledge themselves jointly and severally bound unto the said plaintiff for the amount of said judgment, as to both principal and interest, in the terms of the law in such cases made and provided."

When a defendant can file a stay bond with good and sufficient security, the law stays its processes for 60 days, regardless of the wishes or convenience of the judgment creditor. The stay bond being a provision for the benefit of the principal in the stay bond (a provision of relief of which he is powerless to avail himself without the intervention of a security), and one which leaves the judgment debtor free to make any disposition of his property he may see fit, certainly neither law nor good morals would permit a security, after having taken upon himself the simple, single obligation of the judgment against his principal in case the principal does not pay, to avoid his solemn obligation by the proof of any other fact than payment (unless in an exceptional case such as would be presented if it should be made to appear that the security was induced to sign the bond by the fraud of the judgment creditor).

[2] 2. A contract of suretyship imposes upon the surety the single, simple, and unqualified obligation of paying the amount of the judgment which has been rendered against his principal, in the event his principal does not pay it within the prescribed time. Since the purpose of the stay bond is to relieve the debtor and free his property, the surety upon a stay bond cannot claim a release from his obligation because of any lack of diligence on the part of the judgment creditor in not enforcing the fi. fa.; and consequently an affidavit of illegality, which sets up that the security on a stay bond was discharged because the plaintiff in fi. fa., by dismissing his levy upon certain property of his principal, increased his risk as a surety upon the stay bond, imposes no obstacle to a levy of the fi. fa. against the surety which issued in conformity with law upon the breach of the stay bond. It is doubtful if there can be any such thing as an increase of the risk of a surety upon a stay bond, since section 6045 provides:

"Bond and security being given as provided in the preceding section, the verdict and judgment, or the execution thereon, shall be suspended for the said sixty days, and if the party shall fail to pay the said verdict or judgment within that time, execution shall then issue against such party and his security, without further proceedings thereon."

In view of this provision, the judge correctly held that it was immaterial that the judgment creditor had canceled the record of his former fi. fa., or that there appeared upon the fi. fa. against the original defendant an unexplained levy. The whole purpose of the provisions of sections 6044, 6045, and 6046 is to place upon the security upon a stay bond the whole liability theretofore resting upon the defendant in fi. fa., and to suspend all acts of diligence on the part of the judgment creditor in pressing his execution. It is designed to release the property of the defendant in fi. fa. so as to enable him, if he can, to raise the money himself to pay the amount within the 60 days, and thus relieve the security, who otherwise will be bound to pay it. The relief and the proceeding itself are both extraordinary, and it therefore may be safely said that the usual rule, whereby a surety may be released in case his risk is increased, has no application, because the purpose of the sections to which we have referred is to relieve the principal and give him 60 days' time, with an opportunity for discharging the obligation, if he can, without the cost and humiliation of a public sale of his goods, and to impose a strict obligation on the surety to pay the amount in case the principal is not able to do so. And to that end section 6045 provides that, at the expiration of the 60 days, a new execution shall issue both against the original defendant and the security upon the stay bond "without further proceedings thereon"; and section 6046 provides that "the security paying off such judgment or execution shall have control thereof."

Perhaps the fact that it is generally more convenient and attended with less risk for a surety to pay off the fi. fa. in the first instance, and secure himself at the time by a

transfer of the fi. fa., explains the seeming lack of adjudications upon the points upon which we have been called to rule; but we are well satisfied that the trial judge correctly held, first, that the surety was estopped to set up the fact that the stay bond was signed out of season, and also that no defense to the collection of the bond would be available to the surety other than proof that the amount of the bond had been paid.

Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 751)

SOUTHERN COTTON OIL CO. v. LOUISVILLE & N. R. CO. et al. (No. 5651.)

(Court of Appeals of Georgia. Feb. 6, 1915.)

*(Syllabus by the Court.)*

1. CARRIERS ⟸95, 99—SHIPMENT—"LOSS"—PRESUMPTION—APPLICATION OF STATUTE.

The rule which places upon a common carrier the burden of showing the exercise of extraordinary diligence in the transportation of goods (Civ. Code 1910, § 2712) applies, not only in cases of total "loss," but also in case of partial loss by injury or damage to the goods from delay in transportation or delivery, and requires that extraordinary diligence shall be shown as to the time of completing this service.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 396-433; Dec. Dig. ⟸95, 99.

For other definitions, see Words and Phrases, First and Second Series, Loss.]

*(Additional Syllabus by Editorial Staff.)*

2. CARRIERS ⟸99—DELAY IN TRANSPORTATION OF GOODS—"ACT OF GOD."

A strike, accompanied with violence and intimidation, may be treated as an "act of God" as far as it may cause delay on the part of a carrier in transporting goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 415-426; Dec. Dig. ⟸99.

For other definitions, see Words and Phrases, First and Second Series, Act of God.]

Error from City Court of Greensboro; S. H. Sibley, Judge.

Action by the Southern Cotton Oil Company against the Louisville & Nashville Railroad Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

Lewis, Davison & Lewis, of Greensboro, for plaintiff in error. Jos. B. & Bryan Cumming, of Augusta, and Noel P. Park, of Greensboro, for defendants in error.

WADE, J. A car of cotton seed was delivered to the White Plains Railroad Company, at White Plains, Ga., on September 30, 1912, to be transported over that road and the road of the Georgia Railroad & Banking Company (both of which roads were operated by the defendants) to the Southern Cotton Oil Company at Greensboro, Ga. The car reached Greensboro on the afternoon of October 1, 1912, and was there left at the station, as the train that customarily did the switching at Greensboro had already passed that point; and, had there been no interruption, it would have been switched to the plaintiff's mill by "the next freight going west the next day—the next local freight going west, * * * in accordance with the regular course of business between the railroad and the mill." This car arriving at Greensboro on October 1, 1912, after the switching train had passed that point, in the regular course of business it was obliged to wait until the next day to be switched to the mill of the Southern Cotton Oil Company. At 6 p. m. on October 1, 1912, a strike of all flagmen and conductors of the defendants went into effect, and it remained in effect continuously for about 15 days thereafter. These employés ceased to work, and "the strike was accompanied by much violence and intimidation, and all efforts of the defendants (said efforts having been fully attempted) to forward the freight failed: the violence and armed resistance was of such a character as could not be overcome by the carrier and was not controlled by the civil authorities of the state when they were called upon by the defendants." The car of cotton seed remained at the station and was not delivered to the plaintiff on its side track until October 15, 1912; and, on account of this long and unreasonable delay, the cotton seed greatly deteriorated, as the seed had "heated," rotted, and turned black, and was so greatly damaged as to be entirely useless for the purpose for which it was purchased. The car of rotten seed was then sold for the best price obtainable for manure, and this suit was brought to recover damages for the resulting loss. The trial of the case resulted in a verdict for the defendant, and plaintiff excepts to the refusal of its motion for a new trial.

[1] The plaintiff in its petition complained of unreasonable delay, and of failure by the defendants to give it notice of the arrival of the car at Greensboro, and on these grounds sought damages. The evidence was in conflict as to whether or not notice of the arrival of the car had been given by the agent of the defendants to the plaintiff's cashier. It appears that the train which brought the car to Greensboro placed it on a side track at the station, in a position where it was practically inaccessible to wagons. It further appears that the regular course of giving notice of the arrival of freight at Greensboro embraced three different methods, according to the circumstances of each case: Less than car load lots, consignees other than merchants were notified by postal cards through the mails, and consignees who were merchants were notified personally by the agent; consignees of car load lots, who had side tracks of their own, were notified by placing their cars on such side tracks. So far as the record dis-

closes, it appears that it was impossible to notify the plaintiff of the arrival of the car of cotton seed by placing the car through the ordinary and usual means, on its side track; and, according to the testimony for the defendants, personal notice of the arrival of the car was given to the plaintiff within a day or two from the time the strike was declared. The question whether notice was given personally to the plaintiff was a question entirely for the jury, and need not be considered here. The only question to be determined is whether the trial judge erred in charging the jury as to the degree of care and diligence the defendants were required to exercise.

The fourth ground of the motion for a new trial complains that the court erred in charging the jury as follows:

"I charge you that one who pursues the business constantly or continuously for any period of time or for any distance of transportation is a common carrier, and, while a common carrier is bound ordinarily to use extraordinary diligence, this rule applies in the case of total loss or destruction of the property, and does not apply in the case of partial injury to the property, or of deterioration in value due to delay in transportation. The burden is on the plaintiff, in the first instance, to satisfy you that a loss has been occasioned through the operation and running of defendants' business as a common carrier, and, when such loss is shown, the burden rests upon the common carrier (the defendants in this case) to show that they have used reasonable care and diligence, or ordinary diligence. 'Ordinary diligence' is that care which every prudent man takes of his property of a similar character. The absence of such diligence is termed 'ordinary neglect.'"

The plaintiff insists that this charge was error because the degree of diligence which the law requires of a common carrier, in cases of partial injury or damage to property, as well as in cases of total destruction and loss of property, is extraordinary diligence, and the question for solution by the jury was whether or not the defendants had exercised this degree of diligence to prevent damage to the goods. In the fifth ground of the motion it is complained that the court erred in refusing to give in charge to the jury, without qualification, sections 2712, 3472, and 2713, of the Civil Code of 1910. The fourth and fifth grounds may be considered together, since they practically involve but one question.

The defense urged by the defendants to relieve them from damages on account of the long delay in delivering the car load of cotton seed, which arrived at Greensboro on October 1, 1912, and was not finally switched to the track of the plaintiff until October 15, 1912, is the defense provided for under the Civil Code, § 2737. That section is as follows:

"Where a carrier receives freight for shipment, it is bound to forward within a reasonable time, although its employés strike or cease to work; but if the strike is accompanied with violence and intimidation so as to render it unsafe to forward the freight, the carrier is relieved as to liability for delay in delivering the freight, if the violence and armed resistance is of such character as could not be overcome by the carrier or controlled by the civil authorities when called upon by it."

[2] It appears, from the general trend of the later decisions of courts of last resort, that a strike, accompanied with violence and intimidation, may be treated as an "act of God," so far as it may cause delay on the part of a carrier in transporting goods (4 Ruling Case Law, §§ 212 and 196, and cases there cited); and while, under the weight of authorities elsewhere, proof that the loss happened from the immediate agency of the act of God would create a presumption that the carrier was duly diligent, and shift the burden of proof to the opposite party, the Code of Georgia declares that in case of loss the presumption of law is against the carrier; and this declaration occurs in the section in which the degree of diligence to which the carrier is bound is declared to be "extraordinary diligence" (section 2712); and the burden is upon him to show, "not only that the act of God * * * ultimately occasioned the loss, but that his own negligence did not contribute thereto" (section 2713).

"To silence the presumption altogether, it is necessary to show that the act of God was the sole cause, and that the loss happened in spite of the use of due diligence by the carrier to prevent it. This, at least, must be the general rule, and the one applicable to every case in which the circumstances attending the calamity are such as to suggest the probability that the loss might have been avoided had extraordinary diligence been exercised." Richmond, etc., R. Co. v. White, 88 Ga. 805, 811, 15 S. E. 802, 803.

It appears, from the order of the trial judge overruling the motion for a new trial, that his instruction to the jury, that the carrier is bound only to ordinary diligence, where damages for delay in making delivery of goods are sought, was based upon the rule laid down in the case of Johnson v. East Tenn., etc., Ry. Co., 90 Ga. 810 (7), 17 S. E. 121, as follows:

"Where a common carrier receives goods for transportation and is sued for delay in delivering them, it is error to charge that the carrier is bound to extraordinary diligence as to the time of transportation. Ordinary and reasonable diligence is the rule."

In cases of loss, the presumption of law is against the carrier, and the measure of diligence he must exercise to enable him to escape liability, even where loss was occasioned by the act of God, is "extraordinary diligence." Civil Code, § 2712. See, also, Richmond, etc., R. Co. v. White, supra, and Atlanta & West Point R. Co. v. Jacobs, 135 Ga. 113, 68 S. E. 1039. The Code further provides that:

"In order for a carrier or other bailee to avail himself of the act of God or exception under the contract as an excuse, he must establish not only that the act of God or excepted fact ultimately occasioned the loss, but that his own negligence did not contribute thereto." Civil Code, § 2713.

No rational reason can exist why the measure of diligence exacted where goods in transit are totally lost should be "extraordinary," and the measure where goods in transit are injured or damaged, or, in other words, partially lost, should be "ordinary" only. It is easy to understand the application of the rule of ordinary diligence to a case of damage on account of delay in delivery, where the property has not in any way been injured, damaged, or partially destroyed, but the delay has occasioned loss on account of a drop in the market price of goods of the kind shipped, or for similar reasons; but, as stated above, no reason can be suggested why a carrier, bound to exercise extraordinary care to relieve him from a recovery on account of the total loss or destruction of the property in transit, should not be required to exercise the same degree of diligence to escape the consequences of a partial destruction of the property, resulting from unreasonable delay in delivery at destination. In this connection, another quotation from Richmond, etc., R. Co. v. White, supra, 88 Ga. page 813, 15 S. E. page 804, is exactly in point:

"The Code applies the presumption of default after proof of loss, not only to common carriers, but to all bailees; section 2064 declaring that, 'in all cases of bailments after proof of loss, the burden of proof is on the bailee to show proper diligence.' The word 'loss' in this section has been construed to mean injury or damage to the goods as well as their destruction or disappearance. Hawkins v. Haynes, 71 Ga. 40. There can be no question that the word has a like meaning in section 2066, as applied to common carriers."

The seventh headnote in the case of Johnson v. East Tenn., etc., Ry. Co., quoted supra, appears to state a fixed and certain general rule as to the degree of diligence required by the carrier where suit is brought for damages on account of delay in delivery of goods received for transportation; and it is there clearly announced that "ordinary" and reasonable diligence is the rule. It is also true that from the statement of facts in that case, as it appears in the printed volume, it would seem that the suit was brought on account of delay by the carrier to deliver certain goods within a reasonable time, "and that by this unreasonable delay the goods were *damaged*," etc. (italics ours). The ruling stated in the seventh headnote of that decision is not discussed in the opinion. We have however taken the pains to inspect the original record in that case in order that we might ascertain the exact facts upon which this ruling was based. As we have already indicated if it were construed to cover cases where damages were sought on account of injury to or partial loss of property, caused by delay in transit, this ruling would be directly in opposition to Code sections 2712 and 2713 and also in conflict with the older decision (Richmond, etc., R. Co. v. White) to which we have already referred, as well as in apparent conflict in principle, with several later decisions of the Supreme Court; but an examination of the original record in the Johnson Case discloses that the damages sued for in that case were not for injury to the property shipped, or on account of partial loss thereof. The petition sets forth that certain fertilizers were purchased by the plaintiffs, and were shipped from Charleston, S. C., consigned to the plaintiffs at a point on the defendant's railway in Georgia, the plaintiffs paying in advance the freight on these goods for the entire carriage; and that, having received the bill of lading for the goods, and being assured of quick passage thereof, the plaintiffs sold the goods in advance of arrival, disposing of them regularly in their business, at a certain profit per ton; that one car of guano was delayed en route, and that the plaintiffs lost the sale of that car of guano, as their entire trade had been supplied elsewhere—to the damage of the plaintiffs in an amount stated. It is obvious that under these facts the measure of diligence to which the carrier should have been held was ordinary diligence, since there was no "loss," either total or partial, of the property shipped; and therefore Code sections 2712 and 2713 did not apply. The rule laid down in the seventh headnote is correct under the facts of that case, but the allegation in the statement of facts that the suit was on account of unreasonable delay, whereby "the goods were damaged," is misleading, since it does not appear from the record that the goods were damaged in the slightest degree; it appears only that the plaintiffs were damaged on account of the nonarrival of the goods until after unreasonable delay.

"When goods are damaged in the hands of the carrier, the burden of proof is upon it to show that it was free from negligence, or that, notwithstanding its negligence, the damage occurred without its fault; that is, that its negligence did not contribute to the damage. And no exception to the rule arises from the fact that the goods are perishable or liable to deteriorate rapidly from internal causes. In all cases the presumption of law is against the carrier." Central R. Co. v. Hasselkus, 91 Ga. 382, 385, 17 S. E. 838, 839 (44 Am. St. Rep. 37).

In view of what we have said above, it is clear that, in accordance with the statutory provisions in this state, upon proof of loss arising on account of damage to the cotton seed, or, in other words, on proof of partial loss of the property, the burden was upon the defendants to show that they used extraordinary diligence to prevent the loss, and, if the act of God ultimately occasioned the loss, that the negligence of the defendants did not contribute thereto. The defendants might have had a complete defense under the Civil Code, § 2737, upon proof that they used only ordinary diligence to prevent the loss, if the damage for which recovery was sought had not been on account of injury to the subject-matter of the shipment, but had resulted solely from the delay, without injury to the property transported.

We can readily understand how the learned trial judge, not having access, as we have, to the original record in the Johnson Case, supra, would feel constrained to charge the rule, there apparently laid down (when taken in connection with the printed statement of facts), that ordinary diligence only was required where suit was brought to recover damages arising on account of delay by a common carrier in transporting goods, irrespective of whether or not damages arose because the delay caused the destruction of the goods in whole or in part, or because it occasioned loss to the consignee on account of the decline in the price of the commodity shipped, or for like reasons.

Judgment reversed.

BROYLES, J., not presiding.

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(15 Ga. App. 735)

KESLER v. STULTS.

STULTS v. KESLER.

(Nos. 5524 and 5525.)

(Court of Appeals of Georgia. Feb. 6, 1915.)

*(Syllabus by the Court.)*

1. BROKERS ⇐63 — COMMISSIONS—PERFORMANCE OF CONTRACT—"SALE."

"The broker's commissions are earned when, during the agency, he finds a purchaser ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner." Civ. Code 1910, § 3587. "Usually the word 'sale' denotes a completed, mutually binding contract; but under contracts creating the ordinary relationship of principal and real estate broker, and providing commissions for the latter, the broker has made a sale whenever, through his influence, a person ready, able, and willing to buy on the terms proposed is brought to the principal, though, through the fault or disinclination of the principal, no actual sale is ever consummated." Humphries v. Smith, 5 Ga. App. 340 (1), 63 S. E. 248.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94–96; Dec. Dig. ⇐63.

For other definitions, see Words and Phrases, First and Second Series, Sale.]

2. BROKERS ⇐86—COMMISSIONS—ACTIONS—SUFFICIENCY OF EVIDENCE.

There was evidence in this case from which the jury were authorized to infer that the seller induced the real estate agent to secure a purchaser for property to which he claimed title, and that the only reason why definite terms of sale were not "stipulated by the owner" of the land was because of his disinclination to propose any terms whatever when the agent brought him face to face with the parties offering to purchase, who were "ready, able, and willing to buy," and actually then offered to buy, and "said that they were ready to do business." Under this view of the facts, the jury were authorized to conclude that there was merely a postponement of definite terms on the part of the owner, and that the consummation of the sale was delayed solely for the convenience of the seller, and that the sale was finally defeated altogether on account of his actions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116–120; Dec. Dig. ⇐86.]

3. SUNDAY ⇐19—CONTRACT—RECOVERY ON QUANTUM MERUIT.

There was ample evidence that the contract, though originally executed on Sunday, was ratified on the following Monday (McAuliffe v. Vaughan, 135 Ga. 852, 70 S. E. 322, 33 L. R. A. [N. S.] 255, Ann. Cas. 1912A, 290); but since the plaintiff evidently recovered upon a quantum meruit or an implied contract to pay for services rendered the defendant and accepted by him, the fact that the contract was originally executed on Sunday was altogether immaterial.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 20, 50–53; Dec. Dig. ⇐19.]

Error from City Court of Albany; Clayton Jones, Judge.

Action by N. D. Stults against P. J. Kesler. Judgment for plaintiff, and both parties bring error. Affirmed on main bill, and cross-bill dismissed.

Peacock & Gardner, of Albany, for plaintiff in error. R. J. Bacon and R. H. Ferrell, both of Albany, for defendant in error.

WADE, J. Judgment on the main bill of exceptions affirmed. Cross-bill of exceptions dismissed.

BROYLES, J., not presiding.

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(15 Ga. App. 741)

I. EPSTEIN & BRO. CO. v. THOMAS.

(No. 5642.)

(Court of Appeals of Georgia. Feb. 6, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⇐273, 736—EXCEPTIONS—SUFFICIENCY.

It is the duty of a court of final review to consider exceptions so stated as to suffice to show what errors are complained of. An exception in which it is stated that the plaintiff excepts "to the judgment of the court overruling plaintiff's demurrers to defendant's answer, and to the ruling of the court overruling plaintiff's motion for new trial, * * * and assigns error thereon, and says that the court erred in overruling said motion for new trial on each and all of the grounds therein stated, and erred in overruling plaintiff's demurrers, and shows that said ruling is contrary to law," is equivalent to a separate assignment of error upon each order and ruling complained of, and is a sufficient assignment as to each. Burns v. Horkan, 126 Ga. 161, 163, 164, 54 S. E. 946.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1432–1649, 1764; Dec. Dig. ⇐273, 276.]

2. PLEADING ⇐205—OBJECTION—SUFFICIENCY—DEMURRER.

The general demurrer to the defendant's answer is not sufficiently specific to present for consideration an error, apparently clerical, on the part of the defendant in misnumbering in his answer certain paragraphs of the plaintiff's petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491–493, 495, 496, 498–510; Dec. Dig. ⇐205.]

3. PAYMENT ⇐60—PLEADING ⇐204—PLEA—REQUISITES—GENERAL DEMURRER.

A plea of payment which, while alleging the person to whom the alleged payments were made, nevertheless fails to allege when and how

the alleged payments were made with such reasonable certainty as to enable the opposite party to prepare to meet the plea, is insufficient, and, if advantage is taken of these defects by proper demurrer, it should be stricken, unless amended. A general demurrer, directed to a plea as a whole, is not sufficiently specific to require the court to strike the entire plea, if any portion is good.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 144–148; Dec. Dig. ⊂⊃60; Pleading, Cent. Dig. §§ 486–490; Dec. Dig. ⊂⊃204.]

4. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

There was evidence which authorized the verdict, and it was not error to overrule the motion for a new trial.

Error from City Court of Cairo; J. R. Singletary, Judge.

Action by the I. Epstein & Bro. Company against W. R. Thomas. Judgment for defendant, and plaintiff brings error. Affirmed.

W. H. Krause and J. R. Wilson, both of Bainbridge, for plaintiff in error. Bell & Weathers, of Cairo, for defendant in error.

RUSSELL, C. J. I. Epstein & Bro. Company, alleging that they were the purchasers of the accounts and other choses in action of J. M. Vereen, a bankrupt, brought suit upon open account against W. R. Thomas, alleging an indebtedness upon his part on an unpaid balance of account running from September 1, 1908, to February 3, 1911, of $394.50. Attached to the petition was a statement purporting to set forth each item purchased by the defendant, with sundry credits, consisting of cash and articles of farm produce. The defendant filed a sworn answer, in which he admitted only the allegations of the first paragraph of the petition, in regard to jurisdiction. Paragraphs 2 and 3 of the answer respectively state that they are in answer to paragraphs 1 and 2 of the petition; but it is plain, from the contexts of these paragraphs of the answer, that they are really responsive to paragraphs 2 and 3, and that the use of the words "one" and "two" was a mere clerical mistake of the scrivener.

In paragraph 5 of the answer the defendant attempted to plead payment, as follows:

"Defendant says that, if he ever owed J. M. Vereen any such account as the one sued on, it has been long ago fully paid; defendant having paid to said J. M. Vereen all that he owed him for the period covered by said account, some of the payments being made during said period, and some possibly shortly after the last date of said account. Some of the payments were made in cash and some by check. Defendant has destroyed his vouchers covering said period, thinking he would never have any use for same, and kept no books of account of the transactions with the said J. M. Vereen, took no receipts for payments made, and cannot, therefore, solely from memory, give the times of payment, nor the amounts of the payments but all were made to said J. M. Vereen, and satisfied all the demands of the said J. M. Vereen covering the period of said account. Said payments were made prior to any bankruptcy by J. M. Vereen. Defendant remembers one credit as follows: When J. M. Vereen went into business about four years ago, he owed defendant $80, which was to be placed to defendant's credit and to offset purchases by defendant. Such credit was never made. If the books of said J. M. Vereen showed the proper credits, they would verify all the allegations of this petition."

In paragraph 6 the defendant pleaded the statute of limitations as to items amounting to $60.10 of the account, including all items down to November 29, 1908.

The plaintiff demurred generally to the defendant's answer, upon the ground that it failed to set up a legal defense, and demurred specially to paragraph 5, above quoted, for the reason that it failed to set forth the dates and amounts of the payments, and failed to allege which payments were made by checks and which in cash. The plaintiff demurred also upon the ground that the plea was not sworn to. The court overruled the demurrer, and the trial resulted in a verdict in favor of the defendant. The plaintiff moved for a new trial upon the usual general grounds. Exceptions were preserved pendente lite to the ruling upon the demurrer, and exception is taken to the court's refusal to grant a new trial.

The defendant in error filed a motion to dismiss the bill of exceptions, upon the ground that the following assignment of error is insufficient:

"To the judgment of the court overruling plaintiff's demurrers to the defendant's answer, and to the ruling of the court overruling plaintiff's motion for new trial, the plaintiff excepted, now excepts, and assigns error thereon, and says that the court erred in overruling said motion for new trial, on each and all of the grounds therein stated, and erred in overruling plaintiff's demurrers, and shows that said ruling was contrary to law."

[1] 1. The motion to dismiss the bill of exceptions is not meritorious. Under the mandate of the General Assembly, we must decline to dismiss the case, if "there is enough in the bill of exceptions or transcript of the record presented, or both together, to enable the court to ascertain substantially the real questions in the case which the parties seek to have decided therein." Civil Code, § 6183. It is very plain to us that the plaintiff in error is presenting for adjudication two distinct questions, though they are stated together; and the error complained of in each instance, without regard to the merits of the contentions, is quite apparent. In the assignment of error it is stated, in effect, that the court erred in overruling the motion for new trial for each and all of the reasons stated in the motion, which is a part of the record. In connection with this (though the assignment could more properly have been made in another portion of the bill of exceptions), the plaintiff in error alleges that the court "erred in overruling plaintiff's demurrer, and shows that said ruling was contrary to law." Since the demurrer is in the record, the court can also

refer to the record for the merits of this contention. The present motion to dismiss seems to be very similar to that in Burns v. Horkan, 126 Ga. 161, 54 S. E. 946, in which the point was made that the plaintiff in error was attempting in one assignment to assign error on two separate and distinct orders of the court below, one the order sustaining the demurrer of Taylor, and the other sustaining the demurrer of Horkan; and the court held that this was equal to separate assignments of error upon each of these orders, and was a sufficient assignment as to each.

[2] 2. The error of the defendant in misnumbering the paragraphs of the plaintiff's petition, which he sought to answer, could have been corrected by the filing of a proper special demurrer, but the general demurrer was ineffective to present the point to the court; and hence there was no error in overruling the general demurrer to the answer. When the contents of the second and third paragraphs of the answer, in which certain paragraphs of the petition are erroneously referred to as paragraphs 1 and 2, are considered, it is very plain that these paragraphs of the answer are directly responsive to paragraphs 2 and 3 of the petition, and that the use of the words "one" and "two" was a mere clerical error of the pleader. That this is true is rendered more plain by the fact that paragraph 1 of the petition is admitted in paragraph 1 of the answer, and paragraph 4 of the petition is denied by paragraph 4 of the answer.

[3] 3. Nothing is better settled than that a plea of payment, unless the defect be waived, must state when and how, and to whom, the alleged payment was made. It has frequently been held that a mere general statement that the plaintiff's demand has been fully paid will not suffice as against special demurrer calling for such specific information as would enable the plaintiff to disprove the plea of payment. In the present case the defendant alleged the person to whom the payments were made (for it is stated in the plea that all the payments were made to J. M. Vereen), and the defendant gave such a reason for his inability to state the exact times of the several payments and the respective amounts that it necessarily must have addressed itself to the discretion of the court. Conceding that a good plea of payment must declare the time, place, and circumstances of the payment, as well as to whom it was made, it is nevertheless true that this definiteness of statement is required merely in order not to deprive the opposite party of the substantial right of disproving the alleged payments; and cases may arise where, from the lapse of time and the habit of a large proportion of the people not to keep books of account (for which indeed, there is perhaps no real necessity when they are not engaged in active business), one sued upon account, though having absolute knowledge that the alleged indebtedness has been paid, and though able to substantiate this by some circumstance, the date of which he cannot recall, might be deprived of a defense. The principle to which we refer is indirectly adverted and impliedly asserted to by Judge Powell in Atlantic Coast Line R. Co. v. Hart Lumber Co., 2 Ga. App. 88, 90 (3), 58 S. E. 316.

In the present case the defendant asserted that all the payments were made to J. M. Vereen; and therefore he complied with one of the requisite of a plea of payment. The fact that he was unable to state the time and place and amount of each payment did not give the defendant any advantage over the plaintiff, but rather placed the defendant at a disadvantage, especially if Vereen should testify positively that no such payments were made, because the jury would be likely to discredit the defendant's testimony unsupported by any indicia of definiteness corroborating his mere statement, when the books of account could be introduced to fortify the statements of Vereen contradictory of his own. Under the ruling in Atlantic Coast Line R. Co. v. Hart Lumber Co., supra, the reasonableness of the excuse for being unable to give the exact dates of his payments was addressed to the discretion of the trial court, and the court's exercise of its discretion in the present instance does not seem to have been harmful to the plaintiff in the lower court. But even though the court may not have been authorized to overrule the demurrer for the reason just referred to, still the plaintiff in error cannot complain because the court did not sustain their demurrer, for it was not sufficiently specific to point out the real defect in paragraph 5, and merely attacked the paragraph as a whole, when a portion of this paragraph, at least, was not subject to demurrer. The portion to which we refer is that part of paragraph 5 which alleges a prepayment which should have been entered to the defendant's credit at the time Vereen went into business, and as to which the defendant alleges no credit was ever given him. To this extent the plea was good as against a general demurrer directed to the plea in its entirety, whether it be treated as a plea of payment or as set-off, for the same rule as to definiteness of statement is applicable to both. The statement as to this $80 fixes the time by the statement that this amount was a subsisting debt at the time Vereen went into business "four years ago," and that there was an express agreement that this amount was to be placed to defendant's credit and be consumed by purchases by defendant and in accord and satisfaction of this amount of any purchases to be made by him. If the plea stated the truth as to this, it stated the amount, the time of payment, the manner of payment, and the person to whom the pay-

ment was made, thus fully complying with the well-settled rule as to definiteness in allegations of payment. The plaintiff having demurred to the paragraph as a whole, his demurrer was ineffectual, if any portion of this paragraph of the answer was good (Baer v. Christian, 83 Ga. 322, 324 [3], 9 S. E. 790; Prince v. Cochran, 10 Ga. App. 495, 496, 73 S. E. 693); and for this reason, as well as the reason previously stated, it was not error to overrule the demurrer.

[4] 4. Upon the trial the plaintiff introduced J. M. Vereen to substantiate the correctness of the account, but no books of original entry were offered. The witness Vereen testified that the statement of account attached to the suit was not prepared by him. He swore further that the items of the account were correct, but he did not claim to have any recollection as to many of them, though he testified positively to a few items to which his attention was specifically called. The defendant testified that while he could not remember the dates of the different payments made by him, and he had destroyed his canceled checks, representing some of the payments, he had made numerous payments, some of which he instanced, in addition to the $80, which should have been placed to his credit before any purchases were made; one of these items being the sum of $40 paid shortly before Vereen, his original creditor, went into bankruptcy. He further testified (in substantiation of his statement that the payments made by him settled his indebtedness) that he quit trading with Vereen several months before Vereen became a bankrupt, and that neither before nor after the payment of $40 was any demand for payment made upon him by Vereen or by the trustee in bankruptcy, or by the present plaintiff before the filing of the suit. The evidence was in conflict; but, there being no error of law assigned upon any ruling other than the judgment overruling the demurrer to the answer, we cannot hold that the court erred in refusing to set aside a verdict which the jury evidently based upon the superior credibility to them of the defendant's testimony to that offered in behalf of the plaintiff.

Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 690)

## BARROW v. STATE. (No. 5756.)

(Court of Appeals of Georgia. Feb. 3, 1915.)

*(Syllabus by the Court.)*

CRIMINAL LAW ⇐1174—ARTICLES SENT TO JURY ROOM.

For the jury, without the knowledge or consent of the prisoner, to receive and keep in their room, while deliberating on the case, articles of goods which "the state sent out to the jury room," and which were alleged to have been stolen on the night of the burglary in question, and which had been identified in the presence of the jury, but had not been introduced in evidence, was unwarranted by law, and was presumably prejudicial to the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3170–3178; Dec. Dig. ⇐ 1174.]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Harley Barrow was convicted of burglary, and brings error. Reversed.

H. H. Elders, of Reidsville, for plaintiff in error. N. J. Norman, Sol. Gen., of Savannah, for the State.

RUSSELL, C. J. The ruling stated in the headnote determines the only serious question in the case. Apparently there was no error in the refusal to grant a new trial upon the alleged newly discovered evidence, but we forbear to express any opinion as to this, because upon the new trial which, for the reason stated in the headnote, we feel constrained to grant, the accused will have the opportunity of submitting that testimony to the jury.

The evidence in the record fully warranted the verdict of guilty, but the verdict cannot be held to have been demanded; and for that reason, since a grave irregularity must prima facie be presumed to have been prejudicial to the losing party, the trial judge should have granted a new trial upon the ground of the motion in which it is alleged that certain physical objects identified by witnesses as bearing upon the case (but which were not introduced in evidence) were, without the knowledge or consent of the defendant or his counsel, taken by the jury to the jury room and retained by them during their deliberations. The verbiage of that ground of the motion is somewhat peculiar, and we attach some significance to the fact that there is in the motion no express statement as to whether the trial judge had knowledge that the articles alleged to have been stolen were sent to the jury room, or whether they were sent without his knowledge or consent, though it is alleged that they were sent without the knowledge or consent of the defendant or his counsel. If it expressly appeared, from the allegations of fact in the exception as certified by the presiding judge, that the articles in question were sent to the jury room without the court's knowledge, the case would undoubtedly fall clearly within the ruling in McCoy v. State, 78 Ga. 490 (4), 494, 499, 3 S. E. 768. On the other hand, as stated in Smith v. State, 14 Ga. App. 610 (1), 81 S. E. 817, "where physical objects are introduced in evidence without objection, the general rule is that any objection which could have been made will be held to have been waived." If it had appeared that these articles, after having been identified, were taken to the jury room with the court's permission, after state's

counsel, in introducing them in evidence, had offered to tender them to counsel for the accused, and that a formal tender was prevented by an unexcused or inexcusable absence of the defendant's counsel from the courtroom at any time during the trial, we should be inclined to hold that a waiver of the right to object could be implied from counsel's absence during the trial. Where physical objects pertinent to the case on trial have been fully identified, the court is not required to exclude this demonstrative evidence merely because counsel for the opposite side, by voluntarily absenting himself, prevents formal tender of the object preliminary to its introduction, nor can the court be expected to suspend a trial in order to procure the presence of counsel who has voluntarily absented himself. In such a supposable case it would seem that there would be an implication that counsel considered the introduction of the physical objects of so little importance that, if he were present, he would not object to their introduction. In the case at bar, however, the statement of the occurrence, as approved by the trial judge, is that:

"The state sent out to the jury room, with the jury that tried said case, several articles of goods alleged to have been stolen on the night said burglary was committed, and said goods were identified in the presence of the jury, and this was done, although said goods were not in any way introduced in evidence on said trial, and this was done without the knowledge or consent of the defendant or his counsel."

Since the direction of a trial is absolutely within the control of the presiding judge, and since the judge himself certifies that the state sent out these articles, we think it is reasonably to be implied that he never knew of or consented to the jury's possession of them. In Smith's Case, supra, this court reversed the judgment because a waiver of the right to object was not necessarily to be implied where the trial judge ex mero motu suggested sending out physical objects not formally tendered in evidence, and there was uncontradicted testimony from the defendant's attorney, upon the motion for a new trial, to the effect that he did not hear the remark of the court with reference to the articles. Upon the point now under consideration the case of the plaintiff in error is stronger than Smith's Case, because in Smith's Case the court knew of, and in fact suggested, the sending of the physical objects which had been identified, and, if counsel in that case had been more attentive, he might have heard the remarks of the court and might have made objection. From the statement of facts in the present case, approved as true by the trial judge, it is inferable that the physical objects referred to were put in possession of the jury without the knowledge of either the court or the accused or his counsel.

Though reluctant to set aside this verdict, supported by evidence and approved by the trial judge, the introduction of foreign matter before the jury is presumptively so prejudicial to that fair and impartial trial guaranteed by law that we are constrained to hold that the learned trial judge erred in overruling the motion for a new trial.

Judgment reversed.

BROYLES, J., not presiding.

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(15 Ga. App. 757)

## THOMPSON v. DEAN. (No. 5667.)

(Court of Appeals of Georgia. Feb. 6, 1915.)

*(Syllabus by the Court.)*

CERTIORARI ⟸69 — ENTRY OF JUDGMENT — TIME—PREVIOUS VOID JUDGMENT.

If upon the hearing "the certiorari shall be dismissed, and a final decision made in the cause by the superior court, the defendant in certiorari may sign up judgment in said superior court against the plaintiff and his surety for the sum recovered by him" (Civ. Code 1910, § 5205); and where, in such a case, an order was taken dismissing the certiorari, and an attempt was made by the defendant's counsel to enter up a judgment, which was later conceded by both parties to be a nullity, because the intended judgment was not signed by the court, it was not error for the court, upon proper motion and after notice to the plaintiff in certiorari, to enter up a proper judgment nunc pro tunc, within a reasonable time after the judgment originally taken was so declared to be a nullity. Civ. Code 1910, § 5703.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 185–194; Dec. Dig. ⟸69.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by J. W. Dean, for use, etc., against C. E. Thompson. From the judgment, Thompson brings certiorari. Affirmed.

Daley & Chambers, of Atlanta, for plaintiff in error. Thos. E. Scott, of Atlanta, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 803)

## MITCHELL v. STATE. (No. 6120.)

(Court of Appeals of Georgia. Feb. 6, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸1160 — MASTER AND SERVANT ⟸67 — APPEAL — EVIDENCE — LABOR CONTRACT ACT—REQUISITES OF OFFENSE.

To authorize a conviction of a violation of the Labor Contract Act of 1903 (Pen. Code 1910, § 715), the evidence must show the procurement of money, or other thing of value, on a contract to perform services by the accused, with the intent to defraud, the failure to perform such services, or the failure to return the money or other thing of value, without good and sufficient cause, and loss or damage to the employer; but it is for the jury to find, from all the evidence in the case, including the statement of the accused, whether or not all these

facts have been sufficiently established, and, when their verdict has been approved by the trial judge, his judgment refusing to grant a new trial will not be reversed, if there is *any* evidence to sustain it. Mulkey v. State, 1 Ga. App. 521, 57 S. E. 1022; Patterson v. State, 1 Ga. App. 789, 58 S. E. 284; Fuller v. State, 2 Ga. App. 696, 59 S. E. 1; Porter v. State, 7 Ga. App. 811, 68 S. E. 333.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. ⊂⊃1160; Master and Servant, Cent. Dig. § 75; Dec. Dig. ⊂⊃67.]

2. DEFINITENESS OF CONTRACT.

The contract here, unlike those in the cases cited by plaintiff in error, was sufficiently definite. Williams v. State, 6 Ga. App. 154 (1), 64 S. E. 492; Lewis v. State, 15 Ga. App. —, 83 S. E. 439.

3. MASTER AND SERVANT ⊂⊃67—LABOR CONTRACT ACT—PROSECUTION.

There is no merit in the objection that another person than the party contracted with acted as prosecutor. The accusation and the proof are in accord as to the fact that it was the employer who made the contract and who suffered the damage. Patterson v. State, 1 Ga. App. 782, 58 S. E. 284; Fuller v. State, 2 Ga. App. 696, 59 S. E. 1.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. ⊂⊃67.]

4. MASTER AND SERVANT ⊂⊃67 — BREACH OF CONTRACT—PROSECUTION.

The fact that the accusation alleged an advance of $1, and the proof showed an advance of $1 and two plugs of tobacco (worth 15 cents a plug), is not a fatal variance between the allegata and the probata. Groves v. State, 76 Ga. 808; Green v. State, 114 Ga. 918, 41 S. E. 55; Patterson v. State, 122 Ga. 587, 50 S. E. 489.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. ⊂⊃67.]

5. CRIMINAL LAW ⊂⊃1178 — ASSIGNMENT OF ERROR—ABANDONMENT.

The objection to the charge of the court is without merit, and besides, not being referred to in the brief of counsel for the plaintiff in error, cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011–3013; Dec. Dig. ⊂⊃1178.]

6. MASTER AND SERVANT ⊂⊃67—LABOR CONTRACT ACT—PURPOSE OF STATUTE.

The evidence does not show that the prosecution was an effort to imprison for debt. As was said in Young v. State, 4 Ga. App. 827 (3), 62 S. E. 558: "The fraudulent act of the promisor in procuring the money on his contract does more than make a debt; it also constitutes a crime, and the purpose of the act of 1903, supra, is not to create a remedy for the collection of the debt, but to provide punishment for the fraudulent and successful intent to cheat and defraud. Mulkey v. State, supra." The fact, in the instant case, that the hirer was not the prosecutor, goes to negative the contention that the prosecution was an effort to collect a debt.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. ⊂⊃67.]

7. CRIMINAL LAW ⊂⊃1159 — APPEAL — VERDICT—EVIDENCE.

There was some evidence to authorize the finding of the jury; and, to use the language in the dissenting opinion of Judge Russell, in Bowles v. State, 12 Ga. App. 17, 76 S. E. 594: "Though the amount involved was trivial, the verdict is not entirely unsupported by evidence indicating a fraudulent intent, and the trial judge did not, in refusing a new trial, abuse his discretion."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. ⊂⊃1159.]

Error from City Court of Dublin; J. B. Hicks, Judge.

Morris Mitchell was convicted of violating the Labor Contract Act, and brings error. Affirmed.

R. Earl Camp, of Dublin, for plaintiff in error. Geo. B. Davis, Sol., of Dublin, for defendant in error.

BROYLES, J. Judgment affirmed.

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(15 Ga. App. 736)

## SOUTHERN RY. CO. v. DAVIS.

## DAVIS v. SOUTHERN RY. CO.

(Nos. 5617, 5618.)

(Court of Appeals of Georgia. Feb. 6, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ⊂⊃204, 226—INJURY TO RAILROAD EMPLOYÉ—PETITION—ASSUMED RISK.

The court committed no error in refusing to sustain the general demurrer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544–546; Dec. Dig. ⊂⊃204, 226.]

2. PLEADING ⊂⊃362—INJURY TO RAILROAD EMPLOYÉ—STRIKING MATTER FROM PLEADING.

The court erred in striking from the petition the alleged rule of the defendant railway company that: "Second-class and inferior trains must approach and run through yard limits under full control, expecting to find the main line occupied." Both the plaintiff, as an employé, and the railway company, were bound by the rules of the company, and the plaintiff, having alleged that he was run over and injured by a second-class train, was entitled to allege and prove that this train was being operated in violation of the rules of the company.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1147–1155; Dec. Dig. ⊂⊃362.]

3. PLEADING ⊂⊃364—IMMATERIAL ALLEGATION—STRIKING—INJURY TO RAILROAD EMPLOYÉ.

It was not error to strike from the petition the following rule, alleged to be one of the rules "governing engineers" of the defendant company, to wit: "They must keep a constant and vigilant lookout while running for obstructions, defect of track, and signals"—which rule, it was alleged, was not being observed at the time of the injury; it not appearing from the petition that, if this rule had been observed, the injury would not have occurred, or that the failure to observe the rule contributed in any way to the plaintiff's injury.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1156–1162; Dec. Dig. ⊂⊃364.]

4. PLEADING ⊂⊃364—IMMATERIAL ALLEGATION—STRIKING—INJURY TO RAILROAD EMPLOYÉ.

It was not error to strike from the petition an allegation that it was customary to ring the bells and blow the whistles of trains passing on a double track, and that this custom was not followed on the trains passing at the time the plaintiff was injured; since it

does not appear from the petition that the custom was binding on the defendant, or that the plaintiff knew of the custom or relied on it, or that, if the custom had been followed at that time, the injury would not have occurred.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1156–1162; Dec. Dig. ⟸364.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. M. Davis against the Southern Railway Company. Judgment for plaintiff, and both parties bring error. Affirmed on main bill and reversed on cross-bill.

McDaniel & Black, of Atlanta, for plaintiff in error. Edgar Latham and Marion Smith, both of Atlanta, for defendant in error.

RUSSELL, C. J. J. M. Davis brought suit against the Southern Railway Company in the city court of Atlanta for damages on account of personal injuries alleged to have been received from the negligent operation of a train of the defendant. The petition was in two counts, each alleging the same facts, with the exception that the second count added that the train which struck defendant and caused his injuries was at the time engaged in interstate commerce. The defendant filed both a general and a special demurrer to the petition. The plaintiff amended by setting out more in detail the facts and acts of negligence alleged in the petition. The court, on hearing the demurrer, entered an order striking certain paragraphs of the petition, but overruled the general demurrer. The defendant excepted to the refusal to sustain the general demurrer and certain parts of the special demurrer, and the plaintiff, by cross-bill, excepted to the striking of certain parts of his petition.

[1] 1. The court correctly overruled the general demurrer. The plaintiff alleged in his petition that he was a track foreman, and, as such, was charged with the duty of keeping in repair certain parts of the track of the defendant, in what is known as Inman yard, in Fulton county, Ga.; that in the course of his duty he was walking along a track of the defendant in Inman yard on an inspection tour, and at a point where two main line tracks were parallel; that these tracks were known as the south-bound main track and the north-bound main track; that on observing a train approaching on the south-bound main track, upon which he was walking, he stepped to the north track, to allow the train to pass; that it was practically impossible for him to have awaited the passing of the train by stepping to the other side of the south track rather than to the north track, for there was a great deal of water on that side of the track, and it was therefore necessary for him to get upon the north-bound track for the train to pass; that while thus standing on the north-bound track, awaiting the passing of the train on the south-bound track, he was struck by a train approaching on the north-bound track; that he had not been able to see the train which struck him, by reason of a curve in the track near that point, and was prevented from hearing its approach on account of the noise of the passing train on the south main track. He alleged that he was lawfully upon the track in the performance of his duties, and that the defendant was bound to anticipate his presence there; that the employés of the company knew, or, by the exercise of ordinary diligence, could and should have known, of his presence in time to warn him of the approach of the train and to have avoided doing him any injury. Negligence was also alleged in the following respects: (1) In operating the train at a high and dangerous rate of speed; (2) in violating certain rules of the defendant requiring second-class trains to approach and run through yards under full control; (3) in failing to keep a vigilant and constant lookout; (4) in failing to check the speed of or stop the train after defendant's perilous position became known; and (5) in violating the crossing law.

It is contended that the petition sets forth no cause of action, and that a recovery is barred because of the doctrine of assumed risks; that the plaintiff was engaged in a hazardous work; and that one of the risks incident to it was the risk attending the passing of trains along the track. Learned counsel for the railway company cite many cases, and have presented to this court a very thorough and enlightening brief on the subject of assumed risks. While the plaintiff, under the law, being an employé, assumed the ordinary risks incident to his employment (Civil Code, § 3131), the petition alleges acts of negligence on the part of the defendant and its employés which, as we view the law, if proved to the satisfaction of a jury, would give him a right to recover. It has been repeatedly held in this state that an employé of a railway company, while he accepts the usual risks incident to his employment, accepts no risks arising from the negligence of the defendant or its employés. Coggin v. Central of Ga. Ry. Co., 62 Ga. 685, 35 Am. Rep. 132; A., K. & N. R. Co. v. Tilson, 131 Ga. 395, 62 S. E. 281; King v. S. A. L. Ry., 1 Ga. App. 88, 58 S. E. 252. And as was said by Judge Powell in Atlanta Ry. Co. v. McManus, 1 Ga. App. 308, 58 S. E. 258:

"A laconic and not altogether inexact statement of the substance of the law relative to such risks may be expressed in the words: 'The employé of a railway company does not assume the risk of injury from the negligence of his coemployés.'"

So, then, if the plaintiff's petition shows negligence on the part of the defendant or its employés, and that by such acts of negligence his injury was caused, it cannot be said

that the petition was subject to be dismissed. It not only alleges that the defendant's employés were negligent by reason of their failure to obey the rules of the company, which plaintiff had a reasonable right to believe they would obey, but also alleges a violation of the law of the land. So it cannot be said that the plaintiff in this accepted the risk of being injured in the way he alleges it to have occurred. The defendant certainly owed the plaintiff some duty. The mere fact that the plaintiff was an employé and was engaged in a hazardous employment is no defense to an action for doing him injury negligently.

[2] 2. It is insisted in the cross-bill of exceptions that the court erred in striking from the petition a rule of the railway company, pleaded as showing negligence, which provided, among other things, that "second-class and inferior trains must approach and run through yard limits under full control, expecting to find the main line occupied." We think the court erred in striking this part of the petition. The plaintiff alleged, in connection with this allegation, that the train which caused his injury was a second-class train, and that it was being operated on the main line and within yard limits. He alleged also that it was not "under full control." One of the causes of the injury was alleged to be a negligent operation of the train. Certainly the direct violation of a specific rule governing trains of the class alleged to have caused the injury, at the specific time and place, if shown, might show that the train was, in fact, being negligently operated. It is contended that the court did not err in striking this part of the petition, for it appears from the words "expecting to find the main line occupied" that the rule was formulated for the protection of the property of the company, and not for the protection of individuals. Whatever might have been the intent of the rule, the plaintiff, being in a yard where such a rule for the conduct and operation of trains was of force, and being, as contended, chargeable with knowledge of such rules in and about the yards where he labored, it cannot be said that he accepted risks incident to his employment growing out of the operation of trains otherwise than in accord with such rules and regulations. If, as he alleges, the train had been run in accord with the rules of force, he would not have been injured; and he is therefore entitled to allege and prove specific acts and rules of the company as tending to show negligence on the part of the defendant. The allegation of the act of running a train not within full control might not, without alleging a rule of which such an act is a violation, tend to show any negligence, while in a petition alleging both the negligence might appear.

[3] 3. It is also contended in the cross-bill of exceptions that the court erred in striking from the petition a rule "governing engineers," alleged as bearing on the negligence of the defendant, which rule was as follows: "They must keep a constant and vigilant lookout, while running, for obstructions, defect of track, and signals." This paragraph of the petition is followed by an allegation that: "The engineer of said train failed to keep a constant lookout at said place." It is not alleged that the failure of the engineer to observe this rule contributed in any way to the plaintiff's injury, or that, if the rule had been observed, the injury would not have occurred. There is nothing in the petition which in any way connects the injury with the violation of this rule, and we are of the opinion that the court did not err in striking this part of the petition.

[4] 4. It is contended that the court erred in striking from the petition allegations that it was customary for the defendant, when its trains met on double tracks, to ring the bell or blow the whistle when they passed each other, and that it failed to blow the whistle or ring the bell at the time and place of the injury. We are of the opinion that the court did not err in striking this part of the petition. The plaintiff did not allege that this was a binding custom, or that there was a rule requiring such action, or that the defendant knew of or relied upon such a custom. He does not allege that, if this custom had been followed at the time and place the injury occurred, he would not have been injured, or that, if a whistle had been blown or a bell rung, he could have escaped injury.

Judgment affirmed on main bill of exceptions, and reversed on the cross-bill.

BROYLES, J., not presiding.

(16 Ga. App. 1)

## ROME RY. & LIGHT CO. v. BARNA.

(No. 5592.)

(Court of Appeals of Georgia. Feb. 16, 1915.)

*(Syllabus by the Court.)*

1. CONTRIBUTORY NEGLIGENCE—RIGHT TO RECOVER.

If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover, though in "other cases" (where the plaintiff could not have avoided the consequences brought about by the defendant's negligence) the defendant would not be released, although the plaintiff may have in some way contributed to the injuries sustained. Civil Code 1910, § 4426; Americus, Preston & Lumpkin Railroad Co. v. Luckie, 87 Ga. 6, 13 S. E. 105.

2. STREET RAILROADS ⟸99—COLLISION—CONTRIBUTORY NEGLIGENCE—INCURRED RISK.

Where a vehicle drawn by two mules, and in which the plaintiff was seated, was driven, in violation of a municipal ordinance, from the right to the left side of a city street, across a track on which he clearly saw a rapidly moving trolley car approaching, and he perceived that the motorman running the car had not observed the presence of the vehicle on the track, but was looking backward, and it does not appear that he was unable to remove himself from the dangerous situation, but he remained in the vehicle until the car collided with it, and he thereby received personal injuries, which evidently were due to his miscalculation of the speed at which the car was approaching, and his voluntary assumption of the hazardous risk of effecting a crossing under existing conditions, and also to his failure to exercise ordinary care to escape the apparent danger, he cannot recover for the injuries, notwithstanding the negligence of the defendant.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209–216; Dec. Dig. ⟸ 99.]

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by I. B. Barna against the Rome Railway & Light Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dean & Dean, of Rome, for plaintiff in error. McHenry & Porter, of Rome, for defendant in error.

WADE, J. Barna brought suit for damages against the Rome Railway & Light Company, alleging that about 5 o'clock in the afternoon on January 18, 1913, he left the city of Rome to return to his home at Livingston, in company with James Keith; that they were riding in a double-seated surrey drawn by two mules, Keith being on the front seat driving and the plaintiff on the back seat; that they were traveling on the right-hand side of the street, in obedience to a city ordinance, and the mule nearest the sidewalk became frightened by the granite curbing running along the side of the street near him, and continually pressed against the other mule and pushed it towards the left—towards the center of the street and the trolley track; that a car appeared on the trolley track, coming towards the vehicle in which the plaintiff was riding, and the rays from its headlight were thrown on the curbing and added to the fright of the mule, and therefore the driver, fearing that the right-hand mule would shy from the curbing and would throw the other mule in front of or against the car as it passed, turned the team to the left and attempted to cross the track to the left side of the street, in order that the shying mule would be removed from the curbing which alarmed it, and so that, when the car passed, this mule would press the team away from the car towards the sidewalk on the left; that from where the team was turned across the track there was a straight, unobstructed view of 100 yards from the car to the team, and the occupants of the surrey "could and did easily see the driver of the car, and the driver of the car could see them"; that the car was running at the rapid rate of about 20 miles per hour, and though the vehicle in which the plaintiff was riding was in full view of the approaching car, and there was ample time and space in which to check the car, the speed was not slackened until after it struck the surrey, and in fact the car ran on about 100 feet after the collision before it was stopped; that at the time the vehicle was struck the regular motorman was not in his place or on the car, but the conductor was acting as motorman, and, in running the car, "was looking back, and not forward," and was negligent in not seeing the surrey and in striking it; that the team was turned diagonally across the track, the mules having crossed and the right front wheel and the rest of the vehicle being on the track when the car struck the front wheel of the surrey, knocked the mules down on the left side of the track, and threw the surrey on the right side; and that thereby the plaintiff was thrown out of the surrey, and was injured in a manner described. He alleged negligence on the part of the defendant, because the car was run or driven by the conductor in place of the regular motorman, and because the conductor negligently looked back and not forward, and thus failed to see the surrey, and because the conductor was negligent in not looking to see that the track was clear, and was grossly negligent in failing to stop the car before it struck the vehicle and caused the injury, when the plaintiff was in full view and there was full space and ample time in which to prevent the collision, and, furthermore, that the defendant was negligent in running the car at such a rapid and dangerous rate of speed, and in violation of an ordinance of the city of Rome, which prohibited the running of street railway cars at a greater rate of speed than 8 miles per hour on certain streets named, or than 12 miles per hour in any other part of the city.

Besides demurring on special grounds, which need not be considered, the defendant demurred generally on the ground that the petition set forth no cause of action; and it excepts to the overruling of the demurrer. From the petition it appears that the plaintiff plainly perceived that the conductor, acting as motorman and running the car at the time the collision occurred, was not looking forward towards the point where plaintiff made the attempt to cross the track, but was looking backwards, and the further fact was noted by the plaintiff and the driver that the car was coming at the rapid rate of 20 miles per hour or more, and yet, when the car was only 100 yards from them, the attempt was nevertheless made to cross from the right side of the road (where the ordinance of the city required the vehicle to be) to the left side (where the vehicle had no legal right to go), in front of the rapidly approaching car and in the face of obvious danger, and it also appears that the only excuse offered for the disregard of the city ordinance and the effort made to cross the track in defiance thereof was the conclusion of the plaintiff, or the driver, or of both (it does not clearly appear from the petition which), that on account of the fear of the curbing, which the mule on the right-hand side of the team was exhibiting, the left side of the street (going out of the city) would be a place of greater safety.

It is apparent from the petition that, admitting the truth of all the allegations of negligence attributed to the defendant, the accident would not have occurred if the driver and his passenger had not deliberately gone in front of the rapidly approaching car in attempting to cross over to the side of the street where they did not belong, and where those in charge of the car had no reason to suppose they would attempt to go. It does not appear from the petition whether the driver of the surrey made the hazardous attempt to cross the track in front of the rapidly approaching car by the direction or consent of the plaintiff, or without his approval or his knowledge until too late to intervene; and if the plaintiff was simply a passenger (and perhaps a *simple* passenger), and neither acquiesced in, authorized, nor participated in the dangerous attempt, it might be that the negligence on his part, on *this* account, did not bring about his injuries. Pleadings are to be construed most strongly against the pleader, however, especially where a demurrer brings into question their sufficiency, and it may be assumed, under the allegations in the petition and in view of the absence of anything therein to the contrary, that the plaintiff himself directly participated in the dangerous undertaking, or either expressly or impliedly consented thereto. However, the petition discloses absolutely no reason why the plaintiff remained in the vehicle when he perceived the approaching car and noted the fact that the motorman was looking backward and not forward, and necessarily realized that an attempt to cross the track would be to some extent hazardous. It does not appear that the plaintiff was a cripple, or was a person whose lack of experience and knowledge was so great as to prevent him from understanding the danger of the situation, yet he remained in the vehicle, without making any effort whatever, so far as his petition discloses, to escape the consequences to be expected from the alleged apparent negligence on the part of the defendant in failing to check the car and continuing to approach at the same high rate of speed, which the plaintiff had noted when the car first came into view.

[1, 2] The plaintiff discovered the negligence of the defendant when the car was 100 yards away, and it was his duty under the law to avoid the consequences thereof, if possible. Civil Code, § 4426, declares that:

"If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover."

The plaintiff's petition suggests no reason why the consequences of the defendant's negligence could not have been avoided by him.

"The plaintiff can never recover in an action for personal injuries, no matter what the negligence of the defendant may be, short of actual wantonness, when the proof shows he could by ordinary care, after the negligence of the defendant began, or was existing, have avoided the consequences to himself of that negligence." Americus, Preston & Lumpkin Railroad Co. v. Luckie, 87 Ga. 6, 13 S. E. 105.

The plaintiff alleges in his petition that the car, when it first appeared in sight, was 100 yards away, and the motorman had ample time to bring it to a stop before reaching the point where the plaintiff attempted to cross the track. Conceding this statement to be true, it seems apparent that the plaintiff had ample time to remove himself from his dangerous position in the surrey; and this it was his duty to do when he perceived (as he alleges in his petition) that the motorman was not looking in his direction, and therefore was negligently unaware of his presence.

"Although the agents of a railroad company may be negligent in running its engine and cars at a high rate of speed over a public road crossing and in approaching a station where the train is to stop, and in not keeping a lookout, yet if a person, with the knowledge of the impending danger, steps on the track and seeks to cross immediately in front of the engine, and is injured, he cannot recover." Harris v. Southern Railway Co., 129 Ga. 388 (2), 58 S. E. 873.

"One who deliberately goes upon a railroad track in front of an approaching train, thinking that she can cross before the train reaches her, and miscalculating its speed because she is in front of it, cannot recover for injuries resulting from being run down by the train, although the company's servants may have been negligent in running at a high rate of speed at that point, and also in failing to check the speed of the train at a public road which crossed the track between the place where the train was when first seen by the plaintiff and the point at which the injury occurred. The above

facts being set out in a declaration, a demurrer thereto was properly sustained; for it is clear, from the allegations made, that the plaintiff, by the exercise of ordinary care, could have avoided the injury." Thomas v. Central of Georgia Ry. Co., 121 Ga. 38, 48 S. E. 683, and cases there cited.

As said in Americus, Preston & Lumpkin Railroad Co. v. Luckie, supra:

"The law of contributory negligence is applicable only where both parties are at fault, and when, also, the plaintiff could not by ordinary care have avoided the injury which defendant's negligence produced."

It is clear, from the petition, that the plaintiff, by the exercise of ordinary care, could have avoided the injury resulting from the collision brought about, as he alleges, by the negligence of the defendant; and this being true, the court erred in overruling the demurrer and refusing to dismiss the petition.

It is unnecessary to further consider any alleged errors in the trial, since, if the petition itself made out no case upon which the plaintiff was authorized to recover, the entire trial was nugatory.

Judgment reversed.

BROYLES, J., not presiding.

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(15 Ga. App. 811)

KENNEDY v. BAGGARLEY. (No. 5569.)

(Court of Appeals of Georgia. Nov. 17, 1914. Rehearing Denied Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. USURY ⟸102, 117—USURIOUS CONTRACT—FICTITIOUS TRANSACTION—SUFFICIENCY OF EVIDENCE.

Under the evidence submitted, the jury were authorized to find that the action of the defendant, in taking a deed to the land for which the plaintiff had bargained, and in causing the plaintiff to execute a lease contract and rental notes, upon the payment of which the land was to be conveyed to the plaintiff, was simply a device to cover an agreement to pay usurious interest, and that the plaintiff was entitled to recover this usury in a suit filed for the purpose within 12 months after the payment.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 197, 241, 242, 244-258, 328-340; Dec. Dig. ⟸102, 117.]

2. JUSTICES OF THE PEACE ⟸178—APPEAL—INSTRUCTIONS—PLEADING.

The instruction of the court on the law of usury was not erroneous for the reason that it was not adapted to the issues raised by the pleadings. The issues relative to charging usurious interest by the defendant, and to the right of the plaintiff to recover it as such, were raised by the testimony, and the case having been appealed from a justice's court, where the niceties of pleading are not required as in superior court, it was the duty of the court to give in charge to the jury the law covering the material issues in the case, no matter how they were raised.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 701; Dec. Dig. ⟸178.]

Error from Superior Court, Pike County; R. T. Daniel, Judge.

Action by A. W. Baggarley against J. L. Kennedy. Judgment for plaintiff, and defendant brings error. Affirmed.

C. J. Lester, of Barnesville, for plaintiff in error. J. F. Redding, of Barnesville, for defendant in error.

RUSSELL, C. J. Baggarley brought suit in a justice court against Kennedy, alleging, in his petition attached to the summons, that the defendant was indebted to him in the sum of $83.46. In the petition certain notes which the plaintiff had previously given to the defendant were described, and certain payments made thereon by the plaintiff to the defendant were set out. The petition alleged the indebtedness to be "a mistake in calculation in the above notes and a mistake in calculation when he had final settlement." The defendant filed a lengthy plea, in which he denied owing the plaintiff any sum whatever, and set up that the transaction between them was as follows: During the year 1908 the plaintiff approached the defendant for a loan of money to pay for certain land which the plaintiff had bargained for. The defendant refused the loan, but finally agreed with the plaintiff to purchase the land on his own account and resell it to the plaintiff for an agreed price; and, in pursuance of the agreement, he bought the land and took a deed thereto from the person with whom the plaintiff had made the tentative agreement to purchase. The plaintiff then entered into a certain "lease" contract with the defendant (a copy of which is attached to the defendant's plea), in which the plaintiff agreed to pay the defendant a certain amount annually for four years as rental of the property, and to pay all the taxes assessed against it, and the defendant bound himself to convey the land to the plaintiff on the completion of those payments. In December, 1911, the plaintiff and the defendant had a full and final settlement. The plaintiff having negotiated a sale of the land, the defendant allowed him to take up his notes, "in order that he could perfect sale to the party to whom he had bargained the place." By consent the case was appealed to the superior court, and the jury there found a verdict in favor of the plaintiff for the amount sued for and interest, amounting to $12.77. The defendant filed a motion for new trial, upon the usual general grounds, and upon the additional ground that the court erred in charging the jury upon the subject of usury. It is insisted that the charge was not adjusted to the issues in the case and was not authorized by the pleadings.

[1] Upon the trial the plaintiff testified that the notes described in his petition were given by himself to the defendant for money borrowed; that there was a mistake in the calculation of interest, and he had been

charged too much interest, he did not know the exact amount; that he had never bought any land from the defendant, but that he borrowed money from him to pay for land and gave him the notes; that before the notes became due he sold the land, and the defendant allowed him to take up the notes and allowed him a discount of 8 per cent. on them; that the defendant took a deed to his land for the purpose of securing the payment of the notes described. The plaintiff introduced in evidence the original notes, and the receipts and paid checks representing the payments made thereon. The defendant testified to substantially the same matter set up in his plea; that is, that he had never loaned the plaintiff any money, but that he had bought land for which the plaintiff had previously bargained, and resold it to the plaintiff. He contends that under the evidence the verdict was erroneous. We think to the contrary. The jury had the right to believe that the notes represented a loan made by the defendant to the plaintiff. All the circumstances in the case seem to bear out this contention. The amount of money advanced by the defendant was considerably less than the value of the land, and was the amount represented by the notes which the defendant alleged were given in payment of rental on the land. The "lease" contract contained a clause binding the defendant to convey the land to the plaintiff on the payment of four years' rental, and this four years' rental was the exact amount which plaintiff claimed to have received from the defendant, plus the usurious interest which he stated in his testimony the defendant had charged him. The defendant was never in possession of the land, never paid any taxes thereon, and, so far as the testimony discloses, never exercised any rights of ownership over it. The plaintiff swears positively that the money was merely a loan, and that the defendant never once mentioned buying the land and reselling it to him. The jury could readily have found that the taking of the deed in the defendant's name was merely as security for the debt, as contended by the plaintiff, and that the taking of the agreement to lease was simply a device to allow the defendant to exact usurious interest on the loan. As was said in Baggett v. Trulock, 77 Ga. 373, 3 S. E. 162:

"To stop interest by its own name, and continue it under the name of rent, is one of the most common devices to cover up usury."

The jury, if they were satisfied that the notes were given for debt, had but to calculate for themselves (with the testimony, the original notes, and the receipts and paid checks representing payments thereon, before them) to ascertain whether the plaintiff was really charged usurious interest, and, if so, what amount he was entitled to recover as such. It is not contended that any error was made in the calculation, except as to interest. The jury, as said above, had all the necessary data from which to mold their verdict, and it is not shown that this was erroneously done. If the defendant charged the plaintiff usurious interest on money loaned, the plaintiff was entitled to recover it back with lawful interest from the time of payment, if the suit was brought in 12 months.

[2] There is no merit to the exception to the charge of the court.

"The distinctions as to forms of action observed in the superior court do not obtain in justices' courts. All the pleadings there required is a summons to which is attached, at the time of issuing it, the cause of action sued on." Shuford v. Alexander, 74 Ga. 293.

See, also, Ga. So. & F. R. Co. v. Barfield, 1 Ga. App. 203, 58 S. E. 236, and So. Ry. Co. v. Morrow, 1 Ga. App. 736, 58 S. E. 244. In the Barfield Case, supra, it was said:

"The requirement as to summons and copy in a justice's court is an exception to the general rules of pleading. The form of the action is not changed by appeal to the superior court."

Attached to the summons in this case was a petition alleging an indebtedness of a given amount, and setting out the transaction between the parties. It is true the petition alleges the basis of the cause of action to have been "a mistake in calculation," but the testimony adduced on the trial certainly raised the issue as to whether it grew out of the charging of usurious interest by the defendant. The case was proceeding just as if it were in the justice's court, and in view of this fact it was necessary for the judge to fit his charge to the issues as raised by the evidence as well as the pleadings. In fact, in practically all causes arising in justice's courts there are no pleadings from which the issues between the parties can be accurately predetermined, and the issues in such cases are raised by the evidence adduced on the trial. See Southern Express Co. v. Briggs, 1 Ga. App. 294 (2), 57 S. E. 1066; Williams v. George, 104 Ga. 602 (3), 30 S. E. 751.

The plaintiff evidently intended to bring his action within the provisions of sections 3438 and 3441 of the Civil Code, which give him, under his version of the transaction, the express right to recover the usurious interest any time within one year after payment thereof. The mere fact that plaintiff did not denominate his action as one for the recovery of a forfeiture would make no material difference. The summons and petition served upon the defendant were sufficient, as is evident from the plea filed by the defendant, to put him on notice of what the plaintiff's claim consisted of. Under the plaintiff's testimony, he had a cause of action under the code sections referred to above. Under section 3440, nothing could defeat this right except repayment of the usurious interest. He brought his suit within the time allowed him by law. The only material issue in the case, therefore, was whether the defendant had charged plaintiff

usurious interest; and, this being true, it was not only permissible, but it was the duty of, the court to give in charge to the jury the laws relative to the charging of usurious interest. It is not insisted that the court's charge was an incorrect statement of the law, but it is contended that it was inappropriate to the issues raised. We are of the opinion that it was both correct and appropriate, and that there was no error in overruling the motion for new trial.

Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 759)

## LAMB v. W. H. MITCHELL & CO.
(No. 5712.)

(Court of Appeals of Georgia. Feb. 6, 1915.)

*(Syllabus by the Court.)*

1. CARRIERS ⟸135 — LOSS OF SHIPMENT — MEASURE OF DAMAGES.

If from the market value of a commodity at destination the freight to that point, added to the cost of converting the commodity into cash, be deducted, the resulting balance will show with reasonable certainty the value of the commodity at the point from which the shipment moved.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 557-559, 599-602, 603½-604½; Dec. Dig. ⟸135.]

2. CARRIERS ⟸123—LOSS OF SHIPMENT—DEFENSE — ACT OF GOD — CONCURRING NEGLIGENCE.

Where a carrier is sued for loss or destruction of goods in transit, resulting from unreasonable delay in delivery, the defense that the delay was caused by an unprecedented flood or some other act of God will not avail, where it appears that the delay was attributable, not merely to this cause, but largely to the negligence of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 506, 507, 539-543; Dec. Dig. ⟸123.]

3. VERDICT SUSTAINED.

The evidence was sufficient to authorize the verdict returned.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by W. H. Mitchell & Co. against the Atlanta, Birmingham & Atlantic Railroad Company and E. T. Lamb, receiver thereof. Judgment for plaintiff, and the receiver brings error. Affirmed.

Rosser & Brandon, of Atlanta, and J. H. Merrill, of Thomasville, for plaintiff in error. Snodgrass & MacIntyre, of Thomasville, for defendant in error.

WADE, J. W. H. Mitchell & Co. brought suit against the Atlanta, Birmingham & Atlantic Railroad Company and E. T. Lamb, receiver thereof, alleging that the plaintiffs, on March 25, 1913, delivered to the said railroad company at Thomasville, Ga., a car load of turnips amounting to 2,080 dozen bunches, to be transported to certain consignees in Pittsburg, Pa., and on March 27, 1913, delivered to it at the same place another car load of turnips, amounting to 2,013 dozen bunches, to be transported to certain consignees in Chicago, Ill.; that the turnips were loaded in refrigerator cars and were to be fully iced—that is, to be iced and re-iced—so as to preserve their contents; that the railroad company consumed 9 days in transporting each of these cars to destination, whereas 72 hours would have been a reasonable time for such transportation, and failed to keep the cars properly refrigerated; so that, by reason of the delay and the failure to keep the cars properly refrigerated, the turnips were worthless when they reached their destination, were refused by the consignees, and became a total loss to the plaintiffs; that the reasonable market value of these turnips in Pittsburg and Chicago at the time when they should have been delivered by the carrier was 45 cents per dozen bunches, or a total of $936 for the Pittsburg shipment, and $905.85 for the Chicago shipment; that all the turnips were the property of the plaintiffs, and were shipped to be sold for their account by the consignees, and were fresh vegetables at the time of shipment; and therefore that the plaintiffs were injured and damaged by the defendant in the sum of $1,841.85, for which they prayed judgment.

The defendant demurred generally, and also demurred because no copy of the bill of lading and contract of shipment was attached to the petition, though the petition indirectly suggested a contract for icing the vegetables shipped; and further because it was not stated how the value at destination was arrived at or whether the amount alleged was the net value after deducting charges for transportation, icing, or selling, or was the gross value of the turnips, or how and in what respect and to what extent and at what point along the line of transportation the defendant failed to ice the car sufficiently. The plaintiffs thereupon amended the petition by alleging that the railroad company's local agent at Thomasville orally undertook and agreed to keep the cars fully iced, according to custom, as often as necessary to preserve the contents thereof, and received at the same time, from the plaintiffs $260 as freight charges on each car. The court then overruled the demurrer, and error is assigned thereon.

We think the court properly overruled the demurrer, since the amendment made by the plaintiffs covered the one material point raised thereby, and the failure to state whether the value per car alleged in the petition was gross or net was not a matter to be reached by demurrer. In the absence of anything to the contrary, the allegation would be construed to mean the net value of the commodity at destination, and it would remain for the evidence on the trial to de-

velop what was the fact as to this. In view of the allegation in the amendment, however, to the effect that freight amounting to $260 per car was paid to the agent of the railroad company at Thomasville, and construing the petition altogether, it is clear that as amended the petition charged that the value of the turnips was 45 cents per dozen bunches at destination, less the freight. To sum the matter up, it appears that the petition was sufficiently definite to withstand the special demurrers interposed.

[1] Various grounds were urged in the motion for a new trial. Under the special contract of shipment in this case, the amount to be recovered in the case of loss was the value of the property at the place and time of shipment, and the plaintiff in error insists that there was absolutely no testimony to show what this value was, since the testimony as to value related merely to the market value in Pittsburg and Chicago. If, however, from the market value of the turnips at Chicago and Pittsburg, at the time of shipment, as shown by the testimony, the freight to each point, added to the entire cost of converting the turnips into cash, be deducted, the resulting balance would show the value of the turnips at the point from which shipment was made. Certum est quod certum reddi potest. The evidence establishes the value set out in the petition to have been the gross value of each car, and the documentary evidence shows that the freight on the Pittsburg car was $260.40, and the freight on the Chicago car $285.60; and, if these amounts be deducted from the gross market value, a net sum of $675.60 for the Pittsburg car and $620.25 for the Chicago car would result. The court in rendering judgment deducted the further sum of 10 per cent. from the gross value of each shipment, or $93.60 from the Pittsburg shipment and $90.58 from the Chicago shipment, to cover commission charges for handling, which would have accrued had the goods arrived and been handled in due course. There appears to be no direct testimony authorizing this deduction for commission charges, except the following "note" at the close of the entire evidence:

"This car diverted from Minneapolis, Minn., to Chicago by shipper's order. See other evidence. Freight $285.60. Commission charges for handling, 10 per cent."

So that in deducting 10 per cent. commission charges from the Pittsburg car on account of this testimony, showing that such a deduction was proper on the Chicago shipment, the defendant really received a benefit which was doubtless equitable (since probably the Pittsburg shipment would have been subject to a similar charge), but which was not required by the evidence, for so far as appears therefrom, the consignees in Pittsburg may have expected to handle that shipment for the plaintiffs without any cost whatsoever for placing it on the market. The defendant evidently has no cause of complaint here, and it may be fairly concluded that the value of the turnips at the point of shipment was sufficiently shown.

It was insisted that there was no evidence of negligence on the part of the defendant carrier or its connecting lines, and that, since this was an interstate shipment and (according to its contention) no presumption of negligence is created by any act of Congress, there could be no recovery without such proof. There was abundant evidence showing that the turnips were unreasonably delayed and reached their destination several days after they should have arrived. This in itself was sufficient to authorize the conclusion that the carrier had been negligent, unless some legal excuse for the delay was shown.

The further contention, that the judgment was contrary to the evidence, to the effect that shipping turnips wet would bring about the defects complained of, it is unnecessary to discuss, since there was some evidence tending to show that the manner in which the turnips were actually packed was the best possible method; and the judge, sitting as a jury, had the right to accept whichever testimony commended itself to him.

[2] To the contention that the evidence in behalf of the defendant showed, without conflict, that the cars were properly iced and were kept in that condition from the time they were loaded until they were delivered, and to the main defense interposed by the carrier, that the delay was due to an unprecedented flood which blockaded the usual railroad routes over which these shipments would have ordinarily traveled, making such routes impassable and consequently crowding the lines of railroad over which the cars were compelled to move, so as to make it impossible for freight to move faster than these cars had moved, and that under the circumstances the movement was made with reasonable dispatch, it may be replied that the evidence, coming entirely from the witnesses for the defendant, was conflicting and uncertain and indefinite to an extent that would reasonably have authorized the trial judge (sitting without a jury) to find that the floods relied upon as an act of God to excuse the carrier for delay were not the sole cause of the delay which actually took place, and which produced the injury to the shipments notwithstanding sufficient icing of the cars.

"In order for a carrier or other bailee to avail himself of the act of God * * * as an excuse, he must establish not only that the act of God * * * ultimately occasioned the loss, but that his own negligence did not contribute thereto." Civil Code, § 2713.

The general authorities on this subject are in accord with the rule thus stated. In 1 Moore on Carriers, 308, it is said:

"To excuse the carrier the act of God, or vis divina, must be the sole and immediate cause of the injury."

In order to exempt a common carrier from liability for loss or injury to goods received for transportation, it must be shown that no act or neglect of the carrier caused or contributed to the loss or injury. If, in consequence of departure from the carrier's line of duty, the goods be lost or injured by the act of God, the carrier is not excused. Id., 308.

"A flood which no human power could stay and no prudence or foresight anticipate, or an extraordinary or unprecedented or overwhelming flood which could not have been reasonably foreseen, is an act of God which will relieve a carrier, who is free from negligence, from liability for damage by the flood to goods in his custody." Id., 310.

"Interruption to navigation by frost or ice, the freezing up of canals, rivers, or other means of water transportation, is an act of God which will exonerate the carrier from losses occurring from such causes, where no fault is imputable to the carrier." Id., 314.

"Where goods are injured in the possession of a carrier by act of God, the carrier is not liable, unless its negligence concurred in causing the injury." Id., 316.

"An injury cannot be said to be the act of God which, under any fair view, can be attributed to the negligence of man." Id., 317.

See, also, Richmond, etc., R. Co. v. White, 88 Ga. 805, 806, 15 S. E. 802; Georgia So. Ry. Co. v. Barfield, 1 Ga. App. 203, 58 S. E. 236; Central of Georgia Ry. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170; Savannah, etc., Ry. Co. v. Commercial Guano Co., 103 Ga. 590–598, 30 S. E. 555.

"Under the Carmack amendment, Act June 29, 1906, § 7 [34 Stat. 593, c. 3591 (U. S. Comp. St. 1913, § 8592)] to the Interstate Commerce Act, § 20 [24 Stat. 386, c. 104], a carrier is not excused from liability for destruction of goods by flood, unless it shows some activity in protecting them as necessity arises." Moore on Carriers, § 317.

"Where the negligence of the carrier operates as a contributive element proximate to injury to goods, even though such injury is to some extent caused by the act of God, the carrier is liable as though the negligence was the entire cause of the loss." Id., 322; Gratiot Street Warehouse Co. v. Missouri, etc., Ry. Co., 124 Mo. App. 545, 102 S. W. 11.

From these quotations from Moore on Carriers, and from an examination of the numerous authorities there cited, it is evident that the act of God must be the proximate cause of the resulting injury, and must be unmixed with negligence on the part of the carrier, before it can amount to a complete defense on account of resulting injury or damage to the property, and the same rule must apply where the resulting injury or damage to the property is caused by delay in delivery attributable to the act of God. If the delay be attributable altogether to the act of God, this defense will suffice; but, if the delay was partly caused by the act of God and partly by the negligence of the carrier, it then remains to be determined whether the act of God was the proximate cause of the damage to the property, unmixed with the negligence of the carrier. If the act of God alone is sufficient in itself to bring about such a necessary delay as must result in damage to the property in course of transit, the defense would be complete; but otherwise, where the damage to property resulting from delay in transportation arises on account of the act of God combined with the negligence of the carrier.

From the evidence of Mr. Brower, division superintendent of the Atlanta, Birmingham & Atlantic Railroad, it appears that the distance traveled by the car going to Chicago was 1,232 miles, including 407 miles from Thomasville to Birmingham, 411 miles from Birmingham to Finley, and 414 from Finley to Chicago, and that it took that particular car 147 hours and 35 minutes to travel this distance, which, as the witness stated, was at the rate of "about 8½ miles an hour." This witness further said:

"On my experience as a railroad man, I consider that on a long run, *such as this car took* [italics ours], figuring all delays, a car that averages 10 miles per hour is making reasonable time."

The same witness said:

"On account of flood conditions, I do not consider this movement unreasonable. Under the conditions, going 10 miles an hour is reasonable time. However, I do not wish to leave the impression that the car described made 10 miles an hour. * * * I do not know that the floods interfered with the stuff moving from Memphis. I had no advice that they did."

And the witness said that the Pittsburg car traveled 1,313 miles via Richmond, from Thomasville to Pittsburg, in 171 hours and 30 minutes, which would be at the rate of less than 8 miles per hour for the whole time, including delays, etc. From this testimony it appears that, even allowing for the longer routes pursued in consequence of the floods, neither car traveled at what the witness in behalf of the railroad testified was "a reasonable rate of speed," allowing for all delays, and hence the court was justified in concluding that the act of God was not the sole proximate cause of the injury, even admitting that the proof was sufficiently full as to the existence of the floods in the Ohio valley and the consequent hindrance to the movement of freights over the route which ordinarily would have been taken by these cars.

According to the railroad company's agent at Thomasville, the difference in time between the ordinary route to Pittsburg and the route which was actually followed on account of the flood conditions was only "6, 8, or 10 hours"; and when it is recalled that the report of the delivering carrier showed that this car reached Pittsburg at 11 p. m. on April 1, 1913, having been on the road since March 25th, whereas under the testimony of Mr. Herbener he had moved perishable vegetables from Thomasville to Pittsburg in 38 hours, it might be legitimately concluded that there was unreasonable delay. To recapitulate, one car was loaded in Thomasville on March 25th, and

reached Pittsburg on April 1st at 11 p. m., or more than 7 days thereafter, or (according to Brower) 171 hours and 30 minutes. The other car was loaded in Thomasville on March 27th and reached Chicago on April 3d, also more than 7 days later. The plaintiff testified that ordinarily 72 hours was amply sufficient for either shipment to reach its destination, and even if the outside number of 10 hours be added, which Fleming testified would be required to go via the long route, through Richmond to Pittsburg, the time would be 82 hours instead of the 171 hours and 30 minutes actually consumed; and, if the testimony of Herbener be taken, only 38 hours plus 10 should necessarily have been so consumed. The Chicago shipment reached that point traveling at the rate of 8½ miles per hour (average time including delays, etc.), whereas, according to Brower, 10 miles per hour for "this" shipment, under the existing conditions, would have been a reasonable movement. So that the delay of 1½ miles per hour—the difference between 10 and 8½—was unreasonable, even under the testimony for the defendant; and this added delay caused by the contributing negligence of the carrier, may have caused the destruction of the property. Again, Fleming testified that "the movement over the Seaboard to Pittsburg is approximately the same as the ordinary movement." And Brower said he did "not know that the floods interfered with the stuff moving from Memphis," and was also unable to say that the flood conditions affected one of the connecting lines which appeared to be in the midst of the flood district. Taking all the evidence in regard to the possible delays caused by the floods in the Ohio valley, it may be said that the testimony as to how or to what extent shipments were delayed solely on account of the floods, and the congestion of traffic on the railroads not directly effected thereby, is at best extremely unsatisfactory and indefinite, and the judge was justified in finding, as he evidently did, that no sufficient proof had been adduced to excuse the carrier on the theory that the delay was caused by the act of God.

Admitting, for the sake of the argument, that the testimony showed with sufficient clearness that an unprecedented flood, which might be classed as an act of God, caused the delay in delivery of these two cars, it does not appear that the flood caused all the delay, or even how much thereof could be directly attributed thereto, and, on the contrary, it clearly appears from the evidence in behalf of the defendant that the cars did not move forward at a rate of speed which was reasonable, even under the conditions existing on account of the floods, and the excuse offered was not legal and sufficient, since the consequences arising from the delay could be attributed in part, if not altogether, to the negligence of the carrier, notwithstanding the intervening act of God.

[3] There was sufficient evidence to authorize the recovery by the plaintiffs; and, the assignments of error being without substantial merit, the judgment of the court below is affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 816)

## LUMPKIN v. PROVIDENT LOAN SOCIETY, Inc. (No. 5774.)

(Court of Appeals of Georgia. Feb. 13, 1915.)

*(Syllabus by the Court.)*

1. LANDLORD AND TENANT ⟸150 — DEFECTIVE PREMISES—DUTY TO REPAIR.

A landlord must keep in repair the premises which he has leased, unless the lease contains a stipulation to the contrary; but if there are patent defects, known to both parties at the time of executing the lease, and the lessee takes the premises as they are, he cannot thereafter demand that the landlord remedy the defects.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 536, 538, 544–548, 555, 556; Dec. Dig. ⟸150.]

2. EVIDENCE ⟸378 — DOCUMENTARY EVIDENCE—LETTERS—PROOF OF GENUINENESS.

Letters are not admissible in evidence without proof of their genuineness, and this proof cannot be supplied solely by the fact that they were "received in the regular course of business."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1643–1655; Dec. Dig. ⟸378.]

3. LANDLORD AND TENANT ⟸187 — RENT — DISCHARGE OF OBLIGATION — DEFECTIVE PREMISES.

Where a tenant under a lease testified that he occupied the premises for more than a year without experiencing any discomfort, and that then a restaurant was established, adjoining his office, in the same building, and that shortly thereafter he detected in his office a bad odor, occasioned by food brought in by rats, presumably from the restaurant, and that the odor became so offensive that his office finally became untenantable, and where there was no evidence that the bad odors came from the restaurant itself, but it appeared that they were caused solely by the food so brought in, and where it was further shown that, when the landlord was notified of the offensive smells, he disinfected the premises and did everything in his power to abate the odors, *held*, that the landlord was not liable for this condition, and the tenant was not thereby relieved from his obligation to pay the rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 770–775; Dec. Dig. ⟸187.]

4. JUDGMENT AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the judgment, and there was no error in overruling the motion for a new trial.

Error from Municipal Court of Atlanta.

Action in the municipal court of Atlanta by the Provident Loan Society, Incorporated, against T. B. Lumpkin. A judgment for plaintiff was sustained by the appellate division of that court, and defendant brings error. Affirmed.

Smith, Hammond & Smith and John T. Hardisty, all of Atlanta, for plaintiff in error. H. B. Troutman, of Atlanta, for defendant in error.

BROYLES, J. The Provident Loan Society, Incorporated, sued out a distress warrant for rent against T. B. Lumpkin, in the municipal court of Atlanta. The trial judge, sitting without a jury, gave a judgment for the plaintiff, and refused to grant a new trial, and the appellate division of that court sustained his judgment, to which the defendant excepts.

[1] 1. The undisputed testimony showed that the office leased and occupied by the plaintiff in error was narrow, with no ventilation whatever except a door in the front, opening from the street, and a small transom in the rear, which opened into a dark unoccupied storeroom. The evidence showed, however, that he leased this office with full knowledge of its condition and arrangements, and remained there for more than a year without suffering any discomfort; and he cannot now complain of defects which were in existence, and known to him, at the time of the lease. Driver v. Maxwell, 56 Ga. 12; Aikin v. Perry, 119 Ga. 263, 46 S. E. 93; 1 Tiffany on Landlord & Tenant, 599, 634.

[2] 2. The plaintiff in error, during the trial, sought to put in evidence two letters written by outside parties, in which the writers stated that the odor in his office was very offensive. He attempted to prove the execution of these letters merely by testifying that they "were received in regular course of business"; but there was no proof whatever of the genuineness of the signatures, and no witness attempted to identify the signatures as those of the parties whose names purported to be signed. The mere fact that these letters were received in due course of mail, and purported to be signed by the writers, was not sufficient to render them admissible in evidence; and the trial judge committed no error in ruling them out. Freeman v. Brewster, 93 Ga. 648, 21 S. E. 165; Kent v. Wadley Southern R. Co., 136 Ga. 859, 72 S. E. 413.

[3] 3. This is a unique case. We have been unable to find another like it in any of the books. In the celebrated case of Smith v. Marrable, 11 Mees. & W. 5, it was held that, where a house, at the time it was leased, was greatly infested with bugs, so as not to be reasonably suitable for habitation, the tenant could quit it without notice; there being an implied condition of law that the house was reasonably fitted for habitation. There is, however, a vital distinction between that case and the case at bar, for here the office was not infested with rats until more than a year subsequent to the making of the lease. In another English case (Collins v. Barrow, 1 Mo. & Rob. 112) it was held that the tenant was justified in quitting without notice premises which were noxious and unwholesome for want of proper sewerage. In that case it is clear that it was the landlord's duty, and one that he could easily have performed, to supply proper sewerage for the premises. It was said by the learned judge in Hart v. Windsor, 12 Mees. & W. 75, that:

"The word 'demise' has been held to imply a contract or covenant for quiet enjoyment and against eviction by title paramount; and an eviction by a nuisance, which renders the premises uninhabitable, ought to rest on the same footing. There is no greater reason for importing into the contract a covenant for quiet enjoyment than there is for implying a condition that the house is fit for habitation."

But in that case the nuisanee (bugs) was in existence on the premises at the time of the demise, and the court in that case held (contrary to the ruling in the Smith v. Marrable Case) that:

"There is no implied condition on the demise of real property that it is fit for the purpose for which it is let."

In Paradise v. Jane, 23 Car. I, Sty. 47, Aleyn. 27, the defendant pleaded that:

"Prince Rupert and his army of aliens entered upon the demised premises and did drive away the defendant's cattle and expelled him from the lands let to him by the plaintiff, and kept him out, so that he could not enjoy the lands during the term; and it was holden that the plea was insufficient, and the defendant must pay the rent; for, where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract, and the rent is a duty created by the parties upon the reservation."

So, in the case at bar, the plaintiff in error contracted to "deliver the premises at the expiration of the lease in as good order and repair as when first received, natural wear and tear excepted," and he could have stipulated in his contract that no restaurant should be put adjoining him, and that, if one was so established, and by reason thereof his office became infested with rats, or filled with odors therefrom, that the lease should then terminate; but he did not so stipulate.

In Franklin v. Brown, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744, where offensive odors from an adjoining tenement came into the demised premises, and neither the lessor nor the lessee knew of the existence of the odors when the contract was made, and the defendant occupied the premises, and neither ceased to occupy them nor attempted to rescind until the last quarter of the term, the court held that the lessor was not responsible for the bad odors, and that the lessee must pay the rent; and in that case the court said:

"The cause of complaint did not originate upon the leased premises, was not under the control of the lessor, and was not owing to his wrongful act or default. It was simply a nuisance arising in the neighborhood, but neither caused nor increased by the house in question. Hence we are not called upon in this case to decide whether a lease of a furnished dwelling contains an implied covenant against inherent defects either in the house or in the furniture

therein, but simply whether the lease under discussion contains an implied covenant against external defects, which originate upon the premises of a stranger, and were unknown to the lessor when he entered into the contract. * * * What sound reason then is there for claiming that the law will imply a covenant as to conditions not under his control and with reference to which neither lessor nor lessee can reasonably be supposed to have contracted, as they knew nothing about them? * * * If smoke from a neighboring manufactory had blown through the windows, or gas had escaped from a leaking main in the street and entered the house, could the lessee have abandoned the premises, or have called upon the lessor to respond in damages? * * * We do not think that there was any covenant in the lease in question, implied either by common law or from the acts or relations of the parties, that extended to the grievance of which the defendant complains."

In Edwards v. N. Y., etc., R. Co., 98 N. Y. 249, 50 Am. Rep. 659, the court said:

"If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. * * * If he creates a nuisance upon his premises, and then demises them, he remains liable for the consequences of the nuisance as the creator thereof. * * * But where the landlord has created no nuisance, and is guilty of no willful wrong or fraud, or culpable negligence, no case can be found imposing any liability upon him for any injury suffered by any person occupying or going upon the premises during the term of the demise; and there is no distinction stated in any authority between cases of a demise of dwelling houses and of buildings to be used for public purposes. The responsibility of the landlord is the same in all cases. If guilty of negligence, or other delictum, which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him."

In Westlake v. DeGraw, 25 Wend. (N. Y.) 669, it was held that the existence of a noxious smell on the premises was not ground for a tenant's putting an end to the contract. The courts in Georgia have held that where the premises are rendered untenantable, subsequently to the lease, by the actions of a cotenant, or a third person, the landlord cannot be held responsible. Vason v. City of Augusta, 38 Ga. 542; White v. Montgomery, 58 Ga. 204; Gardner v. Rhodes, 114 Ga. 933, 41 S. E. 63, 57 L. R. A. 749. In the instant case the lease contained no express covenant in the lease for the landlord to keep the premises in repair; but it is true that, under section 3699 of the Civil Code, he must, without such a covenant, keep them in repair. Guthman v. Castleberry, 48 Ga. 172; Whittle v. Webster, 55 Ga. 180; Driver v. Maxwell, 56 Ga. 12; Lewis v. Chisholm, 68 Ga. 40; Dougherty v. Taylor & Norton Co., 5 Ga. App. 773, 63 S. E. 928. None of these authorities, however, control this case, for here no repairs were needed; the undisputed evidence being that the physical condition of the premises was exactly the same as when they were leased, and there was no evidence whatever that any repairs were required. Our Georgia statute, however, does not render the landlord liable for extraordinary and unforeseen occurrences. 1 Tiffany on Landlord & Tenant, 579. In fact, the whole trouble of the plaintiff in error can be summed up in one word—RATS! It is true that the evidence discloses that the office was badly ventilated, and one witness for the defendant in error testified that was the cause of the bad odor; but the plaintiff in error himself makes no such complaint; he puts the bad odors, and the consequent untenantability of his office, squarely upon the "offending heads" of the rats. There is no contention that the rodents disturbed the office force by unseemly squeaking or squealing, or that they otherwise conducted themselves in any ungentlemanly or unladylike manner, or that they gnawed his furniture, or that they themselves had a bad odor; but the sole contention is that they brought in food, presumably from an adjoining restaurant (which was established about a year after the plaintiff in error leased his office), and that this food alone caused the offensive odors. The plaintiff in error, not being an object of charity, but a man of considerable means, strongly objected to having food thus brought in to him from his neighbors, and especially the kind that was furnished; he not being especially fond of "chicken bones," "fish heads," "scraps of cheese," "tripe," and such like delicacies. He testified that he disinfected the premises, but all in vain. He set traps, and every day caught scores of rats "as big as squirrels," but their numbers were no more diminished by his captures than were the ranks of the Allies or the Germans by the "Battles of the Aisne." No traps, no disinfectants, "no nothing," could stop the onslaught of these hungry and persistent vermin; they were imbued with the true "Atlanta spirit," and continued with undiminished ardor their kindly meant, but misunderstood, attentions. Finally, in despair, the plaintiff in error, having no "Pied Piper" to entice them by the witchery of his music to their destruction in the "rolling waters of the River Weser" (or the Chattahooche), cut the "Gordian knot" by breaking his lease and moving to another and distant building. We do not think that, under the law and the evidence, the landlord can be held responsible for the action of the rats. It is clearly established that there was no bad odor in the premises of the plaintiff in error until after the adjoining restaurant was opened (about a year after the plaintiff in error leased his office), and that the odor was caused entirely by food brought in, presumably from that restaurant, by rats. There was no evidence to show that the restaurant was a nuisance, or that it was improperly conducted. The plaintiff in error himself declared in his testimony that he could not swear that it was a nuisance, and that he did not desire it closed up, as it was not responsible for his troubles, and the

landlord offered to remove the restaurant if the plaintiff in error would swear that it was a nuisance, and the plaintiff in error declined to do so, saying it was not to blame. If the restaurant which caused the influx of the rats, and was thereby indirectly responsible for the odor, was not to blame, how could the landlord be held responsible for the actions of these pests?

There is, however, another plea which the plaintiff in error might have set up by way of recoupment, which would have received our careful and sympathetic consideration. The fear of rats, and even of mice, entertained by the fair sex, is proverbial, and this court will take judicial cognizance of the fact that any real estate office overrun by such vermin would lose all patronage of the ladies, and would be entirely deprived of the refining and elevating influence of their presence, to say nothing of the more substantial emoluments derived from business dealings with them. If the plaintiff in error had rested his case on this ground, at once solid and sentimental, this court (though all of its members are staid and settled married men, but, like all men of intelligence and discernment, fond of the beautiful) would have diligently sought to find a way to relieve him, if not by the harsh and inflexible rules of law, then by the softer and more pliant ones of equity. But, the plaintiff in error (possibly through fear of his better half) not having made this plea, the only thing we can do, while affirming the judgment against him, is to tender our congratulations upon the fact that at last he has escaped from his too attentive friends (?)—the rats.

Judgment affirmed.

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(16 Ga. App. 7)

## BYRD v. ATLANTA NAT. BANK et al.

(No. 5465.)

(Court of Appeals of Georgia. Feb. 13, 1915.)

*(Syllabus by the Court.)*

1. CARRIERS ⟸320—ELEVATORS—PERSONAL INJURIES — NEGLIGENCE — QUESTION FOR JURY.

The existence of negligence is peculiarly a fact for determination by a jury. Judicial cognizance does not extend to or include knowledge that it is not negligence for the grating surrounding an elevator shaft to be so constructed as to permit the hand of one who is endeavoring to press the elevator button to pass between the bars, for the jury might find that in the exercise of that extraordinary diligence which devolves upon the owner of an elevator, as a common carrier, that that portion at least of the grating which is adjacent to the press button should be protected by some device which would obviate the possibility of injury to one rightfully in the building and preparing, as a passenger, to use the elevator.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315–1325; Dec. Dig. ⟸320.]

2. CARRIERS ⟸282—ELEVATORS—PERSONAL INJURIES—IMPLIED INVITATION.

The owner of an office building impliedly invites the presence of all patrons or customers having business with his tenants; and by virtue of this invitation the owner of an office building in which a tenant is engaged in the practice of his profession as an oculist is bound to anticipate the presence therein of persons whose eyesight is affected or defective, and who therefore are unable to perceive dangers which might be obvious to persons in possession of unimpaired vision. Further, the owner of a building more than 12 stories in height, which is occupied in part by physicians as his tenants, must anticipate that numerous persons, either temporarily or permanently disabled in some respect, in accepting the implied invitation extended by him through his tenants, will be passengers upon elevators provided by him as a means of ingress and egress.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1103, 1107, 1108, 1115, 1116; Dec. Dig. ⟸282.]

3. CARRIERS ⟸314—ELEVATORS—PERSONAL INJURIES — THIRD PERSON — NEGLIGENCE — PETITION.

The allegation of the petition in which there is an intimation that the defendant was negligent, in that the servant in charge of the elevator failed to see the plaintiff's hand, may be demurrable, in view of other allegations apparently in conflict with it, according to which it seems impossible for the servant to have seen objects through the floor of the elevator; but, for the reasons stated above, the court erred in sustaining the general demurrer and dismissing the petition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1260, 1270, 1273, 1274, 1276–1280; Dec. Dig. ⟸314.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by G. P. Byrd against the Atlanta National Bank and others. Judgment for defendants, and plaintiff brings error. Reversed.

Lawton Nalley, of Atlanta, for plaintiff in error. Dodd & Dodd, of Atlanta, for defendants in error.

RUSSELL, C. J. Judgment reversed.

BROYLES, J., not presiding.

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(15 Ga. App. 786)

## FRIESE v. SIMPSON & HARPER et al.

(No. 5645.)

(Court of Appeals of Georgia. Feb. 13, 1915.)

*(Syllabus by the Court.)*

1. RULINGS AFFECTING PARTNERSHIP.

As to the several exceptions relating to alleged errors and to rulings affecting only the partnership, this case is controlled by the ruling of this court in Cary v. Simpson, 15 Ga. App. —, 82 S. E. 918.

2. TRIAL ⟸25—ARGUMENT—RIGHT TO OPEN AND CLOSE—ADMISSION.

An admission which, by shifting the burden of proof, will entitle the party making it to the opening and conclusion of the argument, must be such a direct and unequivocal admission of the contention of the opposite party as to the material facts at issue as dispenses with the necessity for proof of those facts, and such an admission as, without more, would require a

verdict in favor of the party upon whom the burden of proof originally rested. An admission of the correctness of an account upon which a suit against a partnership is brought, made by one of the individuals alleged to be a partner, but who denies that he is a partner, is ineffectual to include the issue raised by the plea of nonpartnership filed by the party making the admission.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44–75; Dec. Dig. ⟸25.]

3. APPEAL AND ERROR ⟸740—ASSIGNMENT OF ERROR—MERGER OF CONTENTIONS.

When a case proceeds to trial, and exception to the verdict is thereafter taken upon the ground that it is contrary to evidence, a consideration of the merits of the court's ruling upon a motion for nonsuit is merged into the assignment of error complaining that the evidence was insufficient to authorize the finding reached.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3028; Dec. Dig. ⟸740.]

4. PRINCIPAL AND AGENT ⟸21, 177—KNOWLEDGE OF AGENT—NOTICE TO PRINCIPAL—COMPETENCY.

(a) While agency cannot be proved by mere unsworn declarations of one assuming to be an agent, there is nothing in the law that renders the alleged agent himself an incompetent witness to testify to the fact that the relationship exists. One who is in fact the agent of another is just as competent a witness on the subject as the principal himself would be.

(b) When notice of a fact is communicated to a general agent, or to a special agent in absolute charge of a particular business, knowledge of all the facts suggested by the notice is imputable to the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 39, 670–679; Dec. Dig. ⟸21, 177.]

5. PARTNERSHIP ⟸217—ACTION AGAINST—EVIDENCE—ADMISSIBILITY.

In a suit against a partnership and the individuals alleged to compose it, evidence affecting one or more of the partners, though not applicable to another partner, is not for that reason to be excluded from the jury's consideration upon the case as a whole. Especially can there be no ground of complaint when the court instructs the jury not to consider telegrams or letters alleged to have been sent by one of the alleged partners, as affecting the other partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 419–425; Dec. Dig. ⟸217.]

6. PARTNERSHIP ⟸54—PRINCIPAL AND AGENT ⟸21—WITNESSES—EVIDENCE—PLEA OF NONPARTNERSHIP.

Under the ruling in Armour v. Ross, 110 Ga. 414, 35 S. E. 787, the evidence as to agency was competent, and supports the conclusion that the plaintiff in error was a partner in the alleged firm, and therefore there was no error in the instructions of the court to which exceptions are taken.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 77, 79; Dec. Dig. ⟸54; Principal and Agent, Cent. Dig. § 39; Dec. Dig. ⟸21.]

Error from City Court of Sparta; R. W. Moore, Judge.

Action by Simpson & Harper and others against Mrs. John Friese. Judgment for plaintiffs, and defendant brings error. Affirmed.

Lewis & Culver, of Sparta, for plaintiff in error. Burwell & Fleming and J. W. Lewis, all of Sparta, for defendants in error.

RUSSELL, C. J. The present writ of error concerns the complaints of another defendant in a case heretofore before this court. See Cary v. Simpson, 15 Ga. App. ——, 82 S. E. 918. The suit proceeded against the Friese Planing Mill Company under allegations that the Friese Planing Mill Company was a partnership, composed of C. S. Cary and Mrs. Friese.

[1] 1. Each of the alleged partners filed pleas of nonpartnership, and inasmuch as in Cary's Case, supra, we dealt with all of the cognate exceptions which were applicable solely to the partnership, the decision in the present case is controlled by the ruling in that case as to all the points raised in the present bill of exceptions, except those assignments based upon rulings upon the testimony, the portions of the charge relating to the applicability of the evidence to the subject of Mrs. Friese's liability, and the general exception that the evidence did not authorize a finding that Mrs. Friese was a partner. Therefore the only real question raised by the present record is as to the validity of the complaints urged in support of the contention that Mrs. Friese was not a partner in the Friese Planing Mill Company, and, as ancillary to that exception, an assignment that the court erred in refusing a nonsuit, and a complaint that the present plaintiff in error was wrongly deprived of the opening and conclusion of the argument.

[2] 2. There is no merit in the contention that the present plaintiff in error was entitled to the opening and conclusion of the argument, for the gist of her defense was that she was not a partner. It certainly cannot be contended that she admitted she was a partner, and the rule is well settled that for the admission of a party to shift the burden of proof, so as to entitle him to the opening and conclusion of the argument, it must be such a direct and unequivocal admission as to dispense with proof on the part of the opposite party and entitle him to a verdict in the absence of proof sufficient to avoid the admission. For instance, an admission on the part of Mrs. Friese that the account sued on was correct as stated would not and could not have included an admission that she was a partner; and, indeed, if she was not a partner, she could very well make the admission without conferring any advantage upon the plaintiffs Simpson & Harper, in so far as she was concerned, and without exposing herself to any liability. The admission made by Mrs. Friese, as the defendant in the lower court, amounted to nothing more than a statement that she was willing for a judgment to be entered against the Friese Planing Mill Company, provided she were held not to be a partner, and therefore not liable. The very crux of her case was that she was not a partner, and, if she were not a partner, it is evident that she would not be authorized to

make any admissions in behalf of the Friese Planing Mill Company.

[3] 3. Since the case went to trial, and exception was taken to the verdict upon the ground that it was contrary to evidence, a consideration of the merits of the motion for nonsuit is merged into the ground complaining that the evidence was insufficient to authorize the finding reached by the jury. Henderson v. Maysville Guano Co., 15 Ga. App. —, 82 S. E. 588.

[4] 4. The plaintiff in error complains that the court erred in permitting Victor Friese to testify that he was the representative of the plaintiff in error, his mother, in forming the partnership, and was authorized to represent her in this copartnership; the objection being that the testimony was a mere conclusion, and that proof of his authority to act as such should have been restricted to what Mrs. Friese did or said authorizing the formation of the alleged partnership. While agency cannot be proved by mere unsworn declarations of one who assumes to be an agent, it is equally well settled that one, as a witness, may testify whether he was or was not in fact an agent in a particular transaction where the issue of agency is involved. "There is nothing in the law that renders the alleged agent himself an incompetent witness to testify on the trial of the case to any fact showing what the relation is between him and his alleged principal. He is just as competent a witness on the subject as the principal himself would be." Armour v. Ross, 110 Ga. 414, 35 S. E. 792. The testimony of the witness Friese is subject to the latter rule, and therefore the court did not err in overruling the objection to the testimony, and for the same reason the court did not err in charging the jury as complained of in the ninth ground of the motion for a new trial. If the jury found that Victor Friese was the duly and lawfully constituted agent of the plaintiff in error in the conduct of all the affairs connected with the business of the Friese Planing Mill Company, notice of declarations or admissions or statements made to him as such representative for Mrs. Friese would be notice to her. When notice of a fact is communicated to a general agent or to a special agent in absolute charge of a particular business, knowledge of all the facts suggested by the notice is imputable to the principal.

[5] 5. The letters and telegrams affecting Cary as an alleged partner were admissible as to his plea of nonpartnership, and for that reason should not have been excluded upon motion of Mrs. Friese, especially as the court instructed the jury not to consider telegrams and letters alleged to have been sent by Cary, as treasurer, as affecting Mrs. Friese.

[6] 6. The case really turns upon the weight of the testimony of Victor Friese as to whether his mother was a member of the firm of Friese Planing Mill Company. The first statement in his testimony is:

"My mother, Mrs. John Friese, and C. S. Cary compose the Friese Planing Mill Company."

This was a statement of a positive fact, and while it was within the power of the defendants to have inquired into the source of his information and his means of knowing the fact stated by him, this answer was not objected to, and, without more, would have authorized the jury to find that Mrs. Friese was a partner in the Planing Mill Company. Later during the examination of this witness he testified that the partnership was formed by Cary and himself, acting as agent for his mother, and he swore that he mentioned to his mother the conversation between Cary and himself relative to the negotiations, and that "it was satisfactory to her." Further, he swore that he "was representing her in forming the partnership between Mr. Cary and her. I was authorized to represent her. If you call that a representative, I was authorized."

Under the ruling in Armour v. Ross, 110 Ga. 414, 35 S. E. 787, supra, it was competent for him to testify that he was Mrs. Friese's agent, and that he was authorized to act for her. And if he was in fact so authorized, the evidence amply supports the conclusion that he, as agent for Mrs. Friese, authorized by her, held out to the world that she was a partner in the partnership known as Friese Planing Mill Company, and therefore there was no error in the instruction of the court to the effect that, if the jury found this to be true, they should find for the plaintiff on the plea of nonpartnership. As was said by this court in the case of Cary v. Simpson, supra, the real issue in this case was whether the individual defendants were in fact partners. There was no assertion that they were liable because either of them had held themselves out as partners. But the fact that one holds himself out as a partner may be a circumstance tending to show that there was a partnership in fact, and any circumstance indicating the actual existence of the partnership was relevant to the issue.

The trial seems to have been free from error, and, since the evidence as a whole authorized the verdict there was no error in overruling the motion for nonsuit nor in refusing a new trial.

Judgment affirmed.

BROYLES, J., not presiding.

(16 Ga. App. 7)

## MECHANICS' REALTY & IMPROVEMENT CO. v. LEVA. (No. 5698.)

(Court of Appeals of Georgia. Feb. 16, 1915.)

*(Syllabus by the Court.)*

1. CONTRACTS ⟸ 102, 122—VALIDITY—LOANS—ILLEGAL PURPOSE—RIGHTS OF LENDER.

Mere knowledge by a lender of money that the borrower intends to use it for an illegal or immoral purpose will not prevent a recovery of the money due the lender, where he does not aid the borrower in carrying into effect the unlawful design, or participate therein. Singleton v. Bank of Monticello, 113 Ga. 527 (1), 38 S. E. 947. See, also, Hines v. Union Savings Bank, 120 Ga. 711, 48 S. E. 120. The mere fact that houses are to be used for purposes of prostitution does not of itself destroy the consideration of a loan made to obtain money to be used in improving the property. See, in this connection, Phenix Insurance Co. v. Clay, 101 Ga. 331 (1), 28 S. E. 853, 65 Am. St. Rep. 307.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 462–467, 495; Dec. Dig. ⟸102, 122.]

2. CONTRACTS ⟸137 — VALIDITY — ILLEGAL TRANSACTION.

An obligation supported by an independent consideration will be enforced, though indirectly connected with an illegal transaction, where the plaintiff does not require the aid of the illegal transaction to make out his case. Armstrong v. American Exchange National Bank, 133 U. S. 433, 469, 10 Sup. Ct. 450, 33 L. Ed. 747; Ingram v. Mitchell, 30 Ga. 547 (3); Sewell v. Norris, 128 Ga. 824, 58 S. E. 637, 13 L. R. A. (N. S.) 1118; 1 Corpus Juris, 958, 959, § 52. "Where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. * * * But if the promise be entirely disconnected with the illegal act, and is founded on a new consideration, it is not affected by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act." Armstrong v. Toler, 11 Wheat. 258, 6 L. Ed. 468. Allegations, in a plea to an action on a promissory note, that the consideration of the note was money lent by the plaintiff to the defendant to take up pre-existing incumbrances upon certain houses belonging to the defendant, which had been previously used, were then used, and were to be used thereafter, for lewd purposes, and also to pay off and discharge existing obligations of the defendant in no way connected with any immoral transaction, do not set up a defense which would prevent a recovery, where it does not appear that the lender participated in, or is concerned in the carrying on of, the illegal and immoral business. See, in this connection, McAndrew v. Taylor, 83 S. E. 967, 969, and cases cited.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 701–712; Dec. Dig. ⟸137.]

3. MORTGAGES ⟸459 — SECURITY DEED — ISSUES—PLEADING.

Where a security deed provides that upon the failure of the borrower to maintain a stipulated amount of insurance on the property described in a deed, and in default thereof, the debt shall immediately become due and be collectible at law, and a breach of the covenant is distinctly alleged in a suit for the debt, and the defendant admits the breach, but offers an insufficient plea in avoidance thereof, no issue is raised for submission to a jury.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1343–1347; Dec. Dig. ⟸459.]

4. MORTGAGES ⟸408 — SECURITY DEED — BREACH OF CONDITION—WAIVER.

Where, in a contract relating to a loan of money, it was provided that, upon failure by the borrower to maintain a certain amount of insurance on the property conveyed as security for the debt, the entire loan should become due and payable at the option of the lender, and the insurance was canceled, and the borrower failed to have it renewed, and to maintain it in accordance with the contract, and after this failure became known to the lender, but before it was claimed that there was default rendering the entire debt due, past-due interest was paid, the acceptance of the interest would not amount to a waiver of the right to declare a default, and to demand and enforce payment of the entire note. The interest being already past due, the acceptance thereof was not a waiver of the right on the part of the lender to insist upon full payment of the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1172–1176; Dec. Dig. ⟸408.]

5. DEMURRER TO AMENDED PLEA.

The court did not err in sustaining a demurrer to the defendant's plea as amended.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by L. M. Leva, administrator, against the Mechanics' Realty & Improvement Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bell & Ellis, of Atlanta, for plaintiff in error. Rosser, Brandon, Slaton & Phillips, of Atlanta, for defendant in error.

WADE, J. Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 778)

## GUARANTEE TRUST & BANKING CO. et al. v. AMERICAN NAT. BANK. (No. 5550.)

(Court of Appeals of Georgia. Feb. 13, 1915.)

*(Syllabus by the Court.)*

1. VENDOR AND PURCHASER ⟸280 — VENDOR'S LIEN — PURCHASE-MONEY NOTES — RIGHTS OF HOLDER.

Under the provisions of section 6037 of the Civil Code, the transferee and holder of a promissory note given for the purchase money of land may, in appropriate proceedings, subject the land to his debt. Hence, in a suit brought by a transferee on promissory notes which recite that they are for purchase money of land described, a plea denying his right to a lien against the land was subject to demurrer.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 784–789, 791; Dec. Dig. ⟸280.]

2. BILLS AND NOTES ⟸534—VENDOR AND PURCHASER ⟸258—VENDOR'S LIEN—DEBT SECURED—ATTORNEY'S FEES.

(a) In a suit against the maker of a note containing a stipulation for the payment of attorney's fees, when he has been served in accordance with law with notice of the holder's intention to sue on the note, and the principal and interest of the note have not been paid on or before the last return day of the term of the court, the plaintiff's right to recover for attorney's fees is not affected by the fact that after service of the notice, a court of equity appointed receivers, who took possession of the assets

of the debtor; nor is it necessary that the receivers be thereafter served with the statutory notice in order to fix the liability for attorney's fees.

(b) A note given for the purchase money of land may include a stipulation for the payment of attorney's fees in the event the principal and interest is not paid at maturity, and in such case, upon default in the payment of the note, if the holder of the note complies with the statutory requirement as to the giving of notice ten days before the filing of the suit, and, by reason of the nonpayment of the note, liability for the attorney's fees results, the attorney's fees become a part of the indebtedness, and the obligation of the deed given to secure the original debt extends to and includes the attorney's fees. Consequently, one who is entitled to a special lien for purchase money upon described real estate is entitled also to a lien for the amount of any attorney's fees to which the debtor may be legally subject.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. ⟸ 534; Vendor and Purchaser, Cent. Dig. §§ 655–657; Dec. Dig. ⟸258.]

8. COURTS ⟸188—CITY COURT — JURISDICTION—VENDOR'S LIEN.

The establishment of a lien on real estate is not a suit affecting the title to land, and the city court of Atlanta has jurisdiction to declare a special lien upon real estate in a suit upon notes given for the purchase money of such real estate.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 412, 439, 440, 442, 447, 448, 451, 452, 454, 458, 464, 465, 467, 468; Dec. Dig. ⟸188.]

4. TRIAL ⟸141—DIRECTION OF VERDICT.

In directing a verdict the trial judge takes the peril of deciding that no other possible verdict can be legally rendered than that to be directed; but, if his decision be correct, the withdrawal of the case from the jury is not legal error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. ⟸141.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the American National Bank against the Guarantee Trust & Banking Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Dorsey, Brewster, Howell & Heyman, Smith & Hastings, and Chas. T. & L. C. Hopkins, all of Atlanta, for plaintiffs in error. Smith, Hammond & Smith, of Atlanta, for defendant in error.

RUSSELL, C. J. On August 12, 1913, the American National Bank brought suit in the city court of Atlanta against the Guarantee Trust & Banking Company, alleging itself to be the bona fide holder for value of two certain promissory notes executed by the defendant, payable to the order of F. P. H. Akers, for $3,250 each, and purchased by the plaintiff before maturity. The notes fell due June 6, 1913, and June 6, 1914, respectively, and each contained a stipulation that, in the event the first note became due and remained unpaid for 30 days, the other immediately became due. The first of the notes became due and remained unpaid for more than 30 days after it became due On July 8, 1913, the plaintiff served written notice on the defendant of its intention to declare the second note due and to bring suit on both notes, and also of its intention to ask for a judgment for attorney's fees as provided for in the notes, and for a special lien upon certain property described in the notes, for the purchase money of which they had been given. Attached to the petition were copies of the notes, each of which contained the following recitals:

"Being part of purchase money for property located at and known as No. 237 and No. 241 West Peachtree street, in the city of Atlanta, Ga.;" and "we have given two notes for the deferred payments for a certain piece of land, as shown by bond for title of this date, aggregating $6,500," etc.

There was also attached to the plaintiff's petition a copy of a notice of intention to bring the suit and ask for judgment for attorney's fees, and for a special lien on the property described in the notes. Personal service of the suit was effected upon Samuel E. Smith, president of the defendant corporation, on August 16, 1913.

The defendant filed a demurrer on the grounds:

"(1) Said petition sets forth no facts showing that the plaintiff has any special lien upon the property described in the seventh paragraph of said petition. While said petition shows that it is the holder of the notes therein described, it does not show that the plaintiff is the holder of the legal title to the property therein described, or that it holds or owns any lien upon said property which rests upon the notes described in said petition. (2) Because the claim for attorney's fees is not shown by said petition to rest upon any lien or claim of title, or title, and [appears] to be in no wise anything but a mere contractual demand against the defendant company, and not entitled to be established against said land as a claim entitled to either legal or equitable priority."

The defendant company, in its own name, and its receivers, J. D. Robinson and Harold Hirsch, who also appear as defendants, filed an answer admitting the execution and delivery of the notes in question, and alleging that, prior to the suit, the defendant company was placed by the superior court of Fulton county in the hands of the receivers, and that no notice of the intention to bring suit was given by the plaintiff to the receivers. It is denied that the plaintiff is entitled to recover attorney's fees, or to have a special lien established upon the property described in the petition. The defendants further allege that no application for authority to bring the suit was made to or granted by Fulton superior court, which, it is alleged, has full and exclusive authority in the administration of the assets, liabilities, and obligations of the defendant; that, while the notes contain an obligation to pay 10 per cent. of principal and interest as attorney's fees, the "case does not disclose that the obligation to pay attorney's fees is made a part of any retention of title, claim of title,

or lien in behalf of the said F. P. H. Akers, or that any such claim of title, retention of title, or lien was transferred by said F. P. H. Akers to the American National Bank"; that any claim for attorney's fees is one of general contractual relationship, existing only in a like way with other contractual relations entered into by and in behalf of the defendant. The receivers neither admit nor deny that title was reserved in Akers and transferred to the American National Bank, but say if there was any the plaintiff's right to maintain the suit is denied on account of the receivership proceedings. They allege also their authority from the superior court to interpose a defense to the suit, but submit that the issues should be presented to the superior court and the question of amount and priority of the claim be settled by that court in connection with the receivership proceedings; and they deny, for the reasons stated above, that the plaintiff is entitled to a special lien for attorney's fees as against the property in their hands. Attached to the answer is a copy of the order appointing James D. Robinson and Harold Hirsch receivers of the defendant corporation, and delegating to the receivers authority relative to its assets, etc., with special authority to them to defend the present action.

The plaintiff demurred to the answer generally, on the ground that it set forth no facts constituting a defense. There were also various special demurrers, but these were not passed upon. The court, after overruling the demurrer to the petition, entered the following order on the demurrer to the answer:

"Paragraph 1 of this demurrer is sustained, and the defendants' plea is stricken."

This judgment striking the answer is the basis of the first exception presented in the writ of error. Thereafter a verdict for principal, interest, and attorney's fees, and establishing a special lien for these items against the lands described in the petition, was directed, and judgment was entered thereon, and error is assigned upon the ground that the court erred in directing the verdict, and that the judgment was contrary to law.

The various assignments of error present the following questions: (1) Was the plaintiff entitled to a purchase-money lien upon the real estate described in its petition? (2) Did the lien extend to the attorney's fees stipulated in the note; and was the plaintiff debarred from insisting upon a recovery of attorney's fees, and a lien for the amount thereof by the fact that the notice of intention to sue was served only upon the Guarantee Trust & Banking Company, and not upon the receivers? (3) Was the city court of Atlanta without jurisdiction to adjudge and establish the purchase-money lien upon the property described, because the superior court of Fulton county had, in the exercise of its jurisdiction in another case, appointed receivers and placed them in charge of all the assets of the defendant company, with a view to marshaling the company's assets and appropriating them to the payment of debts in accordance with their respective priorities? (4) Was the direction of a verdict error because of the lack of evidence?

[1] 1. We think the bank was clearly entitled to a purchase-money lien upon the real estate described in its petition. The petition sets forth specifically the nature and origin of the alleged indebtedness, and exhibits the notes transferred by Akers, in which the defendant declares that they were given for the purchase money of two described lots on West Peachtree street. These lots are fully described and identified in the petition. So that, passing for the present other objections (which will be dealt with later), the plaintiff, by virtue of the transfer of the notes, which carried with it all of Akers' rights as to the security (Civil Code, § 4276), and in accordance with the original contract between the defendant and Akers, was entitled to a lien for the purchase money of the property identified in the notes, which referred also to the bond for title that the plaintiff alleged had been transferred to it. Civil Code, §§ 3330, 3347, 4276.

[2] 2. It is insisted, however, by learned counsel for the plaintiff in error, that, even if the plaintiff was entitled to a lien upon the land for the amount of the principal and interest of the note, in no event could the amount of the lien be increased so as to include the attorney's fees specified in the note. The objection is twofold: First, that there is no provision of law by which attorney's fees can be included so as to carry a lien provided by a contract, except for the principal and interest; and, second, that, even if the defendant could have been bound for the attorney's fees if there had been no receivership, there can be no lien in this case, for no notice of intention to sue was ever served upon the receivers. It is admitted in the defendant's answer that timely written notice of intention to sue and claim attorney's fees was served upon the defendant company; and, although it is alleged that no such notice was ever served upon the receivers, we are of the opinion that no further notice than that given was necessary, for the law in reference to notice for the collection of attorney's fees does not extend to receivers of the debtor. A receiver is a mere servant of the court, acting under orders from the court, and his compliance with the terms of a debtor's conditional contract to pay attorney's fees would perhaps be unenforceable, because it would be impossible for a receiver to comply with the terms of the notice and pay the principal and interest of the debt on or before the last return day, and thereby relieve himself from the payment of the attorney's fees, unless the court, whose servant the receiver is, has authorized or directed him to appro-

priate funds in his hands to the payment of the indebtedness. There was no difficulty, however, in the way of the directing of a verdict as against the maker of the notes in the present case, because the maker admitted service of the notice; and so far as the obligations of the maker of a note, whose assets have been placed in the hands of a receiver, are concerned, it is not a matter that affects the receiver; and it may be safely said that a notice to a debtor, who is afterwards placed in the hands of a receiver, follows the indebtedness and operates to bind the maker of the note, if the principal, interest, and attorney's fees, as stipulated in the note, are not paid.

It is insisted, however, that even if the plaintiff in this case was entitled, under the rulings in Harris v. Powers, 129 Ga. 86, 58 S. E. 1038, 12 Ann. Cas. 475, and McCall v. Herring, 116 Ga. 239, 42 S. E. 468, to a lien upon the land, these decisions did not hold that the security of the deed extends to the attorney's fees; and it is argued that no Georgia case can be found in which it is held that attorney's fees are a part of the purchase money. A note given for the purchase money of land may include a stipulation for the payment of attorney's fees in the event the principal and interest of the note are not paid at its maturity; and in the event of such default, if the holder of the note complies with the statutory requirement as to the giving of notice ten days before the filing of the suit, and, by reason of nonpayment of the note, liability for the attorney's fees results, the attorney's fees become a part of the indebtedness, and the obligation of the deed given to secure the original debt extends to and includes the attorney's fees as a part of the debt as a whole. Consequently, one who is entitled to a special lien for purchase money upon described real estate is also entitled to a lien for the amount of any attorney's fees to which the debtor may be legally subject. It seems to us that the rulings in McCall v. Walter, 71 Ga. 287, and McCall v. Herring, 116 Ga. 239, 42 S. E. 468, support the principle we have just announced. But if we should be in error as to this, and even though we be pioneers in adjudicating this point, we think our holding is supported by sound reason, and for that reason the holding is unequivocal. Moreover, an examination of the original record in Brown v. Sutton, 142 Ga. ——, 83 S. E. 790, discloses that seemingly this question was involved in that case, and that the case was decided in accordance with the view we entertain.

[3] 3. Under the rulings in Wheatley v. Blalock, 82 Ga. 406, 9 S. E. 168, Young v. Germania Savings Bank, 5 Ga. App. 130, 62 S. E. 999, and Edenfield v. Bank of Millen, 7 Ga. App. 645, 67 S. E. 896, there is no merit whatever in the argument that the city court of Atlanta is without jurisdiction to establish a lien upon real estate. It is directly held in the Wheatley Case, supra, that the establishing of a lien on real estate is not a suit affecting title to land. But it is insisted that the fact that the superior court of Fulton county, in the exercise of its jurisdiction as a court of chancery, had taken charge of the assets of the Guarantee Trust & Banking Company and was administering its assets, and that the allowance of a lien would be an assumption of the superior court's jurisdiction by the city court, whereas the duty rests upon the superior court to distribute the fund in hand. It is one thing to create a lien, and another thing to determine the priority to which it is entitled; and even if this point had not already been adjudicated in the case of American National Bank v. Robinson, 141 Ga. 78, 80 S. E. 555, we should hold that it would be time enough for the point to be raised before the superior court whenever that judicatory proceeds to render a decree fixing the relative rank of the various claims seeking a distributive part of the fund. We think, however, that the decision in the case above cited settled the question of the right of the plaintiff in this case to pursue its remedy in the city court without any other restrictions than those imposed by law in a similar case, where neither of the parties were before a court of equity.

[4] 4. There is not only the exception that the verdict was erroneous because the court was without power and authority to render such a judgment as was rendered, but it is further urged that even if the court was clothed with jurisdiction, and a verdict for the plaintiff might have been found by a jury, it was nevertheless error to direct a verdict. A court can never direct a verdict, unless no other finding can legally be reached than that directed. In the present case it must be assumed that the withdrawal of the case from the consideration of the jury and the directing of a finding was harmless, because the particular verdict directed could not have been prevented otherwise than by a lack of evidence on some particular point essential to the plaintiff's case, for the case is not one in which there is a conflict in the evidence. The court might have rendered a judgment for the principal, interest, and costs; and, under the ruling in Valdosta, etc., R. Co. v. Citizens' Bank of Valdosta, 14 Ga. App. 329, 80 S. E. 913, under the admission of the service of the notice of intention to sue, the jury would have been obliged to find a verdict for the attorney's fees. The admission of the execution of the notes, and the admission that the real estate referred to was that described in the petition, required the establishment of the plaintiff's lien. So there could have been no harmful error in the direction of the verdict.

We decline to grant the motion of the defendant in error for the award of 10 per

cent. damages for a frivolous appeal in this case, although we are perfectly satisfied that our ruling upon the allowance of a lien upon the real estate for the attorney's fees specified in the purchase-money notes is correct. We overrule the motion, not only because the precise question has not hitherto been directly adjudicated, but also because it does not directly appear from the record that the plaintiff in error in this case filed a supersedeas bond, whereby the defendant in error was prevented from proceeding to enforce its judgment, including the lien for attorney's fees.

Judgment affirmed.

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(15 Ga. App. 794)

## PIDCOCK v. NACE et al. (No. 5709.)

(Court of Appeals of Georgia. Feb. 13, 1915.)

*(Syllabus by the Court.)*

1. FRAUDS, STATUTE OF ⟸149—OPERATION—EXCEPTIONS—PERFORMANCE OF CONTRACT.

The amendment to the petition brought the action within an exception to the statute of frauds, and, under the ruling in this case when it was previously before this court (Pidcock v. Nace, 14 Ga. App. 183, 80 S. E. 526), the petition, as amended, set forth a good cause of action.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 359; Dec. Dig. ⟸149.]

2. JUDGMENT ⟸725 — EVIDENCE — PARTNERSHIPS.

The judgment obtained against the plaintiffs by a creditor of the partnership, which had been dissolved, though not admissible for the purpose of fixing liability on the defendant, was admissible in proof of the amount of the indebtedness alleged to have been paid by certain parties formerly composing the partnership in behalf of others who were alleged to have assumed all the liabilities of the partnership at the time of its dissolution, and, who, in consequence of a contract to that effect, were alleged to be liable to the plaintiff in the amount represented by the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1255–1257; Dec. Dig. ⟸725.]

3. APPEAL AND ERROR ⟸1008—CONTRACTS ⟸176 — CONSTRUCTION — DETERMINATION —APPEAL.

It is the duty of the court to construe unambiguous contracts. In case of ambiguity, the construction becomes a matter of fact for the jury. A contract which provides that certain named parties are to assume all the debts of a designated partnership, "except such debts, if any, that [the two retiring partners] have contracted that do not appear in the statement hereto attached marked 'Exhibit A,'" if ambiguous at all, may properly be construed as a limitation of the retiring partners' liability, excluding any other debts than those mentioned in the exhibit, unless such debts had been contracted by the retiring partners themselves, and this construction cannot properly be set aside when found by a judge sitting both as a court and jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. ⟸1008; Contracts, Cent. Dig. §§ 767–770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. ⟸176.]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by C. J. Nace and others against F. R. Pidcock. Judgment for plaintiffs, and defendant brings error. Affirmed.

L. L. Moore and Shipp & Kline, all of Moultrie, for plaintiff in error. T. H. Parker, of Moultrie, for defendant in error.

RUSSELL, C. J. [1] The contract upon which this action is based is set out in substance in the decision rendered by this court upon a former hearing. Pidcock v. Nace, 14 Ga. App. 183, 80 S. E. 526. The plaintiffs, prior to the entering of the remittitur reversing the judgment rendered on the first trial, amended their petition, by alleging a complete performance by them of the contract in question, and (based upon that performance as a consideration) alleged an agreement by the defendants to assume all debts then owing by the Star Lumber Company, except such (if any) as had been contracted by E. S. Nace and C. J. Nace. This amendment operated to bring the case within the exceptions stated in section 3223 of the Civil Code, and which we held would be necessary to take it out of the operation of section 3222 of the Code, generally referred to as the statute of frauds.

[2] 2. The finding of the trial judge for the plaintiff, based upon the evidence in the record, did not amount to a holding that the judgment as obtained by Green & Co. against the Star Lumber Company, composed of E. S. and C. J. Nace and A. E. Williams, for the amount of an account due Green & Co. by them, was res judicata and binding upon Pidcock. That judgment, however, was admissible in evidence as proof of the fact that the Star Lumber Company were indebted to Green & Co. in the amount of the judgment, but not for the purpose of fixing liability upon Pidcock. It was other evidence in the case which fixed the liability of Pidcock to the Naces to be the amount of the judgment which Green & Co. had obtained against the Star Lumber Company. Williams, a codefendant with the Naces in the suit of Green & Co. against the Star Lumber Company, and a codefendant with Pidcock in the present case, and who was proved to be the person who contracted the original debt with Green & Co. in behalf of the Star Lumber Company, according to the testimony, admitted that the account was correct, and also admitted that it was one of the accounts which was a part of the consideration of the contract of sale in question. Without deciding as to whether this admission on the part of Williams was sufficient to fix liability on Pidcock, it is enough to say that it authorized the jury to find that the account was correct. The defendant offered no evidence to rebut any of the evidence for the plaintiffs; and, under the construction that the court gave the written contract, a judgment for the plaintiffs was a proper one.

[3] 3. The contract contains the following stipulations:

"The said E. S. Nace and C. J. Nace hereby warrant that, so far as they know, the debts of the Star Lumber Company do not exceed the sum of $2,786.76. They hereby warrant unto the said F. R. Pidcock and A. E. Williams that if they themselves have contracted any debts against the Star Lumber Company, not mentioned in the exhibit hereto attached, they will be responsible for and assume said debts. The said F. R. Pidcock and A. E. Williams are to assume all debts now owing by the Star Lumber Company, except such debts, if any, that the said E. S. Nace and C. J. Nace themselves have contracted that do not appear in the statement hereto attached and marked 'Exhibit A.'"

The debt of Green & Co. was not named in the exhibit, and, according to the evidence, it was not a debt contracted by either of the Naces, but was a debt contracted by Williams during the time he was manager of the Star Lumber Company. The plaintiff in error contends, however, that the following evidence of E. S. Nace concludes the issue against the plaintiffs:

"Mr. Williams, according to his statement, showed that the Star Lumber Company owed Green & Co. something like $80. I did not know that he owed them anything, only from his statement. I was not keeping the books * * * as to what the Star Lumber Company owed Green & Co. at the time C. J. Nace and myself delivered this property to Williams and Pidcock. All I know about it was Williams' statement that he owed them $85. Mr. Pidcock, the defendant, was present in Judge McKenzie's office when Mr. Williams made the statement to me that the Star Lumber Company owed Green & Co. $85. That was at the time and place that the contract in question was signed, and at the time and place where the property was delivered under the contract, and at the time Pidcock and Williams agreed to pay the debts mentioned in the contract."

The plaintiff in error contends that this evidence showed conclusively that the Naces had notice of this indebtedness, and therefore that, under the provisions in the contract, he was not liable for this reason. The judge, however, acting as both court and jury, placed a different construction upon the contract, and held that this was one of the accounts for which Pidcock and Williams were liable. We will not say that this was an erroneous judgment. The contract, to say the least, is susceptible of more than one construction. The cardinal rule for the construction of contracts is to ascertain the intention of the parties (Civil Code, § 4265); and, in construing contracts, it is important to look to the substantial purpose which must be supposed to have influenced the minds of the parties, rather than to the details provided for making the purpose effectual (Illges v. Dexter, 77 Ga. 36). It does not appear whether the contract had been actually signed at the time of the statement of Williams as to the account due Green & Co. But, be that as it may, it is evident, from both the evidence of Nace and the testimony showing the admissions of Williams and the acts of the parties, that it was the intent of the Naces, and was understood by Williams and Pidcock, that the Naces, after signing the contract, were to be liable only for debts the Naces themselves had contracted in behalf of the Star Lumber Company, if any, which were not named in the contract. This construction, therefore, would be binding on Pidcock (Lynch v. Goldsmith, 64 Ga. 51), for, where the language of a written contract "is ambiguous and may be fairly understood in more ways than one, it should be taken in the sense put upon it by the parties at the time of its execution" (Armistead v. McGuire, 46 Ga. 232). The general rule is that where a contract is free from ambiguity, and no question of fact is involved, the construction of it is solely for the court (McLelland v. Singletary, 113 Ga. 601, 38 S. E. 942); but, where the terms of a contract are ambiguous, its meaning should be left to the jury (Civil Code, § 4265; Erskine v. Duffy, 76 Ga. 602). In the present case the trial judge, if he considered the contract ambiguous, had but to act in his capacity as a jury, under the agreement in this case, and thus decide what was the real intention of the parties. As we view the case, he did not err in his judgment finding for the plaintiff.

Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 797)

## W. H. MITCHELL & CO. v. ATLANTIC COAST LINE R. CO.

(No. 5713.)

(Court of Appeals of Georgia. Feb. 13, 1915.)

*(Syllabus by the Court.)*

1. COMMERCE ⟸8—INTERSTATE SHIPMENTS—WHAT LAW GOVERNS.

The Congress of the United States has, by section 20 of the Interstate Commerce Act of 1887, as amended by the Hepburn Act of June 29, 1906, § 7, pars. 11, 12, 34 Stat. 593, c. 3591 (U. S. Comp. 1913, § 8592), known as the "Carmack amendment," legislated directly upon the carrier's liability for loss of or damage to interstate shipments; and this legislation supersedes all regulations and policies of this state upon the same subject.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⟸8.]

2. CARRIERS ⟸159—SHIPMENT CONTRACT—LIMITATION ON LIABILITY—VALIDITY.

Upon common-law principles and authorities, where a shipper signs and accepts from a carrier a bill of lading issued by a carrier containing a clause stipulating that "claims for loss or damage shall be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than ten days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event," it constitutes a binding contract; and this clause is not void upon the ground that the carrier seeks thereby to limit its liability, and does not give as consideration therefor extra service or monetary consideration to the shipper, or that it is contrary to the public policy of the state. Such a clause, when

applied to shipments of perishable products, such as turnips, is not an unreasonable limitation as to the time in which the claim is to be presented.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 668–671, 699–703½, 711–714, 718, 718½; Dec. Dig. ⊂⊃159.]

3. APPEAL AND ERROR ⊂⊃854—JUDGMENT—INCORRECT REASONS.

A correct judgment will not be reversed even if the reason stated for its rendition is incorrect or insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408–3424, 3427–3430; Dec. Dig. ⊂⊃854.]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by W. H. Mitchell & Co. against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Snodgrass & MacIntyre, of Thomasville, for plaintiff in error. Bennet & Branch and Russell Snow, all of Quitman, and J. H. Merrill, of Thomasville, for defendant in error.

RUSSELL, C. J. W. H. Mitchell & Co. brought suit against the Atlantic Coast Line Railroad Company, alleging damage to a car of turnips shipped by the plaintiffs over the defendant's line of railway under a bill of lading issued by the defendant as the original carrier, from Thomasville, Ga., to New York. The damage was alleged to have been caused by the negligent failure to transport and deliver the turnips to the consignee within a reasonable time. The defendant denied the material allegations of the petition, and contended, not only that the allegations of negligence were untrue, but defended further upon the ground that the plaintiffs had failed to make claim for the loss or damage within ten days from the time of the alleged loss, as they contracted to do in the bill of lading issued to and signed by them, and under which the shipment was made. Upon the trial it was agreed that no notice of loss was given the defendant other than the present suit, which was filed May 26, 1913; that the car reached New York May 11th (Sunday); that the bill of lading was signed by the shipper; that the turnips reached New York in a depreciated condition, and to the amount claimed by the plaintiffs. The bill of lading was, by consent, introduced in evidence. It appears to have been issued May 7, 1913. There was evidence on behalf of the defendant tending to show what was a reasonable time in which the car of turnips should have reached New York, and evidence on the part of the plaintiffs tending to show a less time to be reasonable.

No demand for trial by jury was made, and the court, upon consideration of the evidence adduced and the admissions made by each party, and after argument by counsel, entered the following judgment:

"It is ordered, considered, and adjudged by the court that the defendant was negligent in the matter of transmitting and delivering the car of turnips in question. It is further ordered and adjudged that the contract in the bill of lading, requiring claim to be presented in ten days, was binding, and was not complied with, and the finding of the court is therefore in favor of the defendant recovering of plaintiff the costs of this case."

To this judgment the plaintiff excepted upon the following grounds:

"Because it is contrary to the evidence in the case. Because the evidence shows that the liability of the carrier defendant was that of a common carrier, and that the alleged special contract upon the bill of lading was nudum pactum; there being no consideration for it. (2) Because the judgment was without evidence to sustain it; the evidence distinctly showing that no special service was rendered plaintiff, and no reduction made in freight in this matter. The evidence shows that there could have been no reduction in the freight allowed plaintiff, as there was only one effective, one published rate applicable to this shipment. (3) The judgment is contrary to law. The evidence shows that the defendant carrier sought to limit its liability, and gave as consideration therefor no extra services or monetary consideration to plaintiff. The evidence shows that the liability of the defendant company is that of a common carrier, and there was no special contract effective between the plaintiff and defendant."

[1] 1. As the law now stands, it is too well settled to admit of doubt that the liability of common carriers for loss of or damage to interstate shipments is to be determined solely from the provisions of section 20 of the Hepburn act of June 29, 1906 (34 Stat. 584, c. 3591), known as the "Carmack amendment," and from the interpretation given this act of Congress by the federal court of highest authority. This "legislation supersedes all the regulations and policies of a particular state." Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257.

"The Carmack amendment manifested the purpose of Congress to bring contracts for interstate shipments under one uniform rule or law, and therefore withdrew them from the influence of state regulation." K. C. Sou. Ry. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683.

[2] 2. The amendment above referred to is that:

"Any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. * * * The common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled

to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

The stipulation which the plaintiffs in error contend is void for lack of consideration is as follows:

"Claims for loss or damage shall be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than ten days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event."

The defendant, of course, contends that the clause is a valid clause, even though without any special consideration, and that because of the plaintiffs' admitted failure to make the claim within ten days, they are not entitled to recover. Both parties rely upon the later decisions of the Supreme Court of the United States as authority for their respective contentions, and each cites the cases of Adams Express Co. v. Croninger, supra, Kansas City Sou. Ry. Co. v. Carl, supra, and M., K. & T. Ry. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690. In none of these cases, however, is the exact point dealt with that is here raised. The cases cited deal with the validity of contracts in which the carriers attempted to limit the liability in case of loss or damage to a valuation agreed upon for the purpose of determining which of two alternative rates should be applied to the particular shipment; and, relative to this, in the Harriman Case it was said:

"It is not unreasonable, and in fact is the method approved by the Interstate Commerce Commission, in graduating freight according to value, to divide the particular subject of transportation into two classes—those above and those below a fixed amount—and the establishment of two cattle rates, one based on a minimum fixed value and the other on the actual value, is not a violation of the Carmack amendment to the Hepburn act."

Upon another point ruled in that case, which, though not identical, is very similar to the one here involved, the court said:

"Limitation of the time within which to bring actions is a usual and reasonable provision, and there is nothing in the policy of the Carmack amendment that is violated thereby."

Further in the opinion on page 672 of 227 U. S., on page 401 of 33 Sup. Ct. (57 L. Ed. 690), it is said:

"The liability imposed by the statute [Carmack amendment to the Hepburn act] is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence. [Citing cases.] The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the court. Such stipulations have been sustained in insurance policies. Riddlebarger v. Hartford Ins. Co., 7 Wall. 386 [19 L. Ed. 257]."

Among the decisions cited as a basis for the conclusions reached by the court in the above quotation is the case of Express Co. v. Caldwell, 21 Wall. 264, 22 L. Ed. 556, in which a stipulation similar to that here involved was held to be valid. Neither in that case (nor in the numerous cases there cited) is there anything to show that there is consideration for the contract of limitation. It at least appears inferentially, therefore, that the Supreme Court of the United States would not consider the contract here attacked as void for the reason that there is admittedly no special consideration supporting it.

In 1 Moore on Carriers (2d Ed.) 480, § 24, it is said:

"The carrier may lawfully, by contract with the shipper made by clause or stipulation in the bill of lading or shipping receipt, or otherwise, provide a reasonable time within which the shipper shall present his claim or give notice of claim for loss or damage, and the manner of giving such notice or presenting his claim, and limit its liability to cases in which the claim shall be presented or notice given in accordance with the terms of the contract. Such agreements are not against the policy of the law, and of the right to make conditions of this character there is now no question. They do not relieve carriers from any part of their obligations as common carriers. As such they are bound to the same diligence, fidelity, and care as they would be required to exercise if no such stipulation had been made. All that the stipulation requires is that the shipper shall make his claim in season to enable the carrier to ascertain the facts, and it specifies what that time shall be. The only question that can arise is whether the condition is a reasonable one, with reference to the circumstances of any particular case. Such contracts, when the time and conditions are not unreasonable, are universally upheld by the courts, and the right to recover on a claim for loss or damage will be barred, if the conditions of the contract are not complied with."

The only direct authority on the precise point since the passage of the Carmack amendment, that we have found, is from our own Supreme Court, which in the case of Post v. A. C. L. Rd. Co., 138 Ga. 764, 76 S. E. 45, said, in dealing with a contract containing a provision similar to the one here involved:

"However this may be held, that section of the act [Carmack amendment] does not prohibit an agreement providing a reasonable time within which the shipper shall present his claim or give notice of claim for loss or damage, and that the carrier shall not be liable unless such notice is given or claim made within the prescribed time."

Here it will be seen that no allusion is made to any consideration to support the time limitation referred to; and upon investigation we find that this ruling is in line with quite a long array of decisions of that court, as well as other courts, upholding the validity of limitations as to time of

loss or damage under policies of insurance and other contracts, and for which no special consideration is given. We are inclined to think that we are bound by the decision in Post v. A. C. L. Rd. Co., supra, as a precedent upon the point here raised; but, whether it is conclusive on the point or not, we hold in the absence of any controlling decisions to the contrary, and in view of the sound and logical reasoning given in the quotations from the Harriman Case and from Moore on Carriers, that such contracts, when reasonable as to time, are valid and binding, even though no special consideration be given therefor.

The reasonableness of the time within which the contract before us stipulates that notice shall be given is not denied, and no exception is taken to the judgment, except upon the ground that the stipulation was without consideration. For this reason, the question as to the reasonableness of the stipulated time need not be considered. We might say, however, that on this point the finding of the judge, acting as both court and jury, was not without reason and authority; and this court would not, if the question of the reasonableness of the contract were before it, hold that the judge erred in his finding. Indeed, requirements in contracts limiting to a much less time than ten days, the time in which notice of loss or damage is to be given, have been held to be valid and reasonable; and especially is this true in shipments of fruits and vegetables. See 6 Cyc. 507, and cases there cited.

[3] 3. The finding of the court as to whether the defendant was or was not negligent does not enter into this case, so far as the judgment of this court is concerned. If the court correctly found that the clause requiring ten days' notice was binding, and that it was not complied with, then the failure to give this notice precluded a recovery by the plaintiffs, and the judgment was correct, without regard to whether the carrier was negligent in unduly delaying the shipment. A correct judgment will not be reversed, even if the reason stated for its rendition is incorrect or insufficient. Surrency v. Glennville Supply Co., 13 Ga. App. 180, 78 S. E. 1013.

Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 790)

## HENDERSON v. OCEAN S. S. CO.

(No. 5684.)

(Court of Appeals of Georgia. Feb. 13, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ⟸101, 102, 177—SAFE APPLIANCES—DUTY OF MASTER—NEGLIGENCE OF FELLOW SERVANT.

It is the duty of a master to furnish to servants in his employ safe appliances for the work in which they are engaged; but, when such appliances are furnished, and an injury to a servant is plainly attributable solely to negligence of fellow servants in the manner of using them, or in failing to use them, the master is not chargeable therewith.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178–184, 192, 307, 352, 353; Dec. Dig. ⟸101, 102, 177.]

2. MASTER AND SERVANT ⟸287—INJURY TO SERVANT—EVIDENCE—NONSUIT.

There being no evidence that the master knew or ought to have known of the dangerous condition existing on account of failure to use the appliance furnished, and that the servant did not know, and did not have equal means with the master of knowing, and by the exercise of ordinary diligence could not have discovered that condition, it was not error for the court to grant a nonsuit.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1034, 1045, 1051, 1052, 1054–1067; Dec. Dig. ⟸287.]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Robert Henderson against the Ocean Steamship Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Oliver & Oliver, of Savannah, for plaintiff in error. H. W. Johnson, of Savannah, for defendant in error.

RUSSELL, C. J. Robert Henderson was employed by the Ocean Steamship Company as a gang man or laborer in loading one of its vessels. While going from an upper deck to one of the lower decks of the steamship City of Memphis, where he had been ordered to work, he fell through an open cargo hatch from the lower deck to the hold of the ship, and his arm was broken by the fall. In his petition he charged negligence on the part of the defendant in failing to keep the hatchways closed when not in use, and by an amendment alleged that the defendant knew or ought to have known of the condition of the hatchway, and that he did not know, and did not have equal means with the defendant company of knowing, the condition of the hatchways, and that he could not by the exercise of ordinary care, have known of this dangerous condition.

The evidence shows that the plaintiff had been engaged in this line of work for some 15 years, and had been employed by the defendant for 4 years prior to the injury. On the day of the accident he had been at work for a half hour or more on the upper deck, and was ordered to go to a lower deck to do other work. On this upper deck there were two hatches or openings in the deck of the vessel, about five feet apart, and each about eight feet square. On climbing down a ladder through one of these hatches, he started to walk back toward the stern of the ship, where he was to work. Having gone from the upper deck, where the sun was shining bright, to the lower deck, where it was more

or less dark, he was "sort of blinded." Not being able to see, he walked up against some hatch covers lying between two hatches in the lower deck, and, on trying to walk around these covers, fell through the opening in one of the hatches, a considerable distance to the bottom of the ship, and received the injuries complained of. The plaintiff himself testified:

"It is true, if you wait until your eyes get accustomed to the light, you can see when you get down there. * * * You can see where you are going then."

According to the evidence, the defendant had a universal standing rule or order by which the gang men or laborers who were working in the ship were required to replace hatch covers when the work was stopped at any time or for any reason. The plaintiff testified:

"As to what has been the rule and the custom relative to hatch covers on hatches not in use during that time, when they were not in use, they were covered up; that was always the case ever since I was working there; * * * always the rule since I have been there to put them back on when they knock off; the men do that, the laborers who are working down there. * * * That is a standing rule, and has always been the order when I was there; all the time I worked there previous to my injury that was a standing rule. I am sure about that; the men have orders to put them back on." "I say it is the universal rule down there to cover the hatches when they stop for lunch or dinner or anything."

There is no evidence as to when this particular hatch was left open, but it was not in use at the time of the plaintiff's injury.

[1] 1. We are of the opinion that the injury was the result of the negligence of a fellow servant, and that the grant of a nonsuit was proper. It is apparent that the proximate cause of the injury was the failure of the defendant's servants to carry out what, from the evidence, appears to have been a universal rule. This case is very similar to the case of Fraser v. Smith & Kelly, 136 Ga. 18, 70 S. E. 792, and, in our opinion, the rules there announced are especially applicable to the instant case. In that case it was said:

"In a suit by an employé against his master to recover damages for injuries sustained in the service of the master, it was alleged, in effect, that the master had provided a safe place and appliances when properly adjusted, and that the servant was injured because of the carelessness of fellow servants in substituting for the safe appliance furnished by the master one that was improper, and which rendered the place unsafe. Held, in such case the proximate cause of the injury was the negligence of the coemployés in substituting the improper appliance, and not any dereliction of duty in the master's failure in furnishing a safe place or proper appliances."

In the present case the proved facts, with but slight variance, present such a case. In that case the servants used the appliance improperly; in the present case they failed to use it at all. In so far as the legal aspect of the situation is concerned, there is no difference. In each case it was the servant, and not the master, to whom the negligence was properly attributable. In the case of McLaughlin v. Iron Works, 60 N. J. Law, 557, 38 Atl. 677, it was said that where an appliance for work is needed, the duty is on the master to use reasonable care in its selection, but carelessness in their use or failure to use them on the part of the servants, where injury is received by a fellow servant in the same common employment, is not chargeable to the master.

Counsel for the plaintiff in error contend that a jury might have determined that the officers of the company, whose duty it is to see that the hatch covers were in place, were negligent. There was some evidence tending to show that the stevedore was in charge of the gang, and that he was the person who gave the orders to the laborers. In a case similar to this, however (The Louisiana, 74 Fed. 748, 21 C. C. A. 60 [5th C. C. A.]), where a stevedore was engaged in discharging a cargo and fell through an unguarded hatchway into the between decks of a ship, it was held that, if there was any obligation to have the hatchway closed, the duty of opening and closing it when necessary rested upon the squad of laborers working in the between deck who were the stevedore's fellow laborers and the steamship company was not liable. Judge Powell speaking for this court in the case of McDuffie v. Ocean Steamship Company, 5 Ga. App. 127, 62 S. E. 1008, said:

"It is sufficient to say that, if the nature of the master's work is complex and involves the presence and co-operation of a large number of men, so situated that individual independent action on their respective parts would render the doing of the work unsafe, the law imposes on the master the duty of organizing and maintaining a system of works by which reasonable safety can be secured. Frequently this is accomplished largely through rules and regulations promulgated and enforced by the master. In that event the doing of the work according to the rules and regulations is regarded as mere detail, and those doing it are considered as fellow servants, though some of them are superior servants and others inferiors; though some are bosses and others common laborers."

We see no merit in this contention of the plaintiff in error.

[2] 2. The rules of the common law being applicable in this case, there was no presumption of negligence against the defendant, and the burden was upon the plaintiff to show that the defendant knew or ought to have known of the open hatchway. It was also necessary for the plaintiff to show that he did not know, and did not have equal means with the defendant of knowing, and by the exercise of ordinary care could not have known, of the open hatchway. The evidence did not show these essential facts. The plaintiff testified: "I do not know when the covers were taken off. I have no idea." So far as the evidence shows, the covers might have been removed from the hatchway just a few seconds prior to the injury. There is no suggestion that the condition had existed long enough for the danger to have been discovered by the master, and therefore no

constructive knowledge on the part of the master was shown. Besides, the evidence of the plaintiff himself shows that his opportunity for knowing of the condition was not only equal to, but greater than, the defendant's. Had he but waited a moment for his eyes to get accustomed to the darkness he could have seen. A member of the same gang of laborers, who was with the plaintiff, and who testified in his behalf, said:

"I did not fall in the hatch. I swung to the starboard side in walking. I went to the wing around the hatch, where I saw light. * * * I went on that side where there was light; that is the reason I did not fall in, I suppose so."

In fact, all the evidence tends to show that the plaintiff had at least equal opportunity with the defendant to have ascertained the defects; and, as was said in Hobbs v. Bowie, 121 Ga. 421, 49 S. E. 285:

"This being a suit for damages by an employé against his employers, which was governed by the common-law doctrine of master and servant, and it affirmatively appearing that the servant had equal means with the master of ascertaining the defective condition of the appliance alleged to have been the cause of his injuries, no recovery can be had against the master."

Judgment affirmed.

BROYLES, J., not presiding.

(15 Ga. App. 778)

## COOLEY v. JONES & HOPKINS MFG. CO. (No. 5548.)

(Court of Appeals of Georgia. Feb. 13, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⟸273—EXCEPTION—NECESSITY.

Since no precise and definite exception is taken to the ruling to the effect that no legal defense was presented by the defendant's pleas, we cannot consider that question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620–1623, 1625–1630, 1764; Dec. Dig. ⟸273.]

2. APPEAL AND ERROR ⟸692—PRESENTATION FOR REVIEW—EXCLUSION OF EVIDENCE.

Where error is assigned because the court rejected evidence which the bill of exceptions recites was offered "in support of each and every allegation made" in the defendant's pleas, and it does not appear, literally or in substance, what evidence was rejected, or what objections were urged to its admission, this court cannot determine whether or not it should have been admitted. Evidence might be "offered" which tends to support a legal defense, but which is nevertheless wholly incompetent. An exception to the admission or exclusion of evidence, which fails to set out the evidence literally or in substance, presents no question for decision. Shaw v. Jones, Newton & Co., 133 Ga. 446 (9), 66 S. E. 240; Norton v. Aiken, 134 Ga. 21 (2), 67 S. E. 425; Walters v. Josey, 137 Ga. 475 (3), 73 S. E. 653; Burkhart v. Fitzgerald, 137 Ga. 366, 73 S. E. 583.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905–2909; Dec. Dig. ⟸692.]

3. BILLS AND NOTES ⟸516—EVIDENCE—PRIMA FACIE CASE.

The introduction of the negotiable promissory note in evidence made out a prima facie case upon which the plaintiff was authorized to recover, and in the absence of any evidence in support of a plea the court did not err in directing the verdict for the plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1800–1806; Dec. Dig. ⟸516.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Jones & Hopkins Manufacturing Company against G. W. Cooley. Judgment for plaintiff on directed verdict, and defendant brings error. Affirmed.

Walter W. Visanska, of Atlanta, for plaintiff in error. Moore & Pomeroy, of Atlanta, for defendant in error.

WADE, J. Judgment affirmed.

BROYLES, J., not presiding.

(15 Ga. App. 815)

## CITIZENS' BANK OF TIFTON v. TIMMONS et al. (No. 5769.)

(Court of Appeals of Georgia. Feb. 13, 1915.)

*(Syllabus by the Court.)*

1. BANKS AND BANKING ⟸102—AUTHORITY OF CASHIER—COMPROMISE OF DEBTS.

Generally the cashier of a bank, as such, has no authority to compromise or discharge debts due his bank without payment, or by accepting other securities, and authority from the bank must be shown expressly or by necessary implication, or by usage or practice, or mode of doing business of that particular bank, or it must be shown to have been acquiesced in, or in some other way ratified by the bank, to be of binding effect. See 3 Ruling Case Law, 449.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 239–243; Dec. Dig. ⟸102.]

2. EVIDENCE ⟸241, 242—DECLARATION OF AGENT—ADMISSIBILITY IN EVIDENCE.

Declarations of an agent as to the business transacted by him are not admissible against his principal, "unless they were a part of the negotiation, and constituting the res gestæ, or else the agent be dead" (Civ. Code 1910, § 3606); but declarations made by one shown by some testimony to have been a general agent and manager of a particular business institution, concerning matters relating to that business, are admissible to bind his principal during the continuance of the agency, though made in reference to a particular act or negotiation previously completed, and not constituting a part of the res gestæ thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 887–907; Dec. Dig. ⟸241, 242.]

3. EVIDENCE ⟸166, 571—EXPERT TESTIMONY—ADMISSIBILITY—PROBATIVE EFFECT.

Where a witness duly qualified as an expert general bookkeeper and as a bank bookkeeper, it was not error to admit his testimony, based upon an inspection and examination of the books of a bank, as to the meaning, interpretation, or construction of an account in evidence appearing on such books then under examination, measured by the rules, methods, and usages generally prevailing among commercial bookkeepers and bank bookkeepers. Such testimony is advisory merely, and is not binding upon a jury, though they cannot arbitrarily disregard it; but the weight and val-

ue to be attributed thereto is for determination by them. Griffin v. State, 15 Ga. App. —, 83 S. E. 891, 895.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 556, 557, 2395–2398; Dec. Dig. ⊂⊃166, 571.]

4. Bills and Notes ⊂⊃516, 537—Prima Facie Case—Rebuttal—Question for Jury.

A prima facie case sufficient to authorize a verdict, made out by placing in evidence a negotiable promissory note, reciting a valuable consideration, may be rebutted by testimony tending to support any valid legal defense interposed; but whether or not such testimony, even where uncontradicted, is sufficient to completely overcome the legal presumption created by the introduction of the note, is a question of fact for determination by the jury. Rowland v. Harris, 55 Ga. 141; Purcell v. Armour Packing Co., 4 Ga. App. 253, 259, 61 S. E. 138; Bing v. Bank of Kingston, 5 Ga. App. 578, 580 (4), 63 S. E. 652. The court therefore erred in directing a verdict.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1800–1806, 1862–1893; Dec. Dig. ⊂⊃516, 537.]

5. Direction of Verdict.

This case differs essentially from that of Citizens' Bank of Tifton v. Willis, 15 Ga. App. —, 84 S. E. 157 (decided February 6, 1915), in the fact that in the Willis Case the verdict was not directed by the court, whereas in the case at bar the court directed the verdict.

Error from City Court of Tifton; R. Eve, Judge.

Action between the Citizens' Bank of Tifton and W. W. Timmons and others. From the judgment, the Bank brings error. Reversed.

Fulwood & Skeen, of Tifton, for plaintiff in error. H. S. Murray, R. D. Smith, and J. S. Ridgdill, all of Tifton, for defendants in error.

WADE, J. Judgment reversed.

BROYLES, J., not presiding.

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(99 S. C. 264)

## BLACKWELL v. HARRELSON. (No. 8935.)

(Supreme Court of South Carolina. Sept. 24, 1914. Petition for Rehearing Dismissed Nov. 21, 1914.)

.. Assignments ⊂⊃8—Estoppel ⊂⊃39—After-Acquired Title—Deeds Operative as Estoppel.

A sale by an expectant heir of an interest in land which he expects to inherit from a person then living is not against public policy, and the fact that a grantor was an expectant heir of the owner of land, an interest in which his deed purported to convey, did not prevent the title subsequently acquired by him by descent passing thereunder, under the rule of estoppel.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 13; Dec. Dig. ⊂⊃8; Estoppel, Cent. Dig. §§ 108, 109; Dec. Dig. ⊂⊃39.]

2. Partition ⊂⊃9—Partition Agreements—Estoppel.

Where C., one of the children of an owner of land, conveyed to E., another child, all of his interest in the real estate of his mother, and after the mother's death all of the children executed a partition agreement allotting to each of the other children a parcel of land and allotting a parcel to C. and E. together, though E. was estopped by the partition agreement from claiming any interest in the parcels allotted to the other children, she was not estopped from claiming all of the tract allotted to her and C., and the partition agreement did not reinvest C. with the title which passed, when acquired, under his deed.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 26–32; Dec. Dig. ⊂⊃9.]

3. Estoppel ⊂⊃38—After-Acquired Title—Deeds Operative as Estoppel.

A deed by an expectant heir conveying with general warranty all of his interest in the real estate of his mother, though in effect a quitclaim deed, was sufficient to estop the grantor with respect to a title subsequently acquired by descent, as a quitclaim deed is sufficient to convey an absolute fee-simple title.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 99–107; Dec. Dig. ⊂⊃38.]

4. Execution ⊂⊃272—Rights of Purchasers—Notice.

Under Civ. Code 1912, § 3542, providing that all deeds, etc., shall be valid so as to affect from the time of delivery or execution the rights of subsequent creditors whether lien creditors or simple contract creditors, or purchasers for a valuable consideration without notice only when recorded within 10 days from the time of such delivery or execution, where a creditor had no notice of a conveyance when he extended credit to the grantor, a purchaser of the land conveyed under an execution on a judgment obtained by the creditor acquired a good title notwithstanding actual notice to him, at the time of the sale, of the conveyance, as the rights of the purchaser under an execution are the same as those of the creditor upon whose suit the property is sold.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 771, 781–788; Dec. Dig. ⊂⊃272.]

5. Fraudulent Conveyances ⊂⊃210—Record—Constructive Notice to Creditors.

Under Civ. Code 1912, § 3542, where a grantor had no title to land when his deed was executed or recorded, but subsequently acquired title, the record of the deed was not constructive notice to creditors subsequently extending credit to him, and as against such creditors the deed was not effective.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 634; Dec. Dig. ⊂⊃210.]

Appeal from Common Pleas Circuit Court of Marion County; T. H. Spain, Judge.

Action by R. J. Blackwell against Ella J. Harrelson. From a decree for plaintiff, defendant appeals. Affirmed.

The decree below was as follows:

This is an action for partition, and was heard by me upon an agreed statement of facts at the regular November (1913) term of the court of common pleas for Marion county. Plaintiff alleges by his complaint that he and the defendant are tenants in common, share and share alike, of the land described in the complaint, and prays to have his part of the land set apart to him in severalty. The answer of the defendant denies all the allegations of the complaint, alleging that plaintiff has no interest in the land in question, and prays that the complaint be dismissed. By consent all the issues involved were submitted to me for decision upon the agreed statement of fact, a trial by jury of the issue of title having been waived.

The essential facts of the case are as follows: During the year 1898, Suzan Z. Harrelson, the mother of defendant, was the owner of the lands involved in this action, and during April of

that year she made a will, and a day or two later added a codicil thereto. Under this will and the codicil thereto, she devised certain lands, of which the lands here involved were a part, to her children, Charles H. Harrelson, Ella Jane Harrelson, Altha Gertrude Harrelson (now Bryan), and Elmira Josephine Harrelson (now McLellan). Suzan Z. Harrelson continued the owner of the land until her death, late in December, 1901, leaving the above-mentioned will in force, and the will and codicil were admitted to probate in Marion county on February 4, 1902. On November 24, 1898, Charles H. Harrelson, by his deed, dated on that day and recorded in the office of the clerk of court of Marion county on February 15, 1899, conveyed with general warranty to Ella J. Harrelson, her heirs and assigns, "all my right, title and interest in all the real estate of my mother and father, the same being situate in said county and state, whereon my said mother now resides, on Back Swamp and the Old Stage Road." On December 12, 1905, Addie C. Platt, Gertrude A. Bryan, being the same person mentioned in the will of Suzan Z. Harrelson as Altha Gertrude Harrelson, Ella J. Harrelson, Charles H. Harrelson, and Josephine E. Harrelson, being the same person mentioned in the will of Suzan Z. Harrelson as Elmira Josephine Harrelson, entered into a certain written agreement relative to the land devised under the will of Suzan Z. Harrelson. This agreement recited that the land had been surveyed and divided into parcels, and in this instrument, which allotted one of the divisions to each of the other children, it was provided that division B should be the portion of Charles H. Harrelson and Ella J. Harrelson together; this division B being the tract of land sought to be partitioned in this action. After making the various allotments, the agreement then provided as follows: "And we agree that the division now made in the manner aforesaid shall be forever binding and conclusive upon us and our heirs and assigns forever. And each to the others doth hereby release and quitclaim all interest to the several portions of each according to said division and to the heirs, executors, administrators and assigns of each other forever." This agreement was duly recorded in the office of the clerk of court of Marion county on February 17, 1906. During the year 1907, R. J. Blackwell & Co. extended credit to Charles H. Harrelson on open account to the amount of $604.52, and on May 6, 1908, this account was reduced to judgment by R. J. Blackwell & Co., which judgment was duly entered in the office of the clerk of court of Marion county. An execution was issued on this judgment, and the sheriff levied upon a half interest in tract B of the land above mentioned as the property of Charles H. Harrelson. After compliance with all the requirements of law, the one-half interest in tract B was sold by the sheriff of Marion county on sales day in February, 1909, to R. J. Blackwell, the plaintiff, who complied with his bid and received title from the sheriff. When this land was called for sale by the sheriff, F. D. Bryant announced for Ella J. Harrelson that the land belonged to her, and that Charles H. Harrelson, the execution debtor, had no interest. This announcement was heard by the attorney of R. J. Blackwell, who bid in the property for him. It is conceded, however, that when the credit, upon which the judgment and execution were based, was extended in 1907, and when the judgment was entered thereon in 1908, R. J. Blackwell & Co., the creditors, had no actual notice or knowledge of the deed of Charles H. Harrelson to Ella J. Harrelson, executed in 1898 and recorded in 1899. It is further conceded that, when that deed was executed and recorded, Charles H. Harrelson had no title whatever to the land which he purported to deal with, but that it was then owned and continued to be owned by his mother, Suzan Z. Harrelson, until her death in December, 1901, and that whatever title Charles H. Harrelson has had at any time, or whatever title Ella J. Harrelson acquired by her deed from Charles H. Harrelson, did not vest until the death of Suzan Z. Harrelson. Under this state of facts, R. J. Blackwell, the plaintiff, claims to be the owner of one-half of the land described in the complaint by virtue of his deed from the sheriff, and Ella J. Harrelson, the defendant, claims to be the owner of the entire tract by virtue of her deed from Charles H. Harrelson, executed in 1898 and recorded in 1899.

The defendant, Ella J. Harrelson, admits that Charles H. Harrelson had no title at the time he made his deed to her, and that she acquired no title at that time, but that, when Suzan Z. Harrelson died, Charles H. Harrelson acquired title under the will, which title immediately vested in her by way of estoppel. The general principle of law contained in this proposition is well established in this state. Craig v. Reeder, 3 McCord, 411; Robertson v. Sharpton, 17 S. C. 592; Gaffney v. Peeler, 21 S. C. 55.

However, on the other hand, it is urged that under the peculiar facts of this case Ella J. Harrelson cannot avail herself of the rule of estoppel for the reasons: (1) That when the deed was made by Charles H. Harrelson to Ella J. Harrelson he was an expectant heir of Suzan Z. Harrelson, and a deed made by him purporting to convey an interest in the land of a person of whom he was an expectant heir would be contrary to public policy and void; (2) that the partition agreement of December 12, 1905, reinvested Charles H. Harrelson with his interest in the land; (3) that the deed of Charles H. Harrelson to Ella J. Harrelson, only purporting to convey his right, title, and interest, was in effect nothing more than a quitclaim deed, which would not estop him to claim an interest subsequently acquired; and (4) that the plaintiff was a purchaser at a sale under an execution founded upon a judgment for credit extended without notice of the deed of Charles H. Harrelson to Ella J. Harrelson, and consequently was a purchaser for valuable consideration without notice of the rights of Ella J. Harrelson. The decision of this case therefore depends upon the proper determination of these four objections to the application of the rule of estoppel.

[1] It is, no doubt, true that authority may be found for the proposition that a sale by an expectant heir of an interest in land which he expects to inherit from a person then living is void as against public policy (McCall v. Hampton, 98 Ky. 166, 32 S. W. 406, 33 L. R. A. 266, 56 Am. St. Rep. 335), but no decision to that effect in this state has been called to my attention, and I think the weight of numerical authority as well as the better reasoning support the contrary view. See authorities discussed in note to Trull v. Eastman, 37 Am. Dec. 126 (Mass.); 4 Cyc. 15, and authorities cited. I am therefore of the opinion that the fact that Charles H. Harrelson at the date of his deed to Ella J. Harrelson was an expectant heir of the person in whose land he was purporting to convey an interest would not be sufficient to prevent the application of the rule of estoppel.

[2] I also think the second objection urged against the application of the rule of estoppel without merit, namely, that the partition agreement of December 12, 1905, reinvested Charles H. Harrelson with title. Plaintiff has cited the cases of Senterfeit v. Shealey, 71 S. C. 259, 51 S. E. 142, and Gibson v. Fuller, 74 S. C. 535, 54 S. E. 778, as authority for the position that Ella J. Harrelson is estopped by the partition agreement to claim that Charles H. Harrelson did not thereby become reinvested with title. Those cases, however, are materially different from the case at bar. There was no necessity for Charles H. Harrelson to sign the partition agreement, as he was already estopped to claim

any interest in the land in so far as the signers of the agreement were concerned, and the purposes of the parties only could have been to give additional force to the deed already made by Charles H. Harrelson to Ella J. Harrelson. It is quite true that the partition agreement will estop Ella J. Harrelson from claiming any interest in tracts A, C, and D; but it cannot estop her from claiming all of tract B.

[3] I think it is true, as contended by plaintiff, that the deed of Charles H. Harrelson to Ella J. Harrelson is of no more effect than a quitclaim deed, but that is not sufficient to prevent the application of the rule of estoppel. Under the law of this state, a quitclaim deed is sufficient to convey an absolute fee-simple title, and, though the deed in question was in effect a quitclaim deed, yet it is sufficient to estop the grantor. Martin v. Ragsdale, 71 S. C. 67, 50 S. E. 671.

[4, 5] The position of plaintiff that he is a purchaser for value without notice is well taken. It is undisputed that R. J. Blackwell & Co., had no actual notice of the deed of Charles H. Harrelson when they extended credit to Charles H. Harrelson in 1907. The recording act (volume I, Code 1912, § 3542) extends its protection to simple contract creditors as well as lien creditors, and the rights of R. J. Blackwell & Co., as subsequent creditors for value without notice accrued when the credit was extended in 1907. The fact that actual notice was extended to R. J. Blackwell, the purchaser, at the time of the sale by the sheriff under the execution, cannot suffice to charge him with actual notice of the rights of Ella J. Harrelson, because the rights of the purchaser under an execution are the same as those of the creditor upon whose suit the property is sold. The case of Herring & Co. v. Cannon, 21 S. C. 212, 53 Am. Rep. 661, is precisely in point, and thus states the rule: "The purchase at the sheriff's sale for the benefit of suing creditors, admitted to be subsequent creditors without notice, gave to the purchaser that protection which is extended to the class to which the creditor in execution belonged, whether he (the purchaser) had actual notice or not." Defendant cites the case of Armour v. Ross, 78 S. C. 294, 58 S. E. 941, 1135, as authority for the position that the recording act only extends its protection to lien creditors. An examination of that case, however, will show that it had under consideration the statute relating to bailments and conditional sales of personal property, and has no application to the question at issue in this case. I think it clear therefore that the plaintiff is a purchaser for valuable consideration without actual notice, and the only constructive notice by which it is sought to charge him is the record of the deed of Charles H. Harrelson to Ella J. Harrelson. That deed was executed November 24, 1898, and recorded February 15, 1899. At both of these dates the land was the admitted property of Suzan Z. Harrelson, and Charles H. Harrelson had no title whatever to the land. The title of Charles H. Harrelson was not acquired until December, 1901, nearly three years subsequent to the date of the record of his deed to Ella J. Harrelson; so therefore the question is simply whether the record of that deed was constructive notice. This question is quite explicitly and conclusively answered in the negative by the case of Richardson v. Lumber Corporation, 93 S. C. 254, 75 S. E. 371, and that case is conclusive of this. R. J. Blackwell, the plaintiff, being a purchaser for valuable consideration without notice, either actual or constructive, of the deed of Charles H. Harrelson, the rule of estoppel cannot be asserted against him.

It is therefore ordered, adjudged, and decreed that the plaintiff and defendant are tenants in common of the tract of land described in the complaint in equal proportions, to wit, one-half each, and that plaintiff is entitled to partition.

It is further ordered, adjudged, and decreed that a writ of partition in the usual form do issue as provided by law.

Robt. B. Scarborough, of Conway, and W. F. Stackhouse, of Marion, for appellant.
Henry Buck and A. F. Woods, both of Marion, for respondent.

WATTS, J. For the reasons stated by his honor, T. H. Spain, in his circuit decree, it is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

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(75 W. Va. 494)

## WILLIAMS v. S. M. SMITH INS. AGENCY et al.

## FIRST NAT. BANK OF SUTTON v. SAME.

Nos. 2597, 2608.

Supreme Court of Appeals of West Virginia.
Jan. 19, 1915.)

*(Syllabus by the Court.)*

1. CORPORATIONS ⟸414—OFFICERS—POWERS—BILLS AND NOTES.

A president has no inherent power to negotiate loans and issue notes therefor in the name of the corporate entity of which he is such officer. And unless it ratifies such action on his part, or for an unreasonable length of time after knowledge thereof acquiesces therein, the notes so executed are not enforceable as liabilities against the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1640–1646; Dec. Dig. ⟸414.]

2. CORPORATIONS ⟸426—OFFICERS—EXECUTION OF NOTES—RATIFICATION AND ACQUIESCENCE.

Such ratification or acquiescence results from an appropriation of the proceeds, so derived, to the beneficial use of the corporation, or its failure for an unreasonable length of time, after knowledge of the unauthorized act, to restore the proceeds thereof to the source from which they were derived, or from a course of dealing on its behalf, without objection, so obvious and often repeated as reasonably to induce belief in corporate authorization for such purpose.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702–1704, 1707, 1708, 1710–1716; Dec. Dig. ⟸426.]

3. RECEIVERS ⟸76 — TRUST FUND — INSURANCE PREMIUMS.

Premiums on policies of insurance, collected by the receiver of an insolvent soliciting agent, constitute a trust fund for the use and benefit of the insurers as cestuis que trustent, to the exclusion of general creditors, except as to the surplus remaining after payment of claims primarily chargeable against it.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 137; Dec. Dig. ⟸76.]

4. APPEAL AND ERROR ⟸220—PRESENTATION BELOW—OBJECTION—DECREE—FINDINGS.

Objections to a decree, based upon a master's findings not excepted to before confirmation, and not apparently erroneous, are ineffectual as grounds for reversal in an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1325–1332; Dec. Dig. ⟸220.]

5. BILLS AND NOTES ⊂=492—PROOF OF HANDWRITING—PRACTICE.

The common-law requirement as to proof of handwriting is not altered except as provided by section 40 (sec. 4794), c. 125, Code.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1649–1651; Dec. Dig. ⊂= 492.]

Robinson, P., dissenting.

Appeal from Circuit Court, Mercer County.

Suit by C. L. Williams, receiver, etc., against the S. M. Smith Insurance Agency and others. From the decree, plaintiff and the First National Bank of Sutton separately appeal. Reversed in part, affirmed in part, and remanded.

Sanders & Crockett, of Bluefield, for appellant Williams. Hall Bros., of Sutton, and D. C. T. Davis, Jr., Staige Davis, and Connor Hall, all of Charleston, for appellant Bank. A. W. Reynolds, of Princeton, for appellees.

LYNCH, J. As receiver of the Fidelity Banking & Trust Company, an insolvent state banking corporation, C. L. Williams instituted this suit in the circuit court of Mercer county, alleging in the bill the insolvency of the sole defendant, the S. M. Smith Insurance Agency, another corporation, an indebtedness due from it to the Banking & Trust Company, and praying the appointment of a receiver of the assets of the Smith Agency. Though the record does not disclose any order appointing a receiver pursuant to the prayer of the bill, the orders entered show that C. A. Bradshaw acted in that capacity and as such collected the fund in controversy in this suit, amounting to $8,665.03 less expenses and attorney fees for services rendered, as to which no objection is raised.

Subsequently, the several fire insurance companies for whom as agent the Smith Agency was authorized to solicit insurance, countersign policies, collect and remit premiums, less commissions allowed to it, and the American Surety Company of New York, for which the Smith Agency was also agent, became parties defendant by petition, and claimed the entire fund collected by Bradshaw, so far as necessary to the payment of their claims, to the exclusion of all other creditors of the Smith Agency, excepting the American Surety Company, which, by virtue of premiums due on surety bonds procured through the Smith Agency and collected by Bradshaw, made a like claim on its behalf. These claims the lower court by its decree sustained; and Williams and the First National Bank of Sutton have appealed.

[3] In their several petitions, the insurance companies alleged that in September prior to the appointment of Bradshaw as receiver on October 3, 1911, they revoked the authority of the S. M. Smith Insurance Agency to represent or act for them in any capacity. They do not, however, fix any definite date therefor, further than to aver a revocation late in September. Thereafter the Smith Agency had no authority to represent or act, nor did it undertake to represent or act, for and on behalf of any of these companies in any respect or for any purpose. It made no effort to collect, and did not collect, any premiums then due and unpaid on policies or surety bonds theretofore issued by any one or more of them pursuant to its negotiations as their former soliciting agent.

The money due and unpaid on policies and bonds so issued prior to that date was not due and payable to the Smith Agency, as and for its own use for payment to its general creditors or otherwise. Neither before, at, or subsequent to that date had it any proprietary right or interest in such premiums, except to the extent of commissions for collections pursuant to the terms of the agency contract. Prior to such revocation or the appointment of Bradshaw, it was empowered to solicit insurance, countersign policies, solicit and countersign bonds, collect and remit premiums less commissions. Other authority it had none from its principals. At no time did the collections belong to it.

The collections made by Bradshaw, so far as they arose from premiums due on policies and bonds, were and remained the money of the principals, not of the agency. It could not lawfully appropriate them to its personal use or benefit. They constituted a trust fund, for the exclusive use and benefit of the companies, the cestuis que trustent, previously represented by the agent. They were so treated, and we think properly, by the decree appealed from. In re Brown & Co. (D. C.) 189 Fed. 432; Bank v. Insurance Co., infra; 1 Clark & Skyles on Agency, §§ 421, 429; Baker v. Bank, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150. And, obviously, the fund now in controversy did not go into the hands or under the control of the Smith Agency. That fund, for the most part, arose from collections made by Bradshaw from premiums due and unpaid on October 3, 1911, the date of his appointment. That fact clearly appears; it is virtually conceded. Bradshaw held the fund subject to distribution and apportionment as the court should direct. His authority was so circumscribed.

Nor was there any commingling of the moneys derived from that source with moneys due the Smith Agency in its own right, except commissions allowed and deducted, and except the proceeds of a few items of tangible personal property readily separable from premiums collected. These funds the receiver has kept in an account, readily severable, showing the aggregate of the collections made by him and the premiums collected on policies and bonds issued by the various companies served by the Smith Agency. Besides, it is not an imperative requirement that such funds be kept wholly distinct from

other funds of the agent, or, as suggested in argument, that the beneficiaries must clearly identify the fund claimed by them. It is sufficient if the fund can be separated for the purpose of an accounting; or, "subject to some limitations, the principal may follow the fund into the hands of third persons." 1 Clark & Skyles on Agency, § 421. And, as especially pertinent to the facts here involved, these authors, at section 429, say:

"In case the agent becomes bankrupt, neither the property nor its proceeds would pass to the assignee in bankruptcy for general administration, but would be subject to the paramount claim of the principal. As such trust fund or property never belongs to the agent, his creditors would not be injured if they are turned over to his principal." Manufacturing Co. v. Dehon, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; Story on Agency, § 229; Baker v. Bank, supra; Clark v. Bank, 1 Sandf. (N. Y.) 498; Surety Co. v. Carroll County, 194 Fed. 593, 114 C. C. A. 435.

And there is authority holding that, where an agent or fiduciary mixes trust funds with his own moneys, "the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well to moneys deposited in bank and to the debt thereby created as to every other description of property." Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Surety Co. v. Carroll County, supra. So in Roca v. Byrne, 145 N. Y. 182, 39 N. E. 812, 45 Am. St. Rep. 599, it is held that if an agent receives of his principal bills to be collected and thereafter used to satisfy such obligations as the principal may incur, and which when collected the agent deposits in bank to his own credit, the equitable title to the moneys so deposited is in the principal, and on the agent's insolvency the principal may recover them in preference to the other creditors of the agent.

Since, as observed, the premiums collected by Bradshaw were not the money or property of the Smith Agency, they ought not to be diverted from the rightful owners and applied to the payment of the creditors of the agency. The rights of such creditors are inferior to those of the legal claimants. The general creditors of the Smith Agency may charge any property or funds owned by their debtor or to which he may have a valid legal claim; but they cannot divert a trust fund, in which it has no proprietary right or interest, from its proper channels. As to the greater part of the fund in controversy, their rights are wholly subordinate to the claims of the insurance companies and the surety company; and the circuit court properly so held, and directed a preferential application of the funds, so far as necessary fully to pay the balances due these companies, the real beneficiaries.

[4] For appellant Williams it is also argued that the decree is erroneous, because of excessive amounts allowed in favor of the various beneficial claimants of the funds involved. But the amounts decreed to them were fixed by the report of the commissioner to whom the cause was referred, to which the appellant did not except. It is a general rule of procedure, observed in this state, that objections to a decree based upon a master's findings, to which no exceptions were taken in the lower court, cannot be made in the appellate court for the first time, unless the report is erroneous upon its face. State v. King, 47 W. Va. 437, 35 S. E. 30; Lynch v. Henry, 25 W. Va. 422; Poling v. Huffman, 48 W. Va. 639, 37 S. E. 526.

Nor is it necessary to enter into a general discussion upon the merits of the contention urged by appellant Williams as to the method of conducting the business of the Smith Agency in the collection and remission of premiums due the several companies represented by it. As we view it, there is nothing in the record to show the relation of debtor and creditor between them. The mere fact of delay in collecting and remitting premiums on policies does not establish that relation, nor does the payment by the Smith Agency out of a general account collections on behalf of its principals have that effect. The proof tends to show the agency pursued the custom usually obtaining among insurance companies and their agents. The only question, then, properly arising in the case, is whether the money claimed constitutes a trust fund payable to the cestuis que trustent in satisfaction of their claims, notwithstanding the defective system adopted by the Smith Agency for collections and remittances. The paramount inquiry is: To whom does the fund belong, the beneficiaries or to the Smith Agency? So far as derived from premiums on policies or bonds issued by the several companies at the solicitation of the Smith Agency, it belongs to the principals, not to the agent. And, so far as can be fairly ascertained from the somewhat obscure character of the record, it seems reasonably clear the fund in dispute was, for the most part, derived from that source. The deposition of Bradshaw and his reports and the report of the commissioner so show. There is therefore no difficulty in correctly ascertaining the sources from which the fund was derived.

[1, 2] Each of the appellants urge reversal on the further ground that the decree virtually held invalid notes made or negotiated by the S. M. Smith Agency, because executed or negotiated by its president in its corporate name without authority therefor by the corporation. No pleading challenged these obligations, or the manner of their execution. They were produced by the payee banks before the commissioner, and he allowed them as charges against the funds in the hands of Bradshaw. On exceptions by the insurance and surety companies, the notes were disallowed and virtually held to be not enforceable or chargeable against the assets

of the Smith Agency or any part of them, presumably because not expressly authorized by the corporation, or ratified by it with full knowledge of the existence of the loans for which the notes were executed.

According to Bank v. Kimberlands, 16 W. Va. 555, Bank v. Manufacturing Co., 56 W. Va. 446, 49 S. E. 544, Thompson v. Manufacturing Co., 60 W. Va. 42, 53 S. E. 908, 6 L. R. A. (N. S.) 311, and Varney v. Lumber Co., 70 W. Va. 169, 73 S. E. 321, the president of a corporation has no inherent power to negotiate loans or enter into contracts binding the corporation. As to it his acts in these particulars are not binding, unless authorized by some resolution, or ratified expressly by the corporate entity represented by him, or by a course of dealing or conduct on his part with its knowledge or consent, or by its taking the benefits of such contracts, or inducing the belief on the part of those so dealing with it through the intervention of its officer that it had empowered him to act for and in its behalf. But, except what appears solely from the face of the several notes, there is nothing in the record tending to show either express authority, or any one or more of the several circumstances from which to raise a presumption of the grant of authority, or that the corporation acquiesced in the acts of the president by taking and appropriating to its own use the benefits of the loans with full knowledge of his action, or that it failed for an unreasonable length of time after such knowledge to restore the proceeds of the loans to the sources from which they came. From this knowledge, and from any one or more of such circumstances, would arise by implication a ratification of the acts of the officer, whereby the corporation would become as effectually bound for payment of the debts as if expressly authorized by it at or before the inception of the negotiations for the loans and the execution of the notes therefor. 2 Thomp. Corp. (2d Ed.) §§ 2019, 2020. Such ratification would necessarily be inferred from a deposit of the proceeds of the notes in bank to the credit of the Smith Agency and its application of them to the payment of its obligations or to defraying the expenses incident to the business authorized by its charter. The mere fact, however, that the president negotiated the loans and executed the notes, without express authority and without a ratification implied from circumstances, will not impose a liability therefor on the corporation. How the money was used, how and to what it was applied, and for whose use and benefit it was appropriated, are questions as to which proof ought to have been taken, to the end that justice might have been done to the corporations interested in the final result of this litigation.

Nor are we unmindful of the proof which clearly shows that the two certificates of deposit issued by the First National Bank of Sutton (the second being in renewal of the first) stated that the money they represented was deposited in that bank to the credit of the Smith Agency, and, inferentially, that it was paid to the assignee of the second certificate containing the indorsement of the Smith Agency. Still, it does not necessarily follow that the Smith Agency received the benefit of the money so paid, or that it had knowledge, actual or constructive, of the deposit or disposition of the proceeds of the note executed by the agency through the negotiations of its president.

[5] Moreover, there was no legitimate proof of the due execution and negotiation of the notes by Smith as president. Their mere production by the banks before the commissioner was not legally sufficient. Proof of execution and negotiation was essential. The common-law rule requiring proof of the signature of the maker remains unaltered by section 40, c. 125, Code. It dispenses with such proof only where the declaration or other pleading alleges that "any person made, indorsed, assigned or accepted the writing in controversy, and the fact averred is not denied by an affidavit filed with the plea which puts it in issue." The statute applies only where there is a pleading, not traversed, expressly averring the due execution of the instrument sought to be enforced against the apparent maker. Kelly v. Paul, 3 Grat. (Va.) 191; Shepherd v. Fry, 3 Grat. (Va.) 442; Horner v. Amick, 64 W. Va. 172, 61 S. E. 40; Land Co. v. Calhoun, 16 W. Va. 361. As to the notes here involved, there was no such pleading, as already observed; and, as we construe the section cited, proof of the execution and negotiation of the notes was essential to their enforceability.

As proof evidently was available to show either the existence or nonexistence of the essential facts and circumstances requisite for the establishment of the enforceability of the notes in controversy, and to the end that justice may be promoted, in view of our holdings in Iron Works v. Bank, 82 S. E. 614, Cook v. Lumber Co., 82 S. E. 327, and Wildell Lumber Co. v. Turk, 83 S. E. 83, we reverse the decree appealed from in so far as it directs a distribution of the residue of the fund in the hands of Receiver Bradshaw after payment of the preferential claims allowed, including deductions in his favor; and in all other respects we affirm the decree, and remand the cause for further proceedings therein in conformity with the principles herein announced and otherwise according to principles governing courts of equity.

ROBINSON, P., dissenting.

(75 W. Va. 502)

## NEIL v. WEST VIRGINIA TIMBER CO.

(No. 2402.)

(Supreme Court of Appeals of West Virginia. Jan. 19, 1915.)

*(Syllabus by the Court.)*

1. DEATH ⟸50—DECLARATION—REQUISITES.
A declaration for wrongful death is fatally defective on demurrer, if it fails to aver plaintiff's appointment and qualification when suing as administrator.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 67; Dec. Dig. ⟸50.]

2. MASTER AND SERVANT ⟸258—INJURY TO SERVANT—DECLARATION.
In an action against the master for injury to his servant in the course of the employment, a declaration which fully avers the existence and negligent breach of the master's duty to provide safe and suitable machinery and appliances, together with facts or circumstances sufficient to impart to him notice of defects therein causing the injury, is not demurrable solely because of its failure expressly to allege knowledge by the master of the defects.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816–836; Dec. Dig. ⟸258.]

3. MASTER AND SERVANT ⟸288—INJURY TO SERVANT — DANGEROUS MACHINERY — ASSUMPTION OF RISK—QUESTION FOR JURY.
Ordinarily, in an action for wrongful death, whether, by reason of capacity to know and understand the dangers incident to the operation of the machinery and the use of the appliances furnished by the master, a minor servant did in fact comprehend and appreciate such dangers and the means of avoiding injury therefrom, and therefore assumed the risk of such injury and absolved the master from the duty to instruct, are questions of fact for the jury, under proper directions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068–1088; Dec. Dig. ⟸288.]

4. TRIAL ⟸296—HARMLESS ERROR—INSTRUCTIONS.
An instruction, though in terms doubtful, ambiguous, and alternative, will not warrant reversal if, when read with other instructions properly stating legal principles applicable to the same subject, it is fairly apparent the jury was not misled thereby.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec. Dig. ⟸296.]

Error to Circuit Court, Nicholas County.

Action by James G. Neil, administrator, etc., against the West Virginia Timber Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded on limited issue.

Brown, Jackson & Knight and Angus W. McDonald, all of Charleston, for plaintiff in error.

LYNCH, J. For the reversal of a judgment obtained against it in an action by plaintiff for injuries inflicted upon his son, aged 19 years, while in its service, and from the effect of which he died, defendant assigns, as erroneous, rulings upon its demurrer to the declaration, upon instructions, and the admission of evidence offered by plaintiff.

[1] Under the decisions in Austin v. Calloway, 80 S. E. 361, and Perry v. Coal Co., 81 S. E. 844, the declaration is defective because of its failure to aver the appointment and qualification of plaintiff as personal representative—a defect to be solved pursuant to our holdings in Moss v. Railway Co., 83 S. E. 721, decided October 3, 1914, and Crockett v. Coal & Coke Co., 83 S. E. 987, decided December 15, 1914.

[2] The other defect assigned was failure to allege, in the second count, defendant's knowledge of the defect in the machinery and the appliances for its operation. After averring the relation of master and servant, the assignment to plaintiff's intestate, as and for his specific employment, the operation and control of a ripsaw, and the master's duty to use reasonable care to provide safe and suitable machinery and appliances therefor, the declaration, by way of breach, alleged, in the first count, defendant's negligence in failing and refusing to furnish decedent a safe place and safe appliances in and with which to work. More specifically stated, the breach assigned was the failure and refusal to provide a "belt tightener" to control the gum belt, which, by means of pulleys, one on the pulley shaft below, the other on the machine operated by him, furnished the motive power for the saw, and in providing, in lieu thereof, "sticks" with which to throw the belt from the lower pulley in order to stop the machine and disengage the saw for the purpose of sharpening it. The second count, after averring the same relation and assignment of work and duties, charged defendant with negligence in that it failed and refused to repair the belt tightener, but permitted it to remain unrepaired, and in lieu thereof failed to provide safe and suitable appliances, and negligently provided unsuitable, dangerous, and unguarded machinery and appliances, and failed to post notices of the danger incident to the operation and use thereof. And it was averred that by reason of such negligent omissions in the observance of the respective duties alleged in the two counts, and while engaged in an attempt to throw the belt from the lower pulley, and without fault on his part, decedent received the injury which resulted in his death.

Where from the declaration appears, as we think it does here, the duties by breach of which the servant sustained the injury sued for, or where the defects assigned are sufficiently obvious to impart notice to the master, the declaration will not be deemed demurrable solely because it fails expressly to aver defendant's knowledge of the defect. In Hoffman v. Dickinson, 31 W. Va. 142, 6 S. E. 53, this court has said that if the declaration properly charges the master with

negligence, although it does not allege knowledge in him of the defect in machinery or appliances, or that he ought to have known thereof, it is sufficient. While the decisions are not uniform, the rule stated in the case cited is supported by the authorities collated in 4 Labatt, M. & S. 4958. Where the complaint sets out the master's duty and its nonfulfillment, it is to be regarded as including, by implication, an allegation that he knew his obligation to his servant and his own failure to do what was incumbent upon him by reason thereof. Id. 4960; Linquist v. Hodges, 248 Ill. 491, 94 N. E. 94.

[3] No one witnessed the occurrence; and, because of the serious and painful character of the injury, deceased was unable to explain and did not explain how it was inflicted. Succinctly stated, the evidence shows that, on leaving the machine, he picked up a stick about four feet in length, three-cornered in shape at one end, and carried it with him to the room below, no doubt for the purpose of throwing the belt from the lower pulley; that within the usual time thereafter the belt transmitting the motive power was released and the machine stopped; and that, a few minutes later, he reappeared at the head of the steps, obviously suffering from some serious injury inflicted upon him in the meantime, and upon examination the surgeon called to his assistance found a wound on the abdomen apparently caused, as he testified, by a violent blow from a three-cornered instrument of some character or description.

Though engaged in the service of the company from 4½ to 6 months, the witnesses not agreeing any more definitely as to the time, part of it as "off-bearer" to the operator of the same saw, and, when not otherwise engaged, occasionally and skillfully operating it himself and throwing the belt from the pulley, deceased only two days prior to the injury, at the joint request of himself and his sister's husband, was given charge and control of the operation of the saw and attendant machinery and appliances; and, although the assignment carried with it the duty of throwing the belt when necessary, decedent was set to work without any direction or information as to the dangers involved, or as to the best and safest method of avoiding injury in the use of the appliances, except the knowledge acquired by him during the brief period of employment at defendant's factory.

Frankly, defendant admitted failure on its part to warn or instruct, but sought to show, and now contends, that decedent's intelligence, skill, and capacity made unnecessary any attempt so to do. That decedent was more than ordinarily intelligent, skillful, and competent clearly appears from the proof introduced by defendant and not controverted by plaintiff. Indeed, it may be said he had unusual capacity for one of his age. But the employment to which he was assigned, and the instrumentalities with which he was required to work, may properly be deemed dangerous, though to deceased, a young man 19 years of age, perhaps not obviously so. He may not have considered them vitally or inherently dangerous. However, conceding the hazardous character of the employment and of the instrumentalities he was required to use, still, under the authorities, it was for the jury, under proper instruction, to say whether he fully comprehended the dangers attendant upon the due and proper use of the machinery and appliances, even if, as defendant contends, it did in fact provide suitable appliances for releasing belts from the pulley, and also whether, understanding the danger, he knew or ought to have known, or had capacity to know, the best and safest method or means of avoiding the attendant perils and hazards, or that the stick used by him in throwing the belt was essentially more dangerous or unsafe than the longer ones so furnished, conceding those furnished by defendant were then in the place provided for them. Besides, it does not appear deceased knew or was informed that such instrumentalities had been provided, or, if provided, that he must use them exclusively, and therefore not others specially improvised by him. Again, defendant's foreman, knowing, as he admits, that deceased picked up the shorter stick and went down the steps carrying it, presumably for the purpose of throwing the belt from the pulley, ought then to have warned deceased not to use it as a means to that end. The foreman, however, said he thought deceased intended to leave the building for an entirely different purpose, though he saw him start down the steps with the stick in hand.

Viewed in the light of the circumstances proved and of the authorities later cited, we cannot say, as a matter of law, that the instructions on this phase of the inquiry either misled the jury or were so plainly improper as to warrant award of a new trial, although they were not as appropriate to the facts involved as they ought to have been. They did, however, fairly present the law applicable to the facts of the case.

In effect, No. 2 told the jury that if, taking into consideration decedent's age, capacity, and experience, they believe "he may have been guilty of an act or acts which in an adult may have amounted to an assumption of the risk of injury and a waiver of the duty the master owed him, yet he cannot be held to have assumed any such risk or waived any such duty which one of his age, discretion, and experience could not fully comprehend and appreciate"; and No. 3 that although, as a general rule, the servant assumes the risk incidental to the employment, and, if injured, cannot recover damages for injuries inflicted while so engaged, this does not relieve the master from the duty to warn the employé of danger and instruct him how to avoid it, if from the evidence they

believe deceased "through youth, inexperience, or lack of ability was incompetent to understand fully and appreciate the nature and extent of the danger" incident to the work.

As apropos and illustrative of our meaning, and based on facts somewhat similar, Lehto v. Mining Co., 152 Mich. 412, 116 N. W. 405, says:

"Where a boy of unusual intelligence was injured while attempting, within the scope of his employment, to shift a belt in the manner in which he claims he had been accustomed to do and had seen others, including his foreman, do, without instructions to the contrary, the question whether, without instruction or warning, he appreciated, and so assumed the risk, is not a question of law but of fact, * * * requiring submission * * * to the jury." Laundry v. Schuster (Tex. Civ. App.) 159 S. W. 447; Crowl v. Linseed Co., 255 Mo. 305, 164 S. W. 618; Glaich v. Hogan, 162 Ill. App. 261; Betts Co. v. Hancock, 139 Ga. 198, 77 S. E. 77; Booth v. Stokes, 241 Pa. 349, 88 Atl. 490; Belevicze v. Platt, 84 Conn. 632, 81 Atl. 339; Railway Co. v. Mauck, 152 Ky. 498, 153 S. W. 729; Kuphal v. Flouring Co., 43 Mont. 18, 114 Pac. 122; Noden v. Verlenden Bros., 211 Pa. 367, 60 Atl. 505, note 3 Ann. Cas. 368; note to Cronin v. Columbia Co., 29 L. R. A. (N. S.) 111; Ewing v. Lanark Fuel Co., 65 W. Va. 726, 65 S. E. 200, 29 L. R. A. (N. S.) 487; 3 Labatt, M. & S. § 1155.

[4] Defendant assails plaintiff's instruction No. 5, and cites Whorley v. Lumber Co., 70 W. Va. 122, 73 S. E. 263, in support of the criticism urged against it. Though in part correctly defining the master's duty as to place and appliances in and with which he sets his servant to work, it is nevertheless amenable to criticism, chiefly because of its ambiguity and uncertainty.

But defendant requested, and the court gave, other instructions on the same subject, clearly and accurately defining the duty required of the master as to place, machinery, and appliances. Thereby the law of the case was correctly propounded to the jury, and defendant waived its right to rely on any defective statements contained in plaintiff's instruction. The instructions so proposed and given were defendant's 11 and 18. They in part reaffirmed the principles intended by No. 5, given at plaintiff's request, and eliminated its objectionable features, its uncertainty, ambiguity, and alternativeness. In effect, No. 13 correctly advised the jury that, while the master's duty required it to provide a suitable place and appliances in and with which the servant may perform the labor assigned to him, the master is not bound to provide the safest and best machinery and appliances for that purpose, and that if those so furnished are in common use, and "are such as can with reasonable care be used without unnecessary danger to the employé, it is all that can be required of the employer." Substantially this instruction is based on the first point of the syllabus in Giebell v. Collins Co., 54 W. Va. 518, 46 S. E. 569. Instruction 11 told the jury that defendant was not bound to furnish safe and sound instrumentalities for decedent's use, saying all that could legally be required of it was the use of ordinary care and diligence to provide reasonably safe and suitable machinery and appliances.

These instructions, when read with plaintiff's five criticized, clearly and fully presented the duty legally devolving upon the master as to the degree of diligence and care required in furnishing reasonably safe machinery and appliances. So read, the uncertainty, ambiguity, and indefiniteness of No. 5 was eliminated. It was not erroneous, except in those particulars. Nor was it inconsistent with defendant's instructions. They related to the same duty. The chief objection noted in the Whorley Case, where the same instruction was given, was that it presented the duty of the master in the alternative, and therefore, as stated by Judge Brannon, left the jury to determine which alternative should control. Other instructions, however, permit no such doubt. They remove all duplicity as to the proper application to the facts proved on the trial. Under these circumstances, to hold that a misdirection resulted manifestly would be unreasonable, because grossly technical. Instructions must be read as a whole; and if, when so read, it is apparent they could not have misled the jury, the verdict will not be disturbed, though one or more of them may have defectively stated the principles intended to be announced for the jury's guidance. State v. Waldron, 71 W. Va. 1, 11, 75 S. E. 558; Railway Co. v. Quayle, 95 Va. 741, 30 S. E. 391; Burton v. Seifert, 108 Va. 338, 61 S. E. 933; Adamson v. Railroad Co., 111 Va. 556, 69 S. E. 1055; Marbury v. Jones, 112 Va. 389, 397, 71 S. E. 1124; Coal Co. v. Liddil, 49 Ind. App. 40, 94 N. E. 411. So, in Stewart v. Parr, 82 S. E. 259, we said:

"An instruction based on, but inadequately stating, correct legal principles, will not be deemed prejudicial, if, when read with others, it is apparent the jury was not misled thereby."

See, also, Runnion v. Morrison, 71 W. Va. 254, 260, 76 S. E. 457; Lay v. Coal & Coke Co., 64 W. Va. 288, 295, 61 S. E. 156.

As defendant's foreman on cross-examination denied certain statements attributed to him, though made, if at all, on the day of decedent's burial, three days after the accident, plaintiff was not improperly recalled and in rebuttal permitted to state whether the foreman did make to him or in his presence the statements so denied as to what he did or said immediately after deceased was injured.

As elsewhere observed, the declaration was demurrable because of its failure to aver plaintiff's appointment and qualification as personal representative of decedent, necessitating reversal of the judgment for the purpose of supplying the necessary averment, with direction to permit such amendment, and, when made, to try the issue raised by defendant thereon, if any, and if upon the

trial thereof a verdict be found for plaintiff, or if there be no such issue, to enter judgment on the general verdict, and to set aside the general verdict, should the issue on the amendment be resolved in favor of defendant.

(75 W. Va. 542)

## POCCARDI, Royal Consul of Italy, v. PUBLIC SERVICE COMMISSION.

(No. 2791.)

(Supreme Court of Appeals of West Virginia. Jan. 26, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ⟸250¾, New, vol. 16 Key-No. Series — DEATH OF SERVANT — WORKMEN'S COMPENSATION ACT — PUBLIC SERVICE COMMISSION — SUPERVISION OF COURT.

Under its supervisory power over the Public Service Commission, respecting its administration of the Workmen's Compensation Act (Code 1913, c. 15p, §§ 1–55 [secs. 657–711]), this court takes cognizance of questions of law only.

2. MASTER AND SERVANT ⟸250¾, New, vol. 16 Key-No. Series — WORKMEN'S COMPENSATION ACT—PROCEEDINGS OF PUBLIC SERVICE COMMISSION—REVIEW BY COURT.

In the absence of conflict in the evidence adduced to show a claimant's right to participation in the Workmen's Compensation Fund, the Commission is regarded, in this court, as a demurrant to the evidence, and, if the evidence would sustain a verdict of a jury in favor of the claimant, the claim is regarded as sufficiently proved.

3. MASTER AND SERVANT ⟸250¾, New, vol. 16 Key-No. Series—WORKMEN'S COMPENSATION ACT—PUBLIC SERVICE COMMISSION—PROCEDURE—EVIDENCE.

It is the duty of the Commission, under such circumstances, to give the claimant the benefit of inferences arising in his favor from the facts proved, in the absence of direct evidence.

4. MASTER AND SERVANT ⟸87½, New, vol. 16 Key-No. Series — INJURY TO SERVANT — WORKMEN'S COMPENSATION ACT — "ACCIDENT OR UNTOWARD EVENT."

A rupture caused by a strain while at work is an accident or untoward event, arising in the course of employment, and compensable under the Workmen's Compensation Act.

5. MASTER AND SERVANT ⟸250¾, New, vol. 16 Key-No. Series — INJURY TO SERVANT — WORKMEN'S COMPENSATION ACT — SUFFICIENCY OF EVIDENCE.

Proof of apparent previous good health, a heavy and unusual lift in the course of work, discovery of rupture on the second day thereafter, death from surgical operation for relief thereof, and opinion of the operating surgeon that the rupture was caused by the lifting, is sufficient to establish accidental injury in the course of employment, within the meaning of said act.

Robinson, P., dissenting.

Petition by Gaetena Poccardi, Royal Consul of Italy, on behalf of the widow of Cataldo Gresco, against the Public Service Commission. Ordered that claim presented be paid.

Joseph Henderson and Francis Rawle, both of Philadelphia, Pa., for petitioner. A. A. Lilly, Atty. Gen., and Frank Lively, Asst. Atty. Gen., for respondent.

POFFENBARGER, J. Gaetano Poccardi, royal consul of Italy, on behalf of the widow of Cataldo Greco, an Italian subject, and his sole dependent, complains of an order of the Public Service Commission, rejecting her claim against the Workmen's Compensation Fund.

Though a surgical operation for strangulated hernia precipitated Greco's death, the legally proximate cause thereof was the hernia. But, in the opinion of the Commission, the hernia did not result from accidental injury. Just before his death, Greco was an employé of the Phillips Sheet & Tin Plate Company at Weirton, W. Va. On the 10th day of April, 1914, he and some of his fellow workmen lifted a heavy iron pipe called a "jim pole." He worked the next day, but illness required him to go to bed on Sunday, the second day after the exertion to which reference has been made, where he remained until April 14, 1914, without attention from a physician. On that day, Dr. L. A. Whittaker was called. Finding his condition serious, the doctor had him removed to a hospital on the 15th, performed the operation on the 16th, and the patient died on the 20th. A post mortem examination, made on the day of the death, revealed dilatation of the right ventricle of the heart as the immediate cause of death; the wound showing no unfavorable indications. Weakness of the heart had been observed while he was on the operating table.

Loney Marino, a fellow workman, says Greco, after carrying the "jim pole" to the machine shop, had thrown his hands back to his hips as though he had injured himself. The man who had charge of the men engaged in the removal of the pipe and the labor boss at the plant say neither of them heard any complaint of injury. A verified certificate of the chief clerk of the company for which Greco had worked says he "strained himself" in carrying the pipe, and "first complained of his injury in machine shop." It further says "to the best of" affiant's knowledge "the injury causing death was sustained in the course of the deceased's employment. A report of the attending physician says the hernia and strangulation were "brought on by lifting jim pipe in mill, overworking." He further reports specifically that the disability was due to the accident previously mentioned by him, and that Greco had not been maimed or crippled by previous injury.

After the claim had been rejected, the applicant filed a letter from Dr. Whittaker, directed generally to whom it may concern, saying Greco had been injured in the course of his employment. He further said that, at the time of his investigation, he had understood him to say, through an interpreter, that he had been ruptured previously, but was now assured by the interpreter that he had misunderstood him. This seems to have

been considered as upon an application to reopen or rehear the case. The Commission was notified that several persons, who had known the decedent, were ready to testify to his previous good health. A joint affidavit of these persons to the fact and also one made by three other persons to the effect that he had complained of abdominal discomfort immediately after the lifting of the pipe seem to have been taken, but, if so, they were not filed with the Commission at any time, nor in this court. What purport to be copies of such affidavits appear only in the brief of counsel for the petitioner. If such affidavits exist, it is not perceived how they can be considered here; they never having been filed in the proceeding in any manner or at any stage thereof.

[1-4] Meager development of the merits of the case before the Commission justifies, in the opinion of some of the members of the court, refusal of the prayer of the petitioner. No doubt the operating surgeon could have determined whether the rupture was an old one or the result of disease, or a fresh wound occasioned by a strain. As to the appearance of the wound, no inquiry seems to have been propounded to him wherefore the evidence lacks detail and particularity, which no doubt could have been supplied. One or more of the members of the court entertain the view that the evidence is defective in form and character, justifying rejection, on the ground of failure on the part of the applicant to develop the facts. A further suggestion is that the finding of the Commission is of equal dignity with the verdict of a jury and cannot be disturbed, unless plainly wrong.

The action of the Commission is final and irreviewable, except as to matters "going to the basis of the claimant's right." Code, c. 15p, § 43, serial section 699. As to such matters, its function is administrative, only quasi judicial, and the supervisory power of this court over its action, respecting the right of the claimant, is under its original jurisdiction by mandamus. De Constantin v. Pub. Ser. Com., 83 S. E. 88. In this respect, our statute accords with the English compensation act and those of several of the states, limiting the power of review to questions of law. Gane v. Colliery Co., 2 B. W. C. C. 42; Turner v. Bell & Sons, 4 B. W. C. C. 63; Moss & Co. v. Akers, 4 B. W. C. C. 294; Illinois Act (Hurd's Rev. St. 1913, c. 48) § 19; Iowa Act (Acts 35th Gen. Assem. c. 147) § 34; Massachusetts Act (St. 1911, c. 751) pt. 3, §§ 10, 11; Michigan Act (Pub. Acts 1912, No. 10) pt. 3, §§ 11, 12, 13; Minnesota Act (Gen. St. 1913, §§ 8216, 8225) §§ 22, 30; Bradbury's Work. Com. c. 16, p. 892 et seq.

Under the English act, the courts regard the employer, whose place, under our statute, the Commission takes, as a demurrant to the evidence, when the issue is one of mere sufficiency thereof. If the evidence adduced or the facts found or disclosed are uncontradicted and would sustain a verdict of a jury in favor of the claimant, there is liability, as a matter of law, and legal duty to pay the claim arises. Mitchell v. Glamorgan Coal Co., 9 W. C. C. 16; Wright v. Kerrigan, 4 B. W. C. C. 432; Owners of Steamship v. Rice, 4 B. W. C. C. 298. What rule would govern in a case of conflicting evidence, it is unnecessary to say, since the evidence adduced here is free from conflict. All of it points in the same direction, and the only question is the weight to which inferences arising from the facts are entitled.

The written opinion adopted by the Commission rests largely upon the sound legal proposition that evidence giving rise to inferences consistent with the theory of liability and inconsistent therewith, in equal degree, is insufficient. An illustration of such evidence is found in Hawkins v. Coal Co., 4 B. W. C. C. 178. A workman, whose heart was shown to have been in bad condition, collapsed, while at work, and died of angina pectoris. The court held the two facts (collapse while at work and disease of the heart) rendered the cause of death uncertain; the inferences arising being equally consistent with the theory of death from accident and death from disease. A collier having highly diseased arteries, threatening apoplexy at any time and under any conditions, was attacked with apoplexy while at work, and died. Here likewise the court held the evidence insufficient. Barnabas v. Colliery Co., 3 B. W. C. C. 216. There were like holdings in the case of a man who had undergone two successive surgical operations (amputation of a finger injured while at work and another for a diseased tooth) and died from the effect of the anæsthetics (Charles v. Walker, Limited, 2 B. W. C. C. 5), and a sailor found dead in the water in the morning, after having gone on deck, late at night, to get fresh air (Davis v. Plymouth Colliery, 3 B. W. C. C. 514). In each of these cases, directly contradictory inferences arose from facts proven.

In the absence of such contradiction, however, the probability arising from the facts disclosed governs and concludes. A night workman who had gone to his work, a mile or more distant, in the evening, sound and well, came back in the morning, at the usual hour, in his working clothes and with a finger crushed and bleeding, unwashed, and wrapped in a rag. Continuing his work, blood poison set in, and he died. The county judge held his widow had not proved a case, and said the accident might have occurred in the walk from the colliery. But the appellate court, reversing, said:

"The workman was engaged in work at which accidents do happen, and the probability, therefore, is that the accident happened at the time when he was so engaged, rather than at a time when, in the ordinary course of life, such accidents do not happen. There is nothing to suggest here that the accident happened on the way home." Mitchell v. Coal Co., cited.

A man, whose duty it was to lift coffins, went to work apparently well, and, on returning, complained of having been hurt and had marks on his side and chest and a swollen leg. He died about a week later of pneumonia superinduced by the injury. There was no proof as to how he was injured, except a statement to his physician that he had "met with an accident by moving a coffin." The court, in dismissing the appeal said:

"So far we have, at any rate, the fact that one coffin went out, and it would be the duty of the deceased to assist in removing it, and the doctor's evidence is consistent with the fact that something like a coffin fell upon him. * * * This man, whose employment was lifting coffins, went out well, and came home, as we have heard, with marks and injuries upon him. In these circumstances, it strikes me the inferences drawn in the Glamorgan Case may be drawn here. In that case the man's finger might have been crushed in many ways." Wright v. Kerrigan, cited.

This principle applies as well to the ascertainment of the times and causes of internal injuries, such as ruptures. Here, as in many other instances in the administration of the laws, the right is not susceptible of complete and certain demonstration, and probability, which, ex vi termini, is evidence, must take its place as inconclusive, but nevertheless dependable, proof. In one of the most notable English cases decided apparently by the House of Lords, the decision of the county judge, denying right of compensation for a rupture, affirmed by the Court of Appeal, was reversed and the case remanded for ascertainment of the amount of compensation. Fenton v. Thorley & Co., 5 W. C. C. 1. In that case Lord Lindley said:

"The personal injury was the rupture. The cause of it was the unintended and unexpected resistance of the wheel to the force applied to it. * * * The proximate cause may be an internal strain."

In Fulford v. Coal Ballast Co., 1 B. W. C. C., 222, compensation for injury by rupture was awarded to a man who had a previously existing rupture, on the theory that it had been so increased by a strain as to incapacitate him. The court said:

"I think, regarding the case solely from the medical aspect, the injury could not have been an untoward event not expected. On the other hand, the man had worked in the chalk quarry for six months and had dug out lumps of chalk quite as large as the one in question without injury, notwithstanding the strain he was suffering from, and, as far as he or any one without medical or surgical knowledge was concerned, the injury was occasioned by means of a mishap or untoward event not expected or designed."

In Scales v. West Norfolk, etc., Co., Work. Com. Rep. 165, it appeared the deceased had been ruptured three or four years before the strangulation causing his death, but the court held a strain or overexertion in the course of employment was the proximate cause of death and an accident, within the meaning of the act. Brown v. Kemp, Id. 595, was a similar case, and in it compensation was awarded.

Responding to medical criticism of the theory of rupture by strain or exertion, the Washington Industrial Insurance Commission has adopted rules requiring proof, in cases of claims predicated on hernia: (1) That its origin was recent; (2) that it was accompanied by pain; (3) that it was immediately preceded by accidental strain in hazardous employment; and (4) that it did not previously exist. Similar rules have been adopted by the Commission. Notwithstanding the criticism calling forth these rules, they impliedly admit possibility and probability of rupture from a strain, when the strain and the rupture are in close relation. So does an article by the attorney for the Michigan compensation board, published in the National Compensation Journal, brought to our attention by the brief for the Commission. Both the rules and the thesis admit the English proposition that an internal injury, resulting from a strain while at work, is an accident, within the meaning of the act, and their limitations or restrictions upon proof of the fact have not been judicially approved.

[5] Under the decisions to which reference has been made, the circumstances stated, if sufficiently proved, make out a prima facie case of right to participation. Greco had worked for his employer more than two months. There is no proof of any antecedent infirmity of any kind on his part. In his employment, he was subjected to unusual physical exertion on Friday. He took to his bed on Sunday, and his ailment proved to be hernia. The surgeon who operated upon him and saw the rupture had no personal knowledge of the exertion, but was informed as to that fact. If a competent physician and surgeon, he was likely able to tell, from his inspection, whether the rupture was of recent origin. Having inspected it, and knowing from others what the patient had previously done, he gave it, as his opinion, that the injury had resulted from strain in lifting the pipe. Support of his conclusion is found in the known facts, previous ability to work, the exertion, and the rupture. Failure of the injury to cause serious discomfort, until the second day after its occurrence, does not negative the inference arising from these facts. "Sometimes there is complete absence of pain and tenderness in the hernia itself." Ency. Britannica. The article brought to our attention in the brief says traumatic hernia completely develops immediately or in a day or two after the blow. Common sense suggests that a rupture from a strain might develop more slowly than one caused by a blow.

The case has been very poorly developed. No effort by the applicant strictly to prove the claim was made, until after its rejection. He relied upon the result of the Commission's investigation and apparently was not advised of the supposed insufficiency of the evidence, before the finding and announcement of the

result. Then, although an informal rehearing seems to have been allowed, no new evidence of consequence was filed. The suggestion here of additional proof is utterly futile. However, the facts disclosed by the record establish the claim.

Accordingly an order will be entered, requiring the Commission to ascertain the amount of the indemnity and cause it to be paid.

ROBINSON, P. (dissenting). In view of the hearsay and unverified character of the evidence before the Commission when it passed on this claim, and the insufficient force thereof, lacking as it does any direct and certain probative force, the finding should not be disturbed.

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(75 W. Va. 529)

## WALTON v. ROSS. (No. 2449.)

(Supreme Court of Appeals of West Virginia. Jan. 26, 1915.)

*(Syllabus by the Court.)*

1. JUSTICES OF THE PEACE ⟹162—JUDGMENT—VACATION—APPEAL BOND.

The judgment of a justice is not vacated nor an appeal perfected by the mere production or tender of an appeal bond. While application and tender of a good bond gives absolute right of appeal, there must be action by the justice approving the bond and allowing the appeal; or on his neglect or refusal to act favorably thereon within ten days from the date of the judgment, such appeal must be applied for and allowed by the circuit court or the judge thereof in vacation, within ninety days from the date of such judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 600, 603, 605; Dec. Dig. ⟹162.]

2. JUSTICES OF THE PEACE ⟹162—JUDGMENT—APPEAL—EXECUTION.

Without appeal so perfected the judgment of the justice is not vacated but remains in full force, and a motion to quash an execution thereon, the proper remedy when the judgment has been vacated by perfection of an appeal, is properly overruled.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 600, 603, 605; Dec. Dig. ⟹162.]

Error to Circuit Court, Doddridge County.

Action by T. F. Walton against George Ross. Judgment for plaintiff, and defendant brings error. Affirmed.

L. W. Chapman, of West Union, for plaintiff in error. A. F. McCue, of West Union, for defendant in error.

MILLER, J. The judgment complained of, rendered on appeal from the judgment of a justice, denied the motion of Ross, on notice before the justice, to quash a certain execution number 4, issued on December 17, 1910, by Chapman, justice, upon a judgment rendered by Faris, justice, in favor of Walton against Ross, on May 15, 1909, for the sum of $150.00, and $41.80 costs.

A number of grounds are assigned in the notice and were argued orally and by briefs of counsel filed. But the sole and material question presented is, was there at the time of the execution a valid and subsisting judgment on which to found the same? That the judgment, recited in this execution, was rendered by Justice Faris, on May 15, 1909, is not denied; but the proposition relied on, that there was no such judgment at the date of the execution, is predicated on the fact, shown by the record, that on the day of the judgment, defendant was present in person and by counsel, and, after judgment, prayed for an appeal, which was denied, and also tendered, or, as the record shows, produced a bond signed by himself and I. G. Carter, surety, which the justice decided was unnecessary, as the appeal had been denied. The justice's record also shows that defendant, though present at the trial, in person and by counsel, declined to introduce any evidence, and that after plaintiff had introduced his evidence, he suggested through his attorney that judgment be rendered against him, and then applied for the appeal, which was denied, on the ground that as the judgment was one by confession he was not entitled to an appeal.

The appeal bond is not in the record. Whether actually left with the justice does not appear. We have only the recital in the transcript that a bond was produced and signed, as already stated. What its penalty was, or what its conditions or other provisions were does not appear. But it does distinctly appear, that an appeal was denied by the justice. But the bond was not approved by him, nor were the papers in the case transmitted by him to the circuit court. Nor is there any claim that Ross ever thereafter took any other or further steps to perfect his appeal, by mandamus, or application to the circuit court within ninety days, as prescribed by statute.

The propositions relied on for reversal are: First, that by the filing of the appeal bond, assuming that it was a good one, and prayer for an appeal, and regardless of the fact that an appeal was denied by the justice, the judgment was thereby vacated, and the whole case was thereby immediately transferred to the circuit court, for trial de novo, and that no judgment thereafter remained before the justice upon which execution could issue. Second, that there being no judgment remaining before the justice the motion to quash the execution was the proper remedy and should have prevailed.

[1] On the first proposition section 164, chapter 50, serial section 2718, Code 1913, governing the subject, clearly contemplates action by the justice by approving or disapproving the bond, and allowance or disallowance of the appeal; and if the bond is not approved by him and he neglects or refuses within ten days from the date of the judgment, as prescribed by the statute, if the appellant has done his full duty as required by the statute, that the appellant shall within ninety days after the judgment obtain his appeal by petition or application to the

circuit court. Clearly the statute requires action, by the justice within ten days, or by the circuit court in ninety days, by approval of the bond and allowance of the appeal. In the case at bar Ross simply produced to the justice an appeal bond, but failed to get favorable action thereon, and was advised by the judgment and order of the justice that an appeal was denied. Could he thereafter rest upon this action as the full discharge of his duty in the premises, and claim that the judgment against him had been finally superseded or vacated and the action against him thereby transferred to the circuit court for trial de novo? We think not. He insists, however, on the authority of Holmes v. Yoke, 48 W. Va. 267, 37 S. E. 545, that such was the effect of his tendering or producing the bond. It is said in that case that the giving or tendering of such bond to the justice entitled applicant to an appeal, and that no act of negligence of the justice could deprive him of the same. But what were the facts in that case? The bond tendered had been approved, not at first by the justice who tried the action, who was absent, but by the justice in charge of the office, and after his return also by the justice who tried the case, and the papers were then sent to the circuit court.

In the circuit court the appeal was dismissed on the ground that the justice had made no order granting it, and it did not appear that the justice temporarily in charge of the office had legal authority to receive and approve the bond and grant the appeal. The judgment of the circuit court was reversed, and the case remanded for further proceedings. In that case, while there had been no final order of the justice allowing the appeal, the bond had been approved by the justice in charge, and subsequently by the other justice, and the papers were sent up as upon appeal, and the mere lack of a final order was not allowed to defeat the appeal, substantially allowed, by the action of the justice.

The case of Home Sewing Machine Co. v. Floding, 27 W. Va. 540, is also relied on. That case, as does the one first cited, construes the statute as giving an appeal as a matter of right, upon compliance therewith, by tendering a good bond; but if denied by the justice as giving cause for application to and allowance of the appeal by the circuit court or the judge in vacation. This clearly implies that if the justice denies the right and refuses to approve a good bond, the appeal must be perfected, by some subsequent action of the justice or of the circuit court. In Holmes v. Yoke, supra, Judge Dent says that mandamus will lie against the justice to compel compliance with his ministerial duty in approving a good bond and allowing an appeal; but would this not have to be done within the ten days allowed for such action by the justice? In Lowther v. Davis, 33 W. Va. 132, 10 S. E. 20, it was decided that the refusal of the justice within ten days to grant an appeal from his judgment constituted good ground for allowance thereof on application, by the circuit court or judge thereof within ninety days; and in that case it is intimated by Judge Snyder that the remedy given by statute is complete and adequate and is exclusive of the common law remedy by mandamus.

It is quite true as held in Watson v. Hurry, 47 W. Va. 809, 35 S. E. 830, and Evans v. Taylor, 28 W. Va. 188, cited, that the effect of an appeal from the judgment of a justice, is to vacate the judgment and transfer the case to the circuit court for trial de novo, regardless of the judgment of the justice. In such case, neither party can dismiss the appeal so as to reinstate the judgment of the justice. So after perfection of such appeal no judgment would remain before the justice upon which an execution could lawfully issue.

[2] But with respect to the case at bar, as Ross failed to perfect an appeal in any of the modes allowed the judgment of the justice against him remained in full force, and never became vacated or superseded so as to prevent execution thereon, and we think his motion to quash, though the proper remedy, was properly overruled.

These conclusions call for affirmance of the judgment, and it will be so ordered.

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(75 W. Va. 524)

## STATE v. RAMAGE et al.

(Supreme Court of Appeals of West Virginia. Jan. 26, 1915.)

*(Syllabus by the Court.)*

1. LEWDNESS ⇐1—"LEWD AND LASCIVIOUS COHABITATION."

To constitute the crime of lewd and lascivious cohabitation together, by persons not married to each other, they must have lived together in the same house as husband and wife, that is, as if the conjugal relation existed between them, but it is not necessary that they should hold themselves out to the public as husband and wife.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 1–4; Dec. Dig. ⇐1.]

2. LEWDNESS ⇐7—LASCIVIOUS COHABITATION—SUFFICIENCY OF EVIDENCE.

Proof that defendants occupied the same house together, the woman in the capacity of house servant, sleeping at night in separate rooms, and that on one occasion she was seen to leave her room and enter his bedroom in the nighttime, clandestinely, and remain for an hour, is not sufficient evidence to sustain a verdict of guilty. The jury cannot infer from the one act of incontinence, clandestinely committed, that such acts were habitual and continuous.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 14, 15; Dec. Dig. ⇐7.]

Error to Circuit Court, Boone County.

J. B. Ramage and another were convicted of lewdly and lasciviously associating and cohabiting together, and bring error. Reversed and remanded.

Leftwich, Byrnside & Shaffer, of Madison, for plaintiffs in error. A. A. Lilly, Atty. Gen., John B. Morrison, of Sutton, and J. E. Brown, Asst. Atty. Gen., for the State.

WILLIAMS, J. J. B. Ramage and Maude Hunter were convicted in the circuit court of Boone county on a charge of "lewdly and lasciviously associating and cohabiting together," and adjudged to pay a fine of $50 each, and to that judgment they were granted this writ of error.

The principal error relied on is the refusal of the court to sustain defendants' motion to set aside the verdict. The question presented is: Is there sufficient evidence to support it? The following facts are proven and not controverted, viz.: That defendants are not married to each other; that J. B. Ramage is a married man not living with his wife; that he is general superintendent of the Spruce River Coal Company, and lives in its house at Ramage in Boone county; that Maude Hunter is an unmarried woman and is employed by said company at a salary of $12 a month to do the cooking, washing and general housework; that for most of the time, for a year or more previous to the indictment, she and Ramage lived in the house alone; that the house contained a number of rooms, and he occupied a bedroom on the lower floor and she one upstairs; that she was known and recognized in the community as a servant at the house, and was on the pay roll of the company; that on three or four occasions defendants were seen together, in daylight, going in the direction of the church, and to ball games; that cows, chickens, and sometimes pigs were kept on the premises, and she fed them and milked the cows. The only evidence tending to prove illicit intercourse between them is the testimony of Mrs. Pilcher, Ramage's daughter, who, together with her children and her mother, Mr. Ramage's wife, visited him at Ramage, more than a year before the indictment. She testified that she saw Maude Hunter get his clothes preparatory to starting to a baseball game, and saw him kiss her. On another occasion, during the same visit, she said Maude Hunter had been in Charleston and he had written to her to come back; that she did return, and was relating to witness and her mother, in the kitchen, why she had come back, and he came in, and "she stopped telling what was in the letter." On that night, after they had all retired, witness said she saw Maude Hunter go from her room upstairs, along the hallway, and downstairs, through the kitchen, and into the door of Ramage's room; that it was then between 3 and 4 o'clock in the morning; and that "silence reigned supreme from that time until (she) heard the stove rattle for breakfast," which, she said, was about an hour after Maude Hunter went into his room; that when Maude Hunter left her room to go downstairs she followed her along the hall to the head of the stairway, from which place, she said, she could see her go into the door of his room. She said she saw the kissing incident through a small crack, or opening, in the steps of the stairway. She admits that she was secretly watching to discover if any improper relation existed between defendants. Both defendants denied that there was ever at any time any illicit intercourse between them, and they flatly contradict the testimony of Mrs. Pilcher. A number of witnesses testified that, in their opinion, it was not possible for Mrs. Pilcher to see the door of Mr. Ramage's room from the place on the stairway where she was standing when she says she saw Maude Hunter enter the room, because of the construction of the building; they say the line of vision is cut off by intervening objects. But it does not appear that any of the witnesses made a test of it. The evidence is conflicting, and it was clearly the right of the jury to determine what the facts were. They had a right to believe Mrs. Pilcher and to disbelieve the witnesses who contradicted her. They evidently believed her, and we must accept their finding of the facts.

[1, 2] Assuming the facts to be true, the question of law arises: Are they sufficient to sustain the indictment? This court held lewd and lascivious association and cohabitation to mean "the living and cohabiting together of a man and a woman, not married to each other, in the same house, as husband and wife." State v. White, 66 W. Va. 45, 66 S. E. 20. That case followed State v. Miller, 42 W. Va. 215, 24 S. E. 882, wherein the same doctrine was announced, and in which it was also held that occasional acts of illicit intercourse did not prove a violation of the statute, although the man and woman occupied the same house. The illicit relation must be habitual and continuous. It was early held by the Supreme Court of Massachusetts, in construing a statute worded similar to our own, that proof of one criminal intercourse did not constitute a violation of the statute. Says the court in its opinion:

"The design of the statute, in this particular provision, was to prevent evil and indecent examples, tending to corrupt the public morals." Commonwealth v. Calef, 10 Mass. 153.

Mr. Bishop, in his work on Statutory Crimes, asserts the same doctrine, and cites that case and others to support it. Section 712.

Underhill says:

"It must appear that the parties lived together openly and notoriously as though husband and wife." Underhill, Criminal Evidence, § 384.

One or two instances of incontinence are not enough.

"It is the more indecent, open, and demoralizing example of living in adultery or fornication as man and wife that the statute was designed to prevent." Pruner & Clarke v. Common-

wealth, 82 Va. at page 118, opinion of Judge Lewis.

Iowa has the same kind of a statute that exists in Virginia and in West Virginia, and under an indictment there charging "that the defendants, not being married to each other, did lewdly and lasciviously associate and cohabit together," it was proven that they lived together in the same house as man and hired girl; that they had so lived for several months; that there were but two beds in the house; that a witness for the state and his brother slept in one and the woman slept in the other, and the other defendant slept on the floor; that on two occasions defendants were seen together in the same bed. The court held that the evidence was not sufficient, and, in its opinion, says:

"Secret acts of intercourse would not make them liable. The burden of the offense is the open, lewd, lascivious conduct of the parties living together as husband and wife. It is the publicity and disgrace, the demoralizing and debasing influence, that the law is designed to prevent." State v. Marvin, 12 Iowa, 506.

That case, as well as Commonwealth v. Calef, supra, was cited approvingly by the Supreme Court of Florida, in Luster et al. v. State, 23 Fla. 339, 2 South. 690, wherein the court of that state, in construing a statute describing the offense in the same language as our own, held that the dwelling together by the parties must be "as if the conjugal relation existed. A single or mere occasional acts of incontinency are insufficient to sustain the charge." To the same effect are Penton v. State, 42 Fla. 560, 28 South. 774; Taylor v. State, 36 Ark. 84; and Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465. In a later case the Supreme Court of Mississippi held that it was not necessary that the parties hold themselves out to the community as husband and wife, "but only that they should openly and notoriously consort and live together as if they were husband and wife—that is to say, as husbands and wives usually live"—that so long as the illicit intercourse is secret, or attempted to be made so, the statute is not violated, "but that, whenever secrecy is abandoned and the concubinage is open, the offense is complete." Kinard v. State, 57 Miss. on page 134 of the opinion. The statute of that state, however, was later amended so as to make it unnecessary to constitute the offense for the parties to dwell together publicly as husband and wife, and permitting the crime to be proven "by circumstances which show habitual sexual intercourse." Granberry v. State, 61 Miss. 440. The Supreme Court of Missouri also holds that clandestine acts of illicit intercourse, however frequent, do not constitute a violation of the statute which forbids a man and woman, not married to each other, from "lewdly and lasciviously abiding and cohabiting with each other." That court, citing many of the cases above cited, likewise holds that the statute was aimed to prevent acts "which necessarily tend by their openness and notoriety, or by their publicity to debase and lower the standard of public morals." State v. Chandler, 132 Mo. 155, 33 S. W. 797, 53 Am. St. Rep. 483. A similar view of the California statute on the same subject is taken by the Supreme Court of that state. People v. Salmon, 148 Cal. 303, 82 Pac. 42, 2 L. R. A. (N. S.) 1186, 113 Am. St. Rep. 268. We note, however, that the language of the California statute differs from the language of the statutes of the other states whose decisions we have above cited; but, notwithstanding, that court has followed the decisions of the Iowa and Missouri courts, and cites approvingly their decisions.

Our conclusion is, after a careful investigation of the authorities, that the crime of lewd and lascivious cohabitation is not established by proof of a single act of illicit intercourse, clandestinely committed, although the parties charged may be living together in the same house at the time of the unlawful act, and that the jury cannot presume, from proof of one such unlawful act, that the defendants habitually cohabited together as man and wife. The facts are uncontradicted that Maude Hunter occupied the house in the capacity of servant of the coal company, although she may have been employed by Ramage, its general superintendent, and that she and Ramage slept in different rooms. Defendants may have been guilty of adultery and fornication, but that is not the crime for which they were indicted.

In view of what we have already said, it was error to give the state's instruction which told the jury that, if they believed from all the evidence in the case, beyond a reasonable doubt, defendants had been living together "as husband and wife, within one year prior to the finding of the indictment," then they should find them guilty. There was not sufficient evidence to support the instruction. It was likewise error to refuse to give defendants' instructions Nos. 1, 3, and 4. No. 1 is a peremptory instruction to find for the defendant, and should have been given. Nos. 3 and 4 correctly state the law.

The judgment is reversed, the verdict set aside, and a new trial awarded.

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(75 W. Va. 556)

## CHESAPEAKE & O. RY. CO. v. ROGERS, Justice, et al.

(Supreme Court of Appeals of West Virginia. Jan. 27, 1915.)

*(Syllabus by the Court.)*

1. COMMERCE ⇐89—INTERSTATE SHIPMENT—DEMURRAGE—JURISDICTION OF STATE COURT.

Though a state court has no jurisdiction to affect a filed and published rate for demurrage on an interstate shipment, it may in a proper action find that such rate was charged for a

greater length of time than that to which it was truthfully applicable and give judgment for the amount so overpaid.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. ⊂⊃89.]

2. PROHIBITION ⊂⊃5—GROUNDS—DETERMINATION OF FACT.

Prohibition does not lie as against an erroneous determination of fact, where the court has power to hear and determine in the premises.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 20–30; Dec. Dig. ⊂⊃5.]

Original petition for a writ of prohibition by the Chesapeake & Ohio Railway Company against T. C. Rogers, Justice, and another. Writ refused.

Enslow, Fitzpatrick, Alderson & Baker and Samuel Biern, all of Huntington, for petitioner. M. P. Wiswell, of Huntington, for respondent.

ROBINSON, P. The Chesapeake and Ohio Railway Company made a charge for demurrage on a car of hay shipped from Newark, Ohio, to the Saunders-Weider Company at Huntington. The charge made was based on the published rates of the railway company, filed with the Interstate Commerce Commission pursuant to the acts of Congress in that behalf. The rate so published and established was one dollar per day. The railway company, applying that rate to the number of days which it claimed the car had been left on its tracks, exacted from the Saunders-Weider Company the sum of nineteen dollars. The same was paid by the latter company under protest, so that possession could be taken of the contents of the car. Later, the Saunders-Weider Company, claiming that it was responsible for only nine days of delay in unloading the car, instituted before a justice of the peace of Cabell county its action for the recovery of ten dollars from the railway company, as an amount of overcharge. A plea denying jurisdiction of the justice was overruled. Upon the trial, the justice, finding that nine days instead of nineteen was the proper basis for the application of the one dollar per day rate, rendered judgment for the plaintiff against the defendant for ten dollars. Thereupon, the railway company obtained, in the vacation of this court, from a judge thereof, a rule requiring the justice and the plaintiff in the action to appear and show cause why the writ of prohibition should not issue, stopping further proceedings in the action. The respondents have made return, and the case has been duly submitted for decision.

[1] The petitioner maintains that the justice is wholly without jurisdiction in the premises. It insists that the Interstate Commerce Commission must first pass on the matter and declare the charge to be too much before the plaintiff in the action can resort to a state court to recover back the amount overpaid. Robinson v. Baltimore & Ohio Railroad Co., 64 W. Va. 406, 63 S. E. 323, and other cases, are relied on.

That a rate filed and published by a railway company pursuant to the acts of Congress must stand as the legal rate until the Interstate Commerce Commission declares it unreasonable, and that a state court has no jurisdiction in any action to determine that such rate is unreasonable, is undoubtedly established by the cases cited by the petitioner. But in the case before us the justice has not undertaken to determine that the rate is unreasonable. That rate he has respected as a legally established one. He has however found that such legal rate was applied to a greater number of days than the number for which the Saunders-Weider Company should be responsible. The question before him in the action was not as to the reasonableness of the rate, but as to the number of days for which the rate, accepted as a legal and reasonable one, should be charged. That he had jurisdiction to determine such a question, we have no doubt. The acts of Congress in relation to commerce do not inhibit him from the determination of such an ordinary question of common right as between litigants. They vest in the Interstate Commerce Commission the jurisdiction to say whether the rate is reasonable or unreasonable, but they do not take from a state court power to determine a fact having nothing to do with the reasonableness or unreasonableness of the rate. Whether the railway company applied the rate untruthfully to a number of days when the car was not subject to demurrage, was the litigable question in the action. The action did not affect the rate, nor in any way infringe on the jurisdiction of the Interstate Commerce Commission in regard to it. Let us suppose a railway company charges one the regular rate per car for ten cars when it only hauled nine, must he go to the Interstate Commerce Commission to settle the question as to whether there were ten cars or nine cars? Is a state court by the interstate commerce laws deprived of jurisdiction to determine the fact whether a railway company has actually rendered to one all the service it claims to have rendered? We know of no provision which transfers from a state court to the Interstate Commerce Commission such everyday litigable facts.

[2] The justice may have erred in his finding as to the number of days for which the demurrage should be charged. But he had jurisdiction to hear and determine the fact, rightly or wrongly. Prohibition does not lie as against an erroneous determination of fact, where the court has power to hear and determine in the premises.

We are of opinion to discharge the rule and to deny the writ sought.

(75 W. Va. 553)

## PETERSON v. SMITH et al.

(Supreme Court of Appeals of West Virginia. Jan. 26, 1915.)

*(Syllabus by the Court.)*

ACCOUNT ⟸1—ACCOUNTING—RIGHT—EQUITY JURISDICTION.

Mere conflict in claim to oil royalty does not assure equity jurisdiction. Where the plaintiff has full, complete and adequate remedy at law and no peculiar feature of the case comes within the province of a court of equity, he must proceed in the law forum.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 1–8; Dec. Dig. ⟸1.]

Appeal from Circuit Court, Marshall County.

Suit by B. Walker Peterson against Henry L. Smith and others. From decree dismissing his bill complainant appeals. Modified and affirmed.

Hall & Hall, of New Martinsville, for appellant. L. Carlin, of New Martinsville, for appellees.

ROBINSON, P. By the appeal herein, plaintiff submits that his bill was improperly dismissed on demurrer. But mature consideration leads us to sustain the ruling of the chancellor holding the bill insufficient.

The bill seeks an accounting for oil royalty. The substance of the case which it presents, is that defendant Smith has been paid, by mistake of the operating company, royalty which belongs to plaintiff. For the royalty so paid, plaintiff asserts a mere money demand against Smith. The bill shows no ground of equity cognizance. It does not make a case for an accounting. It appears that the specific account is one which can be fairly determined in a court of law. Grafton v. Reed, 26 W. Va. 437. No trust relation exists between plaintiff and Smith. The latter is simply shown to be debtor to the former. Facts showing the necessity and indispensability of a discovery, or some other reason why equity should intervene, do not sufficiently appear. "Ordinarily a court of law is the proper forum in which to establish a debt. For equity to interpose, there must be something more than a mere claim or demand; there must appear some equity in relation to such claim or demand—something remedial to plaintiff that the law does not give." Teter, Adm'r, v. Teter, 65 W. Va. 167, 63 S. E. 967.

Plaintiff relies on Peterson v. Hall, 57 W. Va. 535, 50 S. E. 603, and Smith v. Linden Oil Co., 69 W. Va. 57, 71 S. E. 167, as sanctioning equity jurisdiction whenever there are conflicting claims to oil royalties. Those cases were quite different from the one presented by the bill herein. In them plain inadequacy of legal remedy, and other grounds of equity jurisdiction, appeared. In this case it appears that plaintiff has a full and adequate remedy at law for all that he claims by the allegations of his bill.

Nowhere does the bill positively assert that there is any conflict of leases whereby Smith has received the royalty. Indeed the bill is so drawn that it contains no direct and sufficient allegations that there is controversy between plaintiff and Smith, either as to title to the land or as to leases thereon. On the other hand, it is alleged that the South Penn Oil Company, which held a lease on plaintiff's land, and which operated the premises wherefrom the royalty in question arose, mistakenly thought that the well was not on plaintiff's land but on Smith's land, as to which also the same company held a lease, and therefore paid the royalty to Smith. A case for removal of cloud from title is not made; nor is any relief in such particular asked. Nor, as we have said, is anything else shown, warranting resort to equity instead of law. Upon the whole, only a money demand is asserted by one man against another. As far as is disclosed, that demand can just as readily be proved and enforced in an action of law as in a suit in equity.

Plaintiff expressly states in the bill that he is seeking no recovery from the South Penn Oil Company and the Eureka Pipe Line Company, which are made defendants thereto. He merely wants them to disclose what they have turned over in way of royalty to Smith. No allegation shows why they cannot quite as well disclose this in a law action. Besides, plaintiff confesses in the bill that the South Penn Oil Company has accounted with him for one-half of the royalty due him from the premises, which one-half was retained by it and not paid to Smith. Readily plaintiff should know what the other half is, so as to base an action at law thereon.

It is true that the bill prays that Smith be enjoined from further trespassing on plaintiff's land and taking gas and oil therefrom, and that the Eureka Pipe Line Company be enjoined from delivering to Smith any oil produced, or hereafter to be produced, from the premises. But the bill presents no case on which such a prayer can be based. It does not assert that Smith ever has trespassed on plaintiff's land or laid claim thereto, or that he threatens to do so. Neither does it assert that the pipe line company upon notice of plaintiff's rights persists in delivering oil to the credit of Smith.

It is not true that in every case conflicting claims to oil royalty may be determined in equity, as plaintiff seems to infer. Some facts necessitating and warranting resort to the equity jurisdiction must be shown. Where the plaintiff has full, complete and adequate remedy at law, and no peculiar feature of the case comes within the province of a court of equity, he must proceed in the law forum.

The decree dismissing the bill is right, but it should have gone further and reserved

to plaintiff right to sue at law. It will be modified by such a reservation. Frye v. Miley, 54 W. Va. 324, 46 S. E. 135; Teter, Adm'r, v. Teter, supra. As so modified, the decree will be affirmed.

(75 W. Va. 521)

## MAXWELL v. MAXWELL. (No. 2588.)

(Supreme Court of Appeals of West Virginia. Jan. 26, 1915.)

*(Syllabus by the Court.)*

1. DIVORCE ⟸49—DEFENSE — RECONCILIATION—OFFER

To be effectual, an offer by husband or wife to reconcile differences resulting in desertion, and resume cohabitation, must be in good faith, conciliatory in form and substance, and not merely colorable grounds for relief by a divorce proceeding.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 171-179; Dec. Dig. ⟸49.]

2. DIVORCE ⟸184 — OFFER OF RECONCILIATION—DECREE—APPEAL.

Whether proposals so made are genuine and sincere, and in form and substance conciliatory, are matters of fact, as to which a decree, denying relief, is entitled to great weight on appeal.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 570-573; Dec. Dig. ⟸184.]

Appeal from Circuit Court, Ohio County.

Suit by Emma W. Maxwell against A. O. Maxwell. From a decree for defendant, plaintiff appeals. Affirmed.

T. S. Riley and A. L. Sawtell, both of Wheeling, for appellant. Russell & Russell, of Wheeling, for appellee.

LYNCH, J. [1] This suit is the fifth of a series brought to obtain a divorce—three by the wife, two by the husband—relief being denied in all of them save one dismissed on her motion. In this suit, and in the one immediately preceding it, she alleged, as one ground for relief, abandonment by her husband in January, 1907. By answer, defendant denies desertion by him, and affirms desertion by her. Their testimony is equally positive and conflicting. No witness corroborates either of them. None other testified on the subject. The burden was on plaintiff to establish the fact averred; but the testimony failed to convince the chancellor, of whose decree she complains. With him we agree. Besides, as noted, the abandonment now relied on, if it occurred as she alleged, was in issue in the former suit brought by her (69 W. Va. 414, 71 S. E. 571), and the decree therein against her, affirmed by this court, was an adjudication precluding further inquiry as to who was the first offender (14 Cyc. 725; Miller v. Miller, 92 Va. 196, 23 S. E. 232). But she undertook to show an offer of reconciliation and resumption of marital duties by cohabitation, and produced two letters, one registered, which defendant refused to receive and did not read, one by a messenger, who delivered it to him, but which defendant testified he read in part only and returned it to the messenger, who carried it away with him. This the latter denied. But, assuming defendant received, read, and retained both letters, we may inquire, as did the chancellor, whether they were in fact conciliatory and written in good faith, or merely as a pretext to obtain proof for use in a suit then evidently in contemplation by her. In the first she says:

"I am writing this to tell you I am entirely without means of support and am living on the bounty of my mother. * * * When we separated, I felt I had a valid ground for divorce. * * * I ask you to furnish me with a home and necessary maintenance, and to perform the duties involved upon you as a husband."

She began the second by saying:

"I am writing this to again call upon you to fulfill the obligations which are incumbent upon you as my husband."

And continued:

"If you do not meet my request within a reasonable time I will consider that you are unwilling to fulfill the obligations which you are under to me, and shall be forced to seek redress in the courts."

In the parts omitted, she does express some contrition on her part, a desire to resume her marital duties, and assurances of their loyal performance by her.

[2] Whether, when she sent these letters, plaintiff was sincere, or that they express a genuine desire for reconciliation and resumption of actual cohabitation, are inquiries as to which the court below, by its decree, expressed an opinion adverse to her contention. We cannot say the decree was erroneous in denying relief on this phase of the case. On the contrary, our conclusion is that the letters were not conciliatory, and that she did not intend them to have that effect. They indicate her desire for alimony. Virtually they demand it. In less than two months after the date of the second letter, she instituted this suit, and obtained an allowance pending the litigation. She did not ask, as properly she could, a permanent divorce. That, apparently, she did not want.

Attempts to effect an adjustment of differences between husband and wife must be made in good faith, and not merely as colorable grounds for a divorce proceeding. Construing similar letters, other decisions support the views expressed herein. Prather v. Prather, 26 Kan. 273; McClurg's Appeal, 66 Pa. 366; Musgrave v. Musgrave, 185 Pa. 260, 39 Atl. 961; Ogilvie v. Ogilvie, 37 Or. 171, 61 Pac. 627; Woolard v. Woolard, 18 App. D. C. 326; 7 Dec. Dig. Div. § 37 (8).

Of certain testimony introduced by defendant, over objections, tending to show improper conduct by her, plaintiff complains, on the ground that no pleading raised any issue as to her relations with the persons named by the witnesses, or afforded any notice that her conduct in these respects would become the subject of investigation. Though no actual adultery was proved, the conduct testified to was sufficient to generate a suspicion of gross impropriety.

But whether, to be available, the facts proved must have been alleged in the answer, it is not necessary to say, because, for reasons already stated, our conclusion is to affirm the decree to which the appeal was awarded.

(75 W. Va. 513)

## HIGHLAND v. ICE et al.

(Supreme Court of Appeals of West Virginia. Jan. 19, 1915.)

*(Syllabus by the Court.)*

1. HUSBAND AND WIFE ⊂⊃25 — AGENCY — POWERS OF AGENT.

A wife by permitting her husband to do business generally in her name may so hold him out as her agent as impliedly to authorize him to sign her name to notes for which she will be bound.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 148–151, 153, 154, 525; Dec. Dig. ⊂⊃25.]

2. REFERENCE ⊂⊃99—FINDING OF FACT—CONCLUSIVENESS.

A finding of fact by a commissioner, though entitled to weight, is not conclusive. If it is plainly not justified by the evidence, the court may set the same aside and decree according to its own view of the evidence.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 148–156; Dec. Dig. ⊂⊃99.]

Appeal from Circuit Court, Wetzel County.

Bill by Cecil B. Highland, receiver, against Emma M. Ice and others. Decree for plaintiff, and defendants appeal. Affirmed.

Wyatt & Ice, of Fairmont, and Hogg & Hogg, of Pt. Pleasant, for appellants. John Ross, Jr., of Clarksburg, and L. Carlin, of New Martinsville, for appellee.

ROBINSON P. This appeal is from a decree foreclosing a mortgage, ordering a sale of the property for the payment of the liens found to be existing against the same. Though the mortgage is in form a deed, it is concededly shown, by a contemporaneous writing between the parties, to have been made for the purpose of securing a debt.

Emma M. Ice, who held the legal title to the property before it was mortgaged, complains that the decree takes her property for a debt of her husband, for which she is not now liable. In another particular, hereinafter to be adverted to, Lory F. Ice also complains of the decree.

That the mortgage, and the original note drawn therewith as representing the debt secured, were executed by Emma M. Ice together with her husband, P. A. Ice, now deceased, is admitted. But the note was several times renewed at the Bank of Smithfield to which it was payable, the last time on February 13, 1908. Emma M. Ice denies signing any renewal of the note, though each renewal purports to have been signed by her. She asserts, in argument but not in her pleadings, that as mortgagor of the property and maker of the note she was only surety for a debt of her husband, and that the taking of a renewal not signed by her, released her from the debt and likewise released the mortgage security. On the other hand, the receiver of the bank, plaintiff in this suit, submits that Emma M. Ice was not surety for the husband; that P. A. Ice in whose handwriting the name of his wife appears on the renewals had authority from her to sign her name thereto; and that in any event, the bank not having relinquished the original note when the renewals were taken, those renewals, even if fraudulently palmed off on the bank as having been signed by Emma M. Ice, do not operate to discharge the original debt and security.

[1] We have made a careful review of the record in this cause, aided by the excellent briefs of counsel. That review leads us firmly to the conclusion that Emma M. Ice was a joint and principal maker of the note and its renewals, and that the property is liable under the mortgage. The sum and substance of it all is that P. A. Ice was generally doing business in his wife's name, with her knowledge and by her authority. In the business so done he acquired in her name the property involved herein. In her name, she then signing in person, he mortgaged the same for debt. In her name he renewed the notes, signing her name thereto as was his general custom to sign it to notes and checks in managing the business. That he carried on an extensive business in her name, acquiring property, contracting debts, drawing checks, and doing all things ordinarily necessary and incident to a business so carried on, that she was so cognizant of all this as to acquiesce in the same and become bound thereby, and that his agency for her had become so fixed and public in this particular that she cannot now gainsay the same, is fully established by the record. Not until after the husband's death did she deny his general agency for her. Many an obligation signed by him for her she permitted to be paid as in due course. Now she seeks to retain the property acquired in connection with that business by denying any obligation for debts incident to the business. Equity can not countenance this. It may be, as she asserts, that she did not expressly authorize her husband to sign the renewal notes. But her course of business through him with this very bank, her acquiescence in and recognition of the husband's general agency in her behalf for a long period of time with the public generally, impliedly bind her as completely as any express authorization. She, living with him as wife, accepting title to property which he acquired by business conducted in her name, and knowing that he was operating in her name, as the proof abundantly shows, thus gave express recognition to his conducting business generally for her. From the authority so recognized, there followed implied authority

in him to do all that was commensurate with conducting the business. Illustrative of the principle here involved the following quotations are pertinent:

"If a person has, in the capacity of an agent for another, repeatedly drawn or accepted bills, or executed promissory notes for him, whether with or without authority, and the supposed principal has recognized or ratified the act of the agent, by payment of the bill or note, or in any other way; the principal will be bound by any subsequent exercise of authority of a like character, on the ground of estoppel." Tiedeman on Commercial Paper, sec. 79. "The power to make or endorse negotiable instruments may be implied as a necessary incident of powers expressly conferred. Where an entire business is placed under the management of an agent, the authority of the agent is presumed to be commensurate with the necessities of the situation. He has implied authority to do whatever is ordinarily incident to the conduct of such business, whatever is necessary to the efficient execution of the duties, or whatever is customary in a particular trade." Whitten v. Bank of Fincastle, 100 Va. 546, 42 S. E. 309.

Clearly Emma M. Ice was principal in the debt evidenced by the renewal note, and the questions in relation to suretyship discussed in the briefs have no place in the case.

[2] It is true that the commissioner to whom the cause was referred found that the renewal notes were not authorized by Emma M. Ice. But that finding was clearly contrary to the weight of the evidence taken before him. The chancellor most properly sustained the exception to the report in this particular. We unhesitatingly approve his ruling. A finding of fact by a commissioner, though entitled to weight, is not conclusive. If it is plainly not justified by the evidence, the court may set the same aside and decree according to its own view of the evidence.

Some minor matters remain. We may well dispose of them briefly, and as follows:

An off-set is claimed against the bank by reason of a certificate of deposit issued to Catherine Ice and assigned to Emma M. Ice. But the proof is well nigh conclusive that the bank paid this certificate, as a lost one, and took a bond of indemnity to protect the bank in the premises. The chancellor properly ignored this claim.

Certain oil interests were conveyed by Emma M. Ice and P. A. Ice to I. D. Morgan as security for debt. After the death of P. A. Ice, the son, Lory F. Ice, with the knowledge and consent of his mother, paid the obligation to Morgan and took from him a conveyance of the title to the property. The decree sets aside this conveyance and subrogates Lory F. Ice to the original place of Morgan. It decrees Lory F. Ice, as against this property, the amount which he paid to Morgan. He joins in the appeal and says that he should have been placed first in priority instead of third. But the decree gives him exactly the priority which Morgan had, and is right. Two judgment liens underlie the Morgan debt.

Error is cross-assigned as to the allowance of any amount to Lory F. Ice. It is submitted that he is not entitled to subrogation. In good equity, under the circumstances of this case, we think he is.

The other cross-assignments must also be overruled. It was certainly proper to refuse to allow the bank commission for collecting the rents of the mortgaged property, and charges for insurance on the property, since the mortgage writing made no provision entitling the mortgagee thereto.

Finding no error in the decree, we affirm it.

(75 W. Va. 533)

## GALLIK v. WHEELING STEEL & IRON CO. (No. 2621.)

(Supreme Court of Appeals of West Virginia. Jan. 26, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ⟸258—INJURY TO SERVANT — DECLARATION — SUFFICIENCY AGAINST DEMURRER—SAFE-GUARDING MACHINERY.

A declaration for personal injuries sustained, due to the alleged negligence of the master to comply with the provisions of section 59, chapter 15H, Code 1913 (sec. 518), requiring machinery, etc., to be safely and securely guarded when possible, or if not possible that notice thereof be posted, etc., which fails to allege that plaintiff's employment required him to go upon the particular machine where he sustained his injuries while the same was in motion; and that it was possible to so safely and securely guard the shafts, cogwheels and other parts, which caused his injuries, or that no notice of the dangers therefrom was conspicuously posted as provided by the statute, is bad on demurrer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816–836; Dec. Dig. ⟸ 258.]

2. MASTER AND SERVANT ⟸258—INJURY TO SERVANT — DECLARATION — SUFFICIENCY AGAINST DEMURRER.

A count in such declaration charging negligence generally of the master in failing to adopt and promulgate proper rules for the conduct of his business, and to provide for the safety of his servants, and which avers specially the negligence of the master in failing to promulgate proper rules for stopping and starting of machinery, and forbidding and prohibiting the sudden starting thereof while belts were being removed, repaired and replaced thereon, is good on demurrer, and such demurrer should be overruled.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816–836; Dec. Dig. ⟸ 258.]

3. MASTER AND SERVANT ⟸177—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—LIABILITY OF MASTER.

The principles of non-liability of master for injuries sustained by the negligence of a fellow servant, enunciated in Jackson v. Norfolk & W. R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337, and subsequent cases, re-affirmed and applied to the facts presented by the record of this case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 307, 352, 353; Dec. Dig. ⟸ 177.]

Robinson, P., dissenting in part.

Error to Circuit Court, Marshall County.

Action by Raphael Gallik against the Wheeling Steel & Iron Company. Judgment for defendant, and plaintiff brings error. Affirmed.

D. B. Evans, and Martin Brown, both of Moundsville, for plaintiff in error. Hubbard & Hubbard, of Wheeling, for defendant in error.

MILLER, J. In an action for personal injuries the judgment complained of set aside the verdict in favor of plaintiff for $11,458.33, and awarded defendant a new trial.

The first point of error is that the court below erroneously sustained defendant's demurrer to the third count of the declaration. This count is predicated on the duty imposed by section 59, chapter 15H, Code 1913 (sec. 518), on the owner or master of "all manufacturing, mechanical and other establishments, in this State, where the machinery, belting, shafting, gearing, drums and elevators, are so arranged and placed as to be dangerous to persons employed therein, while engaged in their ordinary duties" to have the same "safely and securely guarded when possible, and if not possible" that "notices of the danger * * * be conspicuously posted in such establishments."

This count of the declaration, while perhaps otherwise sufficient, is bad on several grounds: First, it fails to allege that plaintiff's duties as an employee to repair and replace belts required him to go up on the particular machine where he is alleged to have sustained his injuries while said machine was in motion; or, second, that it was necessary or possible to safely and securely guard the shaft, pulleys, cogwheels and belts, or metal pin projecting therefrom; or, third, that no notices of the dangers thereof were posted as required by the statute. It is alleged that plaintiff's duties required him to go up on this machine, but not while in motion, and as is alleged, this was a high machine, and the parts referred to were not so located as to be dangerous to plaintiff or other employees, unless required to go up on it while in motion. We think the declaration should have alleged the omitted facts in relation thereto to be good under the statute. The alleged duties of the master in relation to such plant and machinery do not obtain unless the conditions imposing them are present and calling for compliance with the requirements of the statute, and to bring a case within the purview of the statute the declaration should affirm those conditions. Our decisions do hold that the facts being alleged from which the statutory duties arise, the court will take judicial notice of the statute, a breach of those duties being averred. Squilache v. Coal & Coke Co., 64 W. Va. 337, 339, 62 S. E. 446, and authorities cited; 3 Bailey on Per. Inj. (2d Ed.) § 843.

The second point is that it was error to sustain defendant's demurrer to the fourth count of the declaration. This count relates to the alleged negligence of defendant to promulgate rules to govern its employees in operating its machinery, resulting in the injuries sustained by plaintiff. The opinion of the court below was that this count was bad for failure to show how the failure to adopt such rules contributed to or caused the accident, or how the adoption of such rules could have prevented the sudden starting of the machines, and that in the absence of any such showing this count is deficient. Besides averring negligence in failure to adopt and promulgate rules generally, resulting in injury to plaintiff, this count avers defendant's negligence especially in failing to—

"promulgate rules for the government of its said employees in the matter of stopping and starting its said machines and machinery when and while belts were being placed on or removed from its said belt-wheels, and to provide and promulgate proper rules for its said employees, and especially for those of its said servants employed in the running of said machines and machinery, and forbidding and prohibiting the sudden starting of said machines and machinery in motion while belts were being placed on or removed from said belt-wheels by its servants."

And it is distinctly alleged that plaintiff sustained his injuries by such alleged negligence of defendant.

Our decisions have adopted the liberal rule on this subject. If the alleged act of negligence be stated in general terms, and without stating the particular facts going to prove negligence, but stating the main or primary act of omission or commission doing the damage, this will be regarded sufficient pleading. Snyder v. Wheeling Electrical Co., 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922; Veith v. Hope Salt Co., 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410; 10 Ency. Dig. Va. & W. Va. Reports, 397 et seq. These authorities say that:

"A declaration in an action for negligent injuries which states the cause of action so that it can be understood by the party who is to answer it, by the jury who are to ascertain the truth of the allegation and by the court who is to give judgment, and which distinctly sets forth when, where, in what manner and under what circumstances the plaintiff was injured by the defendant's defaults, negligence and improper conduct is sufficient."

In 6 Thompson on Negligence, § 7536, it is laid down on the authority of the Oregon case of Wild v. Oregon, etc., R. Co., 21 Or. 159,[1] contrary to Voss v. Delaware, etc., R. Co., 62 N. J. Law, 59, 41 Atl. 224, cited, that the general charge of negligence is sufficient to admit evidence in respect to failure to promulgate rules, and that a defendant in support of his plea of contributory negligence may show that he promulgated rules violated by plaintiff, or other servant, resulting in the injury complained of, and this without pleading the specific fact of such rules. In Texas & P. Ry. Co. v. Cumpston, 15 Tex. Civ.

[1] 27 Pac. 954.

App. 493, 40 S. W. 546, it is distinctly decided, fourth point of the syllabus, that:

"In an action for negligence of an employer in failing to provide rules whereby an employé was killed, plaintiff need not allege or prove exactly what rules should have been made."

But in the leading case of Voss v. Delaware, etc., R. Co., supra, it is decided, point two of the syllabus, that:

"The general averment in a count in a declaration of the negligence of the railroad company to make and enforce reasonable and proper rules and regulations for the guidance of its employés in its business, or in the operation of its railroad yards, is not a sufficient averment of an element of negligence upon which an action for personal injuries by the servant against the company can be based."

We emphasize the fact stated in the opinion as well as in the syllabus of the case last cited that "a general averment" in respect to the promulgation of rules will not do.

But which of these is the correct rule, and whether or not under a general averment of negligence the fact of negligence in failing to adopt and promulgate rules may be given in evidence, or such negligence must be specially pleaded, we need not for the purposes of this case decide, for in our opinion this fourth count sufficiently answers all the requirements of either rule. It avers generally negligence of defendant to adopt and promulgate rules, and distinctly specifies negligence to adopt and promulgate a rule respecting the stopping and starting of defendant's machines and machinery.

As all the other counts in the declaration seem to be predicated upon the departmental or superior servantcy rule, repudiated in our case of Jackson v. Norfolk & W. R. Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337, and there is no count of general negligence under which the rule of some decisions would admit evidence of negligence in failing to adopt and promulgate rules, we are of opinion to hold that the court erred to the prejudice of the plaintiff in sustaining defendant's demurrer to said fourth count, and that as another trial is to be had in accordance with the judgment complained of, we think the judgment below should be corrected, and the demurrer to said fourth count overruled, and that on the new trial awarded plaintiff should be permitted to sustain said count by evidence if he can do so.

Next, and thirdly, it is complained that the court below erroneously set aside the verdict of the jury and awarded defendant a new trial. As already noted the counts in the declaration upon which the trial was had were predicated solely upon the departmental or superior servantcy theory, once the law of this state, but overruled in Jackson v. Norfolk & W. R. Co., supra, and we think this case as presented is controlled absolutely by the principles of the Jackson Case, which has been many times re-affirmed in subsequent decisions, notably in Miller v. Berkeley Limestone Co., 70 W. Va. 643, 75 S. E. 70, and Ferguson v. Glady Fork Lumber Co., 72 W. Va. 278, 78 S. E. 689. Urgent appeals are made by counsel in the case at bar to overrule these cases, but we think the principles enunciated therein are well founded in reason and authority and should be adhered to.

The only evidence adduced in support of the several counts on which the case was tried, relied on to show negligence, was that, while plaintiff was in the discharge of his duties in removing, repairing and replacing the belt or belts on a particular machine, and where he was required to go while the machinery was not in motion, the machinery was suddenly and without warning started by the direction or order of the superintendent or foreman on night duty at the time, whereby he was caught in the cogwheels and other parts of the machinery and sustained the injuries complained of. It is not alleged, and it is not shown in evidence, that plaintiff was not aware of the dangerous place on the machine where he was required to be in the discharge of his duties. He does not allege or rely on failure to instruct or warn him of the dangers of his position, as were the facts in Cave v. Blair Limestone Co., 82 S. E. 1095, distinguished therein from Miller v. Limestone Co. and Ferguson v. Glady Fork Lumber Co., supra. As was said in Jackson v. Norfolk & W. R. Co., supra, and subsequent cases, the question of the liability of a master for the negligence of a servant does not depend upon the relative rank in which one servant stands in relation to an injured servant, but upon the character of the negligent act which causes the injury. If that negligence pertains to some non-assignable duty of the master intrusted to one of his servants, whatever be his rank, the master is liable; but if it pertains to a co-servant in the operation of the plant or factory of the master, and not falling within his non-assignable duties, the master is not liable. Such is the established law of our decisions. The sudden starting of the machinery as alleged did not pertain to any of these non-assignable duties of the master, but was a mere act of operation which the master could delegate without liability for negligence of a competent co-servant.

And for the foregoing reasons we are further of opinion that as the record then stood there was no error in the judgment below vacating the verdict and awarding defendant a new trial; nor in the refusal of the court to enter judgment upon the verdict for plaintiff.

But the court having erred in sustaining defendant's demurrer to the fourth count, when the case goes back the court below will enter an order overruling the demurrer to said fourth count, so that the plaintiff may have leave to be heard on that count also on proper pleadings and issues joined thereon.

ROBINSON, P. (dissenting in part). Let it be distinctly noted that the order appealed

from is one setting aside a verdict. The effect of the writ of error is that the plaintiff comes here and says that he obtained a verdict and that the court committed error *in setting it aside and awarding a new trial.* In other words, he says that he had a verdict *free from error*, but that the court subsequently erred in setting it aside. So the only error brought up is the alleged error of the trial court in setting aside the verdict. Logically, the writ of error can not present a question other than whether the court did err in setting aside the verdict. It can not present questions as to whether the court had erred to the prejudice of the plaintiff previous to the order complained of; for his appeal says that he is entitled to judgment on the verdict regardless of such error.

Now, on such an appeal the plaintiff complains that error was committed in sustaining a demurrer to certain counts of the declaration. But by his appeal he insists that the verdict was sound notwithstanding any such error. The force of his appeal is not to bring up for review that error, but the subsequent and distinct error of the court in setting aside the verdict. The error in sustaining the demurrer has not entered into or affected the judgment complained of, for according to the theory of the appeal the verdict is good and the plaintiff is entitled to judgment thereon notwithstanding the ruling on the demurrer. Thus, that ruling is out of the review demanded. The plaintiff obtained a verdict despite the ruling on the demurrer. That ruling then did not hurt him, as far as the scope of this appeal is concerned, for by his coming here to support the verdict he urges judgment on the verdict regardless of the ruling on the demurrer. Properly, the ruling on the demurrer to the declaration cannot be considered herein. The writ of error raises but the question whether there were errors underlying the verdict to the prejudice of the defendant for which it should be set aside—not whether there was error to the prejudice of the plaintiff, even though it might underlie the verdict. The plaintiff can not complain of error committed against him, though it underlies the verdict in his favor. He getting the verdict, wherein did the error harm him?

Of course it will be said that the ruling out of a certain count made the verdict to stand on narrower ground and was prejudicial to the plaintiff. But the gist of his appeal is that though a prejudicial ruling was made against him, the verdict is one on which he is entitled to judgment nevertheless. The plaintiff so comes that he brushes aside any prejudicial ruling against him and banks his case on the validity of the verdict regardless of any such ruling.

We find that the verdict was properly set aside because it involved errors against the defendant, and that there must be another trial. But at this stage of the case, for all we know, the plaintiff will again prevail regardless of the ruling on the demurrer and get a verdict and judgment which the defendant cannot overthrow. For all we know, the ruling on the demurrer may never prejudicially enter into any finding or judgment. It has certainly not yet so entered into any appealable order or judgment. Until it does, how can it properly be reviewed on appeal? As the ruling on the demurrer stands in this record, it is a mere interlocutory order which has never entered into or affected in the least any order final in the sense that it is appealable. It is still open so that the trial court may yet correct the same. Perhaps that court would itself have done so before a new trial. The ruling and order on the demurrer is not appealable separately from some final judgment involving it. Yet in the majority opinion it is reviewed as though so appealable and brought into review.

Perhaps it would be good policy if there were some law of appellate procedure reaching such instances, but to my mind there is none. If we are consistently to keep within the range of ordinary rules as to complaints of error, we have nothing to do in this case with error committed to the prejudice of the plaintiff, which according to his own theory, as manifested by the particular appeal that he brings, has not yet affected him.

The majority permit the plaintiff, though the trial court did not err in the judgment complained of, to have a review of the ruling on the demurrer, wholly outside of that on which the appeal rests—an order expressly made appealable by statute. It is the same as to say that when a verdict is rightly set aside by the trial court, though the order is so clearly right that the party against whom it is can not maintain an appeal on it, still he may have all former steps in the case reviewed. This is virtually saying that one may have review on appeal, simply because his verdict has been set aside, of all that has gone before, whether it has yet prejudiced him or not, in preparation for the new trial. Such is not within the contemplation of the statute allowing a writ of error from an order granting a new trial. The scope of appellate jurisdiction under that statute has thus been defined:

"This court being called upon to review the action of a trial court in setting aside a verdict and awarding a new trial, it will inquire from the record what errors, if any, sufficient to justify such action, were committed at the trial to the prejudice of the party against whom such verdict was rendered, and whether such verdict is plainly contrary to law and the evidence." Robinson et al. v. Kistler, 62 W. Va. 489, 59 S. E. 505.

Our jurisdiction goes no further.

(168 N. C. 226)

WEBB v. LE ROY et al. (No. 23.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

FISH ⟸11—SEIZURES BY FISH COMMISSIONER—LIABILITY—PLEADING.

Where a complaint against the State Fish Commissioner for seizure of shad nets alleged personal participation of defendant "by seizing and selling the said nets and converting them to his own use," a demurrer, on the ground that the liability of defendant for the acts of his deputy was not sufficiently charged, was not well taken.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 21; Dec. Dig. ⟸11.]

Appeal from Superior Court, Chowan County; Carter, Judge.

Action by J. B. Webb against J. H. Le Roy and others. Judgment for defendants dismissing the action, and plaintiff appeals. Reversed.

Pruden & Pruden, of Edenton, and S. Brown Shepherd, of Raleigh, for appellant. W. S. Privott, of Edenton, and Ward & Thompson, of Elizabeth City, for appellees.

BROWN, J. The motion of the plaintiff made in this court to amend the summons and complaint so that the suit may be brought in the name of the state upon the relation of the plaintiff, as well as by the plaintiff individually, is allowed. The complaint alleges that the defendant Le Roy is Fish Commissioner for the state of North Carolina, and executed the bond sued on in the sum of $5,000, with the defendant United States Fidelity & Guaranty Company as surety; that on the 23d of March, 1913, the plaintiff was the owner of 13 shad nets which were set to the east of a certain line in Albemarle Sound in all respects in conformity to the laws of the state; "that on or about the 23d of March, 1913, the defendant Le Roy, by his deputy, Thomas P. Leary, attended by persons to assist him, took up the said nets and removed them from the place where they were setting, and deprived the plaintiff of his property, right, and use in the same; that said deputy did this, believing the said nets were setting west of said line in violation of the law."

[1] The point attempted to be raised by the demurrer is the liability of the Fish Commissioner for the act of his deputy. We do not think, in view of the allegations of this complaint, which upon demurrer must be taken to be true, the point can be thus raised.

The complaint further alleges:

"That the action of the defendants and all of them in respect to the said nets set out in the last preceding action was wrongful and unlawful, and the said defendant Le Roy, Commissioner, by seizing and selling the said nets, purporting to act under the law, wrongfully converted the same to his own use."

By these allegations, the plaintiff charges the direct personal responsibility of the defendant Le Roy in seizing and selling the nets and converting the same to his own use. It is further a fair inference from the entire complaint that the deputy was acting under the orders and instructions of the commissioner.

For these reasons, we think his honor erred in sustaining the demurrer and dismissing the action.

Reversed.

(168 N. C. 266)

OWENS et ux. v. MUNDEN. (No. 27.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

MARRIAGE ⟸19 — LICENSES — CONSENT OF PARENTS—"FATHER"—"STEPFATHER."

Under Revisal 1905, § 2088, providing that, where either party to a proposed marriage is under 18 and resides with the father, mother, uncle, etc., the register of deeds shall not issue a license for such marriage until the consent in writing of the relation with whom the infant resides shall be delivered to him, while the consent of the persons named, and in the order named, must be obtained, and where the infant is living with the father and mother the written consent of the father is necessary, where the infant was living with her mother and stepfather, the mother's consent was sufficient, and the stepfather's consent was not required, since the words "father" and "stepfather" are in general use and well understood, the difference in the relationship and the marked distinction between their duties and liabilities are well known, and the word "father" does not include a "stepfather," defined as the husband of one's mother, who is not one's father.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 10, 11; Dec. Dig. ⟸19.

For other definitions, see Words and Phrases, First and Second Series, Father; Stepfather.]

Appeal from Superior Court, Pasquotank County; Carter, Judge.

Action by Joseph G. Owens and wife against J. W. Munden. From a judgment for defendant, plaintiffs appeal. Affirmed.

This is an action against a register of deeds to recover the penalty for issuing a license for the marriage of a girl under 18 years of age without the written consent required by the statute. The plaintiff is the stepfather of Julia Irene Jones, formerly Julia Irene Barber, the plaintiff having married her mother in 1903. From the time of said marriage until her own marriage to Jones, with the exception of two very short intervals, Julia Irene lived with the plaintiff and her mother as a member of the family; the plaintiff feeding her, clothing her, and treating her as if she were his own child. Julia Irene was married to Claude Jones in 1913, when only 16 years of age. The license for this marriage was issued by the defendant. It was admitted that prior to the issuance of such license the defendant had been, in writing, notified by plaintiff that said Julia Irene was only 16 years old, and forbidden to issue a license for her marriage. It was further admitted that, at the time of issuing said license, defendant had

in his possession the written consent to such marriage of Julia Irene's mother, plaintiff's wife, who also resided with plaintiff. The usual issues were submitted. The judge charged the jury peremptorily to answer the first issue "No," and the second issue "Nothing." Plaintiff excepted and appealed.

P. W. McMullan, of Hertford, for appellants. Ward & Thompson and J. Kenyon Wilson, all of Elizabeth City, for appellee.

ALLEN, J. The Revisal (section 2088) provides that where either party to a proposed marriage is under 18 years of age and resides with the father, or mother, or uncle, or aunt, or brother, or elder sister, the register of deeds shall not issue a license for such marriage until the consent in writing of the relation with whom such infant resides, or, if he or she resides at a school, of the person by whom the minor was placed at school, "and under whose custody or control he or she is," shall be delivered to him, and the written consent shall be filed and preserved by the register, and it was held in Littleton v. Haar, 158 N. C. 566, 74 S. E. 12, that the consent of the persons named in the statute, and in the order named, should be obtained; the effect of the decision being that if the child is living with father and mother the written consent of the father is necessary, and if with the mother, the father being dead, that her consent is sufficient. If so, the only question presented by the appeal is whether the word "father" includes the stepfather, within the meaning of the statute, and gives the stepfather the right to dispose of the daughter in marriage to the exclusion of the mother.

The two words, "father" and "stepfather," are in general use and well understood, and the difference in the relationship of the two to the child, and the marked distinction between their duties and liabilities, are well known. If, therefore, we should hold that the stepfather has a prior right to the mother, we would have to insert in the statute a word not used by the General Assembly, and having a meaning different from any word in the statute. A stepfather is defined to be "the husband of one's mother, who is not one's father" (31 Cyc. 1275; 26 A. & E. Ency. L. 784; Rapalje & Lawrence L. Dictionary), and this was approved in Thornburg v. Am. Strawboard Co., 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334, where the court, after quoting the definition, says, in construing a statute giving a right of action to the father, if living, and, if not, to the mother:

"The word 'father,' therefore, does not mean stepfather, nor does the word 'child' mean stepchild, even when the same is used in wills, where the rules of construction are not so strict as those governing the statute in controversy."

In Hennessy v. Brewing Co., 145 Mo. 105, 46 S. W. 966, 41 L. R. A. 385, 68 Am. St. Rep. 554, the same question was decided; the court denying the right of action in the stepfather for the wrongful death of his stepson under a statute conferring the right of action on the father and mother. We are therefore of opinion that the word "father," used in the statute, does not include stepfather, and that the written consent of the mother, the father being dead, authorized the issuing of the license.

No error.

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(168 N. C. 232)

MARTIN v. McDONALD. (No. 17.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

CORPORATIONS ⟸120—SALES OF STOCK—WARRANTY OF TITLE—ASSESSMENT AS INCUMBRANCE.

In a suit for the price of stock his testator had contracted to buy, where defendant executor set up the existence of a valid assessment of $40 per share on such stock as an incumbrance within the seller's usual implied warranty of clear title, the defense was good.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 495, 504; Dec. Dig. ⟸120.]

Appeal from Superior Court, Pasquotank County; Carter, Judge.

Action by John W. Martin against C. C. McDonald. Judgment for defendant, and plaintiff appeals. Affirmed.

Aydlett & Simpson, of Elizabeth City, for appellant. Jones & Bailey, of Raleigh, and Ward & Thompson, of Elizabeth City, for appellee.

BROWN, J. This action is brought to recover for a breach of contract in the sale and purchase of ten shares of stock of the American National Bank of Asheville. The contract is evidenced by two telegrams as follows:

"Elizabeth City, N. C., April 26, 1912.

"C. C. McDonald, Raleigh, N. C.: Will you give sixty for Asheville stock?

"[Signed] Kramer."

The defendant replied:

"Raleigh, N. C., April 26th, 1912.

"H. G. Kramer, Elizabeth City, N. C.: Yes, will give you sixty.

"[Signed] C. C. McDonald."

The plaintiff on the same day assigned the stock and sent it with two drafts to the defendant at Raleigh. The defendant refused to pay the drafts and returned the stock. The plaintiff afterwards sold the stock for $200, and instituted this suit to recover the difference—to wit, $400.

The undisputed fact is that at the time the defendant accepted the plaintiff's offer the stock had been assessed by the United States government $40 per share, which fact was unknown to the defendant. This assessment was made by order of the Comptroller on April 18, 1912, for the purpose of making up a deficiency in the capital of the bank.

The defendant learned of this assessment

after he had accepted the plaintiff's offer, but before receiving and paying for the stock. We are of opinion that his honor was correct in holding upon the admitted evidence that the defendant was not compelled to take and pay for the stock.

It is elementary that in sales of personal property there is an implied warranty of a good title upon the part of the vendor, and this warranty extends to and protects against liens, charges, and incumbrances by which the title is rendered imperfect and the value depreciated thereby. 1 Parsons, Contract, 574; Jarrett v. Goodnow, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321; Benjamin on Sales (6th Ed. by Bennett) 627 et seq., and note 11, p. 631; Anderes v. Lee, 21 N. C. 318; Sparks v. Messick, 65 N. C. 442; Hodges v. Wilkinson, 111 N. C. 56, 15 S. E. 941, 17 L. R. A. 545; 2 Mechem Sales, § 1304; Clevelenger v. Lewis, 20 Okl. 837, 95 Pac. 230, 16 L. R. A. (N. S.) 410, 16 Ann. Cas. 56; People's Bank v. Kurtz, 99 Pa. 344, 44 Am. Rep. 112; Allen v. Pegram, 16 Iowa, 163.

In McClure v. Central Trust Co., 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153, in speaking of the sale of corporate stock with defective title, the court says:

"We think it was a condition of the sale, whether called an 'implied warranty' or any other name, that the defendant was to deliver stock free from lien, for that alone would meet the description of the thing sold, under the circumstances surrounding the parties when the sale was made. Shares of stock, so covered with liens as to be of no value, are not what the parties meant, for such shares would be worth no more than if the signatures to the certificates had been forged, although but for the liens the stock would have been worth the sum paid for it. The substance of the thing sold was not stock of any particular market value, but unincumbered stock, of the same value as free shares, and such as persons of ordinary intelligence would understand was meant by the general description of stock. By a 'share of stock' the parties did not mean half a share or any fraction of a share representing an equity of redemption, but an entire share not cut down by a charge."

It seems to be well settled that the existence of a valid lien upon the stock is such a defect in the title as will avoid the buyer's liability, and in an action for damages, brought by the seller, the buyer may avoid the contract by showing that there was a valid lien on the property. 35 Cyc. 160, 585, 156.

No error.

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(163 N. C. 239)

## SHANNONHOUSE et al. v. SHANNONHOUSE et al. (No. 15.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

LOGS AND LOGGING ⟸3—SALE OF TIMBER—SALE OF LANDS—SECURITY FOR AMOUNT.

Where timber was sold, with five years in which to cut it, and an extension of three years upon the annual payment of 6 per cent. on the price, the interest to belong to the original owner and not to any purchaser, and the purchaser of the timber afterwards bought the land, the right to extend the time for cutting merged in the title of the land, so that after the five years the timber belonged to him, and the extension period could never arise, and no interest for such period could become due to the original owner.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6–12; Dec. Dig. ⟸3.]

Appeal from Superior Court, Perquimans County; Bond, Judge.

Proceeding by W. T. Shannonhouse and others against J. T. Shannonhouse and others. From a ruling that plaintiffs were not entitled to have the amount to be paid for a timber extension period secured to them, they except and appeal. Affirmed.

This is a proceeding for the sale of certain timber interests and of certain lands for partition. The timber on the lands was first sold with the right to cut the same in five years, and with the privilege of extending the time of cutting three years upon the payment annually of 6 per cent. on the purchase price. The land was then sold; the commissioners making the sale stating that the interest payable for the extension period would belong to the present owners and not to the purchasers. The defendants bought the timber and the land, and the only question in dispute is whether the original owners of the land are entitled to have the amount to be paid for the extension period secured to them. His honor ruled against the contention of the plaintiffs, and they excepted and appealed.

P. W. McMullan, of Hertford, for appellants. Charles Whedbee, of Hertford, for appellees.

ALLEN, J. The timber on certain land was sold at judicial sale, with the right to the purchaser to have five years in which to cut the same, and with a further extension of three years upon the payment annually of 6 per cent. on the purchase price, and at the time of the sale it was stated by the commissioners that the interest payable for the extension period would belong to the present owners of the land, and not to the purchasers. The land was then sold and was bought by the same persons who bought the timber, and the contention of the former owners is that they are entitled to have the interest for the extension period secured to them. The difficulty about this position is that there is no necessity, upon the facts before us, to exercise the privilege of extending the time for cutting, and the extension period can never arise, and consequently no interest will be due therefor.

In Hornthal v. Howcott, 154 N. C. 228, 70 S. E. 171, the owner of the land conveyed the timber with the right to cut in four years, and then conveyed the land, and it was held that the grantee of the land was the owner of all the timber not cut within

the time stipulated, and in Bateman v. Lumber Co., 154 N. C. 248, 70 S. E. 474, 34 L. R. A. (N. S.) 615, in which there was an extension clause, that the notice that the privilege of extending the time would be exercised must be given to the grantee of the land.

Applying these principles, if the timber should not be cut in five years, it would then belong absolutely to the defendants as purchasers of the land, and they could cut it when they wished to do so. In other words, when the defendants bought the land, they also bought the right to extend the time for cutting, and the latter was merged in the title to the land, and therefore no interest can become due.

We have dealt with the case upon the assumption that the statement made by the commissioners would ordinarily be enforceable, but we do not so decide.

Affirmed.

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(168 N. C. 400)

## MORRIS et al. v. CITY OF HENDERSONVILLE. (No. 515.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

1. MUNICIPAL CORPORATIONS ⇐465—PUBLIC IMPROVEMENTS—ASSESSMENT.

A city charter authorized the paving of streets, providing that one-third should be paid by each of the abutting owners and one-third by the city, that street railways should pave between their tracks and one foot immediately outside of each rail, and that on failure the city should lay the pavement and assess the cost against the owners or the company. A street on which were located street railway tracks was paved. *Held* that, in computing the one-third which abutting property owners would pay, the amount paid by or assessed against the street railway company should be deducted.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1108; Dec. Dig. ⇐465.]

2. APPEAL AND ERROR ⇐878—MATTERS REVIEWABLE—NECESSITY OF APPEAL.

Where plaintiffs were successful in part only, they cannot on defendant's appeal raise the question of the partial denial of recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3573–3580; Dec. Dig. ⇐878.]

Appeal from Superior Court, Henderson County; J. L. Webb, Judge.

Action by K. G. Morris and others, taxpayers, against the City of Hendersonville. From a judgment for plaintiffs, defendant appeals. Affirmed.

Plaintiffs, taxpayers and abutting owners on fifth avenue, seek to correct an assessment against them for the cost of paving said avenue, alleging that same has been erroneously apportioned by the city authorities: (1) That a portion of paving assessed against a street railroad along the avenue was not first deducted from the estimated cost. (2) That abutting owners were not chargeable with any portion of cost for paving street at point of intersection with cross-streets. There was judgment for plaintiffs on the first position, and defendant excepted and appealed.

McD. Ray and E. W. Ewbank, both of Hendersonville, for appellant. Staton & Rector and J. E. Shipman, all of Hendersonville, for appellees.

HOKE, J. [1] The charter of the city of Hendersonville authorized the municipal authorities to pave the streets under certain conditions, and section 13 in effect provides that, when this is done pursuant to the specified requirements, the costs thereof shall be charged according to the amount of paving done in front of their respective premises, one-third each by the property owners on each side of the street and one-third by the city.

In section 14 of the charter, it is further provided that, whenever a railway or street railway runs its tracks along an avenue, street, or railway, it may be required to grade and pave that portion of the street, avenue, or alley, lying between said tracks, and one foot immediately outside of each rail, etc., and, if the owners or operators of said track shall fail or neglect to make the improvement, the city shall make the same and charge the cost thereof to the owners or operators, etc., and the claim shall constitute a debt in favor of the city to be collected by appropriate action, etc.

In this case, it appears from the facts agreed upon that the avenue in question extends from Main street about one mile to the corporate limits; that the Laurel Park Street Railway extends and is operated along the entire length, occupying seven feet, including the one foot on the outside of each rail; and that the city authorities, under the power conferred by the charter, has assessed the railway with the cost of paving that portion of the avenue occupied by its railroad, as above defined, and has assessed against plaintiffs and other abutting owners two-thirds of the entire cost of paving the avenue without deducting the amount assessed against the railway.

Upon these facts we concur with his honor in the view that in making the costs of paving a charge against these owners, in the proportion of one-third to each, it was intended to make them bear equally in that proportion the costs for which they were liable, and, if a portion of the avenue has been paid for by a railroad company, occupying the street, or the same has been lawfully assessed against such company pursuant to the charter and is collectible, the amount should be deducted before apportioning the assessment between the city and the abutting owners. The assessment against the railroad, having been made pursuant to the provisions of the charter, has the effect of imposing the charge against the company as a primary liability and should be held to relieve the land-

owner and the city equally to the extent indicated.

This, we think, by fair intendment, is the correct interpretation of the charter provisions and is in accord with authoritative decisions elsewhere. City of Shreveport v. Prescott et al., 51 La. Ann. 1895, 26 South. 664, 46 L. R. A. 193; Philadelphia v. Spring Garden, etc., Co., 161 Pa. 522, 29 Atl. 286.

We were referred by counsel for defendant to Hager v. Melton, Sheriff, 66 W. Va. 62, 66 S. E. 13, as an authority against this position. There is some distinction in that case, as the charter there was silent as to imposing assessments for paving purposes against street railways, and the city authorities, having assessed the abutting owners with two-third costs of paving the street, required a street railway to pave between its tracks as a condition for granting the franchise. In any event, the decision, which was by a divided court, may not be recognized on the facts presented here.

[2] It may be well to note that, on the second position, the judgment below was in favor of the city, and, the plaintiffs not having appealed, the question is not before us.

We find no error in the record as presented, and the judgment below is affirmed.

Affirmed.

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(168 N. C. 291)

## SPENCER v. JONES et al. (No. 12.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

1. COVENANTS ⇐=46—GENERAL WARRANTY—SPECIAL WARRANTY.

A deed by J. and S., which recites that the parties of the first part covenant with the grantee, his heirs and assigns, that they are seised of the premises in fee, and have the right to convey in fee simple, and that the same are free and clear from incumbrances, and that they will warrant and defend the title against the claims of all persons claiming by, through, or under them, the said special warranty applying only to S., contains a general warranty as to J. and a special warranty as to S.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 46; Dec. Dig. ⇐=46.]

2. COVENANTS ⇐=21—CONSTRUCTION—INTENTION OF PARTIES.

The court in construing a covenant in a deed must ascertain the intention from the entire instrument and give effect thereto.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 20; Dec. Dig. ⇐=21.]

Appeal from Superior Court, Hyde County; Carter, Judge.

Action by T. B. Spencer against Walter Jones and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action against the executors of W. H. Jones, deceased, upon the following covenants in a deed for land, dated September 4, 1903, from William H. Jones and wife and B. B. Saunderson and wife, to Thomas B. Spencer:

"The said parties of the first part covenant with Thomas B. Spencer and his heirs and assigns that they are seised of said premises in fee, and have right to convey in fee simple; that the same are free and clear from all incumbrances; and that they will warrant and defend the said title to the same against the claims of all persons whomsoever, claiming by, through, or under us, the said special warranty applying only to B. B. Saunderson and wife, Eugenia C., and their heirs."

Thomas C. Spencer was ousted from the premises, under an execution issued in a suit by T. C. Mann against him for the same within three years prior to the bringing of this action, which was commenced on October 14, 1913; Mann having the paramount title. It was admitted that the action was barred as to the covenants of seisin and against incumbrances. Judgment was entered in favor of the plaintiff for $1,500, the amount of the purchase money, with the interest thereon and the costs, and the defendant appealed.

S. S. Mann, of Swan Quarter, and Ward & Thompson, of Elizabeth City, for appellants. Ward & Grimes, of Washington, N. C., for appellee.

WALKER, J. (after stating the facts as above). [1, 2] The only question raised and argued before us is whether the presiding judge was right in holding that the warranty as to the covenantor, W. H. Jones, was a general one, and not special, as contended by the defendants; there being no breach if it was special. We concur with his honor that it is a general warranty. If this is not the true meaning of it, but it was intended to extend the special or restrictive clause to both of the parties, William H. Jones and B. B. Saunderson, it was idle to use the last words of the covenant confining its operation to Saunderson, as without them the clause would have that meaning, and, besides, the use of the words contravene any such intention. Nor can it be successfully argued that the only warranty intended was a special one by B. B. Saunderson, and that W. H. Jones was not embraced by the warranty at all. The language forbids any such construction, because the words are in the plural number, viz., "they will warrant and defend the said title to the same against the claims of all persons whomsoever," which is a general warranty; and then comes the restrictive clause reducing it to a special warranty as to Saunderson. It is somewhat awkwardly expressed, but with sufficient certainty to gather the meaning of the parties from a consideration of the entire deed, which we are enjoined to do. Gudger v. White, 141 N. C. 513, 54 S. E. 386; Triplett v. Williams, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514; Beacom v. Amos, 161 N. C. 357, 77 S. E. 407. This doctrine applies to a covenant as to other contracts, and the intention of the parties, if discernible, will control in determining its meaning, which should be gathered from the entire

instrument. 11 Cyc. 1051; A. K. & N. R. Co. v. McKinney, 124 Ga. 929, 53 S. E. 701, 6 L. R. A. (N. S.) 436, 110 Am. St. Rep. 215; Empire Bridge Co. v. Larkin Soap Co., 59 Misc. Rep. 46, 109 N. Y. Supp. 1062; Godfrey v. Hampton, 148 Mo. App. 157, 127 S. W. 626. What was clearly meant in this case is that the words restrictive of the general warranty should apply only to the Saundersons, for otherwise the first and last parts of the covenant of warranty cannot be reconciled.

No error.

(168 N. C. 281)

## FEREBEE v. BERRY. (No. 22.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

1. APPEAL AND ERROR ⟸1053 — REVIEW — HARMLESS ERROR.

In an action for breach of contract, where the award of damages was less than defendant's own evidence warranted, the erroneous admission of evidence on the question of damages was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178–4184; Dec. Dig. ⟸1053.]

2. EVIDENCE ⟸525—MARKET PRICE—ADMISSIBILITY.

Opinion evidence as to the market price of a commodity, as potatoes, based on information from a competent source, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2333; Dec. Dig. ⟸525.]

3. EVIDENCE ⟸323 — ADMISSIBILITY — MARKET PRICE.

Market reports properly compiled and published in newspapers relied on by the commercial world are admissible to show market value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1214–1217; Dec. Dig. ⟸323.]

4. EVIDENCE ⟸525 — ADMISSIBILITY — MARKET VALUE.

A witness testifying to the market value of a commodity need not be exact; it being sufficient if he testify that the price was above a certain figure.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2333; Dec. Dig. ⟸525.]

5. APPEAL AND ERROR ⟸206—REVIEW—EXCEPTIONS.

The admission of an incompetent and unresponsive answer cannot be reviewed where no exception was taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1273, 1283–1289; Dec. Dig. ⟸206.]

Appeal from Superior Court, Currituck County; Carter, Judge.

Action by Philip N. Ferebee against W. S. Berry. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought by the plaintiff to recover damages for a breach of a contract to sell and deliver to him 300 barrels in which to pack and ship his crop of potatoes. He alleges that, by reason of the breach, he sustained a loss of $500 by a decline in the price of potatoes. The jury assessed his damages at $100, and from a judgment upon the verdict the defendant appealed.

Aydlett & Simpson, of Elizabeth City, for appellant. Ward & Thompson, of Elizabeth City, for appellee.

WALKER, J. (after stating the facts as above). [1] The only exceptions relate to the admission of evidence as to the market value of the potatoes and the fall in the price, but, upon an examination of the case, we find that the jury have really awarded less damages than were warranted by the defendant's own testimony in regard to this matter, and therefore, if error was committed, which we do not concede, it was harmless. He cannot reasonably complain that the jury has accepted and acted upon his own figures and has even given less than they would justify for the delay in delivering 200 of the barrels and the refusal to deliver the other 100. We have recently said that, if the error has worked no wrong or prejudice to the appellant, it would be vain to reverse the judgment. To quote the language in State v. Smith, 164 N. C. at page 480, 79 S. E. at page 982, which is very pertinent to this question:

"The foundation of the application for a new trial is the allegation of injustice, and the motion is for relief. Unless, therefore, some wrong has been suffered, there is nothing to be relieved against. The injury must be positive and tangible, not theoretical merely. For instance, the simple fact of defeat is, in one sense, injurious, for it wounds the feelings. But this alone is not sufficient ground for a new trial. It does not necessarily involve loss of any kind, and without loss or the probability of loss there can be no new trial. The complaining party asks for redress; for the restoration of rights which have first been infringed and then taken away. There must be, then, a probability of repairing the injury; otherwise the interference of the court would be but nugatory. There must be a reasonable prospect of placing the party who asks for a new trial in a better position than the one which he occupies by the verdict. If he obtain a new trial, he must incur additional expense, and if there is no corresponding benefit, he is still the sufferer. Besides, courts are instituted to enforce right, and restrain and punish wrong. Their time is too valuable for them to interpose their remedial power idly, and to no purpose. They will only interfere, therefore, where there is a prospect of ultimate benefit.

See, also, Webb v. Telegraph Co. (at last term) 83 S. E. 568.

[2] It was proper for the plaintiff, testifying in his own behalf, to state his opinion of the price which was based on information derived from competent sources. 16 Cyc. 1142, 1143; Smith & Melton v. Railroad Co., 68 N. C. 107; Fairley v. Smith, 87 N. C. 367, 42 Am. Rep. 522; Suttle v. Falls, 98 N. C. 393, 4 S. E. 541, 2 Am. St. Rep. 338.

[3] And market reports, properly compiled and published in such newspapers as the commercial world relies on in the conduct of business and important affairs, are admissible as evidence of market values. Moseley v. Johnson, 144 N. C. 257, 56 S. E. 922.

[4] It was not required that plaintiff should be exact in stating the market price. He testified that potatoes were selling for more than

$3 per barrel. This fixed the price at least at $3, and was properly submitted to the jury.

[5] The answer of W. O. Ferebee was not responsive to the question put to him, and if the answer was incompetent there was no exception to it, as there should have been. Peyton v. Shoe Co. (at last term) 83 S. E. 487. But the answer, of itself, appears to be unobjectionable, as we must infer from the form and substance of the answer that the witness was speaking of his own knowledge. But, as we have said, if there was error in any of the rulings upon the evidence, no harm has befallen the defendant, as the verdict is correct in any view of the evidence, and it seems to fall below the amount which the undisputed facts justified.

No error.

(168 N. C. 257)

## CAHOON v. BRINKLEY. (No. 11.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

1. DISMISSAL AND NONSUIT ⟸19—VOLUNTARY NONSUIT—RIGHT OF PLAINTIFF TO TAKE.

Where, in an action for conversion of property covered by a chattel mortgage, defendant pleaded payment and prayed for the cancellation of the mortgage, there was no counterclaim or demand for affirmative relief preventing plaintiff from taking a voluntary nonsuit, as, even though the cancellation of chattel mortgages on the record as in the case of real estate mortgages is required or authorized, a decree that the debt was paid would automatically discharge and release the security, especially where no issue was tendered by defendant or submitted to the jury based upon any counterclaim.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 33–36; Dec. Dig. ⟸19.]

2. DISMISSAL AND NONSUIT ⟸7—VOLUNTARY NONSUIT—RIGHT OF PLAINTIFF TO TAKE.

On a trial after the jury had been out for several hours they were called into the jury box and stated that they had not agreed on certain issues, and were then asked whether they thought by staying together a few minutes longer they could agree on any of such issues, to which one juror replied that he thought they all had agreed or could agree on the first issue. The court then told them to go to their room and write the answer to that issue if they had agreed or could agree. Plaintiff then attempted to take a nonsuit, but the court denied his right to do so. *Held* that, there having been no properly pleaded counterclaim, plaintiff had a right to submit to a nonsuit, and the court erred in denying such right, as the jury had not agreed on any issue, and no verdict had been rendered on either issue.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 15–19, 22; Dec. Dig. ⟸7.]

Appeal from Superior Court, Washington County; Bond, Judge.

Action by J. B. Cahoon against D. O. Brinkley. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

The complaint alleged the execution by the Plymouth Brick & Tile Manufacturing Company of a note and chattel mortgage, an assignment to plaintiff, nonpayment thereof, and that defendant wrongfully took possession of the property covered by the mortgage, sold it, and converted the proceeds to his own use. The answer alleged payment of the note and chattel mortgage, that the mortgage should have been marked paid and canceled, but that this had not been done, and prayed that the pretended lien and note be marked paid and canceled.

This action was tried and submitted upon these issues:

(1) Did the Plymouth Brick & Tile Manufacturing Company own the property described in complaint when the note and paper for $325 was given to A. L. Owens? Answer: No.

(2) Has the $325 note, given to A. L. Owens, been paid or discharged? Answer:

(3) Did the plaintiff and E. P. Cahoon fraudulently conspire together to hold said Owens' note and purported mortgage as the property of J. B. Cahoon, after it had been paid, or discharged to defeat the claim of D. O. Brinkley? Answer:

(4) Was the property described in said paper made to A. L. Owens worth, when D. O. Brinkley sold it, as much as the amount of said Owens' note and interest on it? Answer: Yes.

(5) Was the paper writing made to A. L. Owens by said Plymouth Brick & Tile Manufacturing Company so executed, probated, and registered as to make it a valid lien on the property, if said Manufacturing Company owned the property at time such paper was given? Answer: No.

(6) What sum, if anything, is plaintiff entitled to recover of defendant, D. O. Brinkley? Answer: Nothing.

The plaintiff appealed.

Gaylord & Gaylord, of Plymouth, for appellant. Ward & Grimes, of Washington, N. C., and W. M. Bond, Jr., of Plymouth, for appellee.

BROWN, J. The first assignment of error is because the court refused to allow the plaintiff to submit to a voluntary nonsuit. The facts are as follows:

The jury retired to the jury room about 5:30 p. m. and stayed out until about 9 p. m. They were then called into the jury box in presence of counsel for both sides about 9 p. m., and, when called in, were asked by the court if they had agreed on the first three issues, and they answered, "No." The court then asked if they thought by staying together in the jury room a few minutes longer they could agree on any one of the three. One juror replied he thought they all had agreed, or could agree on the first issue. The court told them to go to their room and write the answer to the first issue if they had agreed or could agree. They started toward the jury room, and the counsel for the plaintiff arose and said the plaintiff would take a nonsuit. Defendant objected, and further stated that they had pleaded a counterclaim and demand for affirmative relief, that the plaintiff's claim, etc., be canceled, and the court said it would deny right to nonsuit

under the circumstances, and the plaintiff excepted.

[1] We think this was error. The answer of the defendant, as we read it, sets up practically a plea of payment, which, if found in favor of the defendant, automatically cancels the note and the security. We have not been cited to any statutory provision which authorizes or requires the cancellation of chattel mortgages on record, as is provided in the case of mortgages upon real estate. Even if there is such a provision, when the debt is decreed by the judgment of the court to be paid, the security for the debt is automatically discharged and released. Besides, there was no issue tendered by the defendant, or submitted to the jury based upon any counterclaim.

[2] The plaintiff had a right to submit to a judgment of nonsuit, inasmuch as no verdict had been rendered. It is to be noted that the jury in this case had not agreed on any one issue, and no verdict had been rendered on either issue. Under such circumstances, it is well settled, in the absence of a properly pleaded counterclaim, that the plaintiff had a right to submit to a nonsuit and go out of court. Strause v. Sawyer, 133 N. C. 64, 45 S. E. 346; Sharpe v. Sowers, 152 N. C. 379, 67 S. E. 1003.

The judgment of the superior court is reversed, and the cause is remanded, with instructions to enter a judgment of nonsuit.

Reversed.

(169 N. C. 263)

STATE v. ETHERIDGE et al. (No. 58.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

MASTER AND SERVANT ⟸343 — ENTICING SERVANT TO LEAVE—CROPPER.

One under contract to work a crop for a landowner, who is to furnish the land, team, and implements, and receive one-half the crop, and is to work for the owner when not working on the crop, is a cropper, and not a servant, so that one who entices him away from the owner is not guilty of enticing a servant to leave his master contrary to Revisal 1905, § 3365.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1288; Dec. Dig. ⟸343.]

Appeal from Superior Court, Edgecombe County; Ferguson, Judge.

Ransom Etheridge and another were convicted of enticing a servant to leave his master, and they appeal. Reversed, and prosecution dismissed.

The contract between the prosecutor and Frank Battle, the alleged servant, as testified to by the prosecutor, was that Battle was to live with the prosecutor and work a crop, and while he was not working on the crop he was to work with prosecutor for wages. Prosecutor was to furnish the land, team, farming implements, feed, and half the fertilizer, and was to be paid half the crop.

G. M. T. Fountain & Son, of Tarboro, for appellants. Attorney General Bickett and T. H. Calvert, Asst. Atty. Gen., for the State.

WALKER, J. The defendants were indicted, under Revisal, § 3365, for enticing one Frank Battle, a servant, to leave his master, who, it is alleged, was J. R. Bunting, the prosecutor. It will be necessary to consider only one exception of the defendants, who were convicted below and appealed. They contend that the evidence showed that Frank Battle was not a servant, but either a tenant or a cropper, and, if either, they are not indictable, even if it is true that they had induced him to leave his alleged employer. As we are of the opinion that the position is well taken that Frank Battle was not a servant, and that defendants, therefore, were not indictable for enticing him from the service of J. R. Bunting, they are entitled to a dismissal, even if their other exceptions are not valid. The facts are substantially like those in State v. Hoover, 107 N. C. 795, 12 S. E. 451, 10 L. R. A. 726, where the present Chief Justice says:

"The contract, as testified to by the prosecutor, was as follows: 'Jackson was to cultivate certain of the prosecutor's land, amounting to about eight or nine acres, for the year 1890, and pay him as rental the sum of $33, or one 400-pound bale of cotton, with the understanding that Jackson was to work for the prosecutor whenever he needed Jackson, and he (Jackson) could leave his own crop, at fifty cents a day.' We think the relation of master and servant did not exist, for the reason that Jackson was not in the employment of the prosecutor. The relation between them was that of landlord and tenant. One of the terms or stipulations of the renting was that, in addition to the rent paid, Jackson, whenever at leisure, if called upon by the landlord, should work for him at fifty cents a day. It has been held that where A. employs B. to labor for him for one year at $20 per month, and gives him the use of a dwelling during the term, B.'s occupancy of the dwelling is that of a servant, and not as a tenant, and if he quits A.'s service, or is discharged, A. may enter and forcibly eject him. Wood's Master and Servant, § 153, and cases there cited. The reason is that the contract is that of hiring, and the use of the house is a part of the hire, or an incident of the contract. E converso, here the contract is that of renting and the promise by the tenant to do labor when at leisure, if it is wanted by the landlord, is a mere incident of the contract of renting. The court below erred, therefore, in instructing the jury that 'the contract, as sworn to by the prosecutor, gave him the right to demand the services of Jackson every day if he chose to, and the man who took him away was guilty of violating the statute.'"

The statute itself (Revisal, §§ 1993, 3365, 3366) seems to recognize the clear distinction between a tenant or cropper on the one side and a mere servant, employed to do certain work for hire, and remedies, both civil and criminal, are provided to enforce the rights of the landowner against the defaulting tenant or cropper. A case very much in point is Barron v. Collins, 49 Ga. 580, which was an action against the defendant for enticing one

Charles Barron, a cropper, from the plaintiff's service, and it was held that, it not being a contract of service, the demurrer to the declaration was properly sustained. We have never understood that, in law, either a tenant or a cropper is the servant of the landowner. So far as an indictment of this kind is concerned, there is no essential difference between a tenant and a cropper. The mere fact that the tenant pays rent and has an interest in the land, and a cropper only an interest in the crop which is grown upon the land, when the latter furnishes the labor, his own and that of others, and pays half the expense of making the crop, does not so differentiate the two cases as to make the cropper indictable when the tenant would not be. A tenant and cropper are more independent of the landowner than is a servant, and neither owes him the duty of allegiance or of rendering service, as growing out of their relation to him.

The Attorney General very frankly admitted that the prosecution could not be sustained. We may remark that Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780, was an action at common law for maliciously—that is, without lawful justification—inducing laborers to break their contract and quit the service of their employer, and stands upon a ground and is upheld for a reason altogether different from any that we can possibly apply to these facts. The case, when properly considered, is really an authority for the position that defendants were not indictable in this case. The dissenting opinion of Justice Reade draws the distinction very sharply and properly between a mere servant and a tenant or cropper, although we may not assent to his individual conclusion. Nor do we think the difference between the two relations which he defines so clearly does, in any sense, conflict with the decision of the majority.

The motion for judgment of nonsuit should have been granted, and there was error in refusing it. It will accordingly be entered in the court below, and the prosecution dismissed.

Reversed.

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(168 N. C. 242)

## BOWEN v. DAUGHERTY et al. (No. 26.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

1. HUSBAND AND WIFE ⟸19—NECESSARIES OF WIFE—LIABILITY OF HUSBAND—NECESSARIES.

At common law a husband was liable for the funeral expenses of his deceased wife and for necessaries furnished to her during their married life, including the cost of clothing, food, ordinary household supplies, medical attendance, expenses of sickness, and articles of comfort suitable to the condition and style in which the parties were accustomed to live.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 109, 121–138, 142, 146, 322; Dec. Dig. ⟸19.]

2. HUSBAND AND WIFE ⟸151—NECESSARIES OF WIFE—LIABILITY OF WIFE.

At common law neither a wife nor her estate was liable for necessaries furnished to her or for her funeral expenses, though courts at times enforce such claims against her estate on equitable principles.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 582–595, 599; Dec. Dig. ⟸151.]

3. HUSBAND AND WIFE ⟸152—NECESSARIES OF WIFE — LIABILITY OF HUSBAND — STATUTE.

Under Laws 1911, c. 109, authorizing a married woman to contract as if she were unmarried, a married woman or her estate after her death is liable for her express contract, or in the common counts in assumpsit when goods are furnished on her credit.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 596–602; Dec. Dig. ⟸152.]

4. HUSBAND AND WIFE ⟸19 — NECESSARIES OF WIFE — LIABILITY OF HUSBAND — STATUTE.

Where there was no express promise by a wife or circumstances showing that the expenses of her last sickness and her funeral expenses were furnished on her credit, or that of her estate, the husband was primarily liable therefor, and the estate of the wife could not be charged with claims for such expenses if they could be collected from the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 109, 121–138, 142, 146, 322; Dec. Dig. ⟸19.]

5. HUSBAND AND WIFE ⟸151—NECESSARIES OF WIFE—LIABILITY OF WIFE—STATUTE.

Revisal 1905, § 87, providing for the order of the payment of claims against the estate of a decedent, was designed only to fix the order of such payment, and does not render a married woman's estate liable for necessaries furnished during her last sickness and for her funeral expenses, which otherwise would be a debt of the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 582–595, 599; Dec. Dig. ⟸151.]

Appeal from Superior Court, Washington County; Bond, Judge.

Petition by G. W. Bowen, as administrator of Deborah Stocks, against E. L. Daugherty and others, to sell land for assets. Cause transferred to civil issue docket on denial of all indebtedness. From a verdict establishing the indebtedness and a judgment directing the sale, defendants appeal. Reversed.

On the hearing it was properly made to appear:

That Mrs. Deborah Stocks, formerly the wife of John Stocks, died intestate December, 1913, leaving a tract of land and very little or no personal property, and that petitioner, G. W. Bowen, duly qualified as administrator, and instituted present proceedings to sell her land for assets to pay debts.

That claims had been presented amounting to more than $300, consisting of funeral and burial expenses, tombstone, doctor's bills and nursing, during her last illness, the latter part of 1913, from September to December 31st.

"Third. That all of the said accounts were made since an act was passed giving married women the right to contract and were made between September, 1913, and December 31, 1913,

the period covered by the last illness of the said Mrs. Stocks.

"Fourth. That, at the time of the death of Mrs. Stocks and during the time that said accounts were contracted, the said Mrs. Stocks and her husband were living together as man and wife, and the said Mr. Stocks was at home during said period.

"Fifth. John Stocks, husband of Deborah Stocks died shortly after the death of Deborah Stocks, leaving a last will and testament by which he devised and bequeathed all of his property to Mrs. Kitty Brown (one of the claimants) for life, and after her death to the children of Mrs. Kitty Brown, and appointed Mrs. Kitty Brown executrix, and that the said Mrs. Kitty Brown has duly qualified as executrix of said will.

"Sixth. That Mrs. Deborah Stocks did not leave sufficient personal property to pay the claims above referred to, but did leave sufficient real estate if her estate is liable therefor.

"Seventh. That John Stocks, her husband, left sufficient property to pay all of the above claims, if they are properly chargeable against his estate, in addition to all other debts of his estate.

"Eighth. That all of the items in all of the above claims were necessary to the comfort, the proper care and proper apparel of the deceased lady, and that the amount due the two Mrs. Browns, if anything, for nursing, were also necessary for the comfort and proper care of the said Mrs. Stocks during her illness.

"Ninth. That Mrs. Deborah Stocks left no children, but did leave sisters, nephews, and nieces, all of whom have been properly made parties defendants to this proceeding.

"Tenth. That there was no evidence of any express contract on the part of Mrs. Stocks for any of the supplies, etc., or medical attention, etc., nursing, etc., represented by the claims filed."

On these facts, the court below being of opinion that the real estate of the deceased wife was liable, there was verdict establishing indebtedness, and judgment directing that the clerk proceed accordingly in the proper administration of the estate. Defendants, having duly excepted, appealed.

Rouse & Land and E. R. Wooten, all of Kinston, for appellants. Louis W. Gaylord, of Plymouth, for appellee.

HOKE, J. [1] At common law the husband was liable for the funeral expenses of his deceased wife and for "necessaries" during their married life; the term including "the cost of clothing, food, ordinary household supplies, medical attendance, expenses of sickness, etc., as well as articles of comfort suitable to the condition and style in which the parties were accustomed to live." Smyley v. Reese, 53 Ala. 89, 25 Am. Rep. 598; Ketterer v. Nelson, 146 Ky. 7, 141 S. W. 409, 37 L. R. A. (N. S.) 754; Estate of Eva Waesch, Deceased, 166 Pa. 204, 30 Atl. 1124; Cunningham v. Irwin, 7 Serg. & Rawle (Pa.) 247, 10 Am. Dec. 458; Sears v. Giddey, 41 Mich. 590, 2 N. W. 917, 32 Am. Rep. 168; Stonesifer v. Shriver, 100 Md. 24, 59 Atl. 139; 21 Cyc. pp. 1219–1224.

[2] As a general rule, neither the wife nor her estate was legally liable for such claims, though courts, empowered to administer her estate on equitable principles, have enforced them in certain instances (In re McMyner, L. R. 1886, Chan. Div. 575), a position which has been allowed to obtain in this country where the husband has failed to pay and being insolvent payment from him or his estate could not be enforced (Carpenter v. Hazelrigg, 103 Ky. 538, 45 S. W. 666; Gould v. Moulahan, 53 N. J. Eq. 341, 33 Atl. 483; Fogg v. Holbrook, 88 Me. 169–180, 33 Atl. 792, 33 L. R. A. 660, and note).

This being the law formerly existent here, the Legislature (chapter 109, Laws 1911) enacted the statute known as the "Martin Act," and which provided, in effect, that except in conveyances of her real estate and in case of contracts with her husband, a married woman was authorized to contract and deal as if she were unmarried, and it is chiefly contended that, under and by virtue of the provision of this statute, the wife and her estate have become absolutely and primarily liable for the claims filed in this proceeding.

[3] The law having removed the inability of married women, in ordinary instances, to bind themselves by contract, they can be held liable under their express agreement and when the goods are sold to them on their credit. This was held, at the last term, in Lipinsky v. Revell, 83 S. E. 820, and undoubtedly in proper instances married women may now be held liable in the common counts in assumpsit. Hinkson v. Williams & Williams, 41 N. J. Law, 35; Ackley v. Westervelt, 86 N. Y. 448; Stewart on Husband and Wife, §§ 375, 381.

[4] But, in the absence of such express promise and of any evidence tending to show that credit was given to her or of any facts or circumstances to make her exclusively or primarily liable under the general equitable principles of indebitatus assumpsit, we see no reason, before or since the statute, why a debt of the husband should be imputed to the wife. True, the general rule is that, when goods are supplied or services rendered by one person for another, the law implies a promise to pay what they are reasonably worth, but the principle, in our opinion, should not control when the goods were acquired or services rendered under circumstances which created a recognized liability in some one else. In such case there should be additional proof showing an express promise, or, as stated, facts and circumstances bringing the demand under the equitable principles of indebitatus assumpsit. This, we think, is the correct view as to the effect of the statute in such cases, and the position is in accord with authoritative decisions on the subject in other states. Moore v. Copely, 165 Pa. 294, 30 Atl. 829, 44 Am. St. Rep. 664; Nelson, Adm'r, v. Spaulding, 11 Ind. App. 453, 39 N. E. 168; Nelson, Adm'r, v. O'Neal, 11 Ind. App. 296, 39 N. E. 207; Wilson v. Herbert, 41 N. J. Law, 454, 32 Am. Rep. 243.

[5] We are aware of a number of decisions by courts of eminent ability and learning

to the effect that the estate of the deceased wife is primarily liable on claims of this kind by reason of their statutes as to the proper administration of estates, and which provide, in differing terms, that debts for funeral expenses, medical bills, and services within a stated period, etc., shall be paid, etc. Estate of Skillman, 146 Iowa, 601, 125 N. W. 343, 140 Am. St. Rep. 295; Schneider v. Breier's Estate, 129 Wis. 446, 109 N. W. 99, 6 L. R. A. (N. S.) 917; Constantinides v. Walsh, 146 Mass. 281, 15 N. E. 631, 4 Am. St. Rep. 311; McClellan v. Filson, 44 Ohio St. 184, 5 N. E. 861, 58 Am. Rep. 814.

It may be that, owing to special phraseology of these statutes, a position of that kind can be upheld, but, so far as our own enactment is concerned (Revisal 1905, § 87), we do not hesitate to hold that the statute is only designed to recognize priorities and to establish the order of payment as between claimants who have valid debts against the estate, and was never intended by the lawmakers to create a liability which did not otherwise exist.

As heretofore stated, if the husband, liable for indebtedness of this kind, should fail to pay, or, his estate being insolvent, payment could not be enforced, authority is to the effect that an equity might arise to the creditor enabling him to collect from the wife's estate, but otherwise, and except under conditions formerly referred to, the debt is, and continues to be, that of the husband, and enforceable against him or his estate.

From the case on appeal it appears that all of these claims are for funeral expenses or for necessaries, and that these last were supplied to the wife when she was living with her husband, and without any express promise on her part to pay for same, and, further, that the husband died shortly after the wife, leaving an estate sufficient to pay all of his debts, including those involved in this proceeding, and that he devised his property to Kitty Brown for life, and, after her death, to her children, she being one of the principal claimants against the wife's estate.

Applying the principles as above stated, we are of opinion that there was error in holding the wife's estate liable, and the judgment to that effect must be reversed.

Reversed.

BROWN, J., did not participate in the decision of this case.

CLARK, C. J. (concurring). The statute (chapter 109, Laws 1911) known as the "Martin Act" in no wise enlarges or restricts the common-law liability of the husband for the support of his wife. While that statute authorizes a married woman to contract and deal as if she were unmarried, and while chapter 13, Laws 1913, authorizes her to receive and collect her earnings and damages for wrongs done her, either to her person or property, neither of these acts relieves her husband of his common-law liability for her support nor renders her liable for them, except in such cases as she shall have bought them upon her own responsibility. The husband does not become liable as surety for his wife's contract, nor responsible for debts contracted by her except for her support, as above stated. And she is not made responsible for articles bought for such support except where by contract, express or by such conduct as leads the seller reasonably to understand that she is assuming individual responsibility. In the latter case the husband would still remain liable, and the seller can recover against either or both.

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(168 N. C. 283)

## BARTLETT v. ROANOKE R. & LUMBER CO. (No. 13.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

1. DEEDS ⟸38 — DESCRIPTION — EXCEPTIONS FROM — CONVEYANCE OF UNDESIGNATED PART OF TRACT—EFFECT.

Where a deed purported to pass title to "a certaine * * * parcel of undividede swamp land lying in the county of Camdene," the description concluding, "to have and to hold one hundred and ninety-eight of the above bounded swamp land, the whole of which contains 398 acres, one hundred acres of which Thomas Roberts owns next to Bear Head and one hundred acres not divided, Wilson B. Webster owns," the conveyance was of the whole tract subject to two exceptions, failure to locate which through indefiniteness of expression would, at most, only defeat them, not the plain conveyance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65–79; Dec. Dig. ⟸38.]

2. DEEDS ⟸136 — CONSTRUCTION — TENANCY IN COMMON.

Where a deed conveyed 298 acres, with the exception of 100 acres previously conveyed to another grantee, merely as an undivided part of the tract, the two grantees became tenants in common of the land; one holding an undivided 100/298 interest therein, and the other the remainder.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 372, 431–433; Dec. Dig. ⟸136.]

Appeal from Superior Court, Camden County; Carter, Judge.

Ejectment by D. F. Bartlett against the Roanoke Railroad & Lumber Company. Nonsuit directed, and plaintiff appeals. Reversed.

The plaintiff claims under a deed from Justin B. Jacobs to Thomas Standley, made in 1832, the description in which is as follows:

"A certaine peice or parcel of undividede swamp land lying and being in the county of Camdene and state of North Carolina and bounded as follows: Beginning at a maple, then S. 45 degrees W. 60 chains; N. 45 degrees W. 10 chains; S. 18 degrees W. 19 chains; S. 44 degrees E. 10½ chains; E. 80 chains, from thence to the first station to have and to hold

one hundred and ninety-eight acres of the above bounded swamp land, the whole of which contains 398 acres, one hundred acres of which Thomas Roberts owns next to Bear Head and one hundred acres not divided, Wilson B. Webster owns. To have and to hold the said premises free and clear of all encumbrances to him the said Thomas Standley, his heirs and assigns forever and the said Justin B. Jacobs doth agree to warrant and defend the said premises free and clear from the claim or claims of every person."

These lands are swamp lands. The court, being of opinion that the land was not sufficiently described, directed a nonsuit, and the plaintiff appealed.

Worth & Pugh and Ward & Thompson, all of Elizabeth City, for appellant. Aydlett & Simpson, of Elizabeth City, for appellee.

CLARK, C. J. The plaintiff contends that the deed is good to convey the land therein described. The defendant relies on Cathey v. Lumber Co., 151 N. C. 592, 66 S. E. 580, and cases therein cited, and Higdon v. Howell, 167 N. C. 455, 83 S. E. 807. But this case is very different from those cited. In Cathey v. Lumber Co., supra, the recital was "324 acres" out of a larger tract of land. There was no reference to any description more definite, and the court said:

"The question as to whether the grantors in this deed * * * intended to convey the whole boundary, containing 724 acres, is set at rest by reference, not alone to the descriptive words, but to the language of the habendum, 'to have and to hold the aforesaid 327 acres, being a part of the aforesaid tract of land.'"

To same purport Higdon v. Allen, supra.

[1] Giving this deed a reasonable construction, according to the intent of the parties, as we gather it from the four corners, it means that Jacobs sold and conveyed "to Thomas Standley and his heirs the whole tract of land in question (the description of the entire boundary being given) except 100 acres which Thomas Roberts owns next to Bearhead and 100 acres not divided which Wilson B. Webster owns." The description of the entire tract is given, and the entire tract is conveyed, with the exceptions set out. If those exceptions are not sufficiently definite, the entire tract went to Standley and his heirs. The "100 acres which Thomas Roberts owns next to Bearhead" evidently refers to that quantity of land which had theretofore been conveyed to said Roberts, and which could be made definite by reference to his deed.

[2] The "100 acres not divided which Wilson B. Webster owns" also evidently refers to an undivided interest or right theretofore conveyed to Wilson B. Webster, to be set apart and allotted in the 298 acres which remained after the conveyance of the 100 acres to Roberts. If the conveyance of the "undivided 100 acres" to Wilson B. Webster is too indefinite to be valid, then that interest falls in. If it is conveyed validly, then Webster is tenant in common with the plaintiff. The plaintiff in that case has $^{198}/_{298}$ of the land, and Webster has an undivided $^{100}/_{298}$ thereof. In Waugh v. Richardson, 30 N. C. 472, it is said:

"When the grant clearly identifies the thing granted, it must pass all of it that is not properly and sufficiently excepted. The granting part of the deed is not avoided by a defect in the exception, but the exception itself becomes ineffectual thereby, and the grant remains in force."

In McCormick v. Monroe, 46 N. C. 14, it is said:

"Where there is an exception in a grant, the onus of the proof lies upon the party who would take advantage of that exception."

In this case the description of the tract conveyed is neither vague nor indefinite. If there is any vagueness and want of clearness, it is in the exceptions. The conveying clause governs, and the attempt in the habendum to except the Roberts and Wilson interests cannot defeat the conveyance. The failure to locate the tracts excepted in the habendum will invalidate only the exceptions, and not the conveyance to Standley, under which the plaintiff claims.

Reversed.

(168 N. C. 285)

## CASEY et al. v. DARE COUNTY et al.
(No. 14.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

1. SCHOOLS AND SCHOOL DISTRICTS ⇐111—SCHOOL BONDS—ISSUANCE—COLLECTION OF TAX—INJUNCTION—PARTIES.

Under Priv. Laws 1913, c. 120, providing that the county board of education of D. county may issue bonds to erect a school building in district No. 17, and that the board of commissioners of said county shall levy a tax to pay the bonds at maturity, the board of education was a proper and necessary party to a suit to restrain the issuance of the bonds and levy of the tax.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 265–268; Dec. Dig. ⇐111.]

2. SCHOOLS AND SCHOOL DISTRICTS ⇐97—SCHOOL BONDS—ISSUANCE—ELECTION—REGISTRATION.

Under Priv. Laws 1913, c. 120, authorizing the Board of Education of D. county to issue school bonds, section 3 providing that all voters in the district shall be required to register according to the registration laws governing the election of members of the General Assembly before being permitted to vote at the election, it was not necessary to conduct a new registration for such election, but the registration books used at the last general election could be properly used.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 224–232; Dec. Dig. ⇐97.]

3. SCHOOLS AND SCHOOL DISTRICTS ⇐97—BOND ISSUE—ELECTION—IRREGULARITIES.

That during registration for a school district bond issue election the registrar was improperly absent from his duties during some of the days when he should have been present, that some names were put on the registration books

by an unauthorized person, and the registrar erroneously struck off a few of the names because he was informed that such persons would not be present on election day and vote, were irregularities which did not avoid the election, in the absence of evidence that they changed the result.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 224–232; Dec. Dig. ⟸97.]

4. SCHOOLS AND SCHOOL DISTRICTS ⟸97—BOND ISSUE—ELECTION—CANVASS—DECLARATION OF RESULT.

Failure to canvass the votes at a school district bond issue election and to declare the result as required by law is a fatal defect.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 224–232; Dec. Dig. ⟸97.]

5. SCHOOLS AND SCHOOL DISTRICTS ⟸97—BONDS—ELECTION—VALIDITY—INJUNCTION.

The validity of a school district bond issue election will not be determined on mere suggestion and affidavits in injunction proceedings, unless it clearly appears and is practically not denied that such irregularities so entered into the election as to render it void.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 224–232; Dec. Dig. ⟸ 97.]

6. SCHOOLS AND SCHOOL DISTRICTS ⟸97—BOND ISSUE—ELECTION.

Under Priv. Laws 1913, c. 120, authorizing the issue of bonds for the erection of a school building in district No. 16 in D. county after ratification at an election to determine the amount of the bonds to be issued, the date of maturity and the rate of tax to be levied, the taxpayers were not only entitled to vote on the question whether the bonds should be issued, but on the amount, date of maturity, and the rate of tax.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 224–232; Dec. Dig. ⟸97.]

Appeal from Superior Court, Dare County; Carter, Judge.

Action by John W. Casey and others against Dare County and others to restrain the issuance of certain school bonds and the levy and collection of a special tax to pay interest on the same. Order restraining the collection of the special tax until the final hearing was continued, but injunction prohibiting the issuance of the bonds was dissolved, and plaintiffs appeal from the latter order. Reversed.

W. S. Baily, of Manteo, and Aydlett & Simpson, of Elizabeth City, for appellants. Ward & Thompson, of Elizabeth City, B. G. Crisp, of Manteo, and Ehringhaus & Small, of Elizabeth City, for appellees.

BROWN, J. [1] The first exception is to the order permitting the board of education of Dare county to come in and make itself a party defendant. The said board was not only a proper but a necessary party to this action, and it would have been error in the judge to have prevented their entry into the case. The act of 1913 (Public, Local and Private Laws, c. 120) provided that:

"The county board of education of Dare county shall be authorized to issue bonds for the purpose of erecting a school building in district No. 17 of Dare county, * * * and that the board of commissioners of said county shall levy a tax not to exceed fifty cents on each one hundred dollars worth of property and one dollar and a half on each taxable poll in said district, for the purpose of paying the said bonds at maturity."

The act further provides that:

"An election shall be held upon the request of the board of education to be ordered by the commissioners of the said county for the purpose of determining the amount of said bonds to be issued, the date of maturity of the same, and the rate of tax to be levied."

The act further provides that:

"At said election five freeholders living in the said district shall be named as trustees, and under the supervision of said trustees the school building herein provided for shall be erected, etc."

It is thus seen from the very language of the act that the board of education alone is authorized to issue the bonds, while the commissioners of the county are compellable to levy the tax. That being so, the board of education is an absolutely necessary party to this proceeding, the purpose of which is to enjoin the issuance of the bonds as well as the levy and collection of the tax.

[2] There are several grounds set up in the complaint for the purpose of attacking the validity of the bonds. It is contended that under the act a new registration was necessary in order to give validity to the election. Section 3 of the act provides:

"That all voters in said district shall be required to register in accordance with the registration laws governing the election of members of the General Assembly before being permitted to vote in said election."

This section does not require a new registration, but authorizes the election to be conducted in all respects as the election for members of the General Assembly. That being so, it was proper to use the registration books which had been used in the last general election instead of ordering a new election.

The plaintiff alleges that this election was held on the 28th of July, 1914, and that there was no registrar, as provided in the said act; that those who voted in the said election, or a large majority thereof, were not duly registered; that many of the names on the registration books were placed there by others than the voters; that names were placed on the books when voters were not present; that the registrar did not register any qualified voters, as provided by the act; that the one who acted as registrar had no right to do so, and was not authorized according to law; that those who acted as judges of the election were not appointed by any one who had the right to do so; that at the pretended election the registrar and the judges of the election did not make the canvass of the voters and sign and make the returns as provided by law; that no board or persons in authority have canvassed the re-

turns and declared the result of the election; that one of the judges of the election was a candidate for the office of trustee under the said act.

There are no findings of fact made by the judge, but several affidavits are set up in the record tending to support some of these charges, which are denied by the defendants, both in their answer and in the affidavits filed. The charge that no registrar was appointed, in accordance with the general election laws of the state, does not seem to be sustained. The evidence shows that the registrar in this case was not only de facto, but really de jure. Norfleet v. Staton, 73 N. C. 546, 21 Am. Rep. 479; Van Amringe v. Taylor, 108 N. C. 196, 12 S. E. 1005, 12 L. R. A. 202, 23 Am. St. Rep. 51.

[3] It is true that the registrar was absent from his duties some days when he should not have been absent, and that some names were put upon the registration books by an unauthorized person, and it is further in evidence that the registrar erroneously struck off a few names from the registration books because he had been informed that they would not be present on election day and vote. This, of course, was erroneous; but it does not necessarily invalidate the election, and, before the plaintiff could enjoin permanently the issuance of the bonds, he would have to prove that these irregularities changed the result of the election. An irregularity in the conduct of an election, which does not deprive a voter of his rights, or even admits a disqualified person to vote, but which casts no uncertainty on the result, will be overlooked when the only question is as to whether the proposition was carried by the requisite legal majority. De Berry v. Nicholson, 102 N. C. 465, 9 S. E. 545, 11 Am. St. Rep. 767.

We find in the allegations of the complaint, and, in the affidavits filed in support of it, nothing to substantiate the claim that any legal voter was deprived of an opportunity to register and vote, or that a number of illegal votes sufficient to change the result was cast, and, failing such allegations, the result will not be disturbed. Deloatch v. Rogers, 86 N. C. 358.

[4] The most serious charge, and the only one we think that demands consideration, is that there was no canvass of the votes and no result declared, as required by law. If that is true, which is denied, then the right to use the bonds must necessarily fail. It is the duty of the county commissioners, who are charged with the supervision and control of the election in this case, to canvass the returns and to ascertain whether a majority of the qualified voters of the county voted in favor of the issue of the bonds.

In the election, it was the privilege of the voters to determine under the peculiar words of this special statute the amount of said bonds to be issued, the date of maturity of the same, and the rate of tax to be levied, and as to whether or not the bonds shall be issued at all or not, and it must appear, and it should be so recorded upon the records of the commissioners, that a majority of the qualified voters of the county voted in favor of this proposition.

[5] The validity of this election will not be determined upon mere suggestions in affidavits in injunction proceedings unless it clearly appears and is practically not denied that such irregularities entered into it as to render it void.

We will not preclude the plaintiffs from showing, if they can, on the final hearing of this case, that the votes were not canvassed, that the result was not announced, and that no findings have been made by the commissioners, that the bonds are authorized by a majority of the qualified voters. Those matters may be determined upon the final hearing of the case, and it would seem, in the absence of an injunction, that, as long as that matter remains in doubt, it would appear the part of wisdom for the board of education not to attempt to issue the bonds.

[6] It is alleged in the answer that a large majority of the qualified voters of said district voted for the bonds; but whether the questions relating to the amount of bonds to be issued, the date of maturity, and the rate of tax to be levied were submitted at such election to the judgment of the voters, does not appear in the answer or affidavits in this case.

The statute is a very peculiar one, and, as we read it, the question of issuing the bonds alone is not the only matter to be voted on; but the language of the statute says that the election shall be held for the purpose of determining the "amount of said bonds, date of maturity, and rate of tax to be levied."

Reversed.

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(168 N. C. 248)

## FLEMING v. WASHINGTON & V. R. CO.

(No. 38.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

1. RAILROADS ⇐441—KILLING OF STOCK—STATUTORY PRESUMPTION—EXCUSE FOR DELAY.

A showing that some person connected with defendant railroad, who was not identified or shown to be authorized to speak for it, told the owner of a cow, killed on the track, that no suit would be necessary, did not excuse delay in bringing the suit, so that plaintiff could rely on the presumption of negligence created by Revisal 1905, § 2645, which provides that no person shall have the benefit of that section unless he shall sue within six months after the cause of action accrues.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1575–1595; Dec. Dig. ⇐441.]

2. RAILROADS ⇐443—KILLING OF STOCK—NEGLIGENCE.

Where the only witness to the killing of a cow by a railroad company was the engineer,

called by plaintiff, and who testified that he was keeping a good lookout and saw the cow, and that he blew the whistle and applied the brakes, but could not stop before striking the cow because of the slippery condition of the rails, there was no evidence of negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608–1620; Dec. Dig. ⊂⊃443.]

3. EVIDENCE ⊂⊃244—ADMISSIONS BY CORPORATE AGENTS—NEGLIGENCE.

A statement of some one connected with a railroad, but not identified or shown to have authority to speak for the company, that it would not be necessary to bring suit to recover for the killing of a cow, was not admissible to show negligence by the company.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916–936; Dec. Dig. ⊂⊃244.]

4. APPEAL AND ERROR ⊂⊃981—REVIEW—DISCRETION OF TRIAL COURT—NEW TRIAL.

A motion for a new trial based on newly discovered evidence is addressed to the discretion of the trial court, and his denial thereof is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. ⊂⊃981.]

Appeal from Superior Court, Beaufort County; Bond, Judge.

Action by S. Fleming against the Washington & Vandemere Railroad Company. Judgment for defendant on nonsuit, and plaintiff appeals. Affirmed.

This action was brought to recover the value of a cow, which plaintiff alleges was killed on the defendant's track by its negligence. The plaintiff testified for himself that he found the cow on the right of way of the railroad company about two days after the injury. He then called as a witness the engineer of the defendant railroad company, who testified that on the night of August 27, 1910, he was running an engine of the defendant railroad company; that it was very dark and raining; that the railroad bed was in good condition, and the engine was properly equipped with headlights and brakes, and was in good condition generally; that he was keeping a very careful lookout and saw some cows on the track about 100 yards ahead of him; that he was running at the time about 25 miles per hour; that as soon as he saw the cows he sounded his whistle and applied his brakes, and in fact did everything he could to keep from striking them, but that he did strike one cow and knocked her off the track; that it was impossible to stop the train sooner because of the slippery condition of the rails, due to the rain. The cow was killed August 17, 1910, and this action was commenced April 19, 1912. Plaintiff proposed to account for the delay in bringing his action by proving that some one, who was connected with the defendant, told him that a suit would not be necessary; but there was no proof, nor offer to prove, who made the statement, or, if it was made, that the person had any authority from the defendant to make it. The evidence was excluded, and the court, on motion, nonsuited the plaintiff, and he appealed.

L. M. Scott, of Blounts Creek, for appellant. Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellee.

WALKER, J. (after stating the facts as above). [1] The judgment of the court was manifestly correct. There was no presumption or prima facie case of negligence, under the statute (Revisal, § 2645), as the action was not commenced within six months after the animal was killed, and it is provided therein that:

"No person shall be allowed the benefit of this section unless he shall bring his suit within six months after his cause of action shall have accrued."

He offered no legal excuse for his delay in suing. That some one, without authority to represent the railroad, told him that an action would not be necessary, was no excuse. The defendant is not responsible for the statements or opinions of any one not authorized to speak for it. Besides, the plaintiff's delay continued for more than two years without any explanation. Why, if he was relying upon the statement of his informant, did he not press the matter to a conclusion sooner than he did, and, if settlement was refused, then bring his suit?

[2] Excluding the presumption from consideration, as inapplicable, the case is brought directly within the decision in Seawell v. Railroad Co., 106 N. C. 272, 10 S. E. 1045, which is very much like this case. The facts, as stated by the engineer, who was plaintiff's own witness, show that he complied, in every respect, with the most rigid and exacting rule, as laid down by this court, in regard to the duty of an engineer to keep a proper lookout for obstructions on the track, and as said by Justice Davis in Seawell's Case:

"If the facts testified to by the engineer be accepted as true, there was no negligence on the part of defendant."

The cases of Forbes v. Railroad Co., 76 N. C. 454, Winston v. Railroad Co., 90 N. C. 66, and Proctor v. Railroad Co., 72 N. C. 579, strongly support this view and hold that, even when an action is brought within the six months, it makes out only a prima facie case and is not conclusive, and that upon evidence similar to that in this case, and not more favorable to the defendant, there is no negligence, and consequently no liability.

[3] The statement of the unidentified person was not any evidence of negligence, and no more competent to prove it than it is to show a legal excuse for the delay. It was simply the expression of an opinion emanating from one not in privity with defendant and having no authority to bind it in any way, so far as appears. In one of its aspects—that is, as proof of negligence—it was the statement of a past transaction, and not a part of the res gestæ, and for that reason doubly incompetent. Rumbough v. Improve-

ment Co., 112 N. C. 752, 17 S. E. 536, 34 Am. St. Rep. 528; McEntyre v. Cotton Mills, 132 N. C. 598, 44 S. E. 109; Robertson v. Lumber Co., 165 N. C. 4, 80 S. E. 894.

[4] The motion for a new trial, based upon the ground of newly discovered evidence, was addressed to the discretion of the judge, and, having been denied by him, the decision is not reviewable here. Flowers v. Alford, 111 N. C. 248, 16 S. E. 319; Munden v. Casey, 93 N. C. 97.

No error.

(168 N. C. 234)

## In re BATEMAN'S WILL. (No. 35.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

WILLS ⟸261 — PROBATE — SETTING ASIDE — LACHES.

A sister of testator, married at the time of his death, who lived within 2½ miles of him, and knew of the probate of the will, qualification of administrator, and that the devisees had taken possession of the property, may not file a caveat to the will 26 years after probate; the property for the most part being in the hands of innocent purchasers, and more than seven years having elapsed under Pell's Revisal, § 3135, after she became discovert.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 607; Dec. Dig. ⟸261.]

Appeal from Superior Court, Tyrrell County; Carter, Judge.

Proceedings by Mary Patrick to set aside the probate of a will. From a judgment dismissing the caveat, she appeals. Affirmed.

I. M. Meekins, of Elizabeth City, for appellant. Mark Majette, of Columbia, and Pruden & Pruden, of Edenton, for appellees.

CLARK, C. J. The intestate, Wilson H. Bateman, died in 1886, leaving a last will and testament dated June 21, 1886, which was duly probated October 8th of the same year, and one of the devisees qualified as administrator. Caveat to this will was filed December 17, 1912, more than 26 years after the probate of the will. The caveator, Mary Patrick, at the time of the death of her brother, the testator, Wilson H. Bateman, was living within 2½ miles of him in the same county and continued to live there from the death of the testator to the present time, except two years when she lived in the adjoining county of Pasquotank. She knew of the probate of the will and the qualification of the administrator; that the devisees had taken possession of the property devised, and that they, and those who claim under them, have remained in such possession up to the present time. It also appears from the record that almost every one of the other heirs of the testator who would have shared with the caveator and the devisees in the will, as tenants in common, if there had been no will, were residents of Tyrrell county and knew of the execution and probate of the same. The caveator, though a married woman at the death of her brother, has been a widow since 1907, and this caveat was filed in 1912. The record also shows that the devisees named in the will have sold much of the property devised to them to third persons for value, and these in turn have sold to others who are the present owners and who have acquired the property for valuable consideration. No effort was made to set aside this will by the caveator till the filing of this caveat.

In Re Beauchamp's Will, 146 N. C. 254, 59 S. E. 687, the court held that the caveat, under similar circumstances to these, was barred by the laches, and in Re Dupree's Will, 163 N. C. 256, 79 S. E. 611, acquiescence and unreasonable delay for 23 years—a shorter period than in this case—were held to bar the caveat attempted to be filed. We can add nothing to what has been said in those two cases, which are exactly in point. The court called attention, in those cases, to the fact that until the Acts of 1907, c. 862, now Pell's Revisal, § 3135, there was no statute of limitations, and that the caveat was barred by reason of the laches. Though the caveator was a married woman, she was authorized to bring an action by Rev. 408 (1), and therefore is liable for her laches, though by some strange oversight the statute of limitations as to married women was not repealed until chapter 78, Laws 1899. Even under the seven-year statute of limitations of 1907 (Pell's Revisal, § 3135), the plaintiff would have been required to bring an action or file a caveat within three years after becoming discovert, which she did in 1907. In re Lloyd, 161 N. C. 557, 77 S. E. 955.

The judgment dismissing the action is affirmed.

(168 N. C. 223)

## WINBORNE GUANO CO. v. PLYMOUTH MERCANTILE CO. (No. 24.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

1. SALES ⟸1—VALIDITY OF CONTRACT—CERTAINTY.

A contract for the sale of 100 tons or more of different kinds of fertilizers, named in the contract, at prices therein fixed, is not too uncertain to be enforceable; but the seller may recover damages for the buyer's failure to take the minimum quantity.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3–5; Dec. Dig. ⟸1.]

2. EVIDENCE ⟸129—ACTION BY SELLER—ADMISSIBILITY OF EVIDENCE — SIMILAR CONTRACTS.

In an action for the buyer's breach of a sale contract, testimony that the seller made a contract with another similar to the one claimed by the buyer to have been made with him was not admissible to show the making of the contract as claimed by the buyer.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 388–393, 395–398; Dec. Dig. ⟸129.]

3. TRIAL ⟸165—NONSUIT — DETERMINATION OF AMOUNT—EVIDENCE CONSIDERED.

On motion for nonsuit a court can consider only the testimony of the plaintiff and such

part of the defendant's testimony as tended to establish plaintiff's right to recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. ⟸165.]

4. APPEAL AND ERROR ⟸1078—WAIVER OF ERROR—FAILURE TO ARGUE.

Under Supreme Court rule 34 (164 N. C. 551, 81 S. E. xii), providing that exceptions in the record, in support of which no reason or argument is stated or authority cited, will be treated as abandoned by appellant, an exception, incidentally mentioned, but not discussed in the brief, will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. ⟸1078.]

5. APPEAL AND ERROR ⟸928—PRESUMPTIONS—CHARGE NOT IN RECORD.

Where the charge is not sent up, it will be presumed that all issues raised by the evidence were properly submitted to the jury, especially where no exception was taken to the charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749–3754; Dec. Dig. ⟸928.]

6. APPEAL AND ERROR ⟸928—PRESUMPTIONS—REQUESTED CHARGE.

Where the charge is not sent up with the record, it will be presumed that the substance of requested charges, which were refused, was given in the main charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749–3754; Dec. Dig. ⟸928.]

7. TRIAL ⟸260—REQUESTED CHARGE—REPETITION OF GIVEN CHARGE.

A requested charge, which was given in substance, though not in its exact language, in the main charge, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⟸260.]

Appeal from Superior Court, Chowan County; Carter, Judge.

Action by the Winborne Guano Company against the Plymouth Mercantile Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. M. Bond, Jr., of Plymouth, and E. G. Bond, of Edenton, for appellant. Pruden & Pruden, of Edenton, for appellee.

WALKER, J. [1] This action was brought by plaintiff to recover damages for breach of contract in refusing to take certain fertilizers, which had been sold to defendant. The latter agreed with plaintiff, on January 5, 1913, to buy from him "100 tons or more" of different kinds of fertilizers, named in the contract, at prices therein fixed, to be delivered "f. o. b. cars at Norfolk, Va., freight to be added, payable May 1, 1913, to be covered by note or cash within 30 days from time of shipment," and to be shipped, as wanted, to May 1, 1913, upon signed orders from defendant. According to the terms of the agreement, as we construe it, defendant bought the fertilizers and all were to be shipped by May 1, 1913, and in lots as ordered. Defendant contends that this contract was too uncertain and indefinite in its phraseology to be enforceable, as no particular quantity of fertilizer is specified; but we think this is an erroneous view of it, as defendant was bound thereby to take at least 100 tons by the 1st day of May, and this is all for which the jury assessed the damages, as is apparent from the evidence and verdict.

[2] It was not competent to prove that W. F. Spruill had a similar understanding and agreement with the plaintiff, for the purpose of showing that defendant had the same kind of agreement with the plaintiff. It does not follow that, if a contract is made with one person, a contract of the same character was made with another. The case of Insurance Co. v. Knight, 160 N. C. 592, 76 S. E. 623, does not apply, as there the evidence was admitted to prove like transactions by the agent with others, for the purpose of showing his fraudulent intent, which is an exception to the general rule.

[3] The motion to nonsuit was properly disallowed, as the court could not consider any of defendant's testimony in its favor, but only that of the plaintiff, and such parts of the defendant's as tended to establish plaintiff's right to recover.

[4] The first prayer of defendant for instructions is mentioned incidentally in its brief, but not discussed. It will therefore be taken as abandoned, under rule 34 of this court (164 N. C. 551, 81 S. E. xii). Watkins v. Lawson, 166 N. C. 216, 81 S. E. 623. The second prayer misinterprets the contract. The defendant was bound thereby to take all of the guano by May 1, 1913, but it could do so in such quantities as were designated in its written orders.

[5] It was testified by C. M. Tetterton, manager of the defendant company, which was owned by Conway Newman, that there was an oral agreement with the plaintiff—

"that the contract about the guano should not be binding until defendant had calls from customers and should order it out, and it was signed on the strength of this understanding, and there were no such calls from customers and no orders for the guano were therefore given."

This evidence was not objected to, and we must infer that it was submitted to the jury. As the charge was not sent up, we must presume that the judge instructed the jury correctly in regard to all matters involved, including the effect of the alleged oral agreement, as to the operation of the contract and its binding effect, and especially so in the absence of any exception to the charge. Elliott v. Railroad Co., 166 N. C. 481, 82 S. E. 853; Wacksmuth v. Railroad Co., 157 N. C. 34, 72 S. E. 813; Mizzell v. Branning Mfg. Co., 158 N. C. 265, 73 S. E. 802. In the Wacksmuth Case it was said:

"The charge of the judge is not set out; but, as there is no exception to it, we must assume that he fully explained to the jury the significance of the issue, and the bearing of the evidence."

This being so, a reasonable interpretation of the verdict shows that the jury decided against the defendant as to the existence of

any such agreement. At any rate, defendant had the full benefit of this evidence before the jury, and cannot, therefore, complain.

[6, 7] If the judge refused any instruction in the form requested by counsel, it does not follow that he did not give it substantially, at least, in his charge, and we must assume that he did, in default of an inspection of the charge and of any exception thereto. We cannot say that the jury were not fully instructed, in the absence of any knowledge of the charge. The presumption here is in favor of the correctness of the trial below. If a prayer is refused, but the charge, nevertheless, is sufficiently responsive to it, though not given in its exact language, there is no ground for exception. Carter v. Railroad, 165 N. C. 244, 253, 81 S. E. 321.

Upon a careful review of the whole record, no error has been discovered.

No error.

(168 N. C. 259)

## COTTINGHAM v. MARYLAND MOTOR CAR INS. CO. (No. 435.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

1. INSURANCE ⟸330—FORFEITURE—CHANGE IN TITLE OR INTEREST—REMOVAL OF INCUMBRANCE BEFORE LOSS.

Under a policy of insurance on an automobile providing that it should be void if the property should become incumbered by a chattel mortgage, or if any change other than by the death of insured should take place in the interest or title of the property, a chattel mortgage subsequently given merely suspended the insurance, and, where it was paid and canceled before a loss, the insurance revived.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 829-839; Dec. Dig. ⟸330.]

2. INSURANCE ⟸146—CONSTRUING AGAINST INSURER—STANDARD POLICY.

The terms of a policy of insurance are construed against the insurer and in favor of insured, even though a standard form of policy has been adopted under legislative enactment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 702, 763, 828; Dec. Dig. ⟸146.]

Appeal from Superior Court, Mecklenburg County; Shaw, Judge.

Action by L. T. Cottingham against the Maryland Motor Car Insurance Company. From a judgment for defendant on demurrer, plaintiff appeals. Reversed.

Stewart & McRae, of Charlotte, for appellant. Cameron Morrison and J. H. McLain, both of Charlotte, for appellee.

CLARK, C. J. [1] On June 11, 1913, the defendant insured the automobile of the plaintiff against loss by fire for the term of one year, and the plaintiff paid the premium of $25 therefor. On September 19, 1913, the plaintiff executed a deed of trust on a number of horses, wagons, and other property, including the automobile. Three days thereafter the deed of trust was paid off and canceled of record on September 22d, only three days after its execution. On September 26th, four days thereafter, the automobile was destroyed by fire. The defendant filed an answer, but when the case was called for trial demurred to the complaint on the ground that the policy contained this provision:

"This policy, unless otherwise provided by agreement, indorsed hereon in writing by an authorized agent of the company, shall be void if the interest of the assured be other than unconditional and sole ownership; or if the property hereby insured be or become incumbered by a chattel mortgage; or if any change, other than by death of the assured, take place in the interest or title of the property hereby insured, whether by legal process or judgment or by voluntary act of the assured or otherwise."

The court sustained the demurrer, and the plaintiff appealed. The loss occurred as above stated, after the deed of trust was paid off and canceled.

2 Cooley, Ins. 1780, citing many cases, says:

"The general rule that a breach of the condition against incumbrance is ground for forfeiture must be modified where the incumbrance is merely temporary, and is not in existence at the time of the loss. It may be regarded as settled by the weight of authority that the effect of the incumbrance is merely to suspend the risk, and on cancellation or discharge of the incumbrance the policy is revived."

Elliott, Ins. § 205, collating the authorities also says:

"The weight of authority seems to support the view that a violation of a condition that works a forfeiture of the policy merely suspends the insurance during the violation, and if the violation is discontinued during the life of the policy, and does not exist at the time of the loss, the policy revives, and the company is liable, although it had never consented to the violation of the policy, and the violation was such that the company could, had it known of it at the time, have declared a forfeiture therefor."

To same purport Phillips on Insurance, § 975, and 1 May, Insurance (3d Ed.) § 101; 2 A. & E. 288, and note.

A case almost exactly in point is Strause v. Insurance Co., 128 N. C. 64, 38 S. E. 256, where the defendant set up a defense that the mill was operated at night, contrary to the provisions of the policy, and this court said:

"The fire occurred more than three months thereafter, and was in no wise traceable, so far as the evidence shows, to the working at night, which had long ceased."

Revisal 4806, provides:

"All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein; and all contracts of insurance, the application for which is taken within this state, shall be deemed to have been made within this state and shall be subject to the laws thereof."

Revisal 4808, is as follows:

"All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed and held representations and not warranties; nor shall any representation, unless material or fraudulent, prevent a recovery on the policy."

The purpose of Revisal 4808, was to prevent insurance companies from escaping the payment of honest losses upon technicalities and strict construction of contracts.

In construing these sections in McCarty v. Insurance Co., 126 N. C. 820, 36 S. E. 284, where at the time of issuance of policy there was a deed in trust to secure a debt of which the insurance company did not have notice, and where the policy provided that it should be void if the interests of the insured be not truly stated, this court quoted with approval from Albert v. Insurance Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693, as follows:

"This law applies to all policies of insurance, both of fire and life; and unless such misrepresentations materially contribute to the loss, or fraudulently evade the payment of the increased premium, they do not vitiate the policy. Ordinarily, these are questions of fact for the jury, and not for the court."

In the present case the deed of trust given by the plaintiff embraced horses, wagons, and other property besides the automobile. This mortgage was paid off before the loss, and was not material to the risk or fraudulent. The title of the plaintiff at the time of the loss was the same as at the time of the delivery of the policy. The deed in trust in no wise contributed to the loss or in any way affected the risk. Weddington v. Insurance Co., 141 N. C. 244, 54 S. E. 271, 8 Ann. Cas. 497, Watson v. Insurance Co., 159 N. C. 638, 75 S. E. 1105, and Roper v. Insurance Co., 161 N. C. 151, 76 S. E. 869, differ from this case vitally in that in them the breach of the condition existed at the time of the loss. The law laid down in those cases had reference to the facts therein, and has no bearing on this case.

In Born v. Insurance Co., 110 Iowa, 379, 81 N. W. 676, 80 Am. St. Rep. 300, it is held that giving a mortgage under the circumstances of the present case is a temporary breach of the policy, and when the breach was removed the policy was revived. In that case the mortgage given on the property was paid off, and the fire occurred afterwards, and the court said:

"The theory upon which an existing mortgage is held to be a violation of a clause in the policy against an increase of risk is that it does increase the risk. * * * At the time of the loss the personal property in question was in the possession and ownership of the plaintiff, free from the incumbrances of the mortgages, and covered by his valid policy of insurance. Therefore he is entitled to recover for the loss thereof"—citing Wilkins v. Insurance Co., 30 Ohio St. 317, 27 Am. Rep. 455.

On the rehearing of Born v. Insurance Co., 120 Iowa, 299, 94 N. W. 849, the court reaffirmed its former ruling. The Born Case is reported 80 Am. St. Rep. 300, with full annotations, and the editor reaches this conclusion:

"The general rule to be deduced from the weight of authority is that the violation of a condition in a policy of insurance which works a forfeiture thereof merely suspends the insurance during the violation, and that if such violation is discontinued during the life of the policy, and is nonexistent at the time of loss, the policy revives, the insurance is restored, and the insurer is liable, although he has never consented to a violation of the conditions in the policy, and such violation has been such that the insurer could, had he known of it at the time, have declared a forfeiture therefor."

Insurance Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013, holds that a breach of condition suspends the policy during the existence of the breach, and the removal of the breach revives the policy. In that case the policy contains this provision:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, * * * if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days."

The house did become vacant, but was reoccupied before the loss occurred.

It is thus declared by Cooley on Insurance, Elliott on Insurance, and the notes to the 80 Am. St. Rep. at page 305, that the "weight of authority" is as above stated, and an examination of the authorities sustain that view, though Vance on Insurance, 433, says that the weight of authority is otherwise.

Among many cases, besides the above sustaining the proposition that the removal of the breach revives the policy, when it is removed previous to the loss and has in no wise contributed to it, are Lounsbury v. Insurance Co., 8 Conn. 459, 21 Am. Dec. 686; Insurance Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; Joyce v. Insurance Co., 45 Me. 168, 71 Am. Dec. 536; Insurance Co. v. Kimberly, 34 Md. 234, 6 Am. Rep. 325; Garrison v. Insurance Co., 56 N. J. Law, 235, 28 Atl. 8; Insurance Co. v. Shoe Factory, 80 Pa. 407; Hinckley v. Insurance Co., 140 Mass. 47, 1 N. E. 737, 54 Am. Rep. 445; McKibban v. Insurance Co., 114 Iowa, 41, 86 N. W. 38; Warehouse Co. v. Insurance Co., 163 Ill. 256.

The contrary view in Vance on Insurance, supra, is largely based upon Insurance Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; but that case has no application here. There the policy contained a provision that it should become void if without notice and permission "mechanics are employed in building, altering, or repairing the premises." It was found that such building and repairing increased the risk, and though the work was completed before the fire occurred, and in no wise contributed to the fire, yet the alterations were very material, and were in existence at the time of the fire. In that case there was a forbidden physical alteration made, which continued down to the fire. In the present case there was simply a mortgage, in no wise affecting the physical condition of the property, and which was canceled of record within three days and before the fire.

There are many other cases which support those which we have already cited that when

such temporary incumbrance was removed before the fire it did not invalidate the risk as there was no mortgage outstanding at the time of the fire. In Insurance Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013, above cited, the court, summing up the authorities, says:

"The common people who insure should not be entrapped by a harsh construction of a technical word. The insurance is revived by occupancy, though suspended during the vacancy. * * * So much for the authorities in support of the position announced by this court. We are also very clear that this position is more in consonance with justice and sound reasoning. * * * It would be a harsh and unjust rule to hold that a condition which in no wise contributed to the loss should work a forfeiture of the insurance. The principle of the old legal maxim, 'Cessante ratione legis, cessat ipsa lex,' would seem to be applicable. * * * No maxim of construction of contracts is better established, or has been more generally approved, than that of Lord Coke, 'He who considers merely the letter of an instrument goes but skin deep into the meaning,' and too minute a stress should not be laid on the strict and precise signification of words, to the destruction of the intention of the parties and the spirit of the contract."

To this quotation of the court from Lord Coke the counsel for the plaintiff in this case adds this citation from St. Paul:

"The letter killeth, but the spirit giveth life." II Cor. ch. 3, v. 6.

In Tompkins v. Insurance Co., 22 App. Div. 380, 49 N. Y. Supp. 184, where the policy provided that it should be entirely void if the property became mortgaged, and where the property was mortgaged, but the mortgage was paid off before the loss, the New York court says:

"The defendant contends that the policy was voided by the giving of the first mortgage. The court below found, and we have held, that the second mortgage extinguished the first. Even if the policy would have been void and inoperative during the life of the first mortgage, it revived on the death of that mortgage. This principle is well settled in the analogous case of a marine policy, which contains a limit of the waters within which the vessel is insured. If the vessel leaves the limited waters, and is lost, the insurer is not liable, but the liability reattaches on the return of the vessel to the limits. Hennessey v. Insurance Co., 28 Hun, 98. So here, although the policy was suspended during the existence of the first mortgage, it was revived when that mortgage ceased to exist by the substitution of the second mortgage."

In Hinckley v. Insurance Co., 140 Mass. 38, 1 N. E. 737, 54 Am. St. Rep. 445, where the defense was that the insured property was temporarily put to an illegal use contrary to the terms of the policy, the court, in construing the word "void," says:

"But, irrespective of this consideration, it is not the necessary meaning of the word 'void,' as used in policies of insurance, that it shall, under all circumstances, imply an absolute and permanent avoidance of a policy which has once begun to run. But the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being."

It will be noted that this is the standard form of policy established by statute, and Phillips on Insurance, § 975, says:

"After the policy has begun to run so the premium has become due, it assuredly is but equitable that a temporary noncompliance should have effect only during its discontinuance. To carry it further is to inflict a penalty on the assured and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it."

Warehouse Co. v. Insurance Co., 76 S. C. 76, 56 S. E. 654, 10 L. R. A. (N. S.) 736, 121 Am. St. Rep. 941, 11 Ann. Cas. 780, where the defense was that the hazard was increased contrary to the terms of the policy, which made it void, says:

"The contract of insurance must, like other contracts, be enforced according to its terms. In construing such contracts, however, courts should endeavor to ascertain from the language used, in the light of the surrounding circumstances and the nature of the business, the safeguards which the parties intended to place around themselves. It may be reasonable to suppose an insurance company would desire to reserve the valuable right of canceling a policy, even on a temporary increase of hazard if known to it at the time, because such change might result in loss; but it is not reasonable to impute to it a purpose or desire to curtail its own revenue by canceling a policy on account of a temporary increase of hazard which has come to an end without loss and from which it could not possibly suffer detriment. Hence there may be ground for holding a temporary increase of hazard forbidden by the policy to avoid the insurance without action or even knowledge on the part of the company, when the loss resulted from that cause. But there is no ground for such a holding when the increase of hazard came to an end without loss. The greater weight of authority supports this conclusion."

The last line in the above quotation reiterates what is said above by Cooley, Phillips, May, and Elliott in their works on Insurance, and is a correct statement.

Silver v. Assurance Corporation, 61 Wash. 593, 112 Pac. 666, also sustains the proposition that the removal of the temporary breach of the condition revives the policy, also Insurance Co. v. Pitts, 88 Miss. 587, 41 South. 5, 7 L. R. A. (N. S.) 627, 9 Ann. Cas. 54.

In Nebraska, where a policy contained a provision making it void if the property should be mortgaged, it was held that the payment of the mortgage revived the policy. Insurance Co. v. Schreck, 27 Neb. 527, 43 N. W. 340, 6 L. R. A. 524, 20 Am. St. Rep. 696; Insurance Co. v. Dierks, 43 Neb. 473, 61 N. W. 740; Johansen v. Insurance Co., 54 Neb. 548, 74 N. W. 866.

McClure v. Insurance Co., 242 Pa. 59, 88 Atl. 921, 48 L. R. A. (N. S.) 1221, holds the same general principles as the authorities above cited. In that case the defense was that certain prohibited articles were kept upon the premises. The policy provided that it should be void if they were. The court held that, if they were removed before the fire, and in no wise contributed to the loss, the policy was revived.

Independent of the overwhelming weight of authority, there can be no reason to release the insurance company from liability for a loss which accrued after the forbidden mort-

gage was canceled, the mortgage having in nowise any connection with the loss. "For the letter killeth, but the spirit giveth life."

[2] The terms of a policy of insurance are construed against the insurer and in favor of the insured, and this is true although a standard form of policy has been adopted under legislative enactment. Gazzam v. Insurance Co., 155 N. C. 330, 71 S. E. 434, Ann. Cas. 1912C, 362.

The stipulation that the policy shall be void if the property "be or become incumbered by chattel mortgage" was inserted for the benefit of the insurer upon the idea that, if the owner of the property was permitted to insure and then mortgage the property, it would be an inducement to him to destroy the property by fire, and if the stipulation is given effect so that this purpose and intent of the parties can be carried out, there is no reason for extending it further. In other words, it was the intent of the parties to prevent an increase of the risk to the insurer, and this can be amply protected by holding that the policy is only void if the mortgage is in force at the time of the loss. Instead of increasing the risk, this interpretation of the contract decreases it, because while the mortgage is in existence there is no liability on the part of the insurance company, and if a loss then ensues there can be no recovery, and when the mortgage is canceled the insurer assumes no responsibility that it was not liable for when the policy was first issued. Nor is this construction against public policy, as offering an inducement to the insured to destroy his property, because, if destroyed while the mortgage is in force, the total loss falls on him.

See, also, Insurance Co. v. Pitts, 88 Miss. 587, 41 South. 5, 7 L. R. A. (N. S.) 627, 9 Ann. Cas. 54; Warehouse Co. v. Assur. Co., 76 S. C. 76, 56 S. E. 654, 10 L. R. A. (N. S.) 737, 121 Am. St. Rep. 941, 11 Ann. Cas. 780, and cases cited.

Our cases on the subject, which are collected in Roper v. Insurance Co., 161 N. C. 151, 76 S. E. 869, were decided correctly, because in them the stipulation was violated at the time of loss, and it was properly decided that the policy was void.

Nor is this construction in conflict with the cases of Fishblate v. Fidelity Co., 140 N. C. 589, 53 S. E. 354; Bryant v. Insurance Co., 147 N. C. 181, 60 S. E. 983; Alexander v. Insurance Co., 150 N. C. 536, 64 S. E. 432; Gardner v. Insurance Co., 163 N. C. 367, 79 S. E. 806, 48 L. R. A. (N. S.) 714; and Schas v. Insurance Co., 166 N. C. 55, 81 S. E. 1014, where a representation, actually false and material, was held to vitiate the policy, although the misrepresented fact may not have contributed to the loss, for the insurance company is entitled to know the facts about which inquiry is made, in order to decide whether it will enter into the contract or not, and those things are material for it to know which would naturally affect its judgment or decision, as to making the contract, or which, by its inquiries, it has made material; the company being the judge of what it should know, in order to determine whether or not it will issue the policy.

The demurrer should have been overruled. Reversed.

(169 N. C. 239)

## SHEPARD v. NORFOLK & S. R. CO.

(No. 33.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

RAILROADS ⟸350 — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE — PROXIMATE CAUSE.

An automobile owner, whose car was damaged in a collision with a train at a railroad crossing, is not barred from recovering, as a matter of law, by his testimony that he was exceeding the speed limit prescribed in such a situation by Laws 1913, c. 107, since he was entitled to have the jury determine whether his negligence was a proximate cause of the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. ⟸350.]

Appeal from Superior Court, Chowan County; Carter, Judge.

Action by T. H. Shepard against the Norfolk & Southern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

On the three ordinary issues in actions of this character, negligence, contributory negligence, and damages, there was verdict for plaintiff. Judgment on verdict, and defendant excepted and appealed.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellant. Pruden & Pruden, of Edenton, for appellee.

PER CURIAM. On a former appeal in this cause, reported in 166 N. C. 539, 82 S. E. 872, from a judgment for defendant, a new trial was ordered. The facts will there sufficiently appear. The case has been tried below in accordance with the principles announced in that opinion, and we find no reason for disturbing the result.

It is urged for error that, inasmuch as plaintiff himself testified that his automobile was going 8 or 10 miles an hour, he is barred of recovery, as a conclusion of law, by reason of the public statute of North Carolina regulating speed of automobiles (chapter 107, Laws 1913), and more especially by the last clause of section 15 of the act, in terms as follows:

"Upon approaching an intersecting highway, a bridge, dam, sharp curve, or steep descent, and also in traversing such intersecting highway, bridge, dam, curve or descent, a person operating a motor vehicle shall have it under control and operate it at such speed, not to exceed seven miles an hour, having regard to the traffic then on such highway and the safety of the public."

The position, in our opinion, however, cannot be sustained, because, among other things, it withdraws the question of proximate cause from the jury, and, on the facts in evidence, this would be in contravention of our decisions on the subject, notably McNiell v. Railroad, 83 S. E. 704, Clark v. Wright, 83 S. E. 775, and Buchanan v. Lumber Co., 84 S. E. 50, at the last term.

There is no error, and the judgment is affirmed.

No error.

(168 N. C. 277)

## LEWIS v. FOUNTAIN. (No. 78.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

1. WITNESSES ⟸383 — IMPEACHMENT — COLLATERAL MATTERS.

In an action for assault, evidence that defendant's wife had before trial made a statement as to his conduct towards her, different from her testimony on trial, is not admissible, being merely a collateral matter.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. ⟸383.]

2. NEW TRIAL ⟸44—MISCONDUCT OF JURY—WHAT CONSTITUTES.

In an action for an assault with a pistol, the fact that one of the jurors, after the evidence was in, dined, with third persons, at the house where the affray took place, was not misconduct warranting a new trial, where the matter was not mentioned, and the juror did not inspect the marks made by the shots.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 80–85, 105; Dec. Dig. ⟸44.]

3. NEW TRIAL ⟸44—MISCONDUCT OF JURY—EVIDENCE—SUFFICIENCY.

A verdict need not be set aside merely on a suspicion of misconduct of a juror, but the matter rests in the discretion of the trial judge.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 80–85, 105; Dec. Dig. ⟸44.]

4. NEW TRIAL ⟸55—MISCONDUCT OF JURY—WAIVER OF OBJECTION.

Where a party, knowing of the misconduct of a juror, does not immediately object, but takes the chances of a favorable verdict, he cannot thereafter object.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 106–111; Dec. Dig. ⟸55.]

5. TRIAL ⟸260—INSTRUCTION—REFUSAL.

Where covered by the charge given, requested instructions may be refused, though the charge given be not in the identical language of the request.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⟸260.]

6. TRIAL ⟸260—INSTRUCTIONS—REFUSAL.

Where the charge given presented the law applicable to every phase of the controversy, a new trial will not be granted for failure to give requested instructions containing correct propositions of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⟸260.]

7. ASSAULT AND BATTERY ⟸12, 34 — DEFENSES.

Mere words, however insulting, will not justify an assault, but matter in provocation may be shown in mitigation.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 26, 27, 59–69; Dec. Dig. ⟸12, 34.]

8. ASSAULT AND BATTERY ⟸11—ACTIONS—DEFENSES.

That a party willingly enters into a fight is no defense to a civil action for damages for an assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 23–25; Dec. Dig. ⟸11.]

9. ASSAULT AND BATTERY ⟸43—ACTIONS—INSTRUCTIONS — SELF-DEFENSE — SUFFICIENCY.

In an action for an assault with a pistol, where self-defense was urged, instructions that defendant, having admitted he fired on plaintiff, has the burden of showing that the shooting was in necessary self-defense, and that if plaintiff fired on defendant, putting him in reasonable fear for himself or his family, defendant was justified, if he deemed it necessary, to return the fire, sufficiently presented the issue of self-defense.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 57–59, 61, 62; Dec. Dig. ⟸43.]

10. COSTS ⟸256—APPEAL—RECORD—UNNECESSARY MATTER.

Where the appellee includes unnecessary matter in the record at the settling of the case, on affirmance, appellant is entitled to tax the costs of procuring and printing that part of the record against the appellee.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 968–971; Dec. Dig. ⟸256.]

Appeal from Superior Court, Edgecombe County; Ferguson, Judge.

Action by P. A. Lewis against L. E. Fountain. From a judgment for plaintiff, defendant appeals. Affirmed.

G. M. T. Fountain & Son, of Tarboro, and F. S. Spruill, of Rocky Mount, for appellant. T. T. Thorne, of Rock Mount, and W. O. Howard, of Tarboro, for appellee.

CLARK, C. J. This is an action for damages for injuries received in a personal assault. The plaintiff's evidence is that the defendant was drunk, and at request of his sister, the defendant's wife, to protect her against the defendant, who was threatening her with a pistol, the plaintiff went over to defendant's house to endeavor to quiet him, and that the defendant shot him twice with a pistol without any provocation, one of the wounds cutting an artery, and that, by reason of his wounds, he was unable to work for 12 months, suffered great bodily pain, and was sent to Johns Hopkins in Baltimore for treatment at considerable expense.

The defendant's testimony is that the plaintiff came over and they got into an altercation; that the plaintiff fired first, and he admits that he then wounded the plaintiff as alleged, but avers that it was done in self-defense.

[1] The first exception, that the judge refused to admit evidence that the defendant's wife had made a different statement as to her husband's conduct towards her from that which she had made on the trial, cannot be sustained. It was merely a collateral mat-

ter. State v. Leak, 156 N. C. 644, 72 S. E. 567; State v. Williams, 168 N. C. —, 83 S. E. 714.

[2-4] The second exception is misconduct on the part of a juror. The judge finds the facts to be that the juror, after the evidence was in, took dinner at the house of the owner of the house where the shooting had taken place, but that none of the parties to this action were there; that while at the house there was no reference made as to the facts of the case on trial; and that the juror did not make any inspection of or look at the marks made by the pistol balls in the house. The court found, as a conclusion of fact, that there was no improper conduct on the part of the juror and no improper influence. The circumstances must be such as not merely to put suspicion on the verdict because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge. Moore v. Edmiston, 70 N. C. 481; State v. Brittain, 89 N. C. 483; Baker v. Brown, 151 N. C. 17, 65 S. E. 520; State v. Tilghman, 33 N. C. 552. Besides, in this case, the knowledge of the juror having gone to the house was acquired by the defendant before verdict. Having taken the chances of a favorable verdict, the defendant is now estopped to impeach it on that ground. Pharr v. Railroad, 132 N. C. 423, 44 S. E. 37.

[5, 6] As to exceptions 2 and 3, the prayers for instruction were substantially given. It was not necessary that the identical language should be used. Southerland v. Railroad, 158 N. C. 327, 74 S. E. 102; Board of Education v. Roanoke, 158 N. C. 313, 73 S. E. 994. The charge given presented every phase of the controversy with correct instructions as to the law applicable, and a new trial will not be awarded for failure to give instructions asked, though they were correct propositions of law. Muse v. Railroad, 149 N. C. 452, 63 S. E. 102, 19 L. R. A. (N. S.) 453.

[7] Even though the plaintiff invited the assault by insulting language or provoked it by his conduct, this would not bar the recovery in a civil action. As in criminal actions, no words, however violent or insulting, justify a blow, but, if a blow follows, both are guilty, so, in a civil action, the provocation is a matter in mitigation and not a defense. Palmer v. Railroad, 131 N. C. 250, 42 S. E. 604; Williams v. Gill, 122 N. C. 967, 29 S. E. 879.

[8] When two men fight together, thereby creating an affray, each is guilty of assault and battery upon the other, and each can maintain an action therefor. Bell v. Hansley, 48 N. C. 131. In White v. Barnes, 112 N. C. 327, 16 S. E. 922, the court sustained the following charge:

"If the jury believe that Barnes struck White with a stick described in evidence and broke his nose, the plaintiff is entitled to recover, even though they believe that White entered the fight willingly."

[9] The court charged:

"The defendant having admitted that he fired his pistol at the plaintiff and shot him, it devolves upon him to satisfy you from the evidence, not beyond a reasonable doubt, but to satisfy you by the greater weight of the evidence, that he did the shooting in his necessary self-defense; and, if he has done so, the plaintiff would not be entitled to recover. If he fails to do so, the plaintiff will be entitled to recover such damages as he received by reason of the wound."

The court further charged:

"If you shall find from the evidence that the defendant did not bring about the trouble, that he was at his home and was remonstrating with the plaintiff and directing him to go away, and while in this conversation between them one word brought on another, the defendant being in his porch and the plaintiff on the sidewalk, and the plaintiff told the defendant to shoot, and took out his pistol and fired while the defendant was sitting with his children, so as to cause the defendant to reasonably believe that he or his children's lives were in immediate danger when he fired to protect himself, or them, or both, from death or bodily harm, it would be a matter of self-defense."

The above instructions were correct and as favorable to the defendant as he could ask. The court charged the jury substantially as requested in all the defendant's prayers, except the third, which was:

"If you find from the evidence that plaintiff and defendant were willingly engaged in a mutual assault upon each other with pistols, brought on by the plaintiff going to defendant's house and engaging in an altercation, and the plaintiff was injured while they were willingly assaulting each other, then plaintiff is not entitled to recover damages resulting from his own wrong, and you will answer the first issue, 'No,' and the third issue 'Nothing.'"

This was properly refused. Bell v. Hansley, 48 N. C. 131, and other cases above cited. To have given this instruction would legalize dueling or other fighting by consent or affrays. If the facts were as set forth in this prayer, certainly the defendant did not fight in self-defense.

The defendant cannot complain of the charge. It presented fully his right of self-defense, and was more favorable to him than he was entitled to have, for the court practically told the jury that, if the plaintiff shot first, it was necessary for the plaintiff to shoot to protect himself and the children, omitting the question of reasonable apprehension or reasonable belief.

[10] The defendant also files a motion to tax the costs of a part of the record, and of printing the same, against the appellee, because it was unnecessarily sent up. The defendant made his exception at the proper time when the case was being settled, as required by rule 31 (164 N. C. 550, 81 S. E. xi), and we do not favor sending up any unnecessary matter which will impose an unnecessary expense upon the defeated party, in the appeal. But, examining the transcript, we cannot say that this matter was unreasonably sent up. The motion, therefore, to tax the appellee with the costs thereof is denied.

No error.

(168 N. C. 271)

BRITTON et al. v. TAYLOR et al. (No. 32.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

1. DEEDS ⟸155, 165—CONSTRUCTION — CONDITION SUBSEQUENT—PROVISION FOR GRANTOR'S SUPPORT.

A deed providing that it was made on the special trust that the grantee should feed, clothe, and care for the grantor for life, and that, should he fail to do so, it was to be null and void, conveyed an estate upon a "condition subsequent," defeasible where the condition was not performed by the grantee, whereupon the estate ceased and reverted to the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488–495, 521; Dec. Dig. ⟸155, 165.]

2. DEEDS ⟸144 — CONDITIONS — CONSTRUCTION.

The words used to express a condition may be various, for their effect depends, not on the particular words, but on the sense which they carry, giving effect to every part, since, in ascertaining the intent of the parties, it cannot be presumed that words were employed without meaning something.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 452, 469, 470, 472; Dec. Dig. ⟸144.]

3. DEEDS ⟸154, 155—"CONDITION PRECEDENT" AND "CONDITION SUBSEQUENT" DISTINGUISHED.

Whether a condition in a conveyance is precedent or subsequent depends upon the intention of the parties as gathered from the instrument and the existing facts; a condition precedent defeating the vesting of the estate at all until such condition happens, so that, if it be unlawful or impossible, the estate dependent on it fails, and, where a condition precedent consists of several parts united by a copulative conjunction, each part must be performed before the estate can vest. If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and may as well be done after as before the vesting of the estate, or if it is the intention of the parties that the estate shall vest, and the grantee may perform after possession, the condition is subsequent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 487–495; Dec. Dig. ⟸154, 155.

For other definitions, see Words and Phrases, First and Second Series, Condition Precedent; Condition Subsequent.]

4. DEEDS ⟸168—CONDITION SUBSEQUENT—ENFORCEMENT—ENTRY.

On breach of a condition subsequent, no actual entry upon the land is necessary to enforce a forfeiture, but any act equivalent to an entry is sufficient as an entry; and a possessory action can be maintained upon the breach of a condition subsequent without prior re-entry or demand of possession, such action being equivalent thereto.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 526–533; Dec. Dig. ⟸168.]

5. DEEDS ⟸168—BREACH OF CONDITION SUBSEQUENT—ENFORCEMENT—WAIVER.

If a grantor, for whose benefit a condition subsequent is attached to a conveyance of land, is himself in possession when a breach happens, the estate revests in him without any formal act on his part, and thereafter he will be presumed to hold to enforce the forfeiture, unless he waives the breach, which may be done by such conduct of a grantor as to be evidence of an agreement not to take advantage of the forfeiture, but mere silence, without occasion to speak, is not a waiver or evidence of one, especially when unaccompanied by any act calculated to mislead.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 526–533; Dec. Dig. ⟸168.]

6. DEEDS ⟸168—BREACH OF CONDITION SUBSEQUENT — PERSONS ENTITLED TO ENFORCE FORFEITURE.

Not only a grantor during his life, but his heirs or privies in blood, may take advantage of a breach of a condition subsequent and bring suit for the land or to declare the estate forfeited.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 526–533; Dec. Dig. ⟸168.]

Appeal from Superior Court, Beaufort County; Bond, Judge.

Ejectment by J. A. Britton and others against Matilda Taylor and others. Demurrer to complaint overruled, and defendants appeal. No error.

This is an action in the nature of ejectment to recover the land described in the complaint, upon the theory that the ancestor of defendants, John G. Taylor, had forfeited his right and title thereto by reason of his breach of the following stipulation in the deed made to him for the land by the ancestor of the plaintiffs, Margaret Taylor:

"The said deed is made on this special trust: That the said John G. Taylor is to feed, clothe and kindly care for the said Margaret Taylor all of her natural life, and should the said John G. Taylor fail to feed, clothe and kindly care for the said Margaret Taylor, then this deed is to be null and void."

The defendant demurred to the complaint, upon the ground that the stipulation is a covenant, and not a condition for the breach of which the estate was forfeited and reverted to the grantor; that the complaint fails to state that Margaret Taylor ever insisted upon the breach as a forfeiture, by act or conduct, during her lifetime, or attempted to avail herself of it, and that she had therefore waived the same, and no right now exists in her heirs to take advantage of the breach, and that for these reasons plaintiffs cannot maintain this action. The demurrer was overruled, and defendants appealed. This fairly states the several contentions of the defendants.

Julius Brown and Albion Dunn, all of Greenville, for appellants. Ward & Grimes, of Washington, N. C., for appellees.

WALKER, J. (after stating the facts as above). [1] The stipulation in the deed for support and maintenance is not like those found in the cases to which the learned counsel for defendant has referred in his brief and argument, such as Helms v. Helms, 135 N. C. 164, 47 S. E. 415, McCardle v. Kennedy, 92 Ga. 198, 17 S. E. 1001, 44 Am. St. Rep. 85, and Pownal v. Taylor, 10 Leigh (Va.) 172, 34 Am. Dec. 725, where the stipulation merely for support and maintenance of the grantor, or some one else, with no words of strict condition or forfeiture, was held to be nothing more than a covenant for the breach of which

damages could be recovered, and constituted a charge upon the land. But this provision is not of that kind, for it is expressly stated in the deed that, if the grantee failed to comply with the requirement of support and maintenance, the deed should be "null and void." This is a condition subsequent by its very terms, and also according to the authorities. In the case relied on by appellant (Helms v. Helms, supra) the provision, held to be merely a covenant, was for support and maintenance, without any words of forfeiture in case it was not complied with, and the defendant sought to reform the deed by inserting those words, but the proof failed to show that they were intended to be inserted therein and were omitted by fraud or mistake, and an issue upon that phase of the case was denied; but this court added: "If the deed had contained the words suggested, they would have constituted a condition subsequent." It is said that if something is required by the deed to be done, such as services to be performed, rent to be paid, or divers other undertakings by the grantee, and there be added a conclusion of re-entry, or without such clause if it is declared that, if the feoffee does or does not do the act forbidden or required of him to be done, "his estate shall cease or be void," it creates a good condition subsequent. Washburn on Real Property (5th Ed.) pp. 4, 5; Sheppard's Touchstone, 125; Moore v. Pitts, 53 N. Y. 85; Schulenberg v. Harriman, 21 Wall. (U. S.) 44, 22 L. Ed. 551. It was so expressly held in Jackson v. Crysler, 1 Johns. Cas. (N. Y.) 125. The case of Harwood v. Shoe, 141 N. C. 161, 53 S. E. 616, virtually recognizes that the words used here will create a good condition subsequent. An estate or condition expressed in the grant or devise itself is where the estate granted has a qualification annexed, whereby it shall commence, be enlarged, or defeated, upon performance or breach of such qualification or condition, and estates on condition subsequent are defeasible, if the condition be not performed. 2 Blackstone, Comm. 154; Co. Litt. 201.

[2] The words which constitute a condition may be various, for in particular words there is no weight, as their operation and effect depend on the sense which they carry. 1 Ves. 147; Wheeler v. Walker, 2 Conn. 196, 7 Am. Dec. 264. In the construction of contracts and deeds, that method should be followed, if practicable, which will give effect to every part. This rule, like others, has been adopted and applied by the courts for the purpose of ascertaining the intention of the parties, and results from the presumption that words are not employed in making contracts without meaning something. Moore v. Pitts, 53 N. Y. 92. The language of the deed under consideration leaves no doubt as to what the parties intended. It is plain, intelligible, and explicit. The grantor conveyed the estate upon the condition that she should be supported, and provided, in order to coerce its performance, that, if the grantor failed to do so, the deed should be void and of no effect, which means no more or less than that the estate should cease in the grantee and revest in her, for, if the deed becomes void, the grantee can no longer take under it, and, as the estate cannot be in abeyance, it must vest in the grantor.

[3] It has been said to be not always easy to determine whether the condition created by the words of a devise or conveyance is precedent or subsequent. The construction must depend upon the intention of the parties, as gathered from the instrument and the existing facts, since no technical words are necessary to determine the question. In Underhill v. S. & W. R. Co., 20 Barb. (N. Y.) 455, the court states as a rule that:

"If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act, after taking possession, then the condition is subsequent."

There is this familiar distinction between a condition precedent and a condition subsequent: If the condition is precedent, inasmuch as the estate does not vest at all until such condition happens, the effect of its being unlawful or impossible is that the estate dependent on it fails, and the grant or devise becomes wholly void. And where a condition precedent consists of several parts united by a copulative conjunction, each part must be performed before the estate can vest. A condition subsequent, if it has any effect, defeats an estate already vested; but if such condition is impossible or unlawful at the time of creating the estate, or becomes impossible by the act of the feoffor or the act of God, it leaves the estate an absolute and unconditional one, since it is the condition itself that is or becomes void. 2 Wash. on Real Property, pp. 8, 11. But there is no question made here as to the validity of the condition in this deed; and, it being admitted by the demurrer that the grantee failed to perform his obligation to support the grantor, the estate was forfeited, at the election of the grantor. Formerly, and at common law, it was held that actual entry upon the land was necessary, upon the idea that as the estate was created by a solemn act, viz., a grant and livery of seisin, it must be defeated and restored to the grantor by an act equally solemn, under the maxim of the common law, "Eo ligamine quo ligatur." If a feudal tenant failed to perform the services, his estate was not defeated until the lord had judgment in a writ of cessavit. If a subject incurs a forfeiture by committing treason, his estate is not defeated until "office found." If a feoffment is made on condition, and the condition be broken, the es-

tate continues until it is defeated by the entry of the feoffor or his heirs. Coke on Lit. chapter on conditions. But the grantor cannot enter or make claim when already in possession. Rollins v. Riley, 44 N. H. 9. A party, for whose benefit a condition subsequent is attached to a devise of land, being in possession at the time of the breach, is presumed to hold for the purpose of enforcing the forfeiture, though he may waive it.

"The law will presume that a person, who cannot make a formal entry upon the estate of another for condition broken, because he is already in possession, intends to hold possession to enforce all his legal rights, unless there be some indication that such was not his intention, by which the presumption of law may be rebutted. When the facts disclosed are inconsistent with a claim to hold for condition broken, the presumption will be rebutted, or the person entitled to make an entry will be considered as having waived a performance of the condition. Forfeitures are not favored by the law; and any acts of the party entitled to cause a forfeiture, clearly inconsistent with a claim to be the owner of the estate by forfeiture, must be regarded as proof that performance of the condition was not intended to be enforced for the purpose of creating a forfeiture." Andrews v. Senter, 82 Me. 394.

When the grantor conveyed his estate, he parted with the seisin, which, under the ancient law, he could only regain by an entry made.

[4, 5] But this view has long since ceased to obtain, and any act equivalent to an entry is now considered as sufficient in place of an entry, and numerous cases hold that a possessory action may be maintained upon the breach of a condition subsequent without a prior re-entry or demand of possession; such an action being equivalent thereto. Bronck v. Crysler, 1 Johns. Cas. (N. Y.) 125, and the many cases collected in the note to Mash v. Bloom, 14 L. R. A. (N. S.) 1188. In Phelps v. Chesson, 34 N. C. 194, where land was claimed to have been forfeited and to have reverted to the state for nonpayment of taxes, an action was held sufficient without any entry. But, if entry were required, a learned text-writer says in regard to it:

"If the grantor is himself in possession of the premises when the breach happens, the estate revests in him at once without any formal act on his part, and he will be presumed, after the breach, to hold, for the purpose of enforcing a forfeiture, unless he waive the breach, as it is competent for him to do so, and as he may do by his acts. But to have possession, in such a state of things, work a forfeiture, it must be at the election of the grantor. He is at liberty to waive the breach, and thereby save the forfeiture. Where the grantor covenanted to stand seised to his own use for life, and after his death, to the use of his son in fee, but upon condition, and the son failed to perform the condition, it was held that the grantor being in possession need not make a formal entry, or make a formal claim of the land to defeat the estate of the son. Still, the entry, to be effectual to work a forfeiture of an estate, must be made with an intention to produce that effect. And where an heir entered after a breach of condition, but declared the title under which he entered not to be that in favor of which the condition was made, it was held not to avoid the estate of the grantee, though it is not necessary when making such entry to give notice to the feoffee why it is done." 2 Wash. on Real Property (5th Ed.) pp. 18, 19.

This does not conflict with the principle that a forfeiture may be saved, though a condition may have been broken, if the party, who has the right to avail himself of the same, waives this right, which he may do by acts as well as by express agreement; but mere silence of, or an indulgence by, the grantor, it has been said, will not have this effect, if it has not prejudiced the grantee or induced him to do something which will work to his detriment, if the forfeiture is enforced. 2 Washburn, p. 21, and cases in note 4; White v. Bailey, 65 W. Va. 573, 64 S. E. 1019, 23 L. R. A. (N. S.) 232. The acts and conduct of the grantor, who asserts a forfeiture, may be of such a character as to become evidence of his agreement that he will not take advantage of the breach or forfeiture, and as affirming that the estate, which he once granted, still continues. 2 Washburn, p. 21. The question of waiver is generally one of intention, which is said to lie at the foundation of the doctrine. It may sometimes be declared, as matter of law, but is usually an inference of fact for the jury. 40 Cyc. 261 et. seq. It is there said, at page 263:

"The intention need not necessarily be proved by express declarations, but may be shown by the acts and conduct of the parties, from which an intention to waive may be reasonably inferred, or even by nonaction on their part. Mere silence at a time when there is no occasion to speak is not a waiver, nor evidence from which waiver may be inferred, especially where such silence is unaccompanied by any act calculated to mislead."

See White v. Bailey, supra. But a condition, the breach of which will forfeit an estate, if once dispensed with, is gone forever, and the estate vests absolutely in the grantee. 2 Washburn, p. 21.

[6] It is unquestionably true that not only the grantor, during his life, but his heirs, or privies in blood, after his death, may take advantage of the breach of a condition subsequent and bring suit for the land or to declare the estate forfeited. Sheppard's Touchstone, 125; Tiedeman on Real Property, § 207; Den ex dem. Southard v. Central R. Co., 26 N. J. Law, 21; Hooper v. Cummings, 45 Me. 359; Avelyn v. Ward, 1 Vesey, Sr., 422; 4 Kent, Comm. 127; 2 Cruise, Digest, c. 2, § 49. Ruch v. Rock Island, 97 U. S. at page 696, 24 L. Ed. 1101, held that:

"If the conditions subsequent were broken, that did not ipso facto produce a reversion of the title. The estate continued in full force until the proper step was taken to consummate the forfeiture. This could be done only by the grantor during his lifetime, and after his death by those in privity of blood with him."

So it is said:

"If the tenant neglected to pay or perform his service, the lord might resume his fief. It is upon this ground that conditions are held to be reserved to the grantor and his heirs only, and he and they alone can avail of the right of resuming the estate for a breach." Coke, Lit. 201a, and Butler's Notes, 84; 2 Washb. (5th Ed.) p. 7.

And again Washburn says at page 15, citing Co. Lit. 214, Sheppard, Touch., fol. Ed. 441, and Crabb on Real Prop. 835:

"If there be a breach of the conditions in law, the lessor or his heirs, or, if he have aliened his estate, his assignee, may avail himself of the right to enter. But of conditions in deed no one but he who creates the estate or his heirs, as, for instance, the heirs of a devisor, or, in case of a devise of the contingent right, such devisee or his heirs, can take advantage by entering and defeating the estate. It is a right which cannot be aliened or assigned or pass by a grant of the reversion at common law."

It is not necessary to decide whether any one other than the grantor and his heirs can take advantage of a forfeiture arising from the breach of a condition subsequent, as the plaintiffs in this case are the heirs of the grantor, Margaret Taylor.

There are no allegations in the complaint sufficient to show a waiver of the breach in failing to support the grantor. It would seem to be implied that Margaret Taylor had been in possession of the land during her life, as it is alleged that defendants have had the possession since her death. There is certainly not enough in the complaint for us to declare, as matter of law, that she had waived or abandoned her right to take advantage of the forfeiture caused by the breach. There is really nothing alleged that shows that she did, and upon the meager statement in the complaint we would be unwilling to hold that, in law, there had been a waiver. When the answer comes in, and the facts are developed, under proper issues submitted for the purpose, we may see more clearly what are the legal rights of the parties and declare them accordingly.

There was no error in overruling the demurrer and allowing defendants to answer.

No error.

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(169 N. C. 295)

## STATE v. SEABOARD AIR LINE RY.

(No. 241.)

(Supreme Court of North Carolina. Feb. 10, 1915.)

1. COMMERCE ⟸3—REGULATION OF TRANSPORTATION OF INTOXICATING LIQUORS—VALIDITY OF STATUTES.

Webb-Kenyon Law March 1, 1913, c. 90, 37 Stat. 699 (U. S. Comp. St. 1913, § 8739), prohibiting the transportation from one state or territory into another of intoxicating liquor intended by any person interested therein to be received, possessed, sold, or used in the original package or otherwise, in violation of any law of such state or territory, is constitutional.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 3; Dec. Dig. ⟸3.]

2. COMMERCE ⟸8—REGULATION OF TRANSPORTATION OF INTOXICATING LIQUORS—CONSTRUCTION OF STATUTES.

Webb-Kenyon Law March 1, 1913, withdraws from the operation and effect of the commerce clause of the federal Constitution and brings within the police power of the state, as soon as they cross the state line, shipments of intoxicating liquors into prohibition territory with intent to violate the laws thereof.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⟸8.]

3. INTOXICATING LIQUORS ⟸138—REGULATION OF TRANSPORTATION—CONSTRUCTION OF STATUTES.

Under Web-Kenyon Law March 1, 1913, relative to the interstate transportation of intoxicating liquors, the intent to violate state laws made determinative of the validity of such transportation is an intent on the part of the consignee or other person interested in the liquor.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. ⟸138.]

4. COMMERCE ⟸14—REGULATION OF TRANSPORTATION OF INTOXICATING LIQUORS—VALIDITY OF STATE LAWS.

Pub. Laws 1913, c. 44, § 5, requiring all express, railroad, or other transportation companies to keep a separate book in which shall be entered, upon receipt thereof, the name of the consignee of liquor, to whom delivered, etc., after which record shall be a blank space in which the consignee shall be required to sign his name or make his mark before such liquor is delivered, and providing that such book shall be open for inspection by any officer or citizen of the state, county, or municipality during business hours, and shall constitute prima facie evidence of the facts therein and be admissible in any court, is not in conflict with the commerce clause of the federal Constitution, since Webb-Kenyon Law March 1, 1913, having made certain interstate shipments of intoxicating liquors illegal and brought them within the police power of the state, confers upon state authorities the right to make rules and regulations required and reasonably designed to make such power effective under the rule that a statute containing a definite grant of power authorizes all things necessary to accomplish the express purpose of the grant, and the state law is a police regulation, reasonably designed to carry out the purpose of the statute and make effective the power referred to the state by the federal law.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 30, 92; Dec. Dig. ⟸14.]

5. COMMERCE ⟸61—REGULATION OF TRANSPORTATION OF INTOXICATING LIQUORS—VALIDITY OF STATE LAWS.

Pub. Laws 1913, c. 44, § 5, is not invalid as conflicting with Interstate Commerce Law Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act June 18, 1910, c. 309, § 14, 36 Stat. 555 (U. S. Comp. St. 1913, § 8592), prohibiting interstate carriers from keeping any accounts, records, or memoranda other than those prescribed by the Interstate Commerce Commission, as the book required by the state law is simply an excerpt from the books which the carrier is required to keep by regulations heretofore adopted by the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81–84, 89; Dec. Dig. ⟸61.]

6. CRIMINAL LAW ⟸304—JUDICIAL NOTICE—REGULATIONS OF INTERSTATE COMMERCE COMMISSION.

Judicial notice will be taken of the regulations of the Interstate Commerce Commission as regulations of an important governmental department made pursuant to a public statute, designed and intended to control the general public, and having the force of a public law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700–717, 2951½; Dec. Dig. ⟸304.]

7. COMMERCE ⟸61—REGULATION OF TRANSPORTATION OF INTOXICATING LIQUORS—VALIDITY OF STATE LAWS.

Pub. Laws 1913, c. 44, § 5, is not void as in conflict with Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384, as amended by Act June 18, 1910, c. 309, § 12, 36 Stat. 553, subsec. 6 (U. S. Comp.

St. 1913, § 8583), forbidding carriers to disclose information as to interstate shipments without the consent of the shipper, in view of the proviso that nothing therein shall prevent the giving of such information in response to any legal process issued under the authority of any state or federal court or to any officer or agent of the United States or of any state or territory or to any officer or duly authorized person seeking such information for persons charged with or suspected of crime, as the state law makes any citizen an authorized agent of the state for the purpose of inspecting the record in question.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81–84, 89; Dec. Dig. ⟸61.]

8. INTOXICATING LIQUORS ⟸15 — REGULATION OF TRANSPORTATION — VALIDITY OF LAWS.

Pub. Laws 1913, c. 44, § 5, requiring a record to be kept of the receipt and delivery of shipments of intoxicating liquors to be open for inspection by any officer or citizen during business hours, does not violate Const. U. S. Amend. 14, as that amendment does not impair the exercise of the police power.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 17, 18; Dec. Dig. ⟸15.]

9. COMMERCE ⟸8 — REGULATION OF TRANSPORTATION OF INTOXICATING LIQUORS—VALIDITY OF STATE LAWS.

Pub. Laws 1913, c. 44, § 5, is not invalid as in conflict with federal Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1136 [U. S. Comp. St. 1913, § 10408]) § 238, forbidding the delivery of intoxicating liquors by carriers to any person other than the consignee, unless upon his written order, or section 239 (U. S. Comp. St. 1913, § 10409), prohibiting shipments of intoxicating liquors C. O. D., as such provisions are prohibitive in character, and, subsequent federal legislation having made certain shipments of whisky illegal and placed them under the police power of the state, the state may make further regulations not conflicting with but in addition to the federal requirements.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⟸8.]

Defendant's Appeal.

10. CRIMINAL LAW ⟸1026 — APPEAL—PARTIES ENTITLED TO APPEAL.

Where, in a criminal prosecution, a judgment was entered for defendant on a special verdict, defendant could not appeal for the purpose of securing a review of the court's rulings on motions to quash the indictment and dismiss the action, as no appeal lies for a defendant in a criminal case, except from a judgment on a conviction or a plea of guilty or some judgment against him in its nature final.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2615–2618; Dec. Dig. ⟸1026.]

Appeal from Superior Court, Wake County; Bond, Judge.

The Seaboard Air Line Railway was indicted for an offense. From a judgment in defendant's favor on a special verdict, the State appeals, and, to secure a review of certain rulings, defendant also appeals. Judgment reversed on the State's appeal. Defendant's appeal dismissed.

Indictment for refusing to allow an inspection of certain books containing a record of shipments and deliveries to consignees of intoxicating liquors, in violation of Public Laws 1913, c. 44, § 5. It appeared that the defendant had such a book as the statute requires it to keep, and the relevant facts embodied in a special verdict and the proceedings thereon are as follows:

"We, the jurors sworn and impaneled in this case, return the following special verdict in this case; the defendant having agreed that a special verdict might be found: We find that R. L. Davis, on a date prior to the starting of this prosecution, he being at that time a citizen of the county of Wake, state of North Carolina, went to the office of the defendant company during its business hours, and while said office was open, and demanded of the agent that he be allowed to inspect the book kept by the defendant showing shipments of liquor from points outside of the state of North Carolina to the city of Raleigh. We further find that the said Davis was not an officer. We further find that the agent of the defendant stated that he was instructed to and did refuse to allow the said Davis to make the inspection which he had requested and demanded. We further find that the said Davis had no legal process and did not make any demand under any legal process, and at the time of the alleged demand he was neither a state nor federal officer of any kind of any state or territory. We further find that, at the time the said Davis made such demand, he was seeking information from said book for the purpose of prosecuting persons suspected of violating the law of North Carolina. We further find that, at the time said demand was made, said Davis was seeking general information as to shipments of whisky into the city of Raleigh from points in another state, and that he had in his mind specially an effort to see what evidence could be procured against one or more specific parties in the city of Raleigh, meaning by the words 'general information' that he was seeking to ascertain who were the consignees of liquor and the quantities they were receiving, for the purpose of prosecuting such parties as may be charged or suspected with the violation of the prohibition laws of the state. We further find that the witness R. L. Davis, at the time he made a demand for an inspection of the book, had no authority, except that which existed, if any, by virtue of the fact that he was at that time a citizen of the state. If, upon the foregoing facts, the court is of the opinion that the defendant is guilty, then we say for our verdict that the defendant is guilty; if, upon said facts, the court is of the opinion that the defendant is not guilty, then we find that the defendant is not guilty."

Upon the rendering of the foregoing special verdict, the defendant Seaboard Air Line Railway moved for judgment of not guilty upon the special verdict because the facts stated therein do not constitute a violation of the law, and upon the ground that the statute upon which the action is based is an attempted regulation of interstate commerce, in violation of article 1, § 8, of the Constitution of the United States, and is unconstitutional and void, and for the reasons fully set out in a written motion to dismiss the action and for judgment of nonsuit. Upon the foregoing special verdict the court adjudged that the defendant is not guilty. The state excepted. And thereupon the jury for their verdict said the defendant Seaboard Air Line Railway was not guilty. Motion by the state to set aside the verdict and for a new trial. Motion overruled, and the state excepted. Whereupon it was considered

and adjudged by the court that the defendant, the said Seaboard Air Line Railway, be discharged. To the foregoing judgment the state again excepted and appealed to the Supreme Court.

Defendant also appealed in the case and assigned for errors the refusal of the court to quash the bill of indictment and to dismiss the action; these motions having been duly made in apt time and for reasons stated in the record.

The Attorney General, T. H. Calvert, Asst. Atty. Gen., and Manning & Kitchin, of Raleigh, for the State. Murray Allen, of Raleigh, for defendant.

HOKE, J. It has now for some years been the settled "public policy of this state, approved by popular vote and * * * enforced by general and many local statutes, that, except in" certain specified and "very restricted instances, the manufacture and sale of intoxicating liquors shall not be allowed." Smith v. Express Co., 166 N. C. 155, 82 S. E. 15.

Acting, no doubt, under the conviction that, where such a policy has been established as necessary to the peace and well-ordered progress of communities, the people are entitled to have the same upheld, and recognizing that its successful maintenance and efficient enforcement is seriously hindered and at times obstructed by reason of interstate shipments of whisky, and because such shipments were withdrawn to a great extent from state regulation by the commerce clause of the federal Constitution, Congress has, from time to time, enacted statutes designed to bring this subject (the sale, disposition, and use of intoxicating liquors) more and more under the police power of the states. Thus, in 1890, not long after the decision of the Supreme Court of the United States in Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, in which it was held that, notwithstanding the prohibition statutes of a state to the contrary, an importer could ship whisky into the state and sell same in original packages, Congress passed a statute, known as the "Wilson Law," to the effect that all fermented, distilled, or intoxicating liquors or liquids, transported into any state or territory or remaining therein for use, consumption, or storage, shall, on arrival in such state or territory, be subject to the operation and effect of the laws of such state, etc., etc., and shall not be exempt therefrom by reason of being introduced therein in original packages. This statute was upheld as a valid enactment in Re Rahrer, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572, and in Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, the terms "on arrival in such state or territory" were construed to mean "when delivered to consignee in said state in continuous shipment from another state or territory"; the court being of opinion that, on perusal of the entire statute, its purpose and meaning was to enable the states to prohibit sales in original packages after delivery to consignee.

[1-3] In these and other cases on the subject, clear intimation is given that Congress might, by additional legislation, further extend the police power of the state over the subject. Thus, in Rahrer's Case, Chief Justice Fuller, delivering the opinion, said:

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

And in Leisy v. Hardin, the court, in referring to the case of Bowman v. Railway, 125 U. S. 507, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, in which it had been held that, under the laws then existent, interstate shipments of whisky were excluded from state regulation by the commerce clause of the federal Constitution until delivery in continuous transit to the consignee, said:

"Up to that * * * time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreigner or nonresident importer"

—a statement given with approval in Rhodes v. Iowa, supra, 170 U. S. 417, 18 Sup. Ct. 666, 42 L. Ed. 1088.

In accord with these intimations, Congress on March 1, 1913 (chapter 90, Federal Statutes, Anno. Supp. 1914, p. 208), passed the act known as the "Webb-Kenyon Law." It is entitled "An act divesting intoxicating liquors of their interstate character in certain cases," and provides, in general terms, that the shipment or transportation in any manner or by any means whatsoever of any spirituous, vinous, malted, fermented, or any intoxicating liquor of any kind from one state or territory into another, etc., etc., which said intoxicating liquor is intended by any person interested therein to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such state or territory, etc., is hereby prohibited. We are not aware that the validity or interpretation of this statute has been directly presented for decision to the Supreme Court of the United States, but the question, in different phases, has been before several of our state courts and the lower federal courts of recognized ability and learning, and there is a very general consensus of opinion, in which we fully concur, that the act is constitutional; that it classifies interstate shipments of intoxicating liquors into legal and illegal, withdrawing from the effect and operation of the commerce clause of the federal Constitution all such shipments into prohibition territory with intent to violate the laws thereof, and, in view of the better considered cases, that

the illegal intent of any "person interested therein," made determinative by the law, is an intent on the part of the consignee or others interested in the "article" transported. Smith v. Express Co., 166 N. C. 155, 82 S. E. 15, supra; concurring opinion of Chief Justice in State v. Cardwell, 166 N. C. 316, 81 S. E. 628; Adams Express Co. v. Commonwealth, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342; Atkinson v. So. Ex. Co., 94 S. C. 444, 78 S. E. 516, 48 L. R. A. (N. S.) 349; State v. Express Co. (Iowa) 145 N. W. 451; Van Winkle v. State (Del.) 91 Atl. 385; American Express Co. v. Beer (Miss.) 65 South. 575; Ex parte Peede (Tex. Cr. App.) 170 S. W. 749. And having regard to the language of the law and the facts and circumstances attendant on its passage and throwing light on its meaning and purpose, including also the significance and history of precedent legislation, we are of opinion further that all such shipments made illegal by the Webb-Kenyon Law are brought within the police power of the state when and as soon as they cross the state line and are subject to such rules and regulations as are reasonably designed to make such power effective. This position is stated by C. J. Smith, delivering the opinion in Express Co. v. Beer, as follows:

"The next statute of this character enacted by Congress was the one here under consideration (the Webb-Kenyon Act), and a comparison of its language with that of the Wilson Act will demonstrate that its draftsman intended to cure the defect in the Wilson Act and to make it unlawful to transport into a state from without intoxicating liquors intended by any person interested therein to be dealt with contrary to the laws of the state; in other words, to divest such intoxicating liquor altogether of its interstate character, and thereby permit the laws of the state into which it was being transported to operate upon it immediately upon its crossing the state line. * * *"

[4] About the time the Webb-Kenyon Law was enacted, and with the view of its successful passage, the Legislature of North Carolina enacted a statute entitled "An act to secure the enforcement of the laws against the sale and manufacture of intoxicating liquors," being chapter 44 of Public Laws of 1913, and popularly known as the "Search and Seizure Law," which, in section 1, prohibits the sale, exchange or bartering, etc., of such liquors, and section 2 prohibits the keeping such liquors in possession for the purposes of sale, and makes the following facts prima facie evidence of a violation of the second section:

"First: The possession of a license from the government of the United States to sell or manufacture intoxicating liquors; or

"Second: The possession of more than one gallon of spirituous liquors at any one time, whether in one or more places; or

"Third: The possession of more than three gallons of vinous liquors at any one time, whether in one or more places; or

"Fourth: The possession of more than five gallons of malt liquors at any one time, whether in one or more places; or

"Fifth: The delivery to such person, firm, association or corporation of more than five gallons of spirituous or vinous liquors, or more than twenty gallons of malt liquors within any four successive weeks, whether in one or more places; or

"Sixth: The possession of intoxicating liquors as samples to obtain orders thereon," etc.

After establishing certain methods of procedure for the enforcement of these sections, the act, among other things, and in section 5, makes provision as follows:

"All express companies, railroad companies, or other transportation companies doing business in this state are required hereby to keep a separate book in which shall be entered immediately upon receipt thereof the name of the person to whom the liquor is shipped, the amount and kind received, and the date when received, the date when delivered, by whom delivered, and to whom delivered, after which record shall be a blank space, in which the consignee shall be required to sign his name, or if he cannot write, shall make his mark in the presence of a witness, before such liquor is delivered to such consignee, and which said book shall be open for inspection to any officer or citizen of the state, county, or municipality any time during business hours of the company, and said book shall constitute prima facie evidence of the facts therein and will be admissible in any of the courts of this state. Any express company, railroad company, or other transportation company or any employé or agent of any express company, railway company, or other transportation company violating the provisions of this section shall be guilty of a misdemeanor. * * *"

There are facts in the special verdict showing that defendant, having kept the book as specified and required by the law, refused, during business hours, to permit R. L. Davis, at the time a citizen and resident of Wake county, N. C., to inspect such book, and that said Davis was seeking information from said book for the purpose of prosecuting persons suspected of violating the laws of North Carolina. This refusal is made a misdemeanor by the statute, and, on the record, there should be a conviction of defendant if this is a valid law. It has been so recognized with us in State v. Wilkerson, 164 N. C. 431, 79 S. E. 888, and in State v. Lee, 164 N. C. 533, 80 S. E. 405; and, on these and other authorities applicable, we are of opinion that the court below erred in directing that a verdict of not guilty should be entered.

It is chiefly urged against the validity of the statute and the attempted procedure under it that spirituous liquors, in certain instances, being still recognized as a legitimate subject of interstate commerce, are protected from such interference by the commerce clause of the federal Constitution and authoritative decisions construing it, and that such protection continues until a given shipment is delivered to the consignee in a continuous course of transit, citing, among other cases, McNeil v. So. Ry., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; Bowman v. Railroad, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700, and other cases.

Prior to the enactment of the Webb-Kenyon Law, this position might very well have been

recognized as controlling, but it is an established principle that, when a statute contains a definite grant of power, it will be so construed as to authorize all things necessary to accomplish the expressed purpose of the grant. Dewey v. Railroad, 142 N. C. at page 400, 55 S. E. 292, citing Sutherland on Statutory Construction, §§ 341–343, p. 427 et seq. (erroneously printed in Dewey's Case as page 518), and Enlich on Interpretation of Statutes, § 418. And this statute, as we have endeavored to show, having made certain interstate shipments of intoxicating liquors illegal and brought the same within the police power of the state as soon as they come within its territory, should be held to confer upon the state authorities the right to make the rules and regulations required and reasonably designed to make such power effective. The Wilson Act, as we have seen, brought these liquors under state control as soon as delivered to the consignee; and to hold, as defendant contends, that the Webb-Kenyon Act did no more than this would be to deprive the written statute, enacted after full and extensive discussion and passed over a President's veto, of any and all significance. And to set aside a regulation of this character, intended and reasonably calculated to enable the state's officers and agents to ascertain whether interstate shipments of whisky are or are not within state control and subject to state regulation, would well-nigh render the statute of no practical value to the communities it was intended to benefit. The regulation now objected to puts no burden on interstate commerce, but is only a police regulation, reasonably designed to carry out the purpose of the statute and make effective the power referred to the state by reason of the federal enactment, and comes well within the principle on which quarantine and inspection and other state and local laws and regulations are based and upheld, many of them stated with approval in the Minnesota Rate Cases, 230 U. S. 352, 402, 406, 408, 33 Sup. Ct. 729, 57 L. Ed. 1511; Mo. Pac. Ry. v. Larabee Mills, 211 U. S. 612–622, 29 Sup. Ct. 214, 53 L. Ed. 352, and other cases of like purport.

[5, 6] It is further contended, not only that this state legislation invades a field exclusively referred by the Constitution to federal regulation, but that, on this particular subject, Congress has specially acted, and that this state legislation is in direct violation of the federal statute intended to control the matter, and by which interstate carriers are prohibited from keeping any "accounts, records or memoranda other than those prescribed by the Interstate Commerce Commission." Section 20 of the act to regulate commerce (chapter 104, § 20, Laws U. S. 1887, and amendments thereto in section 8592, 4 Compiled Statutes U. S. pp. 3872, 3873).

If it be conceded that there is direct conflict between the state statute and the provision of the federal law concerning this subject, and we are right in the position that, when Congress made certain interstate shipments of intoxicating liquor illegal and referred the regulation thereof to the police power of the states, it thereby granted the incidental right to make this power effective, in that case the Webb-Kenyon Law, being the later expression of the congressional will, might very well be construed to modify to that extent the former federal laws and regulations on the subject. But, in fact there is no conflict. Taking judicial notice of the regulations of the action of the Interstate Commerce Commission, which we are permitted to do, when the regulations of an important governmental department, made pursuant to a public statute and designed and intended to control the general public have the force of a public law (State v. Railroad, 141 N. C. 846, 54 S. E. 294), we know that, pursuant to this public statute, the Interstate Commerce Commission has required interstate carriers to keep a standard and uniform set of books, showing the movements of traffic, and that it is done with a view to facilitate examination by official agents and to remove or minimize, as far as possible, the opportunity to discriminate among shippers; and there is nothing in this state statute that in any way militates against the requirement or purpose of such a regulation. The book required by the state law is simply an excerpt from the books which the carrier is required to keep by the Commission, and, recognizing this, the facts show that the defendant had actually kept the book in this instance. Being, as stated, only an extract from the carrier's general records, such a book is no burden on commerce, but only a reasonable police regulation, necessary to the effective regulation and control of a subject submitted to it by the federal law.

[7] We were referred, on the argument, to a federal statute (36 Stat. 553, 1 Fed. Statutes Anno. Supp. 1912, p. 122, 4 Compiled St. § 8583, subsec. 6)—that which forbids disclosures as to interstate shipments without consent of the shipper, which may be used by competitors to the shipper's disadvantage. If it be assumed that this statute is otherwise relevant, the act itself contains the proviso:

"That nothing in this act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the United States, or of any state or territory, in the exercise of his powers, or to any officer or other fully authorized person seeking such information for persons charged with or suspected of crime," etc.

The state statute provides that the book required to be kept shall be open to any officer or citizen of the state during business hours, and this constitutes any citizen an authorized agent of the state for the purpose indicated, bringing the applicant, in the present instance, R. L. Davis, directly within the intent and meaning of the provision in the federal law. It is well understood that

offenders against regulations of this character are insistent, enterprising, and elusive, and we see no reason why the state should not commit the duty to any of its citizens, as being required to a proper enforcement of the law on the subject.

[8] The matter having been referred to the police power of the state, the question of method must be left largely to the state's discretion; entirely so, unless the regulation should offend against some constitutional principle. The one in question here, as we have endeavored to show, and owing to the Webb-Kenyon Act, is not within the commerce clause of the federal Constitution; no more is it inhibited by the fourteenth amendment, which has been repeatedly held not to impair the exercise of the police power (In re Converse, 137 U. S. 624, 11 Sup. Ct. 191, 34 L. Ed. 796; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923); and the provision constituting any citizen an authorized agent of the state for the enforcement of the law is not near so searching or stringent as many police regulations which have been approved by the courts (Patsone v. Pennsylvania, 232 U. S. 138, 34 Sup. Ct. 281, 58 L. Ed. 539; Silz v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385). This last upholding a law of New York, which authorized any person to destroy fish nets, set or maintained on the waters of the state in violation of the state statutes. A principle applied in our own state in Daniels v. Homer, 139 N. C. 219, 51 S. E. 992, 3 L. R. A. (N. S.) 997. There are also many decisions sustaining legislation by which the production and examination of books have been compelled and provided for. Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860; In re Chapman, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. Ed. 1154; Santa Fé R. R. v. Davidson et al. (C. C.) 149 Fed. 603. And it will be noted further that the state statute (section 7) contains provision that no person testifying shall be prosecuted for any offense done or participated in by him, nor shall any discovery made by such witness be used against him in any penal or criminal action.

In this connection, we were cited by counsel for defendant to the case of Ezell v. City of Atlanta, 140 Ga. 197, 78 S. E. 821, in which a municipal ordinance of the city, requiring carriers, on receipt of spirituous liquors, etc., to make out a list and report same to the police authorities, was declared void by the Supreme Court of Georgia. This decision was made on the ground that the ordinance in question was an unwarranted interference with interstate commerce and in violation of section 20 of the Interstate Commerce Act and the amendments to the same. The requirements of the said ordinance are much more elaborate and exacting than the provision of the state statute which we are considering, and the same might be distinguished on the ground that the ordinance amounted to a burden on interstate commerce. The case, however, was presented on facts occurring before the passage of the Webb-Kenyon Law, and the court is careful to note that the effect of that law on the question was in no wise considered.

[9] It was finally insisted that the state statute is in conflict with the federal Criminal Code, §§ 238, 239, on the ground that the first prohibits delivery of these shipments to any one but the consignee or on his written order, whereas the state law requires an addition that the name of the recipient shall be signed in the book, etc.; and the second, in effect, forbids the shipment of whisky C. O. D. But it will be observed that both of these provisions of the federal Code are prohibitive in character; and the subsequent federal legislation having made certain shipments of whisky illegal and placed them under the police power of the state, including the right to make all rules and regulations concerning them reasonably required to make its control effective, there is nothing to prevent the state from making further regulations on the subject which do not conflict but are in addition to the federal requirements.

For the reasons stated, and on the facts established, we are of opinion that the court below should have held the defendant guilty. This will be certified that a general verdict of guilty be entered below and the court proceed to judgment.

Reversed.

### Defendant's Appeal.

[10] It is the established position with us that no appeal lies for defendant in a criminal case, except from a judgment on conviction or plea of guilty or some judgment against him in its nature final. State v. Ford, 83 S. E. 831, at the present term; State v. Andrews, 166 N. C. 349, 81 S. E. 416; State v. Webb, 155 N. C. 426, 70 S. E. 1064. The appeal of the defendant, therefore, must be dismissed, but without prejudice to the right to have its positions considered and its rights made available by proper appellate procedure on the entry of judgment below as indicated in the state's appeal.

Appeal dismissed.

(168 N. C. 226)

## THOMPSON v. JOHN L. ROPER LUMBER CO. et al. (No. 19.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

1. EVIDENCE ⟸183—BEST EVIDENCE—SHERIFF'S DEED—RECITALS.

The recitals in a deed executed pursuant to a judicial decree or by a sheriff upon execution sale are only secondary evidence of the facts recited, and, before admission for that purpose, the loss or destruction of the original record must be clearly shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. ⟸183.]

2. EVIDENCE ⟸183—SECONDARY EVIDENCE —CONTENTS OF DEED.

Secondary evidence of the contents of lost records of an administrator's petition to sell land of his intestate was properly excluded, where it appeared that the clerk of the county court who searched for the original papers did not state how much time he spent in the search, nor that no papers could be found, but that he satisfied himself that they could not be found "easily," and that he was "unable to tell whether they could be found or not," and a mark on certain papers of record entitled "Account of sale and inventory 1853," one of which was entitled "Estate of P., deceased, in account with T., administrator," was of itself too meager to furnish evidence of the proceedings for the administrator's sale.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. ⟸183.]

3. DEEDS ⟸13 — JUDICIAL SALES ⟸50 — DEED TO DECEASED GRANTEE—EQUITABLE ESTATE OF HEIRS.

A deed executed in judicial proceedings to a grantee then dead was void, but upon proof of payment of the purchase price bid at the sale an equitable estate would be vested in his heirs.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 21, 22; Dec. Dig. ⟸13; Judicial Sales, Cent. Dig. §§ 90-94, 96; Dec. Dig. ⟸50.]

4. QUIETING TITLE ⟸10—RIGHT TO MAINTAIN—EQUITABLE TITLE.

A civil action to try title to land may be maintained upon an equitable title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36-42; Dec. Dig. ⟸10.]

Appeal from Superior Court, Pasquotank County; Carter, Judge.

Action to try title to land by one Thompson against the John L. Roper Lumber Company and others. Judgment of nonsuit, and plaintiff excepted and appealed. Affirmed.

This is a civil action to try title to land. The plaintiff relies upon a chain of paper title, originating with four grants to Jonothan Herring, with which the plaintiff seeks to connect himself by mesne conveyances. In deraigning his title, the plaintiff is compelled to show title to the locus in quo in William B. Shephard and the heirs of Ann Pettigrew, whose heirs at law or devisees the individual defendants admittedly are. In further deraigning his title, the plaintiff is compelled to rely upon two deeds, necessary links in his chain of title, as follows, to wit: First. A deed of date September 6, 1853, from Ehringhaus, clerk and master, to Joseph Prichard, and further purporting to have been executed under the authority of a decree, in a certain special proceeding, to sell said lands for partition, instituted by William B. Shephard and the heirs of Ann Pettigrew, at spring term, 1850, of Pasquotank county court of equity. Second. A certain paper writing, dated March, 1854, purporting to be a deed from James Taylor, administrator of Joseph Prichard, to Matchett Taylor. The plaintiff contends that, even if the deed from the clerk and master to Joseph Prichard be void, still the equitable title to the locus in quo vested in Joseph Prichard, by virtue of his purchase at the master's sale. It appears from the evidence, introduced by the plaintiff, that, at the time of the execution of said deed, to wit, September 6, 1853, Joseph Prichard was dead. The deed of James Taylor, administrator, contains the usual recitals showing a sale to make assets, but the proceedings and records under which it was made were not introduced.

To establish the loss or destruction of such original record and proceeding, the plaintiff relies on the evidence of G. R. Little, clerk of the court of Pasquotank county, who testified as follows:

"I hold in my hands some papers marked, 'Account of sale and inventory 1853,' which I found in the files in my office where such accounts are kept. One of these accounts is entitled the "Estate of Joseph Prichard, deceased, in account with James Taylor, administrator," interest calculated up to the 1st of September, 1853. I have made search for the petition of James Taylor, administrator of Joseph Prichard, to sell the lands of his intestate for assets, but did not find them. I have found some entries in the petition docket and the appearance docket. I have seen no original papers. I made a search to satisfy myself that it could not be found easily. I don't know whether counsel understand or not. Most of the records about this date are down there in such a condition that I am unable to tell whether they can be found or not. They have not been filed and indexed, and from the search I made I was unable to find them. The record which I referred to just now was the docket record."

The plaintiff further offered certain docket entries, for the appearance and civil docket, December term, 1852, of the court of pleas and quarter sessions of Pasquotank county as follows:

Docket Entry No. 2. "No. 8. Petition to make realty assets. James Taylor, administrator, to the court and against the heirs at law. Report made and confirmed. Cost paid."

At the conclusion of the evidence, his honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

Ward & Grimes, of Washington, N. C., Ward & Thompson, of Elizabeth City, and Winston & Biggs, of Raleigh, for appellant. J. Kenyon Wilson, of Elizabeth City, and Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellee Roper Lumber Co. Pruden & Pruden, of Edenton, and P. W. McMullan, of Hertford, for individual appellees.

ALLEN, J. The deed from Taylor, administrator, and the judicial proceedings authorizing its execution, are necessary links in the chain of title of the plaintiffs, and, unless established by competent evidence, the judgment of nonsuit must be affirmed. The deed was introduced in evidence, but the judicial proceedings were not produced; the plaintiff relying on the recitals in the deed to prove their existence and contents.

[1] It is well established that the recitals in a deed executed pursuant to a judicial decree, or by a sheriff upon an execution sale, are evidence of the facts recited; but they are only secondary evidence, and, before being admitted for that purpose, the loss or destruction of the original record must be clearly proven. Isley v. Boon, 109 N. C. 555, 13 S. E. 795; Person v. Roberts, 159 N. C. 168, 74 S. E. 322.

[2] The law has also fixed the standard by which the loss or destruction of the original record must be established.

In Byrd v. Collins, 159 N. C. 641, 75 S. E. 1073, the court quoted from Avery v. Stewart, 134 N. C. 289, 46 S. E. 520, and applied the rule that:

"If the instrument is lost, the party is required to give some evidence that such a paper once existed, though slight evidence is sufficient for this purpose, and that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits such proof. What degree of diligence in the search is necessary it is not easy to define, as each case depends much on its peculiar circumstances; and the question whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined by the court and not by the jury. But it seems that, in general, the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest and which are accessible to him."

Applying this rule, it is manifest that the plaintiff has not met its requirements. The clerk who searched for the original papers does not say how much time he spent in the search, nor that no papers can be found, but that he satisfied himself they could not be found "easily," and that he is "unable to tell whether they can be found or not." The docket entry, standing alone, is also too meager to furnish evidence of the proceedings and the record.

It does not show whose administrator Taylor was, nor whose heirs were defendants, nor is there any reference to the land sold.

[3, 4] The deed to Prichard, which was objected to, is void, as contended by the defendant, because the grantee named was dead at the time of its execution. Neal v. Nelson, 117 N. C. 406, 23 S. E. 428, 53 Am. St. Rep. 590. But, upon proof of payment of the purchase price bid at the sale, an equitable estate would be vested in the heirs of the purchaser, and it is well settled in this state that an action may be maintained on an equitable title. Condry v. Cheshire, 88 N. C. 375; Brown v. Hutchinson, 155 N. C. 207, 71 S. E. 302. And in our opinion there was circumstantial evidence of payment.

If the controversy should again be litigated, it would be well to have separate findings upon the question of payment in fact, and payment by presumption from lapse of time.

Affirmed.

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(168 N. C. 268)

## BARCLIFF v. NORFOLK SOUTHERN R. CO. (No. 25.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

1. WATERS AND WATER COURSES ⟸126—DIVERSION OF SURFACE WATER TO INJURY OF LOWER PROPRIETOR.

In an action for flowing lands, a motion for nonsuit was properly dismissed, where there was evidence that defendant railroad drained a swamp of surface water through which its right of way passed in 1881, and in 1911 enlarged the ditches, but failed to enlarge a culvert to accommodate the increased flow of water, thereby setting it back on plaintiff's land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 139, 141, 142; Dec. Dig. ⟸126.]

2. WATERS AND WATER COURSES ⟸119—NATURAL STREAMS—DRAINAGE.

One may drain surface waters into a natural stream without thereby coming under liability to a lower riparian proprietor for damage caused by the increased flow.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 131–134; Dec. Dig. ⟸119.]

3. LIMITATION OF ACTIONS ⟸55—STATUTE OF LIMITATIONS—BEGINNING OF PERIOD—ACCRUAL OF CAUSE OF ACTION.

Where defendant railroad drained a swamp of surface water through which its right of way passed in 1881, and in 1911 enlarged the ditches, but failed to enlarge a culvert to accommodate the increased flow, thereby setting it back on plaintiff's land, the latter's cause of action accrued in 1911; and he can recover only such damages as accrued within three years prior to the bringing of the action, or he might have sued for permanent injuries within five years of the enlargement of the ditches.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299–306; Dec. Dig. ⟸55.]

4. DAMAGES ⟸62—DIVERSION OF SURFACE WATER—DUTY OF LOWER PROPRIETOR TO DRAIN OVERFLOWED LANDS.

A lower proprietor is under no duty to avoid damages to his land from surface water diverted upon it by an upper proprietor by carrying off such water in ditches.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119–131; Dec. Dig. ⟸62.]

Appeal from Superior Court, Pasquotank County; Carter, Judge.

Action by R. C. Barcliff against the Norfolk Southern Railroad Company. Motion for nonsuit denied, and defendant appeals. Affirmed.

J. Kenyon Wilson, of Elizabeth City, for appellant. Thomas J. Markham and Aydlett & Simpson, all of Elizabeth City, for appellee.

CLARK, C. J. This is an action for damages for diverting surface water from the right of way of the defendant and ponding it back upon the plaintiff. The defendant in building its roadbed in 1881 passed through several thousand acres of low, boggy, and uncleared land, a portion of which formed a basin in which all water falling on this area and surrounding lands accumulated and stood until it passed off by percolation or evaporation. The defendant, in order to maintain its roadbed through this basin, found it necessary to drain somewhere, and for that purpose cut two six-foot lateral ditches along its right of way, and then, in order that the water on the eastern side might be carried through to the western side, it put a culvert under its roadbed, whereby the water which would have drained east, if at all, was carried to the western side. To let it out of this basin, the defendant secured the use of an old ditch known as the "Terry" ditch, and, cutting a connecting ditch 125 yards from its right of way through the rim of the basin, drained the diverted water down the "Terry" ditch some 800 yards to the county road ditch, and thence along the road 180 yards to where the ditch crossed the county road through a culvert. In 1911 the defendant enlarged these ditches from their right of way to the county road and along the county road to an eight-foot ditch, but left the culvert at the county road not enlarged, and did not extend the ditch beyond the county road.

[1] The motion to nonsuit was properly denied. The principle is well settled that an upper proprietor can increase and accelerate the flow of water from his land, but such flow of water must not be diverted, to the detriment of the lower proprietor. Briscoe v. Parker, 145 N. C. 17, 58 S. E. 443; Mizell v. McGowan, 125 N. C. 439, 34 S. E. 538; Hocutt v. Railroad, 124 N. C. 214, 32 S. E. 681. There is evidence tending to show that the increased flow of the water collected by the defendant's ditches and carried down through the other ditches to the culvert at the county road was there impeded and backed up, overflowing and damaging the plaintiff's land, because the culvert was not enlarged with the enlargement of the ditches above it. The water thus carried down to said culvert, and there backed up on the plaintiff's land, was not water which would have flowed, if at all, eastward, and was brought under the defendant's roadbed, and thence let out by a ditch cut through the rim of the basin, down the ditches above mentioned. This was a diversion of water to the plaintiff's injury.

[2] "The defendant has no right to collect surface water into a ditch not adequate to receive it, and thus flood and injure the lands of another." Staton v. R. R., 109 N. C. 341, 13 S. E. 934; Jenkins v. R. R., 110 N. C. 444, 447, 15 S. E. 193. This is not the case of draining into a natural waterway increasing its flow, which defendant had a right to do, but is a case of collecting surface water into an inadequate ditch, which did not reach a natural water course, diverting it and leading it down to a point where, by reason of the insufficient exit, it was backed up and overflowed the plaintiff's land. Mizell v. McGowan, 120 N. C. 134, 26 S. E. 783; Briscoe v. Parker, 145 N. C. 17, 58 S. E. 443; Davenport v. Railroad, 148 N. C. 288, 62 S. E. 431, 128 Am. St. Rep. 599.

In Brown v. Railroad, 165 N. C. 396, 81 S. E. 452, the court said that the higher owner "cannot artificially increase the natural quantity of water, or change its natural manner of flow, by collecting it in a ditch and discharging it upon the servient land at a different place or in a different manner from its natural discharge."

[3] This cause of action did not accrue till 1911, when the enlargement of the ditch and the defendant's failure to lengthen and enlarge the same at the mouth caused the flooding. No damage had accrued to plaintiff till that time, and no action could have been maintained. The injury was not caused by the ditches dug in 1881, but by the deepening and enlarging of them in 1911, whereby the additional water was carried down and was stopped by the failure to enlarge the culvert at the public road and to carry the ditch further on. It is true the ditches dug in 1881 diverted the water, but it was carried by the plaintiff's land, and, the exit being sufficient, the water was not ponded back on him, and he suffered no damage. The statute of limitations began to run, therefore, only with the enlargement of the ditches in 1911, and the overflow then caused by the insufficient exit afforded by the culvert. Roberts v. Baldwin, 155 N. C. 277, 71 S. E. 319; Parks v. Railroad, 143 N. C. 289, 55 S. E. 701, 12 L. R. A. (N. S.) 680; Hocutt v. Railroad, 124 N. C. 219, 32 S. E. 681.

The diversion of the water began in 1881, but, having caused no damage to plaintiff, he could not bring an action for damages. If the acceleration in 1911 was of a natural flow, this would not give a ground of action; but it is the acceleration of diverted water which caused the damage.

The plaintiff is entitled to recover such damages as accrued within three years prior to the commencement of this action, or he could recover permanent damages in an action brought therefor within 5 years after the enlargement of the ditch, and the ponding back of the diverted water by the insufficient culvert, unless by acquiescence for 20 years the presumption of a grant or easement had arisen. Roberts v. Baldwin, 151 N. C. 408, 66 S. E. 346.

[4] The lower proprietor is not required to avoid damages to his land in such case by digging ditches to carry off surface water wrongfully diverted from its natural flow by the upper proprietor to his damage. Roberts v. Baldwin, 155 N. C. 281, 71 S. E. 319.

No error.

(168 N. C. 246)

WATERS v. KEAR. (No. 29-30.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

DAMAGES ⟸62—MITIGATION—DRAINAGE OF SURFACE WATERS.

The owner of land on which surface waters were wrongfully diverted by defendant is not required by law to permit defendant to dig a ditch through the land, or to dig the ditch himself in order to lessen the damages caused by the wrongful diversion.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119-131; Dec. Dig. ⟸62.]

Appeal from Superior Court, Beaufort County; Bond, Judge.

Action by Josephine Waters against Wiley M. Kear. Judgment for plaintiff, on special issues for a sum less than the general verdict, and both parties appeal. Reversed and remanded for the entry of a judgment on the general verdict.

Ward & Grimes, of Washington, N. C., for plaintiff. Daniel & Warren, of Washington, N. C., for defendant.

CLARK, C. J. This is an action for damages to plaintiff's crops and his land by the diversion of surface water. The jury found upon the issues submitted that the defendant wrongfully diverted the water upon the lands of the plaintiff, that his crops had been damaged within three years before action brought and down to the trial $150, and that the permanent damage to his land was $65.

The court submitted, as additional issues, what it would have cost the plaintiff to have cut certain ditches, marked on the map, which would have prevented the diverted water from injuring the plaintiff's lands and crops, and whether the defendant offered to cut a ditch through plaintiff's land which would have prevented the injury and which the plaintiff refused to let the defendant cut. The jury having found that the water was wrongfully diverted by the defendant upon the plaintiff's land, these latter issues and the findings thereon are irrelevant. If the water was wrongfully diverted, it may be that it would have been good neighborship, and possibly good policy, for the plaintiff to have permitted the defendant to have cut a ditch through his land, and thus have avoided any damage from the wrongful diversion of the water, if it would have had that effect. But the defendant had no legal right to require this, and the plaintiff was not required to assent to the defendant cutting a ditch through his land, which he doubtless had his reason for not wishing to be put there, simply to relieve the defendant from the consequences of his wrongful act.

The defendant's remedy in such case, if any, was to have had the right of way condemned through the plaintiff's land under the Drainage Act. He certainly had the remedy in his own hands of abandoning the diversion of the water and draining the water off according to its natural flow. A somewhat similar state of facts is presented and discussed in Barcliff v. R. R., 84 S. E. 290, at this term.

The court below should have rendered judgment in favor of the plaintiff in accordance with the verdict on the second and third issues for $215.

The case will be remanded to the end that judgment may be so entered. This renders it unnecessary to discuss the defendant's appeal.

In defendant's appeal, no error.

In plaintiff's appeal, reversed.

(168 N. C. 241)

SAVAGE et al. v. NORFOLK SOUTHERN R. CO. (No. 36.)

(Supreme Court of North Carolina. Feb. 17, 1915.)

LIMITATION OF ACTIONS ⟸55—RUNNING OF STATUTE.

A railroad company allowed a culvert to fill up so that water was cast back upon plaintiffs' land. The condition existed for 10 years. *Held*, that the damage caused by the recurring overflow was not caused by the construction of the road or repairs thereto. Hence Revisal 1905, § 394 (2), does not apply, and plaintiff may recover any damages caused by overflows within three years before action was begun.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. ⟸55.]

Appeal from Superior Court, Gates County; Carter, Judge.

Action by S. A. Savage and others against the Norfolk Southern Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. B. Rodman, of Norfolk, Va., and J. K. Wilson, of Elizabeth City, for appellant. Ward & Grimes, of Washington, N. C., for appellees.

CLARK, C. J. This is an action to recover damages for ponding water on the land and crops of the plaintiff. The east side of plaintiff's field drains towards the railroad and into the lateral ditches along its track. Formerly the lead ditch went under the roadbed, but the defendant let this culvert fill up. This turned the water to the south along the railroad, and its lateral ditch along the plaintiff's field has filled up until its bottom is higher than the plaintiff's ditch. The answer of the defendant contends that the plaintiff's ditch is too low, and it also pleads the statute of limitations.

There is no question of accelerating or in-

creasing the flow of the water. But it is simply a question of fact as to whether the water has been diverted, and the jury find on the issues that the water was diverted to the damage of the plaintiff as alleged. The defendant contends that the culvert was filled up when the plaintiff bought the land, and that, as the defendant had neglected to clean out the culvert for 10 years, it was protected by the statute of limitations.

The defendant's brief properly states that the question raised by this appeal is: "When does the statute of limitations begin to run?" There was evidence that the culvert had been stopped up some 10 years. The court charged the jury that the plaintiff was entitled to recover for such damages, if any, done to the plaintiff's land and crop by the land and water ponded back by the defendant within three years before action begun. This is not an action for permanent damages from stopping up the ditch and culvert, but for damages from the recurring overflows from time to time, and his honor's instruction was correct. This damage was not caused by "the construction of said road or the repairs thereto," and the five-year statute (Rev. § 394 [2]) does not apply. This case is substantially like that of Barcliff v. R. R. (the same defendant) 84 S. E. 290, at this term.

No error.

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(100 S. C. 65)

## PAINTER v. WESTERN UNION TELEGRAPH CO. (No. 9001.)

(Supreme Court of South Carolina. Feb. 13, 1915.)

1. TELEGRAPHS AND TELEPHONES ⟸39—MESSAGES—TRANSMISSION—ERRORS—DELIVERY—UNAUTHORIZED PERSON.

Where a telegram announcing the finding and safety of plaintiff's missing son was sent to her, and in transmission was so changed as to make it read that the child was dead, defendant could not relieve itself from liability because it intrusted the message for delivery to plaintiff to an unauthorized person.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 30, 34; Dec. Dig. ⟸39.]

2. TELEGRAPHS AND TELEPHONES ⟸74—MISTAKES IN TRANSMISSION — WILLFULNESS — EVIDENCE.

Where, though a receiving clerk in defendant's telegraph office spelled back all the words in a message announcing that plaintiff's missing son was at the home of the sender of the message, it was so sent and delivered as to read that the boy was dead, the facts were sufficient to justify submission of an issue of willfulness and a recovery of punitive damages.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 77; Dec. Dig. ⟸74.]

3. TELEGRAPHS AND TELEPHONES ⟸69—MESSAGES—ERROR IN TRANSMISSION—INSTRUCTIONS.

An instruction for failure to correctly transcribe and transmit a message without satisfactory explanation is some evidence on which the jury might base a verdict for punitive damages was erroneous under the rule that, before such damages could be recovered, plaintiff was bound to show that the receiving agent understood the message or was negligent in failing to understand it; there being no presumption either that such agent understood it or was negligent in failing to do so.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 71; Dec. Dig. ⟸69.]

4. TELEGRAPHS AND TELEPHONES ⟸74—REQUESTED CHARGE—FORM.

Where, before a telegram was actually delivered, plaintiff learned its contents from a third person, a requested charge that the complaint alleged that the defendant telegraph company delivered to plaintiff the following message: "Bob is dead"—which should have read, "Bob is here," and by reason thereof plaintiff was caused to suffer mental anguish and physical injury, and if the jury found that the telegraph company did not deliver such a message to plaintiff, then she could not recover, was properly refused, since it was likely to lead the jury to believe that the paper, and not the information, was the thing in issue.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 77; Dec. Dig. ⟸74.]

5. TRIAL ⟸253—INSTRUCTIONS—OMITTING ISSUES—TELEGRAM—ERROR IN TRANSMISSION.

In an action for damages from an error in the transmission of a telegram, a requested charge that the action was not one for negligence in disclosing the contents of a telegram, and that if the jury found that the injury to plaintiff, if any, was caused by a third party disclosing such contents, and not through defendant's negligence in delivering the message, then plaintiff could not recover, etc., was properly refused as eliminating the question of negligence in the transmission of the message.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec Dig. ⟸253.]

6. TRIAL ⟸184—INSTRUCTIONS—CHARGE ON FACTS.

Where the court, in stating the issues, charges that it was the contents of the telegram which was changed in transmission, the effect of the contents on plaintiff which caused the trouble was not objectionable as a charge on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 407½; Dec. Dig. ⟸184.]

7. TELEGRAPHS AND TELEPHONES ⟸74—ERROR IN TRANSMISSION—INSTRUCTIONS.

An instruction that, if defendant telegraph company chooses to receive for transmission a message over the telephone to an agent in its office, then they should be held to the same accountability as if the message was written and placed in its hands, etc., was erroneous.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 77; Dec. Dig. ⟸74.]

Appeal from Common Pleas Circuit Court of Greenville County; H. F. Rice, Judge.

Action by Laura E. Painter against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

John Gary Evans, of Spartanburg, and Haynsworth & Haynsworth, of Greenville, for appellant. Wilton H. Earle and Jas. H. Price, both of Greenville, for respondent.

FRASER, J. This is an action for actual and punitive damages, for error in the trans-

mission of a telegram from Charleston to Greenville. There is testimony that Bob Painter, a little boy, the son of the plaintiff, with a son of one of the witnesses, Mr. Gillespie, ran away from their parents in Greenville and went to Charleston. Bob Painter had a sister, Mrs. Moody, who lived with her husband, Leon Moody, in Charleston. It was suspected that these boys had gone to Charleston, and Mrs. Painter sent a telegram to Mr. Moody about her son. From the Charleston office this message was telephoned to Mr. Moody at his home, which was about a mile from the telegraph office. Mr. Moody testified that he telephoned an answer as follows: "Bob is here. Will keep him until hear from you. Leon." The agent of the telegraph company wrote down the message as follows: "Bob is dead. Will keep him until hear from you. Leon." The message as thus written was sent to Greenville. Mr. Gillespie was uneasy about his son and went to see the plaintiff about it. Mr. Painter was not at home, and, after a conference between Mr. Gillespie and Mrs. Painter, it was agreed that Mr. Gillespie would go to the telegraph office in Greenville and send another message to Mr. Moody in Mrs. Painter's name. Mr. Gillespie went to the telegraph office and started to write the telegram, whereupon the telegraph operator informed him that he had received a message for Mrs. Painter and was waiting for a messenger boy to deliver it, but, inasmuch as Mr. Gillespie was also interested in the matter, he would turn over the message to him if he (Gillespie) would undertake to deliver it to Mrs. Painter. Mr. Gillespie undertook to deliver it. The agent of the company then opened the telegram, read it to Mr. Gillespie, and turned over the message to him for delivery to Mrs. Painter. On his way back to deliver the message, he stopped at a street corner to wait for a car. A neighbor, Mr. Eskew, came up to Mr. Gillespie and asked if there was any news of the boys, and Mr. Gillespie told him that Bob Painter was dead. Mr. Eskew then called up Mr. Perry, another neighbor and told him that Bob Painter was dead, and about the telegram. Mr. Perry then went over to the home of the plaintiff and called Mr. Painter out and told him about the telegram announcing the death of his son. While they were talking, Mr. Gillespie came up with the telegram. Mr. Painter did not believe the statement in the telegram and went off and called up Mr. Moody over the long distance telephone, and in that way learned that there was an error in the telegram, and that Bob was not dead, but safe in Mr. Moody's home. There is testimony that, while Messrs. Painter, Gillespie, and Perry were talking, another son of the plaintiff overheard the conversation, and in that way learned the contents of the telegram and went back into the house and told his mother, the plaintiff, about the telegram, and that Bob was dead.

This action is for the transmission and delivery of the erroneous telegram. The defendant in its answer made a general denial and some other defenses. The other defenses were either withdrawn, or there was no attempt made to prove them. The case was tried on two issues: First. Did the appellant ever receive the correct message? Second. Did the appellant deliver the message? The cause was tried on circuit and resulted in a judgment in favor of the plaintiff for $500.

There were 12 exceptions. The seventh and eighth were withdrawn. The others will be considered in order.

[1] I. Exception 1:

"In that his honor erred in refusing to grant defendant's motion for a nonsuit as to the cause of action for actual damages for the reason that there was no testimony tending to show that the suffering on the part of the plaintiff, if any, was the direct, natural, and proximate result of any delict on the part of the defendant.

"(1) Because the undisputed evidence shows that the telegram was never delivered to the plaintiff until the same had been corrected to read as sworn to by the sender.

"(2) Because there is no evidence tending to show that the telegram set forth in the complaint was delivered to the plaintiff but that the information received by her came from a source independent of the company, constituting an intervening efficient cause of the injury to the plaintiff, if any, beyond the control of the defendant."

There is some question as to whether Mr. Gillespie was the agent of Mrs. Painter or the telegraph company. We need not enter upon that question. There was evidence: That the appellant had undertaken to deliver a message. That it sent Mr. Gillespie to Mrs. Painter with the message. That he went to her house and spoke the message in the presence of two members of the family, and it was delivered by one of them to Mrs. Painter. It needs no authority to show that it would be error to hold that a telegraph company could relieve itself from all liability for a telegram by delivering it through an unauthorized person. There would then be no liability for nondelivery, because it was delivered, and no liability for error, because the person who delivered it was unauthorized. Whether the boy heard the conversation or not was a question of fact with which this court has nothing to do. This subdivision is overruled.

(2) What has just been said disposes of this subdivision.

[2] II. Exception 2:

"In that his honor refused to grant a nonsuit as to the cause of action for punitive damages. The error being that there was no testimony tending to show willfulness, wantonness, or a reckless disregard of the plaintiff's right by the defendant company."

The motion for a nonsuit could not have been granted. The witness Moody testified:

That the message was repeated to him by the operator and the words spelled. "Q. I will ask you this much: Did she spell the words back to you? A. Yes, sir. She spelled back the whole business."

This testimony was capable of two interpretations; i. e., the operator exhausted every effort to avoid a mistake and failed, or she deliberately changed the word "here" to the word "dead." Which was true was a question for the jury.

This exception is overruled.

[3] III. Exception 3:

"In that his honor erred in charging the jury as follows: 'For failure to correctly transcribe and transmit a telegraph message without satisfactory explanation is some evidence upon which the jury may base a finding of a verdict for punitive damages.' The error being that said charge is an incorrect proposition of law, and, while it may be regarded as some evidence of negligence, the mere fact that a mistake was made by the telegraph company in transmitting and transcribing a message is not sufficient evidence upon which to base a verdict for punitive damages."

This exception must be sustained. Whatever the rule may or may not be in regard to a change in a telegram in transmission after it reaches the telegraph office, the case of Cameron v. Telegraph Co., 90 S. C. 503, 74 S. E. 929, is full authority for the proposition that, before a party can recover for a mistake in a telegram, he must show that the agent who received a message understood the message or was negligent in failing to understand it. There is no presumption that the defendant agent understood it or was negligent in failing to understand it.

This exception is sustained.

[4] IV. Exception 4:

"In that his honor erred in refusing to charge without modification the following request of the defendant, to wit: 'The complaint alleges that the defendant company delivered to Laura E. Painter the following message: "Bob is dead. Will keep him until hear from you"—and by reason thereof plaintiff was caused to suffer mental anguish and physical injury. If you find that the telegraph company did not deliver such a telegram to the plaintiff, then I charge you she cannot recover in this case, and your verdict should be for the defendant.' The error being that said request was a sound proposition of law applicable to the case, and the modification of his honor destroyed the effect thereof."

This exception is overruled. In this case it was likely to lead the jury to believe that the paper and not the information was the thing in issue.

[5] V. Exception 5:

"In that his honor erred in refusing to charge, without modification, the second request to charge on the part of the defendant, to wit: 'I charge you that this is not an action against the defendant company for negligence in disclosing the contents of a telegram, and you are not to consider it as such. If you find that the injury to the plaintiff, if any, was caused by a third party disclosing the contents of a message, and not through any negligence on the part of the company in delivering the message as set out in this complaint, then, under the law, the plaintiff cannot recover, and your verdict should be for the defendant.' The error being that the same was a correct proposition of law applicable to the case, and the modification of his honor destroyed the effect of the request."

This exception is overruled because it eliminated negligence in the transmission of the telegram.

[6] VI. Exception 6:

"In that his honor erred in charging the jury as follows: 'It was the contents of the telegram, the effect of the contents upon Mrs. Painter, which caused the trouble.' The error being that the same was a charge upon the facts, and in violation of the law of this state."

This exception is overruled. His honor was stating the issue merely.

[7] VII. Exception 9:

"In that his honor erred in charging the jury as follows: 'If the telegraph company chooses to receive for transmission a message over the telephone to an agent in their office, then they should be held for the same accountability as if the message was written and placed in their hands. They are held to the same responsibility as they would be if the parties were in the office and writing out the telegram.' The error being that said proposition was not a correct statement of the law as to the liability of telegraph companies receiving messages over the telephone."

This exception is sustained under the case of Cameron v. Telegraph Co., 90 S. C. 503, 74 S. E. 929, for the reasons stated under exception 3.

VIII. Exception 10:

"In that his honor erred in refusing to charge the eighth request on the part of the defendant as follows: 'I charge you that there is no evidence in this case tending to show that the telegram complained of in the complaint was ever delivered to the plaintiff, Mrs. Laura E. Painter, until the same had been corrected, and your verdict should be for the defendant.' The error being that said request contained a correct proposition of law applicable to the case."

Exception 11:

"In that his honor erred in refusing to charge the ninth request on the part of the defendant, which is as follows: 'I charge you there is no evidence upon which you can base punitive damages, and you should not consider such damages in making up your verdict.' The error being that said request contained a correct proposition of law applicable to the case."

These exceptions are overruled for the reasons already stated.

The judgment appealed from is reversed, and the case remanded for a new trial.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

GAGE, J. I concur, except as to any testimony tending to show willfulness. I think there was no such testimony.

(100 S. C. 59)

## GIBBES MACHINERY CO. v. HAMILTON.

(No. 9000.)

(Supreme Court of South Carolina. Feb. 13, 1915.)

1. BILLS AND NOTES ⟸369—BONA FIDE PURCHASERS—ACTS MAKING INJURY POSSIBLE AS BETWEEN ACTOR AND ANOTHER EQUALLY BLAMELESS.

Where defendant executed a note and mortgage on real property as the consideration for certain machinery on the faith of the payee's oral promise to fulfill a prior unperformed promise to put the machinery in workable condition, knowing that the payee desired the note and mortgage to use as a means of credit, defendant, as against a bona fide assignee of the note and mortgage, could not successfully defend because of nonperformance of such promise under the rule that, when one of two innocent persons must suffer, the loss must fall on him who has made the loss possible.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 951; Dec. Dig. ⟸369.]

2. MORTGAGES ⟸489—FORECLOSURE—DEBT—INTEREST.

Where a note secured by a mortgage bore 8 per cent. interest, it was error to calculate interest on the note after maturity at 8 per cent. in determining the amount due on foreclosure.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1425–1430, 1470; Dec. Dig. ⟸489.]

Appeal from Common Pleas Circuit Court of Hampton County; T. S. Sease, Judge.

Action by the Gibbes Machinery Company against W. T. Hamilton and another. Judgment for plaintiff, and defendant Hamilton appeals. Reversed on condition.

B. R. Hiers, of Hampton, for appellant. J. W. Manuel, of Hampton, for respondent.

FRASER, J. This is an action on a note and to foreclose a mortgage. The circuit decree contains the following:

"This case came on hand to be heard by me at the February term of the court of common pleas for Hampton county on exceptions to the report of a special referee.

"The action was begun by Gibbes Machinery Company, as assignee, to foreclose a mortgage given by W. T. Hamilton to Varn Bros. Company on March 30, 1908. The International Harvester Company of America was made a party defendant, but it did not answer. The defendant Hamilton answered by alleging collusion between plaintiff and Varn Bros. Company to defraud the defendant out of the amount named in his note and mortgage, and also claimed to have been damaged $1,000 by reason of such collusion and fraud.

"On July 13, 1907, the defendant W. T. Hamilton purchased from Varn Bros. Company one cotton gin, one press, with the necessary shafting, belting, and pulleys, which machinery was secondhand, and the following farming implements, which were new: One Deering mowing machine, one Deering rake, one Deering reaping attachment, one Captain Kid cultivator, one plow attachment, the purchase price for the entire outfit, both gin and farming implements, being $586.50. The defendant W. T. Hamilton, to pay this amount, gave his five promissory notes to Varn Bros. Company, and secured the payment of same by a chattel mortgage over the property purchased and a gasoline engine not purchased at the time the ginning outfit and farming implements were purchased. As additional security for the debt, W. T. Hamilton gave Varn Bros. Company a bond for the amount of the debt, and secured the payment of the bond by a mortgage over 218 acres of land. The five notes, the chattel mortgage, and the bond and real estate mortgage were given at the time that the machinery and farming implements were bought.

"The notes matured during the fall of 1907, and payment was demanded by Varn Bros. Company. After the first one or two notes had fallen due, the defendant, W. T. Hamilton, replying to a letter written by Varn Bros. Company to him demanding payment of the notes, stated that he was not able to meet his payments on his notes and craved indulgence. In the same letter he signified his willingness to return the machinery to Varn Bros. Company, but Varn Bros. Company would not accept this proposition. On March 30, 1908, W. T. Hamilton executed to Varn Bros. Company a new note for the full amount of the debt, including accrued interest, $617.44, and secured the payment of the note by a mortgage over certain real estate. This new note and mortgage were assigned for value by Varn Bros. Company to Gibbes Machinery Company in June or July, 1908, and Gibbes Machinery Company is now the owner and holder of the said note and mortgage. The note is not negotiable; hence Gibbes Machinery Company took the same subject to all legal defenses existing between Varn Bros. Company and W. T. Hamilton. The note bears 8 per cent. interest, and provided for 10 per cent. attorney's fees.

"The action was tried before a special referee, and a great mass of testimony as to the entire transaction, failure of consideration, and collusion or fraud was offered. The referee rendered his report in favor of the plaintiff. The defendant's attorney appeared before me on some 20 exceptions from the referee's report. Considerable time was given to the hearing of testimony and arguments in this case, and I am convinced that there was no evidence of collusion or fraud on the part of Gibbes Machinery Company and Varn Bros. Company, nor was there any fraud committed by Varn Bros. Company alone or by Gibbes Machinery Company alone.

"The testimony upon the question of failure of consideration was very conflicting, but there was abundant testimony to support the findings of the referee on this point. Moreover, the fact that the defendant, W. T. Hamilton, after some of his first notes were due, acknowledged his indebtedness before he made any complaints as to the condition of machinery, and the further fact that on March 30, 1908, some several months after his debt was due, the defendant, W. T. Hamilton, executed a new note for his entire debt, including accrued interest, securing same by a new real estate mortgage, are sufficient to convince me that the referee was right when he found that there was not established a failure of consideration, and that this was a just and honest debt which W. T. Hamilton ought to pay."

I. There are 23 exceptions. All but 3 complain of error in the circuit judge in sustaining the findings of the referee. The appellant has failed to convince this court that the preponderance of the evidence is against the concurrent findings of the referee and circuit judge, and the exceptions that complain of the confirmation of the referee's report cannot be sustained. Besides, there is in this case a cardinal fact upon which the determination of this case must turn against the appellant. The appellant himself testified as follows:

"Mr. Varn wrote me that if I didn't pay the debt or part of it he would foreclose mort-

gage. In January, 1908, Mr. Varn came to me and told me he would collect the debt. I refused to pay the debt until he fixed the machinery to do the work as he agreed to do. He came back 1st of March, and had got very kind. Told me he had treated me wrong with the machinery, but that he would do what was right; that he would fix that machinery just as he had contracted to do in 1907, and gave me to March 1, 1909, to pay for it, if I would renew the mortgage, and that he would fix it; if he didn't do it, it would not cost me one cent, just as he had promised. He said he made these statements because he was tied up, and wanted to borrow some money, or at least to pay for some machinery. I promised if he would do that I would renew the mortgage, but he must give me a contract. He said I had one, and I told him I didn't. He saw me later; said he had the paper ready. I started towards Mr. Warren's and he said, 'Hold on; they are not over there; they are not over there; they are over at Mr. Smith's—the papers.' I went to Mr. Smith's office. Mr. Smith read the paper. I told Mr. Varn I would sign, but unless he fixed that machinery I would never pay for it until the laws of my country made me do it. That was about the 30th day of March."

[1] There is a wise and just principle of equity that when one of two innocent persons must suffer loss, then the loss must fall on him who has made the loss possible. Here the note and mortgage sued upon were made in order to enable Varn Bros. to use them in their business—to assign them and use as a means of credit; and if, as the appellant testifies, he then knew of the defects and trusted to the verbal promise of Varn, and put in his hands the note and mortgage to enable him to get the respondent's property, then equity required the appellant to bear the loss. There was no evidence that the respondent had any notice of defects in the machinery or was guilty of fraud. See Chambers v. Bookman, 67 S. C. 432, 46 S. E. 39.

II. Exception 10:

"Because of error of his honor the presiding judge in sustaining the referee in not finding in favor of this defendant for his counterclaim; this defendant having alleged in his answer a counterclaim against plaintiff for $1,000 damage, which plaintiff failed to controvert by any pleadings, and this defendant having offered testimony to prove said counterclaim."

This exception is overruled. There is no evidence of fraud on the part of the respondent.

[2] III. Exception 18:

"Because of error of his honor the presiding judge in sustaining the referee in holding that the amount of the debt, with interest and attorney's fees, is $852.70, and that plaintiff is entitled to a decree of foreclosure in this amount."

It was error to calculate interest on the note after maturity at 8 per cent.

IV. Exception 19:

"Because of circumstances of this case that practically forced this defendant to submit to the trial of this case before this referee, he having been objectionable to him from the beginning."

This exception is overruled. The record does not show that any grounds of objection to the referee were stated, and there is no ground upon which this court can base a finding of error.

The judgment of this court is that a new trial shall be had, unless the respondent shall remit on the record the difference between interest at 7 and interest at 8 per cent. within ten days after notice of the filing of the remittitur in the circuit court.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

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(100 S. C. 74)

CONNOLLY v. BEASON et al. (No. 9002.)

(Supreme Court of South Carolina. Feb. 19, 1915.)

MUNICIPAL CORPORATIONS ⟸918 — PUBLIC IMPROVEMENTS — BONDS — ORDER FOR ELECTION — VALIDITY.

Where freeholders petitioned a town council for an election on the issuance of bonds for the "construction" of waterworks and sewerage systems, the order for an election on the issuance of bonds for the "construction and maintenance" of such systems was not such a variance between the petition and the submission as affected the validity of the bonds, but went only to the application of the proceeds of the bonds, and the freeholders could not complain, unless the council should apply the proceeds to a different purpose, and the voters could not complain, since they authorized the application of the proceeds to both purposes, and necessarily vested in the council discretion to use the whole for the purpose of construction, if it saw fit to do so.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919–1923; Dec. Dig. ⟸918.]

Appeal from Common Pleas Circuit Court of Spartanburg County; Ernest Moore, Judge.

Action for injunction by M. A. Connolly against E. A. Beason and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Johnson & Nash, Lyles & Daniel, of Spartanburg, for appellant. C. M. Drummond, of Woodruff, for respondents.

HYDRICK, J. The freeholders of Woodruff petitioned the town council to order an election on the question of issuing bonds for the "construction" of waterworks and sewerage systems. Council ordered an election on the question of issuing bonds for the "construction and maintenance" thereof.

Plaintiff seeks to enjoin the issuance of the bonds on the ground that council exceeded its authority in ordering the election on the question of issuing bonds for the "construction and maintenance" of these systems instead of for the "construction" alone thereof, as it had been petitioned to do by the freeholders.

The contention of the plaintiff is that, while the freeholders were willing to increase the bonded debt of the town to the extent necessary to "construct" there public utilities, they might not have been willing to add thereto a sufficient amount to maintain them.

The objection is more apparent than real,

because the cost of construction will probably consume the entire proceeds of the bond issue. At any rate, the variance between the petition and the submission does not affect the validity of the bonds as a debt of the corporation. It goes only to the application of the proceeds of the sale of the bonds. The freeholders asked to have bonds issued for the purpose of construction, and they cannot complain, unless council should attempt to apply the proceeds, or some part thereof, to a different purpose. The voters cannot complain, because they authorized the application of the proceeds to both purposes, without specifying how much shall be used for each, and therefore necessarily vesting in council discretion to use the whole for the purpose of construction, if it sees fit to do so; and that was really what all parties intended should be done.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

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(100 S. C. 12)

## GUIMARIN et al. v. SOUTHERN LIFE & TRUST CO. (No. 8990.)

(Supreme Court of South Carolina. Feb. 9, 1915.)

1. CORPORATIONS ⟸682—FOREIGN RECEIVERS—ATTACHMENT OF FUNDS.

A North Carolina corporation having construction contracts in South Carolina became insolvent, and a receiver was appointed by the federal court in North Carolina. Plaintiffs, who had subcontracts, performed them at the request of the receiver. No ancillary receiver was appointed for South Carolina. *Held* that, as plaintiffs were domestic creditors, they could attach funds due the insolvent corporation from local debtors, as there was no ancillary receiver in the state, and the foreign receiver could not sue.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2662; Dec. Dig. ⟸682.]

2. RECEIVERS ⟸79—RECEIVERSHIP—EFFECT OF—ATTACHMENT.

Where an ancillary receiver, if appointed, would only take the property outside the state for administration, the local creditors may attach funds due the nonresident insolvent from local debtors.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 148; Dec. Dig. ⟸79.]

3. RECEIVERS ⟸155—POWERS OF—CONTINUANCE OF WORK.

Where a construction company became insolvent, and a receiver was appointed, he may continue the work, and persons furnishing labor or material after his appointment are entitled to be paid in full before company's creditors receive dividends; hence it was improper for the receiver to distribute funds equitably or equally between his creditors and those of the company.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 283–292; Dec. Dig. ⟸155.]

Appeal from Common Pleas Circuit Court of Richland County; George E. Prince, Judge.

Action by W. B. Guimarin and E. R. Heyward, copartners, doing business under the firm name of W. B. Guimarin & Co., against the Southern Life & Trust Company, as receiver of the Central Carolina Construction Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Simeon Hyde, of Charleston, F. P. Hobgood, Jr., of Greensboro, N. C., and Robert Moorman, of Columbia, for appellant. Frank G. Tompkins, of Columbia, for respondents.

FRASER, J. It appears from the record that the Carolina Construction Company, of Greensborough, N. C., had a contract to build two Y. M. C. A. buildings, one in Charleston and one in Columbia, S. C.; that pending a completion of these contracts the construction company failed, and a receiver for it was appointed by Hon. James E. Boyd, judge of the federal court for the Western district of North Carolina.

It is alleged that the construction company had a contract with the respondents to do the plumbing in said buildings, but the company failed before the respondents started on their work, and the respondents declined to carry out their contracts; that the receiver, the appellant, then undertook to pay for the work to be done, and, by reason of this promise, the respondents did the work. The respondents rely upon the contract with the receiver, who, they allege, undertook to complete the contracts of its insolvent with their respondents.

It is alleged that the receiver refused to pay for the work. The respondents attached the funds in the hands of the Charleston and Columbia Associations, for the payment of their debt. The defendant appeared for the purpose of moving to dismiss the attachment only, on the ground: (1) That the state court has no jurisdiction to attach a fund belonging to a foreign receiver; (2) that the funds are held subject to the order of the United States court for the district of South Carolina, and not subject to attachment by the state courts. Judge Prince refused the motion, holding that the funds were subject to attachment, and that the District Court for South Carolina had taken no action in the matter. From this order the defendant appealed, and argues two questions:

[1] I. "First. Should the South Carolina court permit, through an action at law and an attachment, the funds belonging to the receiver appointed by the United States court in North Carolina, and which he was seeking to recover in the proceeding in the District Court for South Carolina, to be held under an attachment issued in a proceeding pending in the state court, although there was no appointment of an ancillary receiver?"

Appellant in its argument says: "In Rogers v. Riley (C. C.) 80 Fed. 759, the court declares that this rule"—receiver has no extraterritorial jurisdiction—"is subject to a well-established exception which allows a re-

ceiver to sue extraterritorially 'where there are no domestic creditors, and where it is not against the public policy of the state in which the suit is brought.'"

All of the authorities quoted by appellant are to the same effect. These authorities do not apply here, for the reason that the respondents are domestic creditors. Besides, appellants showed before Judge Prince that "the honorable the District Judge for the Western district of North Carolina held that, in order to make said proceedings effective, it was necessary that the bill hereinbefore referred to should be filed in the district of South Carolina."

Judge Prince held: "It does not appear from the papers submitted to me that any ancillary receiver had ever been appointed in this state." Unless we are bound by some high and controlling authority, we would not hold that the distinguished federal judge underestimated the powers of his own appointee or that he made a useless order. It certainly does not lie in the mouth of the appointee to say so.

This proposition cannot be sustained.

[2, 3] II. "Second. Should a creditor of a contractor entitled to a lien under section 4152, vol. 1, Civil Code, be allowed to obtain a lien prior to all other materialmen and laborers upon the fund in the hands of the contractor or to which he is entitled and which he is seeking to recover?"

It appears in the record that, although Judge Boyd, of the Western district of North Carolina, had directed the application for an ancillary receiver in the federal court of South Carolina, yet this had not been done, but, in case the ancillary receiver should thereafter be appointed, it was the purpose of the receiver to take the fund out of the jurisdiction of the courts for South Carolina, both federal and state, and require the domestic creditor to go into the foreign jurisdiction to recover his claim.

It further appeared that it was the intention of the receiver to distribute between the creditors of the bankrupt and the creditors of the receiver "equitably." Equitably may mean equally. If this is not his intention, it ought to appear. The creditors of the bankrupt and the creditors of the receiver are not in the same class. The creditors of the receiver in the administration of the bankrupt estate must be paid in full before there is anything to be distributed equitably between the creditors of the bankrupt estate. Railroads are operated and construction companies wound up by receivers, and it is frequently necessary to continue the operation of the roads and complete contracts in order to prevent utter ruin. It would be monstrous to hold that employés of the one and the subcontractors of the other shall continue their work and take only their pro rata, and that necessarily deferred to the determination of the receivership, because if they must prorate, then the pro rata cannot be determined until the winding up of the receivership. Here the claim is that the respondents did all of their work under a contract with the receiver to complete the bankrupt's contract. There is no showing in the record that there is any other creditor who is in the same class with the respondents. This statement of the law is necessarily true, but, if authority is deemed desirable, it will be found in Am. & Eng. Ency. of Law, vol. 13, p. 1120: "Where a receiver is appointed to operate property for the benefit of the lienholder thereon, he may make the operating expenses a first charge upon not only the current earnings, but the corpus of the estate."

The exceptions are overruled, and the order appealed from affirmed.

GARY, C. J., and WATTS and GAGE, JJ., concur. HYDRICK, J., did not sit.

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(100 S. C. 28)

WILLIAMS v. WEEKLEY. (No. 8993.)

(Supreme Court of South Carolina. Feb. 10, 1915.)

1. APPEAL AND ERROR ⟸1078 — ABANDONMENT OF EXCEPTION.

Exceptions not argued are deemed abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. ⟸1078.]

2. REPLEVIN ⟸71—PROCEEDINGS—EVIDENCE.

In claim and delivery, where defendant claimed as assignee of a chattel mortgage of a mule from plaintiff to one B., signed by plaintiff and one C., evidence that plaintiff got the mule of C. was not erroneous as changing a written contract with B. to an oral contract with C.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 285–291; Dec. Dig. ⟸71.]

3. REPLEVIN ⟸71—PROCEEDINGS—EVIDENCE.

In such action, evidence that plaintiff gave C. the money and took his receipt, and then went with him to B., the mortgagee, and saw the money paid to him, was not erroneous; there being no requirement that agency to receive money shall be in writing.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 285–291; Dec. Dig. ⟸71.]

4. REPLEVIN ⟸71—PROCEEDINGS—PUNITIVE DAMAGES.

In claim and delivery, it was within the court's discretion, on the matter of punitive damages, to allow plaintiff to prove the circumstances that led up to the taking by defendant.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 285–291; Dec. Dig. ⟸71.]

5. APPEAL AND ERROR ⟸216 — REQUESTED CHARGE—WAIVER.

Where the court promised to charge the jury as to the effect of certain evidence, but through oversight did not charge thereon, it was the appellant's duty to have called the court's attention to it, and, not having done so, he is deemed to have waived it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⟸216; Trial, Cent. Dig. § 627.]

6. REPLEVIN ⊂⊃81—PROCEEDINGS—PUNITIVE DAMAGES.

The statute providing that, where a bond is given in claim and delivery, no punitive damages can be recovered thereafter, applies only while the suit is pending.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. ⊂⊃81; Damages, Cent. Dig. § 204.]

7. BILLS AND NOTES ⊂⊃351—INNOCENT PURCHASER FOR VALUE—ASSIGNEE AFTER MATURITY.

In claim and delivery, the defendant's claim of the rights of an innocent purchaser for value without notice could not avail as against evidence of payment to his assignor, where the mortgage note was not assigned until nearly three years after maturity, as the assignee then took it with all the rights of the parties reserved.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 878–881, 882½–885; Dec. Dig. ⊂⊃351.]

Appeal from Common Pleas Circuit Court of Barnwell County; Thos. H. Spain, Judge.

Action in claim and delivery by Paul Williams against Annie E. Weekley. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. M. Patterson, of Allendale, for appellant. V. S. Owens and J. O. Patterson, Jr., both of Barnwell, for respondent.

FRASER, J. This is a proceeding in claim and delivery in which the plaintiff claims that the defendant wrongfully, willfully, maliciously, and surreptitiously seized and withheld from him a certain mule, the property of the plaintiff. The defendant claims the right to the possession of the property by reason of a chattel mortgage executed by the plaintiff to one Bamberg and assigned to her for value. The plaintiff claimed to have paid the mortgage debt. There was a motion for a nonsuit, which was overruled. The jury found for the plaintiff the property and $50 damages. From a judgment entered thereon, the defendant appealed.

[1] There are seven exceptions, with numerous subdivisions, but the appellant argues only four, and the others, under the well-established rule of this court, are deemed abandoned. The exceptions argued will be considered in order.

[2] I. Exception 1:

"The court committed error of law in overruling objection to statement by plaintiff that he 'got the mule from Craddock'; the error being that this testimony changed the transaction from Bamberg to Craddock, changing a written contract which plaintiff had with Bamberg to a verbal one with Craddock."

This exception cannot be sustained.

The mortgage was not then in evidence, but it would have been immaterial if it had been. The plaintiff and Craddock signed the mortgage, and, if it covered the mule, it was immaterial whether the plaintiff bought directly from Bamberg or indirectly through Craddock. The fact that Craddock gave his note for the whole debt for several animals would tend to show that the statement was true, and it in no way contradicted or varied the written instruments.

[3] II. Exception 2:

"The court committed error of law in overruling defendant's objection and permitting plaintiff to testify 'the money went through Mr. Craddock's hands,' and refusing to strike same out on defendant's motion; the error being that the contract was in writing with Bamberg, and no payment to any one else could, as a matter of law, discharge the debt."

This exception cannot be sustained.

The plaintiff testified that he gave Mr. Craddock the money and took his receipt and then went with him to Mr. Bamberg, the mortgagee, and saw the money paid to the mortgagee. Further the plaintiff testified:

"Mr. Bamberg says, 'You give this money to Mr. Craddock, and he will bring it to me.'"

There is no requirement that agency to receive money shall be in writing.

III. Exception 3:

(a) "The court committed error of law in permitting plaintiff to testify, over defendant's objection, to any other attempt to get the mule, other than the one of March 26th; the error being that defendant was charged with a specific delict, alleged to have occurred on March 26th, and not with a series of attempts."

(b) "There was further error in permitting said testimony over defendant's objection, because, at the time testified to, defendant had given her bond and taken the mule under claim and delivery proceedings; the law being that, where a bond is given in such proceedings, no punitive damages can be recovered thereafter."

(c) "There was further error in permitting said testimony over defendant's objection, and saying, 'Go ahead; I will charge the jury what the law is;' the error being that it is an abuse of discretion to admit palpably incompetent testimony, even though the judge should thereafter charge the law correctly, and particularly in this case where the judge failed and neglected so to charge."

[4, 5] (a) On the question of punitive damages, it was within his honor's discretion to allow the plaintiff to prove the circumstances that led up to the taking on March 26th. His honor promised to charge the jury as to the effect of the previous takings on the final taking. It was manifestly a mere oversight that his honor did not charge the jury in regard to it, and it was the appellant's duty to have called his honor's attention to it, and, not having done so, is deemed to have waived it.

[6] (b) It appears from the record: That the claim and delivery proceedings before the magistrate were had. That in the magistrate case the defendant here was the plaintiff. That the magistrate granted a nonsuit, and, while the magistrate was writing out an order for the return of the mule to Williams in that case, it was discovered that the mule had been taken away. If the mule was taken before the nonsuit was granted, then the statute applies, and no punitive damages could be recovered for the taking; but, if the taking was after the proceedings had terminated by a nonsuit, then the statute would not apply. It is manifest that the giv-

ing of a bond in a proceeding for claim and delivery is not a shield from all future actions for punitive damages. The statute simply provides a shield while the suit is pending. If the appellant is entitled to the protection of a pending suit, it must be shown. It has not been shown.

(c) The statement under (a) applies here.

IV. Exception 4:

"That the court committed error of law in permitting the receipts to be introduced over defendant's objection; said receipts having been given by Craddock and Hogg. The error being that, no agency being established, said receipts were incompetent, irrelevant, and were greatly prejudicial to defendant, in that they were offered for the purpose of proving payment of the mortgage under which defendant claimed."

"There was further error in admitting these receipts over defendant's objection, because this defendant was an innocent purchaser for value; and, until plaintiff carried knowledge and notice of the payment before the transfer of said mortgage to this defendant, no testimony of such payment was relevant or competent, and was therefore prejudicial to the defendant."

[7] If these receipts stood alone, they would be manifestly incompetent, but they do not. There was testimony that Mr. Bamberg had directed the plaintiff to pay the money to Mr. Craddock, and that he had seen Mr. Craddock pay it to Mr. Bamberg. If the jury believed that, then neither Mr. Bamberg nor those who claim under him can claim a repayment. The claim of innocent purchaser for value without notice cannot avail here, because the note was not assigned until nearly three years after its maturity, and the assignees took it with all the rights of the parties preserved.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

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(100 S. C. 41)

## SOUTHERN COTTON OIL CO. v. LIGHTSEY. (No. 8995.)

(Supreme Court of South Carolina. Feb. 10, 1915.)

1. CORPORATIONS ⟸517—PLEADING—VERIFICATION—SUFFICIENCY.

Code Civ. Proc. 1912, § 207, provides that verification must be to the effect that the pleading is true to the knowledge of the person making it, except when it is made on information and belief, and that, when a corporation is a party, the verification may be made by any officer thereof. In an action by a corporation the complaint was verified by the assistant district manager, who deposed that it was true of his own knowledge. *Held* that, as the Code does not limit the verification to any particular officer, the verification was sufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2047–2051; Dec. Dig. ⟸517.]

2. PLEADING ⟸294—VERIFICATION—NECESSITY.

Where the complaint was verified, plaintiff may, under Code Civ. Proc. 1912, § 206, providing that, when any pleading is verified, every subsequent pleading except a demurrer must also be verified, return an unverified answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 885, 886; Dec. Dig. ⟸294.]

3. APPEAL AND ERROR ⟸499—REVIEW—RECORD.

The refusal of the court to permit defendant to file his answer cannot be reviewed; the record showing no motion for leave.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295–2298; Dec. Dig. ⟸499.]

Appeal from Common Pleas Circuit Court of Hampton County; H. F. Rice, Judge.

"To be officially reported."

Action by the Southern Cotton Oil Company against W. Fred Lightsey. From a judgment for plaintiff, defendant appeals. Affirmed.

B. R. Hiers, of Hampton, for appellant. H. L. O'Bannon, of Barnwell, for respondent.

GARY, C. J. The complaint herein was upon a promissory note, and was verified by J. W. Hohenstein, assistant district manager of the plaintiff, who swore that the complaint was true of his own knowledge; that the reason the verification was not made by the plaintiff in person was that the plaintiff is a corporation, and the deponent is an officer thereof—to wit, its assistant district manager.

The defendant served an unverified answer, in which he denied the allegations of the complaint, and stated therein that the answer was not verified, for the reason that the complaint was not sufficiently verified; that the proposed affidavit of verification was made by other person than party plaintiff, and failed to set forth therein his knowledge or grounds of belief on the subject. The answer was promptly returned with the statement indorsed thereon that it was returned because it was not verified.

Thereafter the plaintiff's attorney gave notice that he would make a motion for judgment by default. Whereupon the defendant's attorney gave notice of motion for an order, adjudging that the defendant had answered plaintiff's complaint: (1) Because defendant answered said complaint within 20 days from service; (2) because, complaint not being properly verified, defendant was at liberty to serve unverified answer.

His honor, the presiding judge, sustained the plaintiff's motion, but refused the defendant's, whereupon the defendant appealed.

The first question for consideration is whether there was error on the part of his honor, the presiding judge, in ruling that the complaint was properly verified.

[1] Section 207 of the Code provides that, when a corporation is a party, the verification may be made by any officer thereof. The assistant district manager swore that he was an officer of the plaintiff corporation. The section of the Code is very broad in its language, and does not limit the right of verifi-

cation to any particular officer. The officer who verified the complaint stated that its allegations were true of his own knowledge. The complaint was therefore properly verified.

[2] Section 206 of the Code provides that, when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also. Therefore, as the complaint was verified, the defendant's answer was properly returned for want of verification.

[3] The remaining question is whether there was error on the part of his honor the circuit judge in abusing his discretion by refusing to permit the defendant to file his answer. In the first place, the record does not disclose the fact that there was a motion for leave to answer. But, apart from that fact, there is nothing in the record showing that the defendant was entitled to such right.

Judgment affirmed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

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(100 S. C. 51)

## COBB v. GARLINGTON. (No. 8999.)

(Supreme Court of South Carolina. Feb. 13, 1915.)

1. COURTS ⟸30—JURISDICTION ACQUIRED—RETENTION—IMPRISONMENT OF DEFENDANT.

Where the court acquired jurisdiction of a civil cause and of defendant, who retained counsel and answered, the court retained jurisdiction, though pending the action defendant was imprisoned in the penitentiary, and his attorneys appeared in the case and attended all hearings while he was imprisoned, and offered testimony for him, and argued the case after he had been paroled.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 119–128; Dec. Dig. ⟸30.]

2. CONVICTS ⟸6 — ACTIONS — GUARDIAN AD LITEM—APPOINTMENT—WAIVER.

A defendant, who, pending a civil suit against him, was imprisoned in the penitentiary, waived his right to the appointment of a guardian ad litem, where his attorneys, employed before his imprisonment, appeared and attended all hearings while he was imprisoned, and after his parole offered testimony for him and argued the case.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. §§ 5–10; Dec. Dig. ⟸6.]

3. TRUSTS ⟸372—ACCOUNTING—BURDEN OF PROOF.

Where a fiduciary relation required defendant to render to plaintiff an accounting, and the plaintiff traced funds into the hands of defendant, the latter must show that he has complied with his trust and has properly disbursed the funds.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 600–603; Dec. Dig. ⟸372.]

Appeal from Common Pleas Circuit Court of Richland County; Geo. E. Prince, Judge.

"To be officially reported."

Action by W. Hampton Cobb, as receiver of the Carolina Agency Company, against John Y. Garlington. Judgment for plaintiff, and defendant appeals. Affirmed.

The following is the decree of George E. Prince, Presiding Judge:

This cause came on to be heard before me at the spring term, 1914, of the court of common pleas for Richland county, upon exceptions by both plaintiff and the defendant from the findings of the master, to whom the cause has been referred.

It appears from the record that the cause was originally entitled "Carolina Agency Company, Plaintiff, against John Y. Garlington, Defendant," but that, a receiver having been appointed for the plaintiff company during the pendency of the action, the receiver of the plaintiff company was by order of the court substituted as plaintiff.

During the hearing of the cause, by agreement of counsel, the hearing was suspended, but the cause marked "Heard," and it was agreed that the hearing would be resumed before me at Anderson, in case I desired to hear further argument upon the matter. Having decided that further argument was necessary, the attorneys for plaintiff and defendant, by agreement between themselves, resumed the argument before me at Anderson, S. C., on July 20, 1914.

Considering first the exceptions taken to the master's report by the defendant, I find that while the matters complained of in exceptions 1 and 2 may not have been relevant upon the issues here in dispute, and that the master could have refrained from making any reference to them, they are not of such a nature as to affect the merits or final result of the cause, and such findings by the master were therefore harmless.

[1, 2] As to the remaining exceptions of the defendant, it is not necessary for them to be taken up in detail. The point is made that, when it appeared in the case that the defendant had been imprisoned in the state penitentiary, the court lost jurisdiction of the defendant and was powerless to proceed without the appointment of a guardian ad litem. It appears from the pleadings, evidence, and proceedings herein that the court had acquired jurisdiction of the defendant and of the cause of action; that the defendant had retained counsel, appeared by them, and answered by a sworn answer before he was imprisoned in the penitentiary; that his attorneys appeared in the case and attended all references while he was imprisoned, and actually offered testimony in his behalf and argued the case before the master after he had been paroled and released from the penitentiary. Under these circumstances, I find that the court had jurisdiction of the defendant and of the subject-matter of the action throughout the pendency of the cause, and, even if the defendant had been entitled to the appointment of a guardian ad litem, the right has been waived by the acts of the defendant and his counsel as set out in the proceedings herein.

[3] As to the merits of the action, I find that where a fiduciary relation has been shown, which renders it incumbent upon one party to render to another party an accounting, as is the case here, that after the plaintiff has traced funds into the hands of the defendant, from whom an accounting is due, it is incumbent upon the defendant to show that he has complied with his trust, and has legally and properly disbursed or paid over such funds. The plaintiff in this case, by clear and convincing evidence, a part of which consists of the defendant's own statement, has proven that the defendant received as general manager and treasurer of the plaintiff company the sum of $118,770. The plaintiff alleged in its complaint that of this amount at least the sum of $25,000 had not been accounted for, but proved a deficiency of $26,948.63. The master found for the plaintiff in the sum of $21,948.63, and gave judgment for that amount; but in arriving at said sum he allowed the defendant a credit of $5,000 for com-

missions paid others for the sale of stock in the plaintiff company. The allowance of this credit is the foundation of the plaintiff's exceptions to the master's report. I find that the defendant was not entitled to any allowance whatever for the payment of commissions on the sale of stock in the said company, and the finding of the master in that regard is modified in accordance with the contention of the plaintiff herein.

The remaining exceptions of the defendant are therefore overruled, and the finding of the master is modified, by allowing the plaintiff so much of the $5,000 credit allowed the defendant by him as will make the total of plaintiff's judgment, exclusive of costs, $25,000; my construction of the complaint being that there cannot be a recovery for more than $25,000.

It is therefore ordered, decreed, and adjudged that the plaintiff herein shall have judgment against the defendant for the sum of $25,000 and the costs of this action.

Shand, Benet, Shand & McGowan and John J. Earle, all of Columbia, and Dial & Todd, of Laurens, for appellant. Logan & Edmunds, Nelson, Nelson & Gettys and Frank G. Tompkins, all of Columbia, for respondent.

GARY, C. J. The judgment of the circuit court is affirmed for the reasons therein stated.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

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(100 S. C. 18)

## LIVINGSTON et al. v. SEABOARD AIR LINE R. CO. et al. (No. 8991.)

(Supreme Court of South Carolina. Feb. 10, 1915.)

CHATTEL MORTGAGES ⊂⇒48—CROP MORTGAGES —VALIDITY—"DESCRIBED"—"MENTIONED."

Civ. Code 1912, § 4106, provides that no crop mortgage shall be effective unless the land whereon the crops are to be raised shall be described or mentioned in the mortgage, which, when so taken, and indexed, etc., shall constitute a lien. A crop mortgage recited that it covered all cotton and cotton seed grown and cultivated during the year 1911 upon land belonging to L. as well as 60 acres planted in corn. *Held* that, as all parts of a statute are to be given effect, the word "described," which means to give the metes and bounds of land, cannot be construed as synonymous with "mentioned," which means spoken of briefly, and hence, though the mortgage did not give the metes and bounds of the mortgagor's land, it was valid.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 93–95; Dec. Dig. ⊂⇒48.

For other definitions, see Words and Phrases, First and Second Series, Describe; Mention.]

Appeal from Common Pleas Circuit Court of Orangeburg County; I. W. Bowman, Judge.

Action by D. S. Livingston and J. P. Robinson, doing business under the firm name of Livingston & Robinson, against the Seaboard Air Line Railroad Company, a corporation, and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

P. T. Hildebrand, of Orangeburg, for appellants. Raysor & Summers, of Orangeburg, for respondents.

FRASER, J. This is a proceeding in claim and delivery to recover four bales of cotton sold by the defendant, Mrs. Lizzie Ameker, to the defendant William L. Whetstone, and delivered to the defendant railroad company for shipment. Two bales were seized, and two bales were not. The plaintiffs claimed the cotton under a crop mortgage of "all cotton and cotton seed grown and cultivated during the year 1911 and 60 acres planted in cotton and all corn, fodder, peas, hay, etc., grown during 1911 on acres planted in corn. All of above lands belonging to said Lizzie E. Ameker." The defendant Mrs. Ameker did not answer. The other defendants denied the existence of the mortgage and set up a counterclaim for the two bales seized, or $75, the value thereof. On the trial the defendants objected to the introduction of the mortgage in evidence, on the ground that the mortgage was void for indefiniteness of description, and set up the statute, which is as follows (Code of Laws of South Carolina, vol. 1, § 4106):

"No mortgage of any crop or crops shall be good and effective to convey to the mortgagee any interest in any crop or crops, other than the crop or crops to be raised during the year in which said mortgage is given, and unless the land whereon said crop or crops are to be raised shall be described or mentioned in said mortgage, which said mortgage, when so taken, when indexed or recorded as required by law, shall constitute a lien on the crops therein described in preference to all subsequent mortgages on said crop or crops."

The defendants took the position that the land was not described in this mortgage, and it was therefore void; that the words "described" and "mentioned" are synonymous terms; that the description was insufficient and the mortgage void. The presiding judge sustained the position, held the mortgage void, and refused to allow its introduction in evidence. The plaintiffs had no other claim to the cotton, and his honor practically directed a verdict for the defendants for the cotton, though he allowed the jury to fix the value of the two bales seized. This value the jury fixed at $75. For this sum judgment was entered in favor of the defendants against the plaintiffs, and the plaintiffs appealed.

There are 10 exceptions, but they raise only one question, to wit, is the mortgage void for want of description?

The rule on construction of statutes is to give effect to every part. It is not to be assumed that the Legislature used two words to express one idea, when one word is sufficient. Very few words are exactly synonymous. The words "described" and "mentioned" are not synonymous. Land is "described" when its metes and bounds and location are given. It is "mentioned" when it is spoken of briefly or cursorily; spoken of; referred to. Century Dictionary. It is clear that the land was "mentioned," and the

mortgage is not void under the statute, and his honor erred in so holding. This is a stronger case than the case of Brown v. Hughes, 94 S. C. 140, 77 S. E. 730.

The judgment is reversed, and the case remanded for a new trial.

GARY, C. J., and WATTS and GAGE, JJ., concur. HYDRICK, J., disqualified.

(100 S. C. 77)

## STATE v. RODGERS. (No. 8997.)

(Supreme Court of South Carolina. Feb. 10, 1915.)

1. CRIMINAL LAW ⟸202—FORMER JEOPARDY —IDENTITY OF OFFENSES.

Where accused, after shooting a person in his dwelling house and striking him on the head with an axe, set fire to the dwelling house, his conviction for murder, under an indictment charging a killing with a pistol and an axe, did not bar a prosecution for arson, under Const. art. 1, § 17, providing that no person shall be subject for the same offense to be twice put in jeopardy of life or liberty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 386–403, 408, 409; Dec. Dig. ⟸202.]

2. CRIMINAL LAW ⟸1210 — PUNISHMENT — DEATH SENTENCE—PRIOR CONVICTION.

That a person convicted of arson and sentenced to death was undergoing life imprisonment under a prior conviction for murder did not prevent the execution of the death sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3298–3301, 3315; Dec. Dig. ⟸1210.]

3. ARSON ⟸37 — EVIDENCE — OWNERSHIP OF BUILDING.

On a trial for arson, where, though it appeared that accused before setting fire to a dwelling house shot the owner and struck him on the head with an axe, there was no evidence that he was dead, an objection, that there was no testimony to sustain the allegation that such person was the owner of the dwelling house at the time it was burned, was properly overruled.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 71–73; Dec. Dig. ⟸37.]

Appeal from General Sessions Circuit Court of Laurens County; T. S. Sease, Judge.

"To be officially reported."

Greenwood Rodgers was convicted of arson, and he appeals. Affirmed and remanded.

The exceptions were as follows:

(1) That his honor erred in not submitting the plea of former jeopardy to the jury, it being a question of fact for the jury and not for the court.

(2) That his honor erred in not holding that the arson was a contributory cause of the death of George F. Young.

(3) That his honor erred in overruling the motion of the defendant's attorney in arrest of judgment, as the arson was one of the contributing causes of the death of George F. Young, and the prisoner had already been tried and convicted of murder and recommended to the mercy of the court.

(4) That his honor erred in sentencing the prisoner to the electric chair on the 23d day of October, said execution to take place while the prisoner was serving a life sentence for a crime of which the arson was but a part.

(5) That his honor erred in holding that the court was able to abrogate and set aside the sentence of the former court which the prisoner was then serving and substitute a new sentence, which sentence was to be imposed before the first sentence was fully served.

(6) That his honor erred in holding that the state can prefer on the same facts a series of charges.

(7) That his honor erred in not holding the conviction of murder on the same testimony and facts as used at the trial for arson to be a bar to the charge of arson.

(8) That his honor erred in overruling the motion in arrest of judgment.

Augustus G. Hart, of Laurens, for appellant. R. A. Cooper, Sol., of Laurens, for the State.

GARY, C. J. This is an appeal from the sentence of death imposed upon the appellant, for arson.

The facts are thus stated in the record: The appellant, Greenwood Rodgers, was jointly indicted, with Tom Young and Junk Caldwell, for the murder of George F. Young, on the 12th day of January, 1914, spring term of the court of general sessions for Laurens county. Greenwood Rodgers and Junk Caldwell were tried separately, and each convicted of murder, with recommendation to the mercy of the court, and each was duly sentenced to imprisonment at hard labor for the term of his natural life. The indictment was in the usual form, charging killing of George F. Young with a pistol and axe. At the 1914 fall term of the court of general sessions for Laurens county, Greenwood Rodgers was indicted for the crime of arson, on which indictment he was convicted and duly sentenced to be electrocuted, the 23d day of October 1914. The indictment charged that the defendant aforesaid did feloniously, willfully, and maliciously set fire to a certain house, to wit, the dwelling house of one George F. Young, and by the kindling of such fire the aforesaid dwelling house was then and there feloniously, willfully, and maliciously burned and consumed. The appellant's attorney entered a plea of former jeopardy before the jury was sworn, which plea was resisted by the solicitor, who denied identity of the offenses, and the said plea was overruled by the court. The judge's charge was that usually given in arson cases.

After conviction, the attorney of the appellant made a motion for an arrest of judgment, on the following grounds: (1) Autrefois convict (former jeopardy). (2) That the same facts and testimony were used in the previous trial, when he was convicted of murder and sentenced to life imprisonment, the jury having recommended him to the mercy of the court. (3) That, out of the same facts, a series of charges shall not be preferred. (4) That the facts brought out in the trial would have warranted a conviction on the first trial, and did sustain a conviction on the first trial; therefore the conviction for murder at the first trial, on the same facts as brought

out at the trial for arson, is a bar to sentencing the defendant for arson.

The defendant offers in evidence to sustain the above plea, the testimony and judgment in the trial for murder, and the testimony in the trial for arson, and also the records of the court in the entire matter. And the questions were raised as to the court's right to interfere with the first sentence, while the prisoner was serving said sentence; also, the right of the court to sentence the prisoner to the electric chair for an offense committed, prior to trial for a felony, on which trial he was convicted; and that, even if the court had the right to sentence prisoner, said sentence could not be put into effect, until first sentence which prisoner was then serving, had been served. The question was also raised that the arson was a contributory cause of the death of George F. Young. The motions were overruled by the court.

The state's testimony tended to show that Greenwood Rodgers, Junk Caldwell, and Tom Young, on the night of January 12, 1914, went to the house of George F. Young in Laurens county, where they found him reading a paper before the fire. They walked up to the back of his house, which door was partly ajar. That Greenwood Rodgers with a pistol fired upon Mr. Young, who fell from his chair to the floor, and that, when he attempted to rise, Greenwood Rodgers struck him on the head with an axe, and, immediately turning over his body, removed some money from the pocket of his clothes, and then, taking a fire shovel, he scattered coals of fire over and around the body of Mr. Young, and on the bed near by, setting fire to the clothing of Mr. Young and the house, and causing the house to be consumed. The only eyewitness testifying to this was Tom Young, a codefendant of Greenwood Rodgers, in the indictment for murder. Greenwood Rodgers and Junk Caldwell denied all knowledge of the above transaction. No testimony was produced in this case to show that George F. Young was dead, before the burning of the house.

In the two trials, the state used practically the same witness, and practically the same testimony was had at both trials. Tom Young was the only witness who testified in regard to the transaction at the place where George F. Young was killed. He was the only witness who professed to have seen aught of the criminal transaction, on the night of January 12, 1914. His testimony was the same in both trials. A charred body was found in the ashes of the former home of George F. Young, on the morning of January 13, 1914. The defendant appealed upon exceptions which will be reported.

[1] The first question which will be considered is whether there was error on the part of his honor, the presiding judge, in overruling the plea of former jeopardy.

Section 17, art. 1, of the Constitution, contains the provision that no person shall be subject for the same offense to be twice put in jeopardy of life or liberty.

In the case of State v. Jenkins, 20 S. C. 351, he was indicted for arson and acquitted by direction of the court, on the ground that the offense charged did not constitute the crime of arson. He was thereafter, for this same act of burning, put upon his trial for the statutory offense of burning an untenanted house, whereupon he interposed the plea of autrefois acquit. The court after stating that the question was a mixed one of law and fact, that the facts, however, were not disputed, and that the question of law alone would be considered, that there was no doubt that the same occurrence gave rise to the different indictments, and that it was equally clear that the indictments on their face did not charge the same offense, proceeded as follows:

"Let us subject the question to another test. Could the accused have been convicted at the first trial, and, under the first indictment, of the offense charged in either of the other two? When put upon trial for arson, could he have been convicted of burning an untenanted house? Certainly not, as arson does not necessarily embrace the other offense. Nor inasmuch as the indictment for arson did not contain a charge of facts constituting the other offense, could testimony have been introduced as to the other, as it is a rule of law that the testimony must correspond with the allegations, a rule applicable to both civil and criminal cases, and especially so to criminal. If then the accused could not, under any circumstances, have been convicted of the present offense in the former trial, how then can it be said that, upon the present trial, he has been put in jeopardy twice for the same offense, or, in the language of the Constitution that, 'after having been once acquitted by the verdict of a jury of an offense, he has again been put in jeopardy of his life or liberty for the same.'"

In the case of State v. Mitchell, 98 S. C. 474, 82 S. E. 676, it was held that an acquittal on an indictment for burglariously breaking and entering a dwelling house in the nighttime, with intent to steal certain goods, was a bar to a subsequent indictment for entering, without breaking, the same house at the same time, with intent to steal the same goods. The plea of former jeopardy was sustained in that case, for the reason that the two offenses charged were substantially the same.

The exceptions raising this question are overruled.

[2] The next question is whether the fact that the defendant is undergoing the punishment imposed upon him, for the murder of George F. Young, will prevent the execution of the sentence of death for the crime of arson. It has been shown that the offenses, although arising out of the same state of facts, are separate and distinct. The law does not contemplate that a criminal shall escape the extreme penalty for his crime, by reason of the fact that he has also been convicted of another crime, for which the sentence was less than that of death, otherwise the fact that the criminal had committed

more than one crime would inure to his benefit.

[3] The last question is whether there was error in overruling the objection that there was no testimony tending to sustain the allegation of the indictment that George F. Young was the owner of the dwelling house at the time it was burned. It is contended that George F. Young was dead when the crime of arson was committed. This ground is disposed of by the following statement, which appears in the record:

"No testimony was produced in this case, to show that George F. Young was dead, before the burning of the house."

These conclusions practically dispose of all questions presented by the exceptions.

It is the judgment of this court that the judgment of the circuit court be affirmed, and that the case be remanded to that court, for the purpose of having another day assigned for carrying into execution the sentence of the court.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

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(100 S. C. 47)

## WYNN v. CALEDONIAN INS. CO.

(No. 8998.)

(Supreme Court of South Carolina. Feb. 10, 1915.)

INSURANCE ⊂=336 — AVOIDANCE OF POLICY—ADDITIONAL INSURANCE.

Under Civ. Code 1912, § 2718, providing that no insurance company shall issue policies for more than the value to be stated in the policy, and that the value and the amount of the insurance shall be fixed on or before issuance of a policy, that on a total loss insured may recover the full amount and the proportionate amount in case of a partial loss, that two or more policies on the same property shall be deemed contributive insurance, and if the aggregate sum of the insurance exceed the agreed insurable value each insurer shall be liable for its pro rata share, the procuring of additional insurance without the consent of the insurer against a provision of the policy and in excess of the agreed insurable value avoided the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 856–873; Dec. Dig. ⊂=336.]

Appeal from Common Pleas Circuit Court of Richland County; Geo. E. Prince, Judge.

"To be officially reported."

Action by Annie G. Wynn against the Caledonian Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Edward L. Craig, of Columbia, for appellant. Smith, Hammond & Smith, of Atlanta, Ga., and John T. Seibels, of Columbia, for respondent.

GARY, C. J. This is an action on a policy of insurance for a partial loss caused by fire. The only question in the case is presented by the following exception:

"Because his honor erred in instructing the jury that procuring of additional or further insurance, in excess of the insurable value stated in the policy, as having been agreed upon by the insured and the insurer, without the consent of such insurer, would render the policy void (unless there had been a waiver); whereas he should have instructed the jury that, under the statute law of South Carolina, the procuring of additional or further insurance without the consent of the insurer does not render the policy void, but two or more policies written upon the same property are declared to be contributive insurance, and if the aggregate sum of such insurance exceeds the insurable value of the property as agreed upon by the insurer and the insured, in the event of a total or partial loss, each company shall be liable for its pro rata share of such insurance."

The ruling of his honor, the circuit judge, involves the construction of section 2718, Code of Laws 1912, which is as follows:

"No fire insurance company or individuals writing fire insurance policies, doing business in this state, shall issue policies for more than the value to be stated in the policy, the amount of the value of the property to be insured, and the amount of insurance to be fixed by the insurer and insured at or before the time of issuing said policies, and in case of total loss by fire the insured shall be entitled to recover the full amount of insurance and a proportionate amount in case of partial loss: Provided, two or more policies written upon the same property shall be deemed and held contributive insurance; and if the aggregate sum of all such insurance exceed the insurable value of the property, as agreed by the insurer and the insured, in the event of a total or partial loss, each company shall be liable for its pro rata share of said insurance."

The case of Cave v. Insurance Co., 57 S. C. 347, 35 S. E. 577, shows that the evident intention of the statute was to discourage double or additional insurance on the same property. In that case it was held that, where additional insurance was placed on the property, by consent of the company first insuring it, each company was only liable for its pro rata share of the total insurance. It would be inconsistent with the manifest intention of the statute to hold that each company should be liable for its pro rata share of the total insurance, when the first policy contained a provision rendering the policy void if there was additional insurance, as this would confer upon the insured a right which he did not have before the statute was enacted.

In the case of Cave v. Insurance Co., supra, the building was insured in three different companies. One of them valued it at $1,000; another at $3,000; and the third made no mention as to the requirements of the statute.

It will thus be seen that the valuation placed on the building by one company was three times as large as that mentioned in one of the other policies. The valuation of $3,000 increased the risk assumed by the first company, which valued the building at $1,000. To allow the policy holder to insure the property in other companies, without the knowledge or consent of the first company, would render the business of insurance very uncertain as to the extent to which the com-

panies might be made liable without any agreement on their part. It would require them to find out if the insured had taken out policies in other companies, in order to ascertain the amount for which they were liable—whether for the full value or a proportionate part thereof.

It is unreasonable to suppose that the statute contemplated such loose and uncertain business methods.

Affirmed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

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(100 S. C. 21)

SAYE et al. v. HILL. (No. 8992.)

(Supreme Court of South Carolina. Feb. 10, 1915.)

1. FIXTURES ⇐5—PURPOSE FOR WHICH ANNEXATION IS MADE.

Where a structure is placed upon land not to promote the convenient use of the land, but to be used for some temporary purpose external to the land, and the land is used only as a foundation because some foundation is necessary, the structure and its belongings are not fixtures.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 4; Dec. Dig. ⇐5.]

2. TRIAL ⇐136—QUESTIONS OF LAW OR FACT—CONSTRUCTION OF WRITTEN INSTRUMENTS.

It is for the court, and not for the jury, to construe all instruments in writing.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323–327; Dec. Dig. ⇐136.]

3. DEEDS ⇐117—PROPERTY CONVEYED—PERSONAL PROPERTY.

Defendant erected on land conveyed to a railroad company for a particular purpose a cotton gin, grist mill, and planing mill, in which he installed machinery, including a stationary engine bolted to heavy timbers imbedded in the soil around which the floor of the building was laid. The grantor recovered possession of the land; the decree providing that defendant should have until a specified date to remove his buildings. He failed to remove the buildings or machinery within that time, and the grantor subsequently conveyed to plaintiffs. Thereafter defendant went upon the land and removed the engine and grist mill and also pipes and pumps with which certain wells were fitted, and which were used in connection with the machinery. *Held*, that the deed to plaintiffs did not convey any articles in the buildings or in or on the land that were not fixtures.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 336–341; Dec. Dig. ⇐117.]

4. FIXTURES ⇐33—PROPERTY PLACED ON LAND OF ANOTHER.

The decree, in effect, adjudged that the buildings and the machinery therein were not fixtures, and nothing occurred thereafter to change the status of such property, except the failure to remove it within the specified time, which did not forfeit defendant's property therein, and hence, in an action against defendant for conversion, it was error to charge that, if the mill and engine and things of that sort were a part of or fixed or attached to the building, if the building was built around it, or built for the purpose of putting the mill in it, and the mill and engine were put in it and attached securely and firmly to the soil, they became fixtures, and defendant had no right to remove them.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 64, 65; Dec. Dig. ⇐33.]

5. FIXTURES ⇐4—INTENT AND MANNER OF ANNEXATION.

While the manner in which a thing is attached to the soil may be of some value in determining whether it is a fixture or not, it does not afford an absolute or conclusive test, and the intention with which it is so attached is usually a more controlling factor, though all of the circumstances should be considered.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 3, 6; Dec. Dig. ⇐4.]

6. FIXTURES ⇐27—PURPOSE FOR WHICH ANNEXATION IS MADE.

Where houses are built and expensive machinery installed, with every appearance of permanency, under a license from the owner of the soil or a lease thereof, and under agreement for, and with the intention of, removal at the expiration of the license or lease, they are not fixtures.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 5, 22, 25, 44, 45, 54; Dec. Dig. ⇐27.]

Appeal from Common Pleas Circuit Court of York County; R. C. Watts, Judge.

Action by Ella R. Saye and another against W. L. Hill. Judgment for plaintiffs, and defendant appeals. Reversed for new trial.

Hart & Hart, of Yorkville, for appellant. J. S. Brice, of Yorkville, for respondents.

HYDRICK, J. In 1888 or 1889 John L. Rainey conveyed a lot in the town of Sharon, York county, to a railroad company by a deed which provided that the lot was to be used only for a depot site. The deed was never recorded, and the company did not use the lot for a depot site, but it was generally believed in the community that the lot belonged to the company. In 1901 the defendant, Hill, obtained the consent of the company to erect a cotton gin, grist mill, and planing mill on the lot. The buildings were erected and machinery installed therein, and some wells were bored and fitted with pipes and pumps for use in connection with the running of the machinery. This was done with the knowledge and acquiescence of Rainey. In 1904 Rainey brought suit against the company and Hill to recover possession of the lot, on the ground that it was not being used for the purpose for which it had been conveyed. In that suit it was adjudged that Rainey recover possession of the lot, and that Hill have until May 1, 1908, to remove his buildings, and that on and after that date he should vacate and surrender the premises to Rainey. Nothing was said in the decree about the machinery. Hill failed to remove the buildings or machinery within the time specified. In November, 1908, Rainey conveyed the lot to his daughters, the plaintiffs herein. Thereafter, and after he had been notified by the plaintiffs not to trespass upon the lot, he went on it

and removed certain machinery—to wit, an engine and grist mill—and took up and carried off the pipes and pumps out of the wells. This action was brought to recover actual and punitive damages for the conversion of the property and for the trespass.

The plaintiffs base their claim to damages for the conversion of the property on the contention that it had been so attached to the freehold as to become fixtures, and passed to them with the lot. The engine, which was what is known as a stationary engine, was bolted to heavy timbers which were embedded in the soil. The mill was set upon and fastened to a framework of heavy timbers, and the floor of the building was laid around it.

[1-4] At the trial the defendant admitted liability for nominal damages for the trespass in removing the property after the time specified in the decree above mentioned, but denied liability for the alleged conversion, contending that the property removed was his own. He requested the following instructions:

"(1) That where a structure is placed upon land, not to promote the convenient use of the land, but to be used for some temporary purpose, external to the land, and the land is used only as a foundation, because some foundation is necessary for the business, then the structure and its belongings are not fixtures. Hughes v. Shingle Co., 51 S. C. 29, 28 S. E. 2.

"(2) It is for the court, and not for the jury, to construe all instruments in writing. The jury is charged that the deed offered in evidence will not, or did not, carry articles in the houses, or in or on the land, that were not fixtures."

The presiding judge refused these requests, and, on the contrary, instructed the jury that:

"If this mill and engine and things of that sort was a part of, or fixed or attached to, the house, if the house was built around it, or if the house was built there for the purpose of putting the mill in it, and they did go there and put the mill and engine in it and attach it securely and firmly to the soil, then it became a fixture and he had no right to move it."

Under this instruction, the jury found for plaintiffs $750 damages, and from judgment on the verdict this appeal was taken.

[5, 6] We think the learned judge erred in refusing the defendant's requests, and in giving the instructions above quoted. While the manner in which a thing is attached to the soil may be of some value in determining whether it is a fixture or not, it does not afford an absolute or conclusive test. The intention with which it is so attached is usually a more controlling factor. Yet all the circumstances should be considered, especially as they throw light upon the intention. Houses are frequently built and expensive machinery installed therein with every appearance of permanency; yet it is done under a license from the owner of the soil, or under a lease thereof, and under agreement for, and with the intention of removal at the expiration of the license or lease. In such cases they are not fixtures. Hughes v. Shingle Co., 51 S. C. 1, 28 S. E. 2; Hurst v. Craig Furniture Co., 95 S. C. 221, 78 S. E. 960; Rawls v. Ins. Co., 97 S. C. 189, 81 S. E. 505.

The decree in the case of Rainey v. Hill and others in effect adjudged that the buildings, and, of course, the machinery therein, were not fixtures. Nothing occurred thereafter to change the status of this property, except the failure of Hill to remove it within the time specified in the decree. But that did not forfeit his property therein. It is conceded, however, that it did have the effect of making him a trespasser, when he went upon the lot to remove it, after the expiration of the time allowed in the decree. But, as we cannot tell whether the damages awarded were solely for the trespass, or whether they included damages for the conversion of the property, there must be a new trial.

Judgment reversed.

GARY, C. J., and FRASER and GAGE, JJ., concur. WATTS, J., disqualified.

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(100 S. C. 33)

## YARBOROUGH v. COLUMBIA RY., GAS & ELECTRIC CO. (No. 8994.)

(Supreme Court of South Carolina. Feb. 10, 1915.)

1. JURY ⟸85—EXCUSING FROM PANEL—DISCRETION.

Excusing from the panel two jurors, who stood up when the court asked if any of them were in defendant's employ, was in the discretion of the court, though one had only a small rent account to collect for defendant, and the other a contract for advertising space with a company, of which defendant's president was an officer or stockholder.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 405; Dec. Dig. ⟸85.]

2. CARRIERS ⟸347—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

There being evidence that an electric car was moving very slowly when a passenger stepped on the running board to alight, the question of her contributory negligence is for the jury, and not one of law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350–1386, 1388–1397, 1402; Dec. Dig. ⟸347.]

3. TRIAL ⟸193—INSTRUCTION—OPINION ON FACTS.

A requested charge that if a passenger leaves her seat while the car is in motion, and steps on the running board, she assumes the risk incident to such position, and, if injured through no negligence of the company, cannot recover, is objectionable as intimating an opinion on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436–438; Dec. Dig. ⟸193.]

4. APPEAL AND ERROR ⟸1005—REVIEW—DENYING NEW TRIAL—PREPONDERANCE OF EVIDENCE.

The question of preponderance of evidence is for the trial court on motion for new trial, and not for the court on appeal after denial of the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876, 3948–3950; Dec. Dig. ⟸1005.]

5. APPEAL AND ERROR ⟸1004—REVIEW—EXCESSIVE DAMAGES.

The question of mere excess of damages for personal injury is one for the trial court, and not for re-examination on appeal; it being one on the evidence, and the excess not appearing as a matter of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. ⟸ 1004.]

6. NEW TRIAL ⟸104—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

Where, at the trial, defendant, to show that plaintiff had changed her testimony, over objection that the stenographer's notes were the best evidence, introduced testimony of witnesses as to what plaintiff had testified, the stenographer's minutes are not newly discovered evidence, but merely cumulative, as regards defendant's motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218–220, 228; Dec. Dig. ⟸ 104.]

7. TRIAL ⟸252 — INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

An instruction as to injury of a passenger through an instrumentality under the exclusive care and control of the carrier is pertinent, where there is evidence that the passenger is injured by the sudden jerk of the car under the carrier's exclusive care and control.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. ⟸252.]

Appeal from Common Pleas Circuit Court of Richland County; W. A. Holman, Special Judge.

Action by Clyde Yarborough against the Columbia Railway, Gas & Electric Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Elliott & Herbert, of Columbia, for appellant. J. B. McLauchlin, of Columbia, for respondent.

FRASER, J. The appellant thus states his case:

"This suit was brought by Miss Clyde Yarborough on the 24th day of July, 1914, to recover $10,000 damages on account of injuries received by her as a result of the alleged negligent and willful conduct of the defendant in causing a car from which she was alighting to jerk forward. Plaintiff testified that, as defendant's car was nearing the stopping point at the intersection of College and Main streets, she stepped to the running board, and that the car started forward with a jerk and threw her to the street, by which her arm was sprained and her knee bruised. The testimony of defendant's motorman and conductor, and passengers, King, Smith, Howell, Bundrick, and Pope, was to the effect that plaintiff had attempted to step from a moving car and had fallen."

"The jury found a verdict for plaintiff for $4,000, which his honor refused to disturb on motion for a new trial."

[1] Argument:

"As the case was proceeding to trial, the court excused from the panel W. L. Kelly and C. P. Heise, jurors, who stood up when his honor inquired whether or not any jurors were related to the plaintiff or in the employ of defendant. Mr. Kelly stated he had a small rent account for the street railway company; that he was a rent collector. Mr. Heise that he was contracting for advertising space, and that he had a contract with the company. His affidavit shows that his contract was with the Record Publishing Company, with which Company he was informed Mr. E. W. Robertson, president of Columbia Railway, Gas & Electric Company, was connected as an officer or stockholder. Counsel for defendant objected to these two jurors being excused from the panel. His honor ruled it was a matter for his discretion, and that the fact that they had stood up showed them to be not indifferent, and he would excuse them from the panel. The jurors were not sworn on their voir dire."

Exception 1:

"This exception charges error in the action of his honor in excusing the jurors and in the ruling of his honor that the matter was for his discretion, and the fact that said jurors stood up when questioned showed them to be not indifferent. It is provided in the Civil Code (volume 1, § 4045) as follows: 'The court shall, on motion of either party in suit, examine, on oath, any person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he shall be placed aside as to the trial of that cause, and another shall be called.'"

It will be observed that the statute says "on motion of either party." The record does not show that either party made a motion to examine the jurors on oath. The jurors did not consider themselves entirely unconnected with the appellant, and it was within his honor's discretion to exclude them. The law is well stated in Tucker v. Buffalo Mills, 76 S. C. 541–542, 57 S. E. 626, 627 (121 Am. St. Rep. 957).

"When the case was called on circuit, plaintiff requested that all jurors be asked whether or not they were employés or stockholders in either the Union or Buffalo Cotton Mills. The defendant objected solely on the ground that the two mills were distinct corporations, having one president. It was ascertained that three jurors were employed by the cotton mills named and two by the Union Mills store. While we do not regard this fact as ground for legal disqualification of a juror, still the circuit court has very large powers as to the conduct of jury trials, including a discretion to exclude a juror for this cause, if the circumstances are such as, in the judgment of the court, would afford any reasonable ground for apprehension of unfairness, and his ruling will not be reversed, except for abuse of discretion, which does not appear in this case. State v. Wyse, 32 S. C. 45, 10 S. E. 612. Appellant contends that the circuit court should have examined the jurors on their voir dire, and cites State v. Williams, 31 S. C. 238, 9 S. E. 853, but no request for such examination was made, and the ground of objection stated shows that there was no issue as to facts, but presented merely a legal question as to whether the jurors were disqualified on an admitted state of facts."

This exception is overruled.

[2] 2. Exception 2:

"In declining to grant defendant's motion for a nonsuit at the close of the plaintiff's testimony on the ground that said testimony showed that plaintiff contributed to her injury as a proximate cause by her own negligence, the error being that the only inference properly deducible from the evidence was that plaintiff

contributed to her injury as a proximate cause by her own negligence, and his honor should have granted a nonsuit for this reason."

Appellant in his argument says:

"It has never been held in South Carolina that under all circumstances it is negligence for a passenger to endeavor to board or alight from a moving car, but such conduct, under some circumstances, may be negligence as a matter of law."

There was testimony that the car was moving very slowly, and the circumstances were for the jury. This exception is overruled.

[3] 3. Exception 3:

"Because his honor erred in refusing defendant's fifth request to charge as follows: 'If a passenger on a car leaves his or her seat while the car is in motion and steps upon the running board, he or she assumes the risks incident to such position, and, if injured through no negligence on the part of the company, such passenger cannot recover.' The error being that said request contained a correct proposition of law, and defendant was entitled to this instruction."

His honor had just charged request No. 4, which was as follows:

"Although a carrier of passengers, such as the defendant in this case, is due such passengers the highest degree of care, it is not an insurer of their safety, and, if they are injured through no negligence on the part of the carrier, they cannot recover. I charge you that."

To charge request No. 5 would have intimated an opinion on the facts, and was properly refused. This exception is overruled.

[4] 4. Exception 4:

"Because his honor erred in declining to grant a new trial on the following grounds to wit:

"(a) Because the overwhelming preponderance of the evidence clearly established the fact that the plaintiff was injured through her own negligence and through no negligence of the defendant, and the excessive sum awarded by the jury indicated that it was biased to such an extent as to be unable to give a fair consideration to the merits of the suit."

This preponderance of the evidence is a question for the court of common pleas, and cannot be considered here.

[5] "(b) Because the sum of $4,000 awarded by the jury was grossly excessive and entirely out of reason when the comparatively slight damage inflicted upon the plaintiff is taken into consideration."

This is also a question for the court of common pleas. The rule is well stated in Southern Railway v. Bennett, 233 U. S. 86, 34 Sup. Ct. 567, 58 L. Ed. 860:

"The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive. It is admitted that the judge charged the jury correctly, according to principles established by Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417 [Ann. Cas. 1914C, 176], but it is thought to be apparent, as matter of law, that the jury found more than the charge or the law allowed. The argument is this: The deceased was making not more than $900 a year, and the only visible ground of increase was the possibility that he might be promoted from fireman to engineer, with what pay was not shown. He could not have given more than $700 a year to his family. His expectation of life was about 30 years by the tables of mortality. Therefore, at the legal rate of interest, the income from $10,000 for 30 years was all that the plaintiff was entitled to, whereas she was given the principal of $20,000 out and out. It may be admitted that if it were true that the excess appeared as matter of law—that if, for instance, the statute fixed a maximum and the verdict exceeded it—a question might arise for this court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error. Lincoln v. Power, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; Herencia v. Guzman, 219 U. S. 44, 45, 31 Sup. Ct. 135, 55 L. Ed. 81, 82. The premises of the argument for the plaintiff in error were not conclusive upon the jury, and, although the verdict may seem to us too large, no such error appears as to warrant our imputing to judge and jury a connivance in escaping the limits of the law."

This exception is overruled.

[6] "(c) Because the affidavit of W. H. Macfeat, with extract from testimony, clearly indicated that plaintiff, in order to gain a verdict, had totally changed her testimony and was simply an imposter attempting to gain a verdict, and his honor should therefore have set aside the verdict rendered by the jury."

The record shows that when the appellant offered to prove the statements of the respondent, at the former trial, by witnesses who heard the former statements, the respondent strenuously objected and claimed that the stenographer's notes were the best evidence, and therefore the way now required by law. Over respondent's protest, the evidence was allowed. It would be manifestly unfair to deprive the respondent of her verdict by reason of the very evidence for which she called on the trial. The evidence was cumulative and not after-discovered.

This exception is overruled.

[7] 5. Exception 5:

"Because his honor erred in charging the jury as follows: 'I should state, where a passenger is injured through any instrumentality under the exclusive care and control of the carrier, the law will presume negligence.' The error being that there was no evidence that the plaintiff herein was injured through any instrumentality under the exclusive care and control of the carrier; and the entire question in the case was whether or not there was a jerk of the car, or whether plaintiff fell through her own negligence, and such instruction was not responsive to the allegations or proof, and conveyed to the jury the impression that a presumption arose that the injury was caused through the negligence of the defendant herein."

There was evidence that the injury was produced by the sudden jerk of the car under the exclusive care and control of the appellant, and the charge was pertinent. This exception is overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(16 Ga. App. 51)

## FINLEYSON BROS. v. LIVERPOOL & LONDON & GLOBE INS. CO.

(No. 5657.)

(Court of Appeals of Georgia. Dec. 9, 1914. Rehearing Denied Feb. 26, 1915.)

*(Syllabus by the Court.)*

INSURANCE ⟸335, 375—PLEADING ⟸34—CONCLUSION OF PLEADER — IRON SAFE CLAUSE—FORFEITURE OF POLICY.

The court did not err in sustaining the general demurrer and dismissing the petition. The petition was based upon two policies of fire insurance, each of which contained a provision negativing the right of any agent to waive the condition of the policy commonly known as the "iron safe clause"; and in dealing with the petition on demurrer the court properly disregarded mere conclusions of the pleader, which were contradicted by the stipulations of the contract governing the plaintiffs' right to recover. The stipulations which required the plaintiffs to prepare an inventory and keep books was a warranty, the breach of which avoided the contract and placed it beyond the power of the agent to amend, reconstruct, or resurrect it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 852, 853, 948–951, 956–965; Dec. Dig. ⟸335, 375; Pleading, Cent. Dig. §§ 5½, 66–74; Dec. Dig. ⟸34.]

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by Finleyson Bros. against the Liverpool & London & Globe Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. V. Custer, of Bainbridge, and P. D. Rich, of Colquitt, for plaintiff in error. Smith, Hammond & Smith, of Atlanta, and W. H. Krause and T. S. Hawes, both of Bainbridge, for defendant in error.

RUSSELL, C. J. The plaintiffs in error brought suit on two policies of fire insurance, issued by the defendant in error for $3,500 and $500, respectively, copies of which were attached to the petition. The policies covered a stock of merchandise, and were in the usual form, and contained what is commonly called the "iron safe clause," stipulating that the assured should take an inventory of stock within 30 days of the issuance of the policy, or the policy should be void from that date, and that the assured should keep books containing a complete record of business transacted. The allegations of the petition are in substance as follows: The policies sued on were originally issued to Lamar, Taylor & Riley Drug Company, and were, by written consent of the defendant, transferred to the plaintiffs on May 6, 1913. Some time prior to June 30, 1913, one of the plaintiffs called on the defendant's agent at Bainbridge and stated that the plaintiffs wanted additional insurance. The agent stated it would be necessary to take an inventory to determine if additional insurance would be allowed. Thereupon the statement was made by this plaintiff to the agent that the plaintiffs had never previously taken an inventory, nor had they kept any books, to which the agent replied that "it would be necessary to keep books and make inventories, otherwise said policies would become null and void by their terms." The plaintiffs "immediately set about making an inventory," and on June 30, 1913, completed the inventory and notified the agent that an inventory had been taken, and that it amounted to over $4,000. On July 2, 1913, the following indorsement was entered on the policies sued on:

"Indorsement July 2, 1913. From this date permission is granted allowing a total of $4,500 concurrent insurance on the first item of this policy, including this policy. Attached to policy No. ..... of the Liverpool & London & Globe Insurance Co., Bainbridge, Georgia.

"E. J. Perry, Agent."

The agent, Perry, did not tender to the plaintiffs any unearned premium, or advise them that their failure to keep books and prepare an inventory had rendered the policies null and void; and after the indorsement above stated he issued to the insured, as agent for another insurance company, a policy for $1,000 on the same property. The petition further alleges that by reason of the indorsement placed upon the policies by the agent, Perry, they were new contracts from the time of the indorsement; that the insured kept books since that time, and that they are entitled to recover on the policies. The defendant demurred generally to the petition, as setting forth no cause of action, and to the sustaining of this demurrer the plaintiffs excepted.

We are of the opinion that the court did not err in sustaining the demurrer. When the policies were transferred to the plaintiffs by the Lamar, Taylor & Riley Drug Company on May 6, 1913, they became a new contract as of that date (St. Paul Fire & Marine Ins. Co. v. Brunswick Grocery Co., 113 Ga. 790, 39 S. E. 483), and were subject to all the conditions of the original contract. The "iron safe clause" in the policies was a warranty, on the part of the insured that they would do something in the future, and was important as providing a check against fraud on their part; and their compliance with this part of the contract was a condition upon which, by the express terms of the contract, the validity of the policy depended. Scottish Union Ins. Co. v. Stubbs, 98 Ga. 761, 27 S. E. 180; Southern Fire Ins. Co. v. Knight, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216. The plaintiffs, therefore, were bound to take an inventory within 30 days after the transfer of the policies; else the contract of insurance would be void from that date. It is conceded in the petition that no such inventory was taken. The question, then, is whether the agent of the defendant could and did, as contended by the plaintiffs, waive this provision of the policy.

In the policy it is stipulated that no officer or agent "shall have power to waive any provisions or conditions of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto." It is not alleged that the waiver was indorsed upon or attached to the policy. Neither does it appear from the petition or the policy that the "iron safe clause" was one of the provisions or conditions which were the subject of agreement. The failure of the insured to comply with the provisions of the "iron safe clause" placed it beyond the power of the agent to amend, reconstruct, or resurrect the policy. By the very wording of the policy, the policy was void, not merely voidable. Insurance Co. of North America v. De Loach, 3 Ga. App. 812, 61 S. E. 406. Agents are without authority to bind their principal by any waiver of the terms of the policy, after a forfeiture has already taken place. Graham v. Niagara Ins. Co., 106 Ga. 840, 32 S. E. 579. And notice to an agent who solicits insurance, made subsequent to the issuance of a policy, of a violation of a condition of the policy, is not notice to the insurer, so as to constitute waiver of the insurer's right to forfeit the policy thereunder. A forfeiture cannot be waived without express authority from the governing officials of the insurance company. Lippman v. Ætna Ins. Co., 120 Ga. 247, 47 S. E. 593. It is not alleged that the agent was given this express authority by the governing officials; and, under the facts of this case as alleged, even if they had given him such authority, we do not think he could have waived the clause, because that would have amounted in substance to bringing to life something already dead, which, under the ruling in the De Loach Case, supra, cannot be done.

Judgment affirmed.

BROYLES, J., not presiding.

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(15 Ga. App. 822)

## PRYOR v. AMERICAN TRUST & BANKING CO.

## AMERICAN TRUST & BANKING CO. v. PRYOR.

(Nos. 5531, 5532.)

(Court of Appeals of Georgia. Feb. 16, 1915.)

*(Syllabus by the Court.)*

1. BILLS AND NOTES ⟸365—NEGOTIABLE INSTRUMENTS—DEFENSES.

A promissory note, payable to the order of the maker thereof and properly indorsed by him, is a negotiable instrument, and the holder is presumed to be such bona fide and for value, and is protected from any defense set up by the maker, acceptor, or indorser, except non est factum, gambling, immoral and illegal consideration, or fraud in its procurement by the holder.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 944, 958, 959; Dec. Dig. ⟸365.]

2. JUDGMENT ⟸145, 151—MOTION TO VACATE—REQUISITES—DEFENSE.

A motion or petition to vacate a judgment must show the existence of some statutory cause for setting it aside, or facts sufficient to warrant the court in taking such action in the exercise of its sound general discretion. The movant must not only show generally and inferentially, but by precise and specific averment, that he has been without fault, or has exercised due diligence, or, if negligent, that his negligence was excusable. "The motion must show that he has a good and meritorious defense to the action, not merely by so alleging, but by setting forth fully the facts which constitute the proposed defense, except in cases where the judgment is absolutely void, when no defense need be shown."

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292–298, 727, 730; Dec. Dig. ⟸145, 151.]

3. JUDGMENT ⟸145—MOTION TO VACATE—SUFFICIENCY.

Where a motion to set aside a judgment fails to disclose the facts which constitute the defense, therein alleged to be "good and legal," by any definite allegations included therein, or contained in any "affidavit of merits" thereto attached as an exhibit, or even made a part of any ground of the motion by identifying reference thereto, the motion is incomplete and insufficient.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292–295; Dec. Dig. ⟸145.]

*(Additional Syllabus by Editorial Staff.)*

4. BILLS AND NOTES ⟸28—"PROMISSORY NOTE."

A "promissory note," within Civ. Code 1910, § 4270, defining a promissory note as "a written promise made by one or more to pay to another or order or bearer at a specified time a specified sum of money or other article of value," is a written promise "to pay to another, or to order or to bearer," and not merely a written promise "to pay to the order of another or bearer."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 40; Dec. Dig. ⟸28.

For other definitions, see Words and Phrases, First and Second Series, Promissory Note.]

5. BILLS AND NOTES ⟸373—"FRAUD IN ITS PROCUREMENT."

The "fraud in its procurement," which under Civ. Code 1910, § 4286, will enable the maker of a promissory note to avoid paying it in the hands of an innocent purchaser for value, means fraud on the part of the holder, and has no reference to fraud in the contract out of which the instrument arose.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 966–970; Dec. Dig. ⟸373.]

6. WORDS AND PHRASES—"HOLDER"—"BEARER."

"Holder" is a word of the same import as "bearer," and is applied to any one in actual or constructive possession of the bill, and entitled at law to recover or receive its contents from the parties to it (citing Words and Phrases, Holder).

Error from City Court of Leesburg; R. L. Greer, Judge.

Action by the American Trust & Banking Company against R. S. Pryor. Judgment for plaintiff, and defendant brings error, and plaintiff files cross-bill of exceptions. Reversed on cross-bill, and main bill of exceptions dismissed.

R. L. Maynard, of Americus, for plaintiff in error. Peacock & Gardner, of Albany, for defendant in error.

WADE, J. The American Trust & Banking Company brought suit against R. S. Pryor on a promissory note, dated July 18, 1912, and due January 10, 1913, for the principal sum of $750, which was signed by him and by its terms made payable to "myself" and indorsed by him and by Smith & Connor. The defendant filed a plea denying generally the allegation of indebtedness in the declaration of the plaintiff, and setting up as an affirmative defense against the collection of the note various allegations of misrepresentation and fraud made to the defendant by Smith & Connor at the time the note was procured, and in order to induce the defendant to execute it—the representations being in reference to the value of stock in a certain corporation, for the purchase of which the note was executed and delivered to Smith & Connor, the agents of this corporation. The plea further set up that the defendant had "notified the plaintiff of the circumstances under which such note was given," but did not say when this notice was given to the plaintiff, nor by whom the notice was received on the part of the plaintiff and failed to show that the notice was given to the plaintiff before the purchase of the note. A demurrer to the plea as filed was interposed by the plaintiff, and when the demurrer came up at the proper time for argument the presiding judge declined to pass upon it on account of his possible disqualification, and the case went over, by express agreement, to the first day of a subsequent adjourned term of the court. Through some misunderstanding, the merits of which it is unnecessary to discuss under the view we take of the case, counsel for the defendant failed to be present on the first day of the adjourned term of the court when the case came up in its order, in accordance with the previous setting thereof for trial before a judge qualified to dispose of the case. The plaintiff insisted upon its demurrer, and after argument the court sustained the demurrer and dismissed the plea, and a judgment in behalf of the plaintiff for the amount of the note resulted. Later during the same day, counsel for the defendant appeared at the court and filed a motion to set aside the judgment, pleading in detail the misunderstanding and mistakes which had prevented his presence at the time the case was called in its order for trial, and making this sole additional allegation:

"Fifth. That your petitioner had a valid and legal defense to said action, and was then ready for the trial of said cause, that the trial of said cause proceeded in the absence of defendant's counsel through accident or mistake in the understanding between his said attorney and the attorney for plaintiff; and that on account of this mistake and misunderstanding said verdict and judgment should be vacated."

The plaintiff filed a demurrer on the general ground that the motion set forth no legal showing for the relief prayed, and on several special grounds touching the sufficiency of the showing as to diligence on the part of counsel for the movant, and also because the motion failed to disclose that there was any error in striking the original plea, since the plea itself was not set out, and failed to show that the "valid and legal" defense referred to in the motion was ever pleaded, and did not set out and specify wherein the alleged valid and legal defense lay. This demurrer was overruled, and the plaintiff filed exceptions pendente lite, and in its cross-bill of exceptions assigns error thereon.

The petition asking that the judgment be set aside was not verified, but was signed simply by the attorney for the movant. A rule nisi thereupon was issued by the presiding judge, requiring the plaintiff to show cause at a future date why the verdict and judgment should not be vacated. The hearing was had on the date fixed, and it appears from the bill of exceptions that the attorney for the movant then introduced an affidavit, made by himself, setting out in detail and with careful particularity facts leading to his failure to be present at the time and place of trial when the judgment was rendered. The bill of exceptions recites that the movant introduced as evidence the original petition of the plaintiff, on which the verdict and judgment complained of were based, the original plea filed by the defendant, which is a part of the record in the said case, and an amendment which he (the movant) "*proposed to offer*," which was sworn to by R. S. Pryor, and was as follows:

"First. That the plaintiff is not a bona fide purchaser for value of the note sued upon, without notice of the method used by Smith & Connor to make sale of stock of the Southern Finance Corporation; that the plaintiff, through its agents and officers, had at the time of the purchase of said notes due notice of the consideration of said note."

It does not appear from the record how this amendment which the movant "proposed to offer" was verified, whether as required by section 5640 of the Civil Code or not; but, waiving this point, it does not appear from any recitals in the bill of exceptions, or from any part of the record specified therein, that the amendment which the attorney for the movant introduced in evidence as being an amendment which was "proposed," was attached to or in any way made a part of the motion to set aside the judgment, or was even by words remotely referred to, and an effort thus made to incorporate it in the motion to vacate as an exhibit or component part thereof.

The plaintiff insisted that as the note sued upon was signed by Pryor and made payable to his own order, it was not a negotiable instrument, which would be free from attack in the hands of one who purchased it before due, for value, and without notice of any defects therein other than the notice brought home to the purchaser by the fact that the

note was payable to the order of the maker. The note, as we have already said, was indorsed by the maker, R. S. Pryor, to whose order it was made payable, and was further indorsed by Smith & Connor, from whom it was obtained by the plaintiff.

[1, 4] Civil Code, § 4270, defines a promissory note to be:

"A written promise made by one or more to pay to another, or order, or bearer, at a specified time, a specific amount of money, or other articles of value."

The Code section does *not* declare that a promissory note is a written promise made by one or more "to pay to the order *of another*, or bearer," but explicitly says that such a note is a promise to pay to "another, or order, or bearer," using the disjunctive conjunction between "another" and "or order," and between "or order" and "or bearer," which we may interpret to mean "to another, or *to* order or *to* bearer." A note payable to maker, "or order," would come exactly within the terms of this description, and, when indorsed by the maker, would become a negotiable instrument.

In Moody v. Threlkeld, 13 Ga. 55 (2, 3), it was held that a note payable to bearer only was a valid note, and that a note issued with a blank for the payee's name may be filled up by any bona fide holder with his own name as payee, and is a good promissory note as to him from its date. He can collect thereon, sue thereon, and otherwise enjoy all the right and powers thereunder which he would have possessed, had his name been originally written therein. See also Roth v. Donnelly Grocery Co., 8 Ga. App. 851, 70 S. E. 140. "A promissory note is negotiable by indorsement of the payee or holder, or, if payable to bearer, by transfer and delivery only." Civil Code, § 4273.

[5] A bona fide holder for value of a promissory note or other negotiable instrument, who receives it before it is due, and without notice of any defect or defense, is protected from any defense set up by the maker, acceptor, or indorser, except non est factum, gambling, immoral and illegal consideration, or fraud in its procurement (Civil Code, § 4286), and "fraud in its procurement" which would enable the maker of a promissory note to avoid paying it in the hands of an innocent purchaser for value has been time and again judicially interpreted to mean fraud on the part of the holder (Robenson v. Vason, 37 Ga. 66; Hogan v. Moore, 48 Ga. 162), and has no reference to fraud in the contract out of which the instrument arose (Grooms v. Olliff, 93 Ga. 789, 20 S. E. 655), and the holder of a note is presumed to be such bona fide and for value (Civil Code, § 4273).

[6] The terms "holder" and "bearer" are words of similar import, and where either of these words is employed in a note, the note may be made negotiable by delivery. Putnam v. Crymes (S. C.) 1 McMul. 9, 36 Am. Dec. 250. "Holder" is a word of the same import as "bearer," and is applied to any one in actual or constructive possession of the bill, and entitled at law to recover or receive its contents from the parties to it. See 4 Words and Phrases, 3319, and cases cited. From all of which it appears to us that the presumption in favor of a note in the hands of a holder thereof exists where the note is made payable to the order of the maker and is by him properly indorsed. If a note payable to bearer merely, without mentioning *any* name, is a valid note, and a note issued with a blank for the payee's name may be filled up by any bona fide holder with his own name as payee, and then be treated as a good promissory note, enjoying all the presumptions which such a note has under our statute, it is apparent that a note made payable as section 4270 of the Civil Code provides, not only "to order," but to the order of a person designated, to wit, the person executing the same, who thereafter imparts negotiability to the instrument by indorsing thereon the "order" provided for by its terms, is a negotiable instrument, and is entitled in the hands of a holder to the same presumptions which would arise if the maker had made the note payable to the order of another person, and the payee had indorsed it.

Since it appears, from what has been stated above in regard to the original plea filed by the defendant, that this plea failed to allege that the plaintiff was not a bona fide holder of the note before due and for value, and simply asserted that the defendant "avers that he has notified the plaintiff of the circumstances on which the said note was given," without alleging that this notice was given before the plaintiff in good faith purchased the note and paid therefor (even though it be assumed that this averment is intended to convey the idea that the plaintiff had been at *some time* informed by the defendant of all the alleged fraud practiced upon him by Smith & Connor), the plea was nevertheless fatally defective, and raised no issue to rebut the presumption in favor of the holder of the note, and the plaintiff did *not* have a "valid and legal" defense on file originally; for, construing the plea more strongly against the pleader, this allegation must be interpreted to mean that the notice referred to was given by the defendant to the plaintiff after the acquisition of the note, for value, and bona fide.

[2, 3] The judge therefore did not err in striking the original plea, regardless of whether or not the defense therein set up might have been a good and legal defense as against Smith & Connor, or one who obtained the note after notice. "Where the only defenses set up by the defendant were without merit and were properly stricken, and a verdict and judgment were rendered against him, it was error for the court to sustain a motion, made during the term, to set aside

the verdict and judgment so rendered; no defense being set up and offered to be pleaded, or shown to exist, except those properly stricken, and no meritorious ground for reopening the case appearing." Murray v. Willoughby, 133 Ga. 514, 66 S. E. 267. The movant in this case insists that the rule laid down above is not applicable, since it appeared from the proposed amendment, which was verified by Pryor and offered in evidence, that the defendant did have a valid meritorious defense. As we have already suggested, the meritorious defense which the defendant claimed to have was that the plaintiff had knowledge of the equities between the parties before it obtained the note, and, without considering whether or not the proposed amendment as worded was entirely adequate to set up the defense claimed, it does not appear that this defense was in any way made a part of or incorporated in the motion to vacate, or even attached thereto as an exhibit, nor is it referred to in any definite way in the motion. An application to vacate a judgment "must show the existence of one of the statutory causes for setting aside a judgment, or facts sufficient to warrant the court in taking such action in the exercise of its general jurisdiction, and it is not enough to allege 'mistake,' 'surprise,' 'fraud,' 'unavoidable casualty or misfortune,' or the like in general terms, but the very fact which led up to the taking of the judgment or which prevented the party from defending the suit must be stated explicitly. He must also show, not generally or inferentially, but by specific averments, that he has not been in fault, or has exercised due diligence and vigilance, or if he has been negligent he must show in like manner that the negligence was excusable. And the motion must show that he has a good and meritorious defense to the action, not merely by so alleging, but by setting forth fully the facts which constitute the proposed defense, except in cases where the judgment is absolutely void, when no defense need be shown." 23 Cyc. 949, 950, 951.

Able counsel representing the movant appears to have recognized this rule so far as it applied to the facts relied upon to prove mistake, or to show that he had exercised due diligence, or if negligent that his negligence was excusable, since the motion itself set out in substance all that the movant claimed by way of explanation or excuse for his absence at the time the judgment was taken. No attempt whatever was made, however, to set out the valid and legal defense to the action, which the movant baldly alleges that he had, in his motion to set aside the judgment. "In all cases where the application is not based upon want of jurisdiction or irregularity, but upon something presented as an excuse by the defendant, he must make an affidavit of merits. And nothing else can take its place and serve its purpose. An answer to the complaint, already, on file or which the defendant proposed to file, is not equivalent to an affidavit of merits, although it discloses a defense apparently complete and meritorious, and although it is verified." 1 Black on Judgments, § 347, p. 538. The motion itself should disclose the nature and character of the defense relied upon by the movant in the event the judgment was set aside and a trial thereafter had, and it must appear that the defense would in fact be legally a meritorious one. To file a motion asking that the solemn judgment of a court be set aside, and alleging simply that the defendant had a good and valid defense to the action upon which judgment had been obtained against him, would certainly not authorize the court to grant such a motion; for under the great weight of authority, the defense must be set up in detail, and it must appear from the facts thus alleged that the defense was actually valid and meritorious. The statement of the movant that he had a "valid defense" without more amounts to nothing but a conclusion on his part, upon which the court would be unable to act. The motion to vacate is not verified, and a separate affidavit was introduced to substantiate the allegations made therein, tending to explain the absence of counsel for the defendant when the judgment was rendered, and to set up and establish that a "mistake" had occurred.

There was also offered in evidence what is referred to in the bill of exceptions as an amendment which the movant "proposed to offer," and which was sworn to by him, and which presumably set up the "valid and legal defense" referred to in the motion to vacate, and to this affidavit, apart from the pleadings, reference must necessarily be had, in order to determine what defense is referred to in the motion. In other words, the motion is not complete in itself, and the affidavit referred to did not prima facie *support* the allegations made in the motion to set aside, but itself set up and declared the substantive facts and circumstances relied upon to make out the "valid and legal defense," and the affidavit was not attached to or in any way made a part of the motion, so that the motion in itself, and without referring to the extrinsic matter contained in the affidavit offered as evidence to support the allegations in the motion, was not sufficient to show that the defendant had any defense which might on a trial possibly suffice to prevent another judgment against him. A motion to set aside a judgment should be complete in itself, and such a motion is fatally defective when it fails to disclose the character and nature of the defense relied upon, without depending upon matters of evidence, or even (as suggested from the quotation above from Black on Judgments) upon a verified plea already filed in the court. To entertain a motion to set aside a judgment which alleges merely (in addition to the necessary al-

legations, in a case like the present one, explaining the apparent negligence which resulted in the judgment) that the movant has "a legal and valid defense," and to permit him on the hearing, to tender in evidence a proposed amendment to his plea, which has never even been filed in the court, and which *may* never be filed, and thus never become a part of the record of the case, would give a defendant an advantage to which he is not entitled under any rule of pleading, or even in common fairness. If the movant were so disposed, and were not restrained by scruples of conscience, he could, at the hearing of the motion to vacate the judgment, offer in evidence, to sustain a general allegation that he had a good and legal defense, a verified amendment to his plea, which his counsel might in perfect good faith present with the representation that the movant *proposed* to file it in the event that the judgment should be set aside, and then after thus inducing the court to set aside the judgment, and possibly obtaining a long delay, might, when the case came to trial, offer an amendment somewhat different from the proposed amendment exhibited on the hearing of the motion to vacate the judgment, and not sufficient to constitute a valid defense; or he might offer at the trial an altogether different defense from the one proposed at the hearing of the motion, and perhaps one which would conflict with or be in direct contradiction of the "proposed amendment," and in such an event the plaintiff would perhaps be unable to show by the record in the case, and by way of admissions on the part of the defendant, should he desire to do so, what was set out in the original "proposed amendment" never actually filed. If on the other hand, the facts relied upon to constitute the good and valid defense which the movant alleged he had were sufficient, and his allegations were sustained by outside affidavits, and the motion should be granted by the court, the motion itself would be a part of the record in the case, and might be referred to in any after proceeding, in the event that the plaintiff regarded any statement therein as an admission beneficial to him, or as contradictory to any statement made in an amendment subsequently filed.

If the proposed amendment offered in evidence and verified by Pryor had been attached to the motion to set aside, or even identified in any way as a part of the proceedings, and it had appeared that the presiding judge had directed that it be filed as a part of the record, this argument would not apply; but it appears to have been entirely separate and apart from the motion, and not only not filed as a part of the proceedings in the case, but not even then identified in any way by the order of the presiding judge. It was said in Murray v. Willoughby, supra, referring to motions to set aside judgments, that:

"Motions of this character, as it has frequently been decided, are addressed to the sound discretion of the court, and this court will not interfere with the exercise of that discretion, where it does not appear that it was abused; and where there is any doubt as to whether or not the court, at the time of rendering the judgment setting aside and vacating a judgment previously rendered, exercised a sound discretion, this court, as a general rule, will not disturb the ruling of the court below."

So that we may conclude by saying generally that this court, considering the record as a whole, not only sees no reason why the sound discretion of the trial court should be interfered with, and the verdict and judgment set aside, but since, under the view we entertain as to the insufficiency of the motion, the trial court should have sustained the demurrer thereto, the judgment overruling the demurrer is reversed on the cross-bill of exceptions, and the main bill of exceptions is dismissed.

Judgment reversed on cross-bill of exceptions; main bill of exceptions dismissed.

BROYLES, J., not presiding.

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(15 Ga. App. 842)

## ATLANTIC COAST LINE R. CO. v. ADEEB.

(No. 5571.)

(Court of Appeals of Georgia. Feb. 16, 1915.)

*(Syllabus by the Court.)*

1. CARRIERS ⟸814—INJURY TO PASSENGERS—PETITION—COLLISION.

The court did not err in overruling the demurrer to the petition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1260, 1270, 1273, 1274, 1276–1280; Dec. Dig. ⟸314.]

2. RELEASE ⟸24 — CONTESTING VALIDITY — RESTORING CONSIDERATION.

Where at the request of an agent of one who has prepared a blank form of contract and is named therein as a party another person writes his own name in the space left for signing but cannot read the instrument and it has not been read to him, and its purport has not been stated to him, and is not understood by him, and his intention in writing his name is merely to comply with what he understands to be a request to write it as information, or to show how it should be spelled, no contract on his part is thereby created. And this is so even though he receives at the same time a sum of money which the writing states is the consideration of the contract, when he does not understand it to be such, and does not accept it as a payment in connection with the subject-matter of the contract. It is not necessary, in such a case, that the person receiving the money should return or tender it before bringing a suit to recover damages for which the writing purports to be a release.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 41–46; Dec. Dig. ⟸24.]

3. CARRIERS ⟸306—INJURY TO PASSENGER—CONCURRENT NEGLIGENCE—NONSUIT.

Where two railroad companies are sued as joint tort-feasors, on account of injuries caused by their concurrent negligence at a grade crossing, and undisputed evidence shows that the sole proximate cause of the injuries was the failure on the part of one of the defendants to exercise that extraordinary care and diligence to insure the safety of its passengers which is re-

quired by law, the court did not err in granting a nonsuit as to the other defendant, notwithstanding the injuries complained of would not have occurred without negligence on the part of both.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1249–1251; Dec. Dig. ⟸306.]

4. CARRIERS ⟸306—PASSENGERS—COLLISION—DUTY OF RAILROAD COMPANIES.

While section 2687 of the Civil Code of 1910 declares that, whenever the tracks of different railroads cross each other, the trains of the road first constructed and put in operation have the privilege of crossing first, nevertheless, in making the prescribed stop within 50 feet of the crossing and in approaching it, as provided by that section, those in charge of the train which has the right of passing first must use extraordinary care and diligence to protect the safety and welfare of its passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1249–1251; Dec. Dig. ⟸306.]

5. CARRIERS ⟸318—TRIAL ⟸233—INJURY TO PASSENGER—EVIDENCE—INSTRUCTIONS.

There was no error in the instructions complained of, or in the refusal to charge as requested; and the evidence was sufficient to authorize the verdict returned.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307–1314; Dec. Dig. ⟸318; Trial, Cent. Dig. §§ 527–530; Dec. Dig. ⟸233.]

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by Mrs. Louise Adeeb against the Atlantic Coast Line Railroad Company and another. Judgment for plaintiff, and the defendant named brings error. Affirmed.

Patterson & Copeland, of Valdosta, and Bennet & Branch, of Quitman, for plaintiff in error. Whitaker & Dukes, of Valdosta, for defendant in error.

WADE, J. Mrs. Louise Adeeb filed suit against the Atlantic Coast Line Railroad Company and the Georgia Southern & Florida Railway Company, alleging that she had suffered various injuries on account of a collision which occurred through the concurrent negligence of the defendants at a grade crossing in the city of Valdosta, Ga. Each defendant filed a special plea setting up accord and satisfaction, the issue raised by which was determined, in each instance, in favor of the plaintiff. The court, at the conclusion of the evidence for the plaintiff, granted a nonsuit as to the Georgia Southern & Florida Railway Company, but that company nevertheless filed a motion for a new trial of the issue raised by its special plea; and it brought the case to this court on exceptions to the refusal of the motion. The case proceeded to a verdict and judgment against the Atlantic Coast Line Railroad Company, and that defendant filed its motion for a new trial, not only of the issue determined by the trial on the special plea, but also of the issue raised by its plea to the merits. The motion was overruled, and the Atlantic Coast Line Railroad Company excepted to that judgment, and also to the overruling of its demurrer to the plaintiff's petition. We take up the various exceptions in the order in which they occur.

[1] 1. It is admitted in the brief for the plaintiff in error that the court did not err in overruling the general demurrer, which alleged that the petition set out no cause of action. In grounds 2 and 3 of the demurrer it is contended that the allegations of the petition show that the defendants were not joint tort-feasors and were not jointly liable to the plaintiff in any manner, and that there were no joint acts on their part. The petition alleges, in the fifth paragraph, that when the passenger train on the Atlantic Coast Line Railroad Company, on which the plaintiff was riding as a passenger, reached the point in the city of Valdosta where the main track of that road crosses the main line of the Georgia Southern & Florida Railway Company, and as the passenger train approached the crossing and started to make its passage over the same, "by reason of the fact that the agents, servants, and employés of the said Atlantic Coast Line Railroad Company, in charge of said locomotive and train, and the agents, servants, and employés of the said Georgia Southern & Florida Railway Company, in charge of a different locomotive and car hereafter more fully described, and at the said time being operated along the said track of the said Georgia Southern & Florida Railway Company, negligently attempted and endeavored to drive or cause the said respective trains and locomotives to pass over the said crossing at the same time, the said respective trains and locomotives collided with great force and violence." In the next paragraph the petition set out that the violent stopping and jerking of the train incident to the collision between the train on which the plaintiff was riding and the train on the track of the Georgia Southern & Florida Railway Company resulted in various injuries to the plaintiff; and the seventh, eighth, ninth, tenth, eleventh, twelfth, and thirteenth paragraphs attempted to set out in detail the precise nature of the physical injuries suffered by the plaintiff, her age, occupation, and earning capacity, etc., and the extent to which her earning capacity had been impaired by these injuries, and also the medical and other necessary expenses incurred by her on account thereof. The fifteenth paragraph merely sets forth facts explaining the inability of the plaintiff to more definitely describe the locomotive and train of the Georgia Southern & Florida Railway Company, which came in contact with the train upon which she was a passenger. The sixteenth paragraph is as follows:

"The acts of negligence, and the lack of diligence hereinbefore generally referred to, causing the injuries to the petitioner set out, are as follows: (a) Because there was neither an automatic interlocking and derailing switch nor a signal tower in which an operator was continually

kept at the place where the separate tracks of the said defendants crossed each other. (b) Because the engine drivers and conductors in charge of the said respective trains and locomotives did not cause the said respective trains and locomotives, or either of them, to come to a full stop within 50 feet of said crossing, and then move forward slowly. (c) Because the engine drivers in charge of the said respective trains and locomotives did not approach said crossing slowly, but at a rapid and dangerous rate of speed, to wit, at the rate of 15 or 20 miles per hour. (d) Because the said engine drivers and other servants in charge of said respective trains and locomotives did not keep a proper lookout for the purpose of detecting the presence of other trains, near and in the act of passing over the crossing. (e) Because the said engine drivers in charge of the said respective trains and locomotives, in approaching said crossing, ran their respective engines at such a high rate of speed that they could not stop when they each discovered the presence of the other near said crossing. (f) Because it was gross negligence on the part of both of the said defendants, their agents, servants, and employés, to attempt to pass over the said crossing at the same time."

It appears, from an inspection of the fifth paragraph of the petition, taken in connection with the sixteenth paragraph, that the plaintiff distinctly alleges that the collision and the injury occurred because the servants and employés of each of the two defendant companies, in charge of the two locomotives and trains then being operated on the respective tracks of the two defendants, "negligently attempted and endeavored to drive or cause the said respective trains and locomotives to pass over the said crossing at the same time." From the allegations in the fifth paragraph it would appear that the concurrent negligence of both defendants was necessary to bring about the disastrous results to the plaintiff which followed from the collision. Had the crew of either train observed proper caution, without regard to the question as to which train was properly entitled to precedence over the other in effecting this passage over the dangerous crossing, the injury could not have resulted; and hence the injury was necessarily a consequence of the concurrent negligence of both, though the proximate cause of the injury and the consequent legal liability therefor to the plaintiff might depend exclusively upon the negligence of one. Then from the sixteenth paragraph it appears that the train crews of both defendants are charged with negligence in that they both did not cause their respective trains and locomotives, or either of them, to come to a full stop within 50 feet of the crossing, and then move forward slowly, because the engine drivers in charge of both locomotives and trains failed to approach the crossing slowly, but approached it at the rapid and dangerous rate of 15 or 20 miles per hour; and further that the injury resulted on account of the negligence of the servants in charge of both locomotives and trains in failing to keep a proper lookout for the purpose of detecting the presence of other trains near and in the act of passing over the crossing, and because both said trains approached the crossing at such a high rate of speed (15 or 20 miles per hour) that they could not stop when each discovered the presence of the other near the crossing; and that there was gross negligence on the part of both defendants in attempting to pass over the crossing at the same time.

From an analysis of these various allegations it can easily be seen that it required the negligence of the engine crews of both the defendant companies to bring about the collision. Had either engine come to a full stop 50 feet from the crossing, and then moved forward slowly, instead of at the rapid and dangerous rate of 15 or 20 miles per hour, and if the proper servants in charge of each engine had kept a careful lookout for the purpose of ascertaining the presence of another train near and in the act of passing over the crossing, and if each engine driver had not approached the crossing with his train at such a high rate of speed that he could not arrest the movement of his train when he discovered the presence of the other train near the crossing, and if the employés in charge of each train had not attempted to pass over the crossing at approximately the same time, no injury could have occurred. While, according to these allegations, if either defendant had observed proper care and caution, the injury would not have occurred, notwithstanding gross negligence on the part of the other, nevertheless it is obvious that it required the combined, conjoint, or concurrent negligence of both defendants to produce the injury; and the court did not err in overruling grounds 2 and 4 of the demurrer.

In the third ground of the demurrer it is contended that the petition does not clearly and distinctly set out the acts of negligence charged against the two defendants; but it appears to us that, while the negligence might have been more specifically charged, enough is set out in paragraphs 5 and 16 to sufficiently put the defendants on notice as to what negligence is relied upon by the plaintiff to sustain her action.

In the fifth ground of the demurrer it is contended that subsection (a) of the sixteenth paragraph, which alleges negligence "because there was neither an automatic interlocking and derailing switch, nor a signal tower in which an operator was continually kept at the place where the separate tracks of the said defendants crossed each other," should be stricken, because the law which prescribes the duty of railroad companies, where their tracks cross, does not require this at the hands of the defendants.

Section 2687 of the Civil Code provides that:

"Whenever either or any of the railroads whose tracks shall cross in the manner herein contemplated shall place at such * * * crossings modern automatic interlocking and derailing switches, and shall establish and maintain

at such crossings signal towers in which an operator shall continually be present, it shall not be necessary for trains to stop at such crossings;" but otherwise the train must "come to a full stop within fifty feet of the * * * crossing, and then to move forward slowly."

So taking subsection (a) in connection with the rest of paragraph 16 of the petition, it is apparent that the negligence which the plaintiff intended to allege in subsection (a) was merely that the defendants, while having no automatic interlocking and derailing switch, and no signal tower at the point of crossing, nevertheless failed to stop their trains 50 feet away from the crossing, and to then move forward slowly towards the crossing. Conditions might conceivably exist that would require such devices, in the exercise of the care the law demands, even though no statute expressly provided for their installation and use at a grade crossing.

In the sixth ground of the demurrer it is contended that the allegation in subsection (e) of the sixteenth paragraph of the petition contains a conclusion merely as to the speed of the respective engines, and fails to state at what speed the engines approached the crossing, and therefore the allegation is too general. In subsection (c) of that paragraph it is plainly alleged that the respective trains of the two defendants did not approach the crossing slowly, but approached at a "rapid and dangerous rate of speed, to wit, at the rate of 15 or 20 miles per hour." This allegation may be taken in aid of the allegation in subsection (e), which alleges merely that the locomotives approached the crossing "at such a high rate of speed that they could not stop when they discovered the presence of the other at the crossing." From the section, as a whole, it is easily ascertainable that the plaintiff intended to allege, and did allege, that the rate of speed that both engines approached the crossing was 15 or 20 miles per hour, and that this rate was a dangerous rate, and was such a high rate as rendered it impossible for either engine to stop when the presence of the other was discovered by those in charge.

In the seventh ground of the demurrer it is contended that the petition is defective because it fails to show which of the two railroads, crossing at the point where the collision occurred, was first built, and therefore fails to show which of the said railroad companies was entitled under the law (Civil Code, § 2687) to have its train cross first at this crossing; that there was no negligence on the part of the defendant which first constructed its line of road in proceeding to cross the line of the other road. This ground of the demurrer does not appear to be insisted upon in the brief filed in behalf of the plaintiff in error. However, we may say here that the court did not err in refusing to sustain this ground, since it is obvious that the fact that trains on the road first built had, under the law, the right to cross first, when trains on both tracks approached the crossing simultaneously, would not excuse the agents and employés in charge of each train from the exercise of extraordinary care in an effort to preserve the safety of the passengers on that train, when, by the exercise of such care, the rapid approach of the other train toward the same crossing at a high rate of speed and in defiance of law could be discovered. The court, therefore, did not err in overruling the demurrer.

[2] 2. The next assignment of error in the bill of exceptions is as to the alleged insufficiency of the evidence to sustain the verdict on the special plea of accord and satisfaction. It is contended that a return or tender of the money received by the plaintiff, in consideration of the execution of the release, was necessary before bringing this action. The evidence, as a whole, authorized the inference, evidently drawn by the jury, that the money paid to the plaintiff, if accepted by her at all, was not accepted on account of the injuries which she suffered, and that, when she signed the release offered in evidence by the defendant to support its special plea of settlement, she did not enter into the particular contract therein set out, nor did she intend to make, and did not actually make, any contract of any kind whatsoever with the defendant, but simply signed her name to a blank release, afterwards filled out, without knowledge on her part that it was a release—a contract by which she undertook to do or refrain from doing anything whatsoever on account of her injuries. The question raised by the special plea is more fully discussed in the case of Georgia Southern & Florida Railway Co. v. Adeeb, 84 S. E. 323, this day decided, where the finding by the jury upon an identical plea filed in the same case by the Georgia Southern & Florida Railway Company was under consideration. See, also, Butler v. Richmond & Danville R. Co., 88 Ga. 594, 15 S. E. 668.

[3] 3. The plaintiff in error excepts to the ruling of the court below in granting a nonsuit as to the Georgia Southern & Florida Railway Company, and ordering the trial to proceed against the Atlantic Coast Line Railroad Company alone. It appears, from an inspection of the evidence in this case, that there was concurrent negligence on the part of both defendants, and that both approached the crossing without due caution and circumspection. The train on the track of the Georgia Southern & Florida Railway Company did not stop within 50 feet of the crossing, and in fact did not stop at all until it was struck by the train of the Atlantic Coast Line Railroad Company. The evidence shows further that the Atlantic Coast Line Railroad train stopped 50 feet from the crossing, and then moved forward more slowly towards the crossing, as required by law, though there is a variance in the testimony as to the actual rate of speed at which this train approached the crossing after it had

first stopped, and then renewed its motion.

The evidence of the engineer in charge of the train of the Atlantic Coast Line Railroad Company clearly discloses that had he been on guard, carefully noticing the crossing and looking out for trains on the other track as he neared it, he could have stopped his train in time to prevent the collision, notwithstanding the negligence of the engineer in charge of the train of the Georgia Southern & Florida Railway Company in speeding across the dangerous point without any preliminary stopping, and without checking its speed. The engineer of the Atlantic Coast Line Railroad Company testified: That he brought his train to a full stop at the blow post, 50 feet from the crossing, blew the whistle, and looked south down the track of the Georgia Southern & Florida Railway Company, and had the fireman to look ahead, then rang the bell, and started off. That his train proceeded slowly towards the crossing. That he could see at least 50 feet south, down the Georgia Southern & Florida Railway Company's track (from which direction the train came that collided with the Atlantic Coast Line Railroad Company's train), and there was no train in sight when he started his engine after the stop at the blow post, and, if the train on the Georgia Southern & Florida Railway going north had been moving at the rate his train was moving, there would have been no accident, but that train did not stop at the crossing, and the witness did not know whether it blew for the crossing or not. That he put on brakes in full force as soon as he saw the Georgia Southern & Florida Railway Company's engine, but it was impossible to avoid the collision which occurred, and which was sudden, violent, and jarred the whole train. That he had "always been afraid of the Georgia Southern & Florida crossing," but, after looking to satisfy himself that there was no train in sight on that road, he "pulled the engine open and started." That he could not see much below the blow post on the Georgia Southern & Florida track (50 feet south of the crossing on that track), because of a building that was about 100 feet from both tracks. That he looked south before he started his engine, "but did not look afterwards. I looked straight ahead. After I had complied with everything perfectly, I concluded the track was mine, belonged to me, and none else had any business to come up there without stopping." That there were air brakes on his engine, and that he "could have stopped almost instantly," but if he had only moved his train up 25 feet from where he stopped at the blow post, and had then "looked and seen that train coming," he could not have stopped in time, but the two trains would have collided anyhow. That he could have stopped his train in about three seconds, but he did not put on any brakes at all until his train actually struck the train on the Georgia Southern & Florida Railroad, on the crossing.

The fireman on the Atlantic Coast Line Railroad Company's train testified: That this train came to a full stop at the "stopping board" before proceeding to cross the Georgia Southern & Florida track, and that he looked out on the north side, where he was stationed, and "told the engineer, 'All right,'" and the engineer blew the whistle, rang the bell, and started away slowly. That his train was going only about two miles per hour when it reached the Georgia Southern & Florida crossing, and, if the train on the Georgia Southern & Florida track had been coming from the north, he could have seen it, but he did not see it until "we struck." "The engineer was working the reverse lever, and possibly did not see this train for that reason. It took him about a second or two to do that. It was a little foggy that morning, and steam was leaking out of the engine a little."

From this testimony it appears that the proximate cause of the injury was the fact that the engineer in charge of the train of the Atlantic Coast Line Railroad Company, after having complied with the requirements of law as to making a full stop 50 feet from the crossing, started up his train to approach the crossing more slowly, and having, as he expressed it and as he concluded, "complied with everything perfectly," and seeing nothing approaching on the other railroad track from the south, he decided the track was his, and, having the right of way, that no one else "had any business to come up there without stopping," and therefore he did not again look south after starting the engine, but looked straight ahead, though he was on the south side of his engine. He says explicitly that he could see as far as the blow post on the Georgia Southern & Florida Railway track, 50 feet south of the crossing, at the time he stopped his engine and looked south, and, if he had then observed anything on the track, he could have stopped his train instantly with his air brakes, going at the slow rate of speed at which the train was then moving; but, seeing nothing at the time he started his train, he never again looked, and ran into the train that was crossing in front of him, without ever having actually seen that train until the shock of the collision attracted his attention. There was testimony, from a witness who was in the passenger coach behind the engine, that it was possible to see down the Georgia Southern & Florida Railway track a distance of 30 or 40 yards from the crossing, and that in his opinion "the Coast Line engineer could have seen the cars and the engine of the Georgia Southern at least 50 yards down the track." Another witness stated that he was in the second-class coach at the back, and saw the Georgia Southern & Florida Railway train through a window that the Atlantic Coast Line train approach-

ed the crossing at the rate of 4 or 5 miles per hour, and the Georgia Southern & Florida approached the same crossing at 14 or 15 miles per hour, and did not stop; that he saw the Georgia Southern & Florida train as soon as it came in view from behind the ice plant, about 150 feet away. The fireman attempted to excuse the engineer for his failure to see the approaching train on the other track by suggesting that the engineer was working the reverse lever and "possibly" did not see the train for that reason, and by adding that it was a little foggy that morning, and also, that steam was leaking out of the engine. Neither the engineer himself, nor any one else who testified, suggested the presence of any fog or escaping steam which could have interfered with a clear view down the Georgia Southern & Florida Railway track in a southerly direction, had the engineer been looking in that direction.

It is evident, from the testimony of the engineer himself, that, had he not relied upon his previous compliance with the legal requirements up to the time he started forward from the blow post, no accident would have occurred. He says himself that he ad always been afraid of this particular crossing, and yet, though asserting that, on account of an intervening building, he could not see more than 50 feet in a southerly direction down the track of the Georgia Southern & Florida Railway (or what was beyond the building), that after glancing in that direction, and seeing nothing then on this short stretch of track, he started his engine forward, without again looking in that direction or even apparently being on the alert to avoid the possibility of injury from any train which might be traveling in a northerly direction on that track. In fact, he did not look again in a southerly direction, but looked straight ahead, relying blindly upon what he conceived to be his exclusive right to the track, and did not discover the presence of the other train until his engine actually collided therewith, and not until then did he put on brakes. The engineer must have relied also upon his knowledge as to the usual schedule over the Georgia Southern & Florida Railway, as otherwise it is inconceivable to suppose he would have approached a crossing, which he himself admits he had always regarded as dangerous, without keeping a most careful outlook and exercising proper care. It was the duty of those in charge of the train to exercise extraordinary care to preserve the life and safety of the passengers in their charge; and, if this duty had been fully observed by the engineer and the fireman in charge of the engine, the train could have been stopped before the collision occurred, and notwithstanding the negligence of those in charge of the train on the other road in approaching the crossing without having previously stopped and without moving forward slowly.

Irrespective of what may have been the comparative diligence of the two roads as to each other, and regardless of what liabilities might have resulted thereby from one to the other, the proximate cause of the injury to the plaintiff was the failure on the part of the engineer on the Atlantic Coast Line Railroad Company to keep a proper lookout, and to stop his train upon the discovery of the fact that the train on the other road was negligently approaching the crossing. Therefore, notwithstanding the negligence of the Georgia Southern & Florida Railway Company, the court did not err in granting a nonsuit as to that defendant, under the undisputed evidence, going to establish absolutely that the exercise of due and lawful care on the part of the employés of the Atlantic Coast Line Railroad Company would have prevented the injury.

[4, 5] 4, 5. (a) That ground of the motion for a new trial which complains that the court charged that, under certain circumstances named, the jury should return a verdict in favor of the defendant, if the defendant "was not otherwise negligent," whereas the court should have instructed the jury to return such a verdict if they found certain facts to be true, and found that the defendant "was not otherwise negligent, as charged in plaintiff's petition," is without merit, when this statement is taken together with the entire charge. The jury must have understood from the charge as a whole that the court limited their consideration of negligence on the part of the defendant to the particular negligence charged in the plaintiff's petition, and the mere failure to qualify the statement in this one instance and in this connection is not such error as to demand a reversal.

(b) The plaintiff in error insists that the court erred in refusing to give to the jury a requested instruction to the effect that if the jury believed from the evidence that the conductor and the engineer in charge of the train of the Atlantic Coast Line Railroad Company, on the 15th day of January, 1912, caused the train to come to a full stop within 50 feet of the point where that road crosses the track of the Georgia Southern & Florida Railway Company, and then to move forward slowly, and further believed that the Atlantic Coast Line Railroad Company or its predecessors in title first constructed this road, and put its trains in operation before the Georgia Southern & Florida Railway Company's railway was constructed, and before the latter put its trains in operation, then the Atlantic Coast Line Railroad train had the privilege to cross first; and if the collision which occurred at the crossing was due to the fact that the Georgia Southern & Florida Railway train did not accord to the Atlantic Coast Line Railroad train this privi-

lege to cross first, and this demand was incurred by reason of its failure so to give this privilege of crossing first to said train of the Atlantic Coast Line Railroad Company, their verdict should be in favor of the last-named company.

(c) The plaintiff in error further insists that the court erred in refusing to give a charge requested, which was, in substance, as follows: That if the jury believed, from the evidence, that the conductor and the engineer in charge of the Atlantic Coast Line Railroad Company's train, on the 15th day of January, 1912, caused that train to come to a full stop within 50 feet of the place where that road crosses the track of the Georgia Southern & Florida Railway Company, and then moved forward slowly, and that if they further believed from the evidence that the Atlantic Coast Line Railroad Company or its predecessors in title constructed its road and put its train in operation before the Georgia Southern & Florida Railway Company constructed its road and put its trains in operation, then the train of the Atlantic Coast Line Railroad Company had the privilege to cross first; and if the injury of the plaintiff was due to the fact that the train of the Georgia Southern & Florida Railway Company did not come to a full stop within 50 feet of the place of crossing, and then move forward slowly, their verdict should be in favor of the Atlantic Coast Line Railroad Company.

The court charged the jury fully as to the right and privilege of the company which first constructed its line of road and put its trains in operation to cross first at a grade crossing, and as to the duty of those in charge of trains approaching such a crossing to come to a full stop within 50 feet of the crossing, and then move forward slowly, and specifically instructed them that if they believed from the evidence that the Atlantic Coast Line Railroad Company constructed its road first, and put its trains in operation before the trains of the Georgia Southern & Florida Railway Company were operated, then the train of the Atlantic Coast Line Railroad Company would, under the law, have the privilege of first crossing, and that if injury to the plaintiff was due to the fact that the said train was exercising this privilege, and that the defendant the Atlantic Coast Line Railroad Company was not otherwise negligent, they should find in favor of the defendant, provided, however, that "in making the stop, and in making the approach to the crossing, the Atlantic Coast Line Railroad Company's agents and employés exercised that degree of care and caution the law puts upon them relative to passengers, to wit, they must use extraordinary care and diligence to protect the safety and welfare of the passengers."

It scarcely seems necessary to do more than state the proposition, in order to disclose the fallacy of the contention put forth in the two requests to charge, which the court properly rejected. If the mere fact that, under the law, the trains of the Atlantic Coast Line Company had the right of way over trains on the intersecting track of the Georgia Southern & Florida Railway Company was a complete defense for lack of proper care on the part of those in charge of trains on the Atlantic Coast Line Railroad approaching the crossing, it would excuse absolute and utter recklessness even after the discovery of danger on the crossing on account of a disregard of law by the other railroad company, or would excuse, on the part of the employés of the Atlantic Coast Line Railroad Company when approaching the crossing, an entire absence of care to ascertain whether or not trains on the intersecting track were liable or likely to obstruct the same, or were being run at such a rapid rate of speed or in such a dangerous way as to jeopardize the safety of passengers on the Atlantic Coast Line Railroad Company's train.

The trial judge very succinctly and clearly put before the jury the respective rights of the parties, advised that no recovery could be had against the Atlantic Coast Line Railroad Company unless the injuries resulted from negligence on its part, and very properly instructed them that, notwithstanding the precedence to which the company constructing the first road was entitled under the law, this did not authorize those in charge of a train, and upon whose care and diligence depended human safety and human lives, to assume an absence of danger at such a railroad crossing, because of the further assumption that, since the right of first crossing belonged to the trains of one road rather than to those of another, this right would not be infringed upon by accident or design, and that the officers and employés of the dominant train could rely thereon as an absolute protection to their passengers.

We think the trial was free from material error, and the verdict returned was authorized by the evidence.

Judgment affirmed.

BROYLES, J., not presiding.

(15 Ga. App. 831)

GEORGIA S. & F. RY. CO. v. ADEEB et al.
(No. 5584.)

(Court of Appeals of Georgia. Feb. 16, 1915.)

*(Syllabus by the Court.)*

1. CONTRACTS ⟸15—RELEASE ⟸57—VALIDITY—MEETING OF MINDS.
The concept of a contract requires that the minds of the parties shall meet and accord at the same time, upon the same subject-matter, and in the same sense. The evidence in the present case authorized the jury to conclude that there was no contract between the alleged contracting parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 61–66; Dec. Dig. ⟸15; Release, Cent. Dig. §§ 106–108; Dec. Dig. ⟸57.]

2. RELEASE ⟸24—PERSONAL INJURIES—RIGHT OF ACTION—CONDITION PRECEDENT—TENDER.
Where accord and satisfaction as to the plaintiff's claim against the railway company, for damages on account of personal injuries, are embodied in an instrument signed by her, the purport of which she testifies she did not understand, because of her ignorance of the English language and her inability to read it, and because it was not read to her, and she denies that she entered into any contract whatever with the railway company, and, while admitting that, at the time of the signing, money was paid to her, she asserts that she did not accept it on account of any contract, or in satisfaction, to any extent, of her claim against the railway company, and that she thought she was simply furnishing her name for the convenience or information of the company's agent who requested it, and that she did not understand why the money was given her, a return or tender of the money is not necessary before suit for the damages referred to in the alleged release.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 41–46; Dec. Dig. ⟸24.]

3. SUFFICIENCY OF EVIDENCE.
The evidence authorized the verdict.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by Mrs. Louise Adeeb against the Georgia Southern & Florida Railway Company and another. Judgment for plaintiff, and the defendant named brings error. Affirmed.

J. E. Hall, of Macon, and E. K. Wilcox, of Valdosta, for plaintiff in error. Whitaker & Dukes and Patterson & Copeland, all of Valdosta, and Bennet & Branch, of Quitman, for defendant in error.

WADE, J. Mrs. Louise Adeeb brought her action for damages against the Atlantic Coast Line Railroad Company and the Georgia Southern & Florida Railway Company as joint tort-feasors, alleging that, because of the concurrent negligence of both defendants, she had suffered various physical injuries, resulting from a collision at a grade crossing in Valdosta, Ga., on January 15, 1912, between a train of the Atlantic Coast Line Railroad Company, on which she was a passenger, and a train of the Georgia Southern & Florida Railway Company. Each defendant filed, in addition to a plea to the merits, a special plea, setting up that, prior to the bringing of the suit, the plaintiff had effected with the Atlantic Coast Line Railroad Company a full and complete settlement for the alleged injuries, for a valuable consideration paid by that company and accepted by her, as an accord and satisfaction for all such injuries. The issue raised by the special pleas was submitted to a special jury and was determined in favor of the plaintiff. The trial then proceeded, and, at the close of the evidence for the plaintiff, the court granted a nonsuit as to the Georgia Southern & Florida Railway Company, and upon the completion of the entire testimony the jury returned a verdict for $600 against the Atlantic Coast Line Railroad Company. Both the plaintiff and the Atlantic Coast Line Railroad Company filed exceptions pendente lite to the order granting a nonsuit as to the Georgia Southern & Florida Railway Company. The Atlantic Coast Line Railroad Company made a motion for a new trial, on various grounds, and the Georgia Southern & Florida Railway Company also filed a motion for a new trial of the issue raised by its special plea of accord and satisfaction. Both motions for a new trial were overruled, and each defendant excepted to the refusal of the court to grant its particular motion, and brought its case here for review.

[1-3] We now have before us only the question raised by the motion filed in behalf of the Georgia Southern & Florida Railway Company. There are no assignments of error, except on the general grounds, and we are to determine solely if, under the rules of law controlling in such cases, the verdict in behalf of the plaintiff is supported by evidence, or was not authorized by the evidence, and therefore was contrary to law.

The defendant introduced in evidence a written release, dated January 15, 1912, signed by the plaintiff and witnessed by F. A. Bates and O. T. Hill, which recited that the plaintiff had a claim against the Atlantic Coast Line Railroad Company for injury to her back and side, and for all injuries to her person of every kind and character, occurring at Valdosta, Ga., on the 15th day of January, 1912, under circumstances which she claimed rendered the Atlantic Coast Line Railroad Company liable (which liability was denied by the railroad company); and, whereas both parties desired to effect a compromise, the plaintiff acknowledged the receipt by her from the Atlantic Coast Line Railroad Company of the sum of $10, and, in consideration of the payment of this amount to her, she thereby acquitted, discharged, and released the Atlantic Coast Line Railroad Company, its agents and employés, from any and all liability on account of such injuries or for any results therefrom, direct or indirect.

See Donaldson v. Carmichael, 102 Ga. 40, 29 S. E. 135.

F. A. Bates, the conductor in charge of the train of the Atlantic Coast Line Railroad Company, on which Mrs. Adeeb was riding when injured, and O. T. Hill, the special claim agent of that company, both testified that shortly after the collision they assisted the plaintiff to leave the passenger coach, and that at the time she was excited, and was crying, and said she was suffering pain; that she could speak English, but they "could tell she was a foreigner"; that they conducted her to a nearby hack and placed her therein, and Hill got into the hack with her; that after she was seated in the hack, and after the matter had been fully explained to her, and Hill had read over a printed form of release (except that no mention was made of the $10 consideration, which Bates produced), she signed her name thereto with full knowledge that the same was intended to be in full settlement of any and all damages she had suffered or might suffer on account of the said collision; that they both signed their names to the paper as witnesses, and Bates then handed to Mrs. Adeeb a $10 bill, the amount named in the release, which she accepted and placed in her bag or hand satchel, and which Bates testified he never afterwards saw, and which Hill said "she did not refuse to take when Bates offered it to her," and that Bates did not throw it into her lap, and he (Hill) did not pick it up from her lap. Bates said that the release was not filled out at the time it was signed, because he did not have pen and ink at the hack, but that he filled in the rest of the agreement after he returned to the station, and "did not put anything in there, except what she agreed to." The signature was made with a pencil; and Bates further said:

"I wrote in the written part of that paper at the station after she had signed it and after I came from the train. None of the writing on this paper was there when she left there, except her name. I did not see Hill any more for some time. I put my name down here after the paper was made out. Hill witnessed it at the time. Those names look very much like they were written with the same kind of ink and the same pen."

Hill testified that he accompanied the plaintiff to the home of a friend of hers in the city, and there left her.

Here the defendant rested, and the plaintiff testified, in broken English, that she was 30 years old, and came from Syria to America 8 years before; that she learned to speak the English language one or two years after she arrived here, but could not read English, though she could "write French, and English is the same write, * * * same sort of letters—different ways, that is all." The plaintiff said that on the morning the train was wrecked "the conductor first see me inside the car. I be in car hollering. The conductor, he told me, 'You hurt.' He said me hurt, and ask me what the matter with me. He said, 'Give me your name, please;' and I said, 'Louise Adeeb.' He said, 'How do you spell your last name?' I spell it for him. He told me to sign it down here, and 'I am going to help you get hack.' He make me sit down; make me get me hack. He go after hack. That is what he say. He come back 15, 20, or 30 minutes." Without attempting further to use the exact language of the witness, but giving her testimony in substance and as nearly as possible, she said further that the conductor, or Hill, one of them, told her to sign the paper; that they took her to a hack, and then the conductor came to her and said, "Sign that paper," and she told him she could not sign, as she was suffering from the hurt, but he insisted, and she signed. She stated positively that the conductor did not tell her what he wanted her to sign the paper for; and that neither he nor Hill read it to her, and in fact Hill, who was standing near her, never spoke to her at all, and never mentioned the paper; that when she signed the paper she did not know what it was, but from the fact that the conductor, when he first tried to take her name on the train, said he could not "spell it good," she supposed he wanted her to write her name, and "thought he wanted to take my name to the doctor"; that she could not understand the paper if read to her, and that it was not read to her, and that she did not look at it at the time, as she was suffering, but the conductor urged her to sign it, and said he wanted it right away, and insisted, though she told him two or three times that she could not sign, because her "hand do like that" (indicating). She further testified that after she had signed the paper the conductor gave her $10, but she "never take it from him. He said, 'Take $10.' I said, 'For what is the $10?' He said, 'Pay the doctor.' I told him, 'Railroad pay doctor.' He said that the railroad would pay him back that money. I told him I did not want it. He throwed it away; fell in my lap. Mr. Hill, he take it from my lap, and the next time I saw the $10 is the second day after I was hurt." She testified: That two days later she told her husband to get some change out of her hand bag, and he discovered a $10 bill therein. That she supposed that Mr. Hill had perhaps put this bill in her hand bag on their way from the scene of the accident, as she had never accepted it, and saw him pick up the $10 bill which the conductor had thrown in her lap, but she did not know whether this was true or not, and could not say she herself "had not made the $10," and that it did not in fact properly "belong in that purse." That Hill took her satchel and carried it for her, as she was unable to carry it herself. That she had a satchel and hand bag, and the money was in the hand bag. That she did not see Hill put the satchel down. She lay down on the bed, and she knew nothing further about

the satchel until her husband came the next day. That when her husband discovered the $10 bill she thought it was the $10 bill the conductor had thrown in her lap. That the physician who attended her asked her about the $10 bill, and why she signed that paper, and told her that she had "no business to sign that paper," and she told the physician that she "did not know anything about that paper." That she thought the conductor could not sign her last name, and that she did not know if the conductor gave her $10. That she "did not take any money."

Dr. Thomas then testified, for the defendant, that he attended the plaintiff as a physician on January 15, 1912, seeing her twice on the day she was hurt, and then every two days, and then no more until four days later —five times in all; that on Tuesday afternoon following the accident, which occurred on Monday, he asked the plaintiff why she signed any paper for the railroad company, and told her she had no chance to recover any damages; that he did not give her any notice that she had signed a release, but told her Mr. Hill had paid her $10 for the release; that he did not remember what she said, or that she told him that she did not know anything about any paper; that he did not pay much attention to it, did not have any paper or explain anything to her, but told her what Hill said he had done; that he did not recall explaining any paper; that Hill had told him in the afternoon, the next day after the collision, that the plaintiff had signed a release.

The plaintiff in error insists that the evidence discloses that $10 was paid to the plaintiff and received by her in consideration of the execution of the release, and that since she failed to return this amount and to rescind the contract of release as soon as she discovered that a fraud had been perpetrated upon her, and still retained the money, she could not now attack the agreement. The case of Pennsylvania Casualty Co. v. Thompson, 130 Ga. 766, 61 S. E. 829, is relied upon to sustain this view. In that case the Supreme Court said:

"In no event could the plaintiff maintain an attack on the release, in the absence of proper allegations in his petition and an offer on his part, prior to the commencement of the suit, to rescind, and a tender back to the defendant of the amount which it had paid in order to obtain such release."

In Jossey v. Georgia Southern Ry. Co., 109 Ga. 439, 34 S. E. 664, the Supreme Court said:

"One who signs a contract which recites that, in consideration of a stated sum paid him by a railroad company, he releases it from all liability for a personal injury, which he contends was caused by its negligence, will be estopped from claiming that the release is not binding upon him, because he thought, when he signed the contract, that it related only to the time he lost in consequence of the injury, and did not cover damages caused thereby, when it appears that no fraud of any kind was practiced upon him, and that, having ample opportunity and capacity to read and understand the contract before he signed it, he negligently failed to do so."

In Petty v. Brunswick & Western Ry. Co., 109 Ga. 666(5), 35 S. E. 82, it was said:

"A contract will not be set aside on the ground of fraud in its procurement, at the instance of one who has neither restored nor offered to restore the fruits thereof."

In Hamilton v. Stewart, 105 Ga. 300, 31 S. E. 184, Justice Cobb said:

"The retention of the amount forwarded, declared to be in full settlement of the claim held by the person to whom it is sent, coupled with a failure within a reasonable time to decline the proposition, will raise a conclusive presumption of an acceptance of the terms and conditions set forth in the proposal. While, of course, a party cannot be bound by a settlement, unless he assents to its terms, still this assent may be implied from the circumstances and conduct inconsistent with a refusal would raise a presumption of assent, upon which the other party would have a right to act. Nothing could be clearer than the proposition that where one person delivers to another property, to be retained upon a condition stated, the party receiving it cannot retain the property and repudiate the condition."

In Strodder v. Southern Granite Co., 94 Ga. 626, 19 S. E. 1022, it was held:

"Where an accord and satisfaction is fully executed, the party receiving money from the other cannot rescind on the ground of fraud, * * * without refunding or offering to refund the money which was the fruit of the accord and satisfaction."

There are many other cases along this line, but it will be seen from an examination of the cases above referred to, as well as others, in which it is held that, before a party can rescind or attack a contract or release on the ground of fraud or for any other reason, he must return or offer to return money or property which he has received, the money or property was the fruit of a contract or release, which he either actually made and agreed to, or which, because of his acts and conduct in connection therewith, he is presumed by law to have acquiesced in, accepted, or agreed to. There must either have been an actual meeting of the minds of the parties at the time, or such conduct on the part of one as the law will construe to amount to an acceptance then or afterwards of the proposition made by the other.

Where, by fraudulent representations or practice, one has been induced to sign a contract, there is no contract, the minds of the parties having never in fact met; but, where the one perpetrating the fraud has paid money as a consideration for the contract, it is well settled, as a general rule, that the other cannot retain the money and seek to repudiate the contract. But even where the consent of a party to a contract is induced by fraud, and a consideration is paid to him, and it is sought to bind him by reason of his retention of the consideration, it must appear that both parties intended to make a contract of some sort and character, even if not of the particular force and effect which the defrauded party understood. And where there was no intention on his part to

make an agreement of any sort, kind, or description with the other, but his signature was secured to an instrument which he could not read, did not understand, and did not even know was intended for a contract of any kind or character, and he accepted the money without knowing that it was intended as a consideration for the execution of such an instrument, and without connecting the payment of the money in any wise with it, the money, not being in fact received on account of or as a consideration for the pretended contract, need not necessarily be returned before the person so defrauded can attack the pretended contract. It seems clear that where one signing an instrument is unaware that he is making an agreement or contract of any kind with the other, and where money is paid to him by the other person, which he receives without supposing it to be in consideration of the execution of any contract, there is no relation between the money and the pretended contract, and the return of the money is not a condition precedent to a rescission of the contract. Butler v. Richmond & Danville R. Co., 88 Ga. 594, 15 S. E. 668.

Applying the law as we understand it to the facts of this case, there seems to be no reason in law or good conscience why the suit of Mrs. Adeeb should be abated because she did not, before bringing her action, return the $10, which, according to her testimony, was thrust upon her by an employé of the defendant company, and which she says she never in fact received or agreed to accept, when it further appears from her testimony that the alleged contract, which the defendant insists she is attacking, was never any contract at all. According to her testimony, she signed her name to a paper which was not read to her, which she herself was unable to read, and the meaning of which was not explained to her, and did not know that it purported to relate in any wise to the injuries which she had just undergone, or compensation therefor. She says she thought the conductor "wanted to take my name to the doctor," and again that she "thought he wanted to take my name and put it in the papers of the conductor." She kept, it is true, the $10, which she testified the conductor threw into her lap, and which Hill picked up, and which she declared she did not know had been paid to her on account of her injuries or in consideration of the signing of a paper, and which she only surmised, when she afterwards discovered it in her satchel, may have been the same money thrown into her lap by the conductor and rejected by her. She testified that she did not know that the $10 found in her hand bag was in fact the particular $10 offered to her by the conductor, and that, if it was in fact the same money, it must have been placed in her satchel by Hill, the claim agent of the company, without her knowledge or consent; and furthermore that, for aught she knew, the $10 found in her hand bag may have in fact been money she herself had earned, and which belonged to her.

Under this evidence, it does not appear, in the first place, that there was an intention on the part of Mrs. Adeeb to make a contract of any kind with the defendant, or that, at the time she signed the blank form of release, she knew that the defendant intended to bind her thereby in any way, or even that the payment of $10 to her, if it be conceded that the $10 was actually received by her or was actually retained after she discovered that it had been delivered to her by the defendant, was for and in consideration of her act in signing her name, or was intended to bind her in any way whatever. It appears that she was a foreigner, ignorant of English, probably but little acquainted with business affairs or methods, and possibly obsessed with the idea, said to still predominate in certain remote quarters of the globe, that in this land of the free and home of the brave currency may be plucked from the trees and gold picked up on the streets, and, even after eight years absence from her Syrian birthplace, she may have thought, when the conductor insisted so earnestly upon her acceptance of the $10 bill and even cast it in her lap, as if it were mere negligible dross, that this amount was paid to her from the overflowing coffers of a benevolent and most generous corporation, and was but an earnest of other and larger benefits to flow from that source in the future—induced by her tears and the obvious excitement and suffering on her part which the conductor, doubtless to her mind a high dignitary of the company, witnessed when he entered the coach immediately after the collision. From her evidence there is nothing to show that Mrs. Adeeb knew or had reason to know, at the time she signed her name to a blank form of release, or when she discovered the $10 bill in her satchel, or when the physician talked to her, or later, either that she had made any contract whatsoever with the railroad company, or that she had been paid anything whatever on account of such agreement.

It is true the evidence is in sharp conflict on this point, but the jury had the right to believe the evidence of the plaintiff in preference to that of the defendants, and they may have judged, from the slight knowledge of English which she betrayed on the witness stand, and from her statement as a whole, that in point of fact she did not understand what she was requested to do when she affixed her signature to the release, and that she never at any time understood for what reason, how, or on account of what consideration the $10 was paid to her, and that she may have believed and understood that this amount, if she ever felt assured it came from the railroad company, was in-

tended merely as a gift, binding her to nothing whatsoever. The physician who testified that he asked the plaintiff why she had signed the paper, and why she had accepted $10 from the railroad company, said he did not explain to her the nature of the paper he heard she had signed, and he did not testify that she understood from his questions the nature of the paper or why the $10 was paid to her. It appears entirely possible, and in fact probable, that the plaintiff never realized why the defendants claimed the $10 had been paid to her, or why it had been thrust upon her, until after her suit was filed and the special pleas setting up the release and the payment of this amount were interposed by them. Be this as it may, there is nothing to show that she understood that the $10 was "to be retained upon a consideration stated" (Hamilton v. Stewart, supra), or that this amount had been paid to her "in order to obtain such a release." Pennsylvania Casualty Co. v. Thompson, supra.

As to the suggestion that the release could not be attacked without proper pleading on the part of the plaintiff, it is enough to say that the plaintiff was not attacking the release on account of fraud in its procurement, or on any other ground such as was contemplated in Pennsylvania Casualty Co. v. Thompson, supra; but, when the defendants pleaded this alleged release, she simply replied by her evidence, after the paper had been duly proved by the subscribing witnesses thereto, that she did not make the contract set out therein, or any other contract of any kind whatsoever, with the plaintiff. Suppose that, in a suit on a note, the defendant offers in evidence a receipt purporting to have been signed by the plaintiff, and setting out a credit made by the defendant on the note sued upon, certainly no pleading on the part of the plaintiff would be requisite in order to admit testimony from him that in point of fact the alleged receipt had never been given by him, and that, while his signature was appended thereto, what preceded that signature had been written after he had signed his name and without his knowledge, or that he had signed the paper thinking that it was something entirely different, and that it bound him to nothing—perhaps believing it to be a mere testimonial as to his opinion of the personal worth of the defendant. So in this case, had it appeared that Mrs. Adeeb ever made a contract of any kind with the defendant in reference to her injuries, it might have been necessary for her to set up by proper pleadings whatever she claimed in avoidance of her agreement—either that she had been fraudulently induced to sign the same, or that she made one agreement, and through accident or mistake appended her signature to another, entirely different. Here, however, she absolutely denies having made any agreement or contract whatever, but says she simply gave her name to the conductor, and signed it herself, because he did not seem to be able to understand how she spelled it, and believing merely that she was informing him on that point.

We think the jury had ample testimony upon which to base their verdict in favor of the plaintiff on this issue, if they elected to accept the testimony of the plaintiff; and it appears that the circumstances surrounding the signing of the alleged release were sufficient to authorize the conclusion reached by them that the plaintiff, in signing the paper and in retaining the $10 placed in her hand bag, did not at any time understand what she was thereby doing, and that the conductor and the claim agent thoroughly understood what they intended, desired, and attempted to do. It may be that the unfeeling haste and urgency displayed by the conductor and his colleague in endeavoring to procure the signing of a release by the plaintiff at a time when she was suffering actual pain, and was still nervous and unsettled on account of the collision immediately preceding, to some extent prejudiced the jury against the weight of the testimony given by the conductor and the claim agent; and it may be that both of these witnesses believed what they testified that the plaintiff understood that she was signing a release when she appended her signature thereto; and yet, in fact, on account of her limited knowledge of the English language and of legal matters, she did not actually understand what the release itself meant or what was meant by the explanation thereof. Suffice it to say, the jury found in favor of the plaintiff, and there was evidence to authorize their conclusion.

Judgment affirmed.

BROYLES, J., not presiding.

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(16 Ga. App. 81)

## BROWN v. STATE. (No. 5882.)

(Court of Appeals of Georgia. Dec. 22, 1914. Rehearing Denied Feb. 26, 1915.)

*(Syllabus by the Court.)*

1. INTOXICATING LIQUORS ⇐139—"KEEP ON HAND"—ELEMENTS OF OFFENSE—PURPOSE OF KEEPING.

The various assignments of error directed to rulings on evidence, to tentative statements as to the law of the case, made by the judge during the trial, to the refusal to instruct the jury as requested, as to the court's omission to define the phrase "keep on hand," all raise the same point, to wit, that a mere temporary deposit of intoxicating liquor in a place of business while the liquor is in transit and being transported from a place where it was lawfully received to another place, where it might be lawfully deposited, does not fall within the definition of the term "keep on hand" (Penal Code 1910, § 426); and upon this point the ruling of the majority of the court in Cohen v. State, 7 Ga. App. 6, 65 S. E. 1096, is adhered to, especially in view of the fact and for the reason

that this case is presented for the consideration of only two judges.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 149; Dec. Dig. ⊂⊃139.

For other definitions, see Words and Phrases, First and Second Series, Keep.]

2. ADMISSION OF EVIDENCE.

In view of the definition of the phrase "keep on hand" (as related to intoxicating liquors), applied by a majority of this court in Cohen's Case, supra, the testimony admitted by the court was not subject to the objections urged by the defendant.

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence warranted the verdict, and there was no error in refusing a new trial.

Error from City Court of Madison; K. S. Anderson, Judge.

C. L. Brown was convicted of crime, and brings error. Affirmed.

E. H. George, of Madison, for plaintiff in error. A. G. Foster, Sol., of Madison, for the State.

RUSSELL, C. J. Judgment affirmed.

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(16 Ga. App. 53)

## CHEROKEE BRICK CO. v. HAMPTON.

(No. 5746.)

(Court of Appeals of Georgia. Feb. 3, 1915. Rehearing Denied Feb. 26, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ⊂⊃208, 222—ASSUMPTION OF RISK—WAIVER.

As a general rule, the contractual relation of master and servant includes an implied agreement, on the part of the servant, to assume the usual risks ordinarily incident to the service for which he is employed, but this term of the contract (which is implied from the nature of the relation created by the contract of service) may be abrogated by a distinct order on the part of the master to use a dangerous appliance in the manner directed by the master, accompanied by an implied assurance that the instrumentality which the servant is directed to use is safe. Under such circumstances, the order of the master may amount to a waiver of his right to insist upon the servant's implied obligation to assume risks which will thereafter estop the master from asserting that the servant assumed the hazards attending the act which the master himself directed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538–543, 648–651; Dec. Dig. ⊂⊃203, 222.]

2. MASTER AND SERVANT ⊂⊃289—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—DETERMINATION.

A court can never judicially declare that a servant has failed to exercise ordinary care in performing an act in obedience to the orders of his master, unless, after a consideration of the circumstances in the case, including the orders given the servant, the demands of his duty, the apparent risk to be met, and the purposes his act was intended to subserve, it is obvious that the risk was so great that it would not have been hazarded by any man of common prudence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. ⊂⊃289.]

3. MASTER AND SERVANT ⊂⊃234, 289—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE—KNOWLEDGE OF DANGER.

Knowledge of a danger is not necessarily conclusive evidence of negligence in failing to avoid it, and there are circumstances under which it does not follow from the fact that the servant voluntarily took some risk that he was not using due care. Labatt's Master and Servant (2d Ed.) vol. 3, § 1236. "Where several conditions combine to produce an injury, the servant cannot be held to be guilty of contributory negligence, as a matter of law, where he knew of only a part of those conditions." Hence his action will not be barred on the ground that he was guilty of contributory negligence in doing an act which was the immediate cause of his injury unless it is made to appear that he knew or ought to have known all the material conditions which would render it imprudent to do the act. Labatt's Master and Servant (2d Ed.) vol. 3, § 1233. The servant may maintain an action unless, in addition to knowing the risk to be encountered, he also knows that it will probably be attended with an injury which could be avoided by the exercise of due caution.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684–686, 706–709, 1089, 1090, 1092–1132; Dec. Dig. ⊂⊃234, 289.]

4. MASTER AND SERVANT ⊂⊃226—INJURY TO SERVANT—LIABILITY OF MASTER—PROXIMATE CAUSE.

Even the most peremptory command on the part of the master will not justify or excuse a servant in rashly exposing himself to a known and obvious danger, but the mere fact that the servant, by obeying an order of his master, exposed himself to such risk of injury as a man of ordinary prudence would not have assumed, and was injured while performing, in obedience to his master's order, a service attended with such hazard as to involve the element of rashness, will not preclude the servant's right of recovery, if his injury is traceable to an act on the master's part, which, independently of the servant's exercise of his faculties, was the proximate contributing cause of the servant's injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659–667; Dec. Dig. ⊂⊃226.]

5. MASTER AND SERVANT ⊂⊃222—NONDELEGABLE DUTIES—DANGEROUS INSTRUMENTALITY.

One of the absolute, continuous, and nondelegable duties of a master is the duty of refraining from giving orders which will require the servant to put himself in a position where he will be subject to risk or injury from a dangerous instrumentality.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 648–651; Dec. Dig. ⊂⊃222.]

6. MASTER AND SERVANT ⊂⊃289—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

The evidence authorized a finding that the instrumentality was furnished by the master; that the plaintiff was ordered to use it; and that he was also assured by the alter ego of the master that it was safe. The question as to whether the plaintiff knew that the gun was overloaded, and whether he was negligent in obeying the order of the master to shoot the gun, after he had been assured by the master that the gun was safe, was a question of fact for the solution of the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. ⊂⊃289.]

7. TRIAL ⟸193, 260—INSTRUCTIONS—INTIMATION OF OPINION—REPETITION.

The court did not err in refusing the written request for instructions presented by the defendant, for the reason that the same contained an intimation of an opinion as to what had been proved in the case, and for the further reason that the principles of law contained in the request, so far as the same were pertinent, had been fully covered by the general charge of the court, which was full, accurate, and properly adjusted to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436–438, 651–659; Dec. Dig. ⟸193, 260.]

8. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from City Court of Macon; Robert Hodges, Judge.

Action by Alonzo Hampton against the Cherokee Brick Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Guerry & Son, of Macon, for plaintiff in error. Hall & Roberts, of Macon, for defendant in error.

RUSSELL, C. J. Alonzo Hampton brought suit in the city court of Macon against the Cherokee Brick Company, a corporation, for $5,000 damages on account of the loss of his left hand and other injuries alleged to have been caused by the explosion of a muzzle-loading shotgun which he was instructed by the defendant's superintendent to discharge into one of the brick kilns of its plant. The discharge of the gun into the kilns was for the purpose of expelling accumulations of soot from the kiln. The plaintiff himself testified that he was unfamiliar with guns of the muzzle-loading type, had never used this particular shotgun before that day; that after he had loaded the gun, and the superintendent had rammed down the wadding, he protested to the superintendent of the company that the gun was unsafe, and that he was afraid to discharge it; that the superintendent assured him the gun was safe, and insisted upon his firing it into one of the kilns, the door of which was opened for that purpose by the superintendent, and when he discharged it the barrel exploded, blowing away his left hand. The evidence is in conflict upon some of the material points, but the jury, by their verdict, gave preference to the testimony in favor of the plaintiff, and returned a verdict for $2,500 in his favor.

[1]. Giving the testimony for the plaintiff, as we must, the preference accorded to it by the jury, it cannot be said that the verdict is contrary to law or evidence; and a review of the various special assignments of error presented by the record satisfies us that the trial judge committed no error in overruling the motion for a new trial. In its answer to the plaintiff's petition, the defendant admitted that he received the injuries and suffered pain as alleged, and that he was in its employ, but all the charges of negligence were denied. The gist of the defense, as stated by the learned counsel for the plaintiff in error, was as follows: That the injuries resulted from the plaintiff's own negligence and the fact that he voluntarily, and without knowledge or permission of the defendant, abandoned the scope of his employment when he got the gun and overloaded it; that the gun exploded because it was overloaded, and the defendant had no notice that it was deficient, if it was deficient, and the constant use of the gun showed it was not defective. It was further insisted that, if the gun was defective, the plaintiff had as much notice of its condition as the defendant. It is further insisted that, because the plaintiff had overloaded the gun he was bound by his own act; and that Goforth, the defendant's superintendent, told him to shoot it because he had overloaded it, and it was his duty, rather than that of any one else, to shoot it. As we have already stated, all the contentions of the defendant as to the facts of the case were disputed by testimony in behalf of the plaintiff, which unequivocally contradicted the defendant's theory of the case, and argument upon these propositions is fruitless, because upon these points the finding of the jury is conclusive.

The only question this court is empowered to determine is whether the circumstances of the occurrence in which the plaintiff lost his arm, as related by him, precluded a recovery, as a matter of law. He stated that he was wholly ignorant of the use of guns; that he loaded the gun as directed by Goforth, the defendant's superintendent; that after he loaded it he was afraid to shoot it, and would not shoot it until the superintendent ordered him to "poke it up there and shoot it," after having twice assured him that the gun was all right and would not hurt him. The plaintiff swore that Goforth himself rammed the wadding down on the powder, and, when the plaintiff told him he was afraid to shoot it, the superintendent replied: "That is all right. Take it and shoot it." The plaintiff had never seen a gun like it before, and testified: "I never had any dealings with a muzzle-loading shotgun in my life."

Another witness, testifying in behalf of the defendant, swore that the defendant's superintendent, Mr. Goforth, said to the plaintiff: "You have fooled around and overloaded this gun. You put it in there, and you have got to shoot it out." Mr. Goforth himself admitted that, when the plaintiff called his attention to the load in the gun and told him that the wadding was hung and the gun overloaded, he replied, "All right, you are the man that loaded it, and you will have to shoot it."

In view of the fact that there is no dispute

that Goforth told Hampton to shoot the gun, the court did not err in refusing to charge the jury, as requested, that the plaintiff could not recover if Goforth did not believe or know that the gun was dangerously overloaded. The principle upon which the defendant seems to rely for its defense is that the contributory negligence of the plaintiff was so great that he cannot recover; and it is further argued that the plaintiff, having assumed the risk, cannot recover for the consequences of his own act, and further that his act was so rash as entirely to defeat his action. The plaintiff having assumed the ordinary risk of his employment, and it appearing undisputed, in the evidence, that the method by which the defendant cleaned the soot from its brick kilns was by the discharge of a gun into the openings of the kiln, the plaintiff presumptively assumed the risk of shooting a safe gun furnished by the master, and was bound to use ordinary care in the use of this instrumentality, or not to use it at all, if it was apparent that the gun was too defective to be safely used. Ordinarily the plaintiff would have assumed the risk dependent upon improper loading upon his part, for if the accident was the proximate result of the gun's being overloaded by him, of course he could not recover; but if the gun was overloaded according to the master's directions, and the master supplied the defective and dangerous gun, and then, after furnishing and loading this gun and assuring the plaintiff that it was all right to go ahead, and telling him to "poke it up there and shoot it," we are of the opinion that the plaintiff would be entitled to recover, unless it was shown that the plaintiff knew or had good reason to know that the gun was defective, knew that the load with which it was charged was excessive for that particular gun, and shot the gun upon his own judgment, conscious of the risk which might be expected to attend an overcharge of a gun of that make or kind, and conscious also of the danger attending a discharge of the particular load from the particular gun. In other words, the plaintiff might recover if he knew that it would ordinarily be dangerous to discharge as large a load of gunpowder from such guns as he was acquainted with, if any, but did not know it would be dangerous, and from the assurance of his master had been induced to believe that it would not be dangerous, to discharge the load which his master put into the gun, with whose qualities his master was acquainted, and which his master assured him was safe.

Under the proof, the assumption of risk by the servant, which is ordinarily to be implied, was abrogated by a distinct order of the defendant's superintendent to use the gun as ordered by him, with the implied assurance that the instrumentality thus employed was safe. As a general rule, the servant assumes the ordinary risks of his employment, including the chances of being injured by the instrumentality furnished by the master for the prosecution of the work at hand. But when it is apparent that the servant was unwilling to assume the risk, and that he used a defective machine or instrumentality furnished him by the master only because he was expressly commanded to do so, a presumption may arise (from the use of the apparently dangerous instrumentality under the express order of the master) of a quasi new agreement, whereby the master relieved the servant of his former assumption of risk and himself assumed responsibility for injuries which might result to the servant. Whether the evidence, as a whole, supports such a presumption, or rebuts it, is to be determined in the light of the circumstances attending the occurrence, and is for the jury. Massee & Felton Lumber Co. v. Ivey, 12 Ga. App. 583, 77 S. E. 1130; Bush v. West Yellow Pine Co., 2 Ga. App. 295, 300, 58 S. E. 529.

[2] 2. It is insisted, however, that the danger was so manifest that the act of the plaintiff in discharging the gun, although in obedience to the commands of the alter ego of the defendant, amounted to rashness, and for this reason he cannot recover. Of course, the servant cannot justify his taking the risk of an obvious danger or excuse gross negligence on the ground that he acted in obedience to his master's command, because his first duty is to exercise due care—the care of an ordinarily prudent man—for his own safety; but the jury had before it, not only proof of the order to the servant to discharge the gun, and the fact that this was the customary method of removing soot from the defendant's brick kilns, but also the fact that this gun was supplied by the master, whose absolute duty it was to furnish safe instrumentalities. It did not appear that the servant had equal opportunity with the master to know that the gun was defective, for he had never seen a gun like it, and the master himself loaded the gun. So really all that the plaintiff did was to overcome what, under the circumstances of the case, had the master properly loaded the gun and had the gun itself not been defective, would appear to have been an unreasonable nervousness as to discharging the gun, because he did not know what was a proper load, and in his ignorance apprehended that perhaps the load was too large. The fact that the plaintiff, who had never seen a gun like this, was afraid or uneasy, would not be conclusive evidence that the gun was defective, or that the load was in fact unduly large; and the jury were not compelled to find that he was guilty of any contributory negligence.

"In determining what is ordinary care on the part of a given individual, all the circumstances of his position should be regarded, including, in cases like the present, the servant's orders, the demands of his duty, the apparent risk to be met, and the purpose of his action, no less than his physical surroundings. Having weighed all these considerations, unless the case then discloses that the risk was such as would

not be taken by a man of common prudence so situated, the court cannot justly declare that the taking of that risk by the servant, in obedience to orders, was negligence. * * * The servant may maintain an action unless he not only knows what is the risk to be encountered but also that it will probably be attended with injury which he cannot avoid by the exercise of care and caution." 3 Labatt's Master and Servant (2d Ed.) § 1236.

[3] 3. Learned counsel for the plaintiff in error insists that the plaintiff was bound to know that the gun was overloaded, and that therefore, in shooting the gun, he incurred a risk and incident injury, notwithstanding any negligence of which the superintendent might have been guilty in requiring him to shoot it, and that, under the circumstances, the plaintiff was manifestly guilty of greater negligence in shooting the gun than the defendant's superintendent was in requiring him to shoot it. We have already referred to evidence which authorized the jury to find that the superintendent, and not the plaintiff, loaded the gun, and to the plaintiff's testimony to the effect that he was absolutely ignorant of the quality and character of the gun. But even if it be conceded that the plaintiff had reason to believe it was dangerous to discharge the gun, and even if the testimony to the effect that the gun was old and rusty was sufficient to impute to him knowledge of its defective and dangerous condition, that fact would not necessarily defeat his right to recover. This is especially true because it is undisputed that the defendant's superintendent ordered him to shoot the gun. Knowledge of a danger is not necessarily conclusive evidence of negligence in failing to avoid it, and there are circumstances under which it does not follow from the fact that the servant voluntarily took some risk that he was not using due care. 3 Labatt's Master and Servant (2d Ed.) § 1236. Usually evidence that the servant acted under a direct order negatives the inference of contributory negligence. As said by Labatt (volume 4 [2d Ed.] § 1363), it is plain that negligence cannot be predicated on the servant's obedience to an order, where he had no knowledge, actual or constructive, of the dangerous condition to which such obedience would expose him. Under such circumstances, the fact that a direct order was given obviously becomes wholly immaterial. But there is also a large class of cases in which that fact is treated as a differentiating element, and in which the courts apply the doctrine that, if the testimony goes to show that the servant's compliance with the master's order was the immediate occasion of his being subjected to danger, the conclusion that the servant was negligent in subjecting himself to danger, when the circumstances surrounding the transaction are considered in connection with the order given by the master, may be deemed to be rebutted.

"The practical result of this doctrine, when stated in terms of the servant's knowledge, is that the servant may maintain an action, unless he not only knows what is the risk to be encountered, but also that it will probably be attended with injury which he cannot avoid by the exercise of care and caution. In other cases the extent of the servant's right of action is indicated by a restrictive form of statement, and he is said to be entitled to obey a specific command of his superior, without incurring thereby the imputation of contributory negligence, unless the execution of that command involves a hazard to which no ordinarily prudent person would have subjected himself, or unless a reasonably prudent person in his situation, and with his knowledge of the danger, would not have obeyed the command, or unless the danger was so 'apparent,' or 'obvious,' or 'clear,' or 'manifest,' or 'glaring,' or 'imminent,' that a person of that average prudence and intelligence, whose hypothetical conduct is the test of the existence or absence of negligence, would have declined, under the given circumstances, to have complied with the order. In other words, if a danger is not so absolute or imminent that injury must almost necessarily result from obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order. It does not follow that, because disobedience to the order would have been justifiable, the servant was guilty of negligence in obeying it. Still less will the employer be permitted to escape liability on the ground that, by disobeying the order, the servant would have avoided injury, where it is a reasonable inference from the testimony that it was the servant's duty, under the given circumstances, to encounter the danger in question. Nor does it follow that, because it may be negligence for a superior servant to order his subordinates into a dangerous position into which he himself is to accompany them, they are therefore negligent in complying with the order." 4 Labatt's Master and Servant (2d Ed.) § 1363.

It is to be borne in mind that:

"The servant does not stand on the same footing with the master. His primary duty is obedience; and if, when in the discharge of his duty, he is damaged through the neglect of the master, it is but meet that he should be recompensed." Patterson v. Pittsburg & C. R. Co., 76 Pa. 389, 18 Am. Rep. 412.

The essential inequality in the position of the parties seems to warrant the deduction that:

"A prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound, at his peril, to set his own judgment above that of his superior." Indiana Car Co. v. Parker, 100 Ind. 181.

In other words:

"When a servant did not assert his judgment in opposition to the supposed better judgment or stronger will of his master, the law usually allows a jury to determine whether he was negligent, or acted in reliance upon the judgment of his master, or out of a constrained acquiescence in the rule of obedience which his relation as servant imposed." 4 Labatt's Master and Servant (2d Ed.) § 1364.

Our own Supreme Court has held that the question whether obedience to an order apparently dangerous is negligence is one of fact for a jury. In Central R. Co. v. DeBray, 71 Ga. 406, it was ruled that negligence is not inferable, as a matter of law, where the evidence shows that a brakeman, who was injured by striking against a skid when com-

plying with an order to dismount at night from a train moving at a rate of from four to six miles an hour, used his lantern and got off carefully. This ruling was followed in Augusta Factory v. Barnes, 72 Ga. 218 (7), 227, 53 Am. Rep. 838. See, also, Cheeney v. Ocean Steamship Co., 92 Ga. 726, 19 S. E. 33, 44 Am. St. Rep. 113; City Council of Augusta v. Owens, 111 Ga. 473, 474, 36 S. E. 830.

As this court said in Southern Ry. Co. v. Diseker, 13 Ga. App. 816, 81 S. E. 276:

"There are two principles of law in which knowledge of danger is a salient feature: (1) The doctrine of contributory negligence, which forbids a recovery where the plaintiff knows or should know of the danger and fails to use reasonable care to avoid it; and (2) the maxim embodied in section 2322 of the Civil Code of 1895 (Code of 1910, § 2781)—volenti non fit injuria—which requires the plaintiff to refrain from exposing himself to a known danger, and thus consenting to his own injury. * * * In neither case, however, is the knowledge of the danger conclusive of the plaintiff's right to recover. In either event it only imposes a duty —in the first case to use care to protect himself; in the second to use discretion not to expose himself to a danger so great that a prudent man would refuse to encounter it. A servant will be allowed to recover in any case where he measures up to the full responsibility imposed by his knowledge. [And it is quite apparent that a servant may include, as a part of his knowledge, the presumption that his employer or employer's agents have done, are doing, and will do their duty.] * * * In order to complete the defense of contributory negligence, not only must it be shown that the person injured had knowledge of the danger, but it must also be made to appear that he failed to use reasonable care to avoid it; and presumption to consent to an injury, which might arise from knowledge of the danger, may be rebutted by the compulsion of service. * * * From this fundamental duty of the master arises the presumption of law and of sound public policy that the servant may, in obedience to direct and specific command, or in response to the no less imperative obligation of faithful, efficient, and eager performance of his work, incur a large degree of danger without shifting the primary responsibility * * * from the master to himself, and hence may recover from an injury received while in the performance of his duty, unless obedience to the command is so obviously and eminently fraught with peril, or unless his performance of the work is so reckless and so rash, that a reasonably prudent man would act differently."

In view of the fact that the plaintiff had only a short while before seen the same gun discharged without danger, and the fact that he had the right, in his condition of ignorance, to rely upon the presumption that the master would not supply him a dangerous instrumentality, as well as in view of the superintendent's assurance that the gun was safe, it cannot be said that the jury were not authorized to find that a reasonably prudent man would have acted just as the plaintiff did.

[4] 4. Even a direct and immediate order on the part of the master will not justify a servant in rashly exposing himself to a known and obvious danger. But though the servant, at the time of the injury, may be performing a duty so dangerous as to involve the element of rashness, yet if this rash conduct is not a natural, proximate, and contributory cause of his being hurt, and the injuries are received by reason of an independent act on the master's part, the mere fact of the servant's being engaged in the rash conduct mentioned will not preclude his right of recovery. Southern Cotton Oil Co. v. Gladman, 1 Ga. App. 260 (6–7), 58 S. E. 249. Granting that the plaintiff in the present case was negligent in not using his faculties, or in miscalculating the danger of the risk, and conceding that if he had not pulled the trigger the gun would not have been fired, it is nevertheless plain to us that the direct, proximate, contributing cause of the plaintiff's injury was the superintendent's order to him to shoot. Whether this be true or not, the servant had the right to assume that the master's representative, who presumably had superior knowledge of the conditions, would not expose him to unnecessary peril; and an order of the master, having the natural tendency to throw the servant off his guard, may properly be considered to excuse him from the exercise of the same degree of care as would have been incumbent on him if the case had not involved this factor. Obedience to an order is not contributory negligence in any case in which the servant has the right to assume that the master will warn him as to any danger which the service may involve; and, where the servant is entitled to assume that he is ordered to put himself in a dangerous position because his duty requires it, it will be for the jury to say, upon a review of all the circumstances, whether the plaintiff was guilty of negligence.

[5] 5. A specific order to do a certain act carries with it an implied assurance that the act may be done with reasonable safety. One of the absolute, continuous, and nondelegable duties of a master is the duty of refraining from giving orders which will require a servant to put himself in a position where he will be subject to risk or injury from a dangerous instrumentality. This duty naturally follows from the inherent right to give orders which every consideration of public policy has conferred upon the master, and the breach of this duty may constitute an actionable wrong. A servant must rely largely upon the presumption that obedience to the orders of his superiors will not unreasonably endanger his safety. Obedience is his paramount duty.

"The theoretical right of a servant to throw up his hands and quit his work because some extra hazard appears, and he is exposed to a risk which it is questionable whether he assumed at the time the contract is made, is one whose exercise is practically and humanly speaking impossible. It would require an immediate and accurate determination of the vexed question of what risks were assumed, and ofttimes would exact of an unlettered laborer an instantaneous solution of abstruse legal problems which have perplexed the highest legal tribunals. * * * Courage to do work, rather than care to avoid its danger, is what the public welfare requires." Southern Ry. Co. v. Diseker, supra.

[6, 7] 6, 7. The other questions presented are sufficiently dealt with in the headnotes.

[8] 8. The evidence authorized the verdict, and there was no error in refusing a new trial.

Judgment affirmed.

BROYLES, J., not presiding.

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(75 W. Va. 510)

## LARAWAY v. CROFT LUMBER COMPANY.

(Supreme Court of Appeals of West Virginia. Jan. 19, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⟸1040—HARMLESS ERROR—OVERRULING OF DEMURRER.

Where a demurrer to faulty counts in a declaration has been overruled, the appellate court will not reverse for the error if all the evidence adduced for the plaintiff was admissible under a good count.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089–4105; Dec. Dig. ⟸1040; Pleading, Cent. Dig. § 567.]

2. PLEADING ⟸45—DECLARATION—JURISDICTION.

By the statute, Code 1913, ch. 125, sec. 33 (sec. 4787), it is not necessary in any action to aver that the cause of action is within the jurisdiction of the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 100; Dec. Dig. ⟸45.]

3. WITNESSES ⟸392—CROSS-EXAMINATION—IMPEACHMENT—CONTRADICTORY STATEMENT.

Refusal on the cross-examination of a witness to admit an affidavit formerly made by him, tendered for the purpose of contradiction, is not error when the affidavit is not inconsistent with the testimony of the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1249–1251, 1257; Dec. Dig. ⟸392.]

4. ACCOUNT STATED ⟸6—REBUTTABLE ADMISSION—ACCOUNT RENDERED—FAILURE TO OBJECT.

Failure to object within a reasonable time to an account rendered amounts only to a rebuttable admission, not to an estoppel.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 30–39; Dec. Dig. ⟸6.]

5. TRIAL ⟸242—MISLEADING INSTRUCTION—REFUSAL.

An instruction tending to mislead the jury from proper issues in the case should be refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569–576; Dec. Dig. ⟸242.]

Error to Circuit Court, Upshur County.

Action by A. B. Laraway against the Croft Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Young & McWhorter, of Buckhannon, for plaintiff in error. J. M. N. Downes, of Buckhannon, for defendant in error.

ROBINSON, P. This is an action in assumpsit to recover money for work done and for goods and chattels sold. Plaintiff has judgment and defendant prosecutes error.

The judgment follows a verdict of the jury based upon the consideration of conflicting oral testimony of witnesses. The finding of the jury was within their province. From the record we would not be warranted in saying that the verdict was contrary to the evidence.

[1] It is submitted that the demurrer to the declaration should have been sustained as to some of the counts. But the common counts are unquestionably good. All the evidence that was admitted was admissible under the common counts. The case that was proved, was provable under them. Then, though it be that the demurrer ought to have been sustained as to some of the other counts, there is no reversible error. Many decisions are here in point, but it suffices to set forth the following:

"Where a declaration contains two or more counts, and there is a demurrer to each count; some of the counts are bad, and the demurrer is overruled as to all; the evidence is all certified, and the case is brought to this court on a writ of error, *Held:* Notwithstanding it was error to overrule the demurrer to the bad counts, still, if the court is satisfied that all the plaintiff's evidence was admissible under the good counts, it will not reverse the judgment of the trial court for such error." Hood v. Bloch, 29 W. Va. 244, 11 S. E. 910.

[2] The point insisted on that no venue was laid in the declaration is not true as to the common counts. Besides, the statute distinctly provides:

"It shall not be necessary in any action to aver that the cause of action arose or that the matter is within the jurisdiction of the court." Code 1913, ch. 125, sec. 33.

[3] On the cross-examination of a witness, defendant sought to contradict him by the introduction of a copy of an affidavit he had formerly made. The court refused to admit the affidavit. Defendant submits this was error. The affidavit, it seems, could well have been admitted for elucidation of defendant's theory of the case. But the affidavit contains no material contradiction of the witness. For its exclusion, we shall not reverse. Viewing the case as a whole, we are of opinion that the admission of the affidavit would not have changed the finding of the jury. Nothing which the witness had stated in the affidavit is inconsistent with what he stated in his testimony. We must assume that the jury were intelligent. Taking them as such, we know that if the affidavit had been admitted, they could have given no weight to it as a material contradiction.

[4] Defendant's instruction number five was properly refused. In relation to defendant's claim of set-off, it would have told the jury that if they believed that defendant rendered to plaintiff a statement of the account and plaintiff did not object to certain items thereof within a reasonable time, he is estopped to deny the correctness of such items. This is not the law. Failure to object within a reasonable time to an account rendered does not create an estoppel.

It does amount to an admission, but only to that. The admission, however, is one which may be rebutted.

[5] The refusal of defendant's instruction number six was also proper. This instruction wholly ignored plaintiff's theory that he had by a valid agreement with defendant been relieved from any liability on the matters embraced in the account of set-off. The instruction should have been conditioned on the jury's not believing from the evidence plaintiff's theory that the set-off had been discharged as a whole. Otherwise, by reason of the substance of the instruction, it would have told the jury to consider defendant's set-off as an unsettled one for which plaintiff was liable. The instruction called upon the jury to consider tannery weight and measurement in relation to the bark embraced in the account of set-off. Yet plaintiff's evidence was that he had been totally discharged from liability for the set-off. The ignoring of plaintiff's evidence in this particular, in giving such an instruction, would certainly be prejudicial to plaintiff. It would mislead the jury to believe that consideration should be given to the items of set-off in any event. An important issue was whether plaintiff was at all liable for the account of set-off. The instruction would have tended to mislead the jury from this issue. An instruction tending to mislead the jury from proper issues in the case, should always be refused.

Two other assignments remain. They are plainly untenable and have not been argued. The judgment will be affirmed.

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(75 W. Va. 549)

## WEST VIRGINIA PULP & PAPER CO. v. BALTIMORE & O. R. CO. (No. 2627.)

(Supreme Court of Appeals of West Virginia. Jan. 26, 1915.)

*(Syllabus by the Court.)*

1. RAILROADS ⊂=469—FIRES—RELEASE—CONSTRUCTION.

A clause in a contract between a railroad company and the owner of land adjoining its right of way, providing for the construction of a spur or side track, part thereof on the right of way and part on the adjacent land, for the mutual advantage of the parties, and, in consideration of the advantages and benefits to the latter, indemnifying, protecting, and saving harmless the former against loss and damage or expense by fire to cars and contents standing on such siding, and releasing it, in general terms, from all claims of whatsoever character for damages resulting to the property of the latter, by reason of fire originating from the engines and locomotives of the railroad company, releases it from damages by fire from engines and locomotives on the main line of the railroad, as well as those on the siding.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1665; Dec. Dig. ⊂=469.]

2. RAILROADS ⊂=469—FIRES—RELEASE—CONSIDERATION.

Inasmuch as such a siding contemplates and induces storage or deposit of inflammable materials in dangerous proximity to the railroad, with the consent of the company, augments the danger of fire, increases the burden of care on the part of the company, and affords ground for a claim of estoppel against its right to assert the defense of contributory negligence on the part of the depositor, such danger and provision against liability therefor logically arise in the course of the negotiations between the parties, and constitute a part of the subject-matter of the contract.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1665; Dec. Dig. ⊂=469.]

Error to Circuit Court, Ohio County.

Action by the West Virginia Pulp & Paper Company against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

J. W. Vandervort, of Parkersburg, W. W. Brannon, of Weston, Russell & Russell, of Wheeling, and Mollohan, McClintic & Mathews, of Charleston, for plaintiff in error. Geo. E. Nelson, of New York City, and T. S. Riley, G. T. Knote, and J. B. Handlan, all of Wheeling, for defendant in error.

POFFENBARGER, J. By way of complete defense to this action for the burning of a large quantity of pulpwood, stored around a side track, by the escape of fire from one of its engines passing on its main line, the defendant relied upon a release from damages to the property of the plaintiff by fire from its engines, contained in a written contract pertaining to the construction and maintenance of the side track or spur, primarily for the benefit of the plaintiff. But for such release the evidence is amply sufficient to sustain the verdict for $45,314.17, but the trial court refused to allow the contract to be put in evidence, deeming the release applicable only to fires originating from engines on the side track.

[1] Admitting his construction of the contract did not conform to that given similar agreements passed upon in Mayfield v. Southern Railway Co., 85 S. C. 165, 67 S. E. 132, and Richmond v. N. Y. & H. Railroad Co., 26 R. I. 225, 58 Atl. 767, the learned trial judge suggests, in his written opinion, grounds for differentiation of the contracts, but we are unable to discover any. In the former case the terms of the indemnity clause were narrower in their scope than those of the agreement under consideration here. They extended only to "loss or damage by fire communicated by locomotive engines or trains of the railway company to buildings used by the party of the second part in connection with the business served by said industrial track, or to the contents of such buildings, or to other property stored by or with the consent of the party of the second part upon or near said industrial track." Though the clause referred specifically to the industrial or side track and made no mention of the main track, the court held it

extended to fires originating from engines or trains on the main line. It is to be observed there was no express limitation or restriction as to the location of the engines or trains communicating the fires. In other words, the clause did not say loss or damages by fire from trains on the industrial track. The description or specification of engines and trains was general. The contract involved in the other case was more nearly like the one relied upon here, which, although providing for the construction of a side track, partly on the railroad right of way and partly on the plaintiff's land, closes with the following indemnity and release clause:

"In further consideration of the advantages and benefits to accrue to said second party on the account of the location and operation of said side track by the first party, it is further agreed that the said second party will indemnify, protect, and save harmless said first party against loss and damage or expense by fire to cars and contents standing upon said siding which have been placed there for use of said second party. And said second party hereby releases said first party from all claims of whatsoever character for damages resulting to the property of said second party by reason of fire originating from the engines and locomotives, of the first party and resulting in the burning or destruction of or injury to the property of the second party."

[2] Though these authorities and others somewhat similar are only persuasive in this court, they, in our opinion, properly apply the rules of construction. Side tracks bring into close proximity to the railroad stores of combustible property which would not otherwise be there, and so greatly augment the risk of fire from passing engines and trains. Of course, the adjacent owner has the right to store property on his own land, but he would not do so without a side track to the same extent to which he does it when he has a side track. If, without a side track, he carelessly and negligently exposes his own property on his own premises to fire from escaping sparks from passing trains, he cannot recover. Wilson Bros. v. Bush, 70 W. Va. 26, 73 S. E. 59. Though it may be the duty of a railroad company to permit a large shipper to connect his spur track with the road, a question we do not decide, still it is not bound to assent to the storage of large quantities of inflammable property dangerously close to its main line, and so estop itself from the defense of contributory negligence on the part of the depositor. According to some authorities, the assent of a railroad company, express or implied, to the placing of combustible matter on or near its right of way precludes the defense of contributory negligence, in an action for the burning of the property. Pittsburgh, etc., R. Co. v. Noel, 77 Ind. 110; Pittsburgh, etc., R. Co. v. Nelson, 51 Ind. 150; Gulf, etc., R. Co. v. McLean, 74 Tex. 646, 12 S. W. 843; Missouri, etc., R. Co. v. Bartlett, 69 Tex. 79, 6 S. W. 549; Elliott, Railroads, § 1236. The adjacent owner can put his place of storage at a safe distance from the main line. Assuming, therefore, that each party to the spur track contract knew its legal rights, the danger of fire from passing engines on the main track naturally and inevitably came up in the negotiations. The spur track thus clearly affected the general business of the railroad company, and afforded both reason and consideration for a general indemnity and release as to property on and about the side track. In a sense it is part of the subject-matter. Of course, it would not extend to other property, and the general terms of the clause here involved must be limited to property so deposited or stored. The property for the destruction of which this action was brought was stored within a few feet of the main line, and consisted of a vast quantity of corded wood. This conclusion necessitates a new trial, and disposes of the only question seriously discussed, and we see no error in the other rulings of the court.

The judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(75 W. Va. 595)

## HATFIELD v. CABELL COUNTY COURT.

(Supreme Court of Appeals of West Virginia. Feb. 2, 1915.)

*(Syllabus by the Court.)*

1. PARTIES ⟸19 — NECESSARY JOINDER — JOINT OBLIGATION.

Where an obligation confers a joint right on several obligees, they must all join in an action founded on it.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 19–24, 26; Dec. Dig. ⟸19.]

2. PAYMENT ⟸5 — EFFECT — JOINT OBLIGATION.

Payment to one of several joint obligees effectually operates to discharge the obligation.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 7, 8; Dec. Dig. ⟸5.]

3. APPEAL AND ERROR ⟸845 — DECISION — AGREED STATEMENT — INSUFFICIENT EVIDENCE.

Where a cause has been tried on an agreed statement of facts by the court in lieu of a jury, and judgment rendered for the plaintiff, upon writ of error the evidence will be considered as though the defendant was a demurrant thereto, and if insufficient to warrant the judgment, reversal and judgment nil capiat must follow.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3342–3345; Dec. Dig. ⟸845.]

Error to Circuit Court, Cabell County.

Action by Allen Hatfield against the Cabell County Court. Judgment for plaintiff, and defendant brings error. Reversed, and judgment for defendant.

Jean F. Smith, of Huntington, for plaintiff in error. Rufus Switzer, of Huntington, for defendant in error.

ROBINSON, P. In a tract of land Hatfield owned an interest of twenty-one thir-

tieths, Swann eight thirtieths, and others one thirtieth. By verbal agreement with the owners the county court obtained the right to construct a public road through the land, for which it was to pay the sum of one hundred and seventy-five dollars. Pursuant to such agreement the road was put through the land. Later, at the suit of Swann, the land was partitioned, and the part through which was the road fell to Swann. That part was decreed to him in the partition suit, but the amount due from the county court was in no wise considered in the decree of partition or affected thereby. After Swann thus became the sole owner of the land through which the road had been constructed, the county court paid to him the whole of the one hundred and seventy-five dollars.

The action now before us is one by Hatfield to recover from the county court his share of the one hundred and seventy-five dollars. He has obtained a judgment for the amount of his twenty-one thirtieths share with interest, from which judgment defendant brings error.

The case was tried by the court in lieu of a jury, on an agreed statement of facts. The substance of that statement is what we have set forth in the first paragraph hereof. By the agreed statement of facts alone must the question of the liability of defendant be determined. Some matters presented in argument are not pertinent and must be wholly eliminated.

[1] The contract to pay for the right to build the road was one with the owners of the land jointly. From the statement of facts the contract is disclosed as one for the payment of a sum of money to joint obligees. Nothing is shown whereby each of the owners of the land was severally entitled to his share in the sum to be paid. It simply appears that the whole of the sum was to be paid to them jointly. Defendant agreed to pay the owners of the land the sum of one hundred and seventy-five dollars, without reference to their respective interests in the land and without several obligation to them. The contract was one for their joint benefit. No one of them can have any several benefit from it. The contract as made, was expressly and positively joint. It discloses no several right or benefit. Looking to all the terms of the contract expressed in the statement of facts, we observe only that the sum is payable to all the obligees jointly, for there is nothing therein to show us what several right any one of them has in the sum. We observe no several covenants; a single covenant appears wherein the obligees are only jointly identified.

"Wherever an obligation is undertaken by two or more, it is the general presumption of law that it is a joint obligation or right. Words of express joinder are not necessary for this purpose; but on the other hand, there should be words of severance, in order to produce a several responsibility or a several right." 1 Parsons on Contracts (8th Ed.) 11.

The right to the money being joint, plaintiff alone can not, as he undertakes to do, maintain an action to recover his share of the money.

"If an obligation confer a joint right upon several covenantees, they must all join in an action founded upon it." 2 Chitty on Contracts (11th Amer. Ed.) 1340.

"Two persons to whom or for whose benefit a third person has promised to pay a single amount cannot maintain separate suits for their alleged shares of such amount, or the whole thereof. They must sue jointly." Phœnix Assurance Co. v. Fristoe, 53 W. Va. 361, 44 S. E. 253.

[2] But a more complete denial of plaintiff's right of action must come from the statement of facts wherein it is recited that defendant has paid the whole of the debt to Swann, one of the joint obligees to whom it was payable. The payment to Swann discharged defendant from the obligation. The following are some of the iterations of the settled rule here applicable:

"Payment to any one of several joint obligees discharges the obligation." Allen v. South Penn Oil Co., 72 W. Va. 155, 77 S. E. 905.

"The payment of a debt to one of two persons to whom it is jointly due is effectual." Bishop on Contracts, sec. 875.

"A release of a debt, or of a claim to damages, by one of many who hold this debt or claim jointly, is a full discharge of it." 1 Parsons on Contracts (8th Ed.) 27.

"Accord and satisfaction with one of several plaintiffs or joint creditors is a complete extinction of the claim, and is a good accord and satisfaction without showing that the one who made the settlement had authority from the others to do so." 1 C. J. 537.

[3] Where a case has been tried by the court in lieu of a jury, upon writ of error the evidence will be considered as though the plaintiff in error was a demurrant thereto. Rohrbough v. Express Co., 50 W. Va. 148, 40 S. E. 398, 88 Am. St. Rep. 849. A fortiori it is so where the case has been tried by the court on an agreed statement of facts. The evidence, as we have observed, by no means sustains the finding of the circuit court. Therefore, the judgment will be reversed, and final judgment that plaintiff take nothing by his suit will here be entered. Plaintiff's remedy for his share of the money is against Swann, to whom it has been paid in discharge of the obligation of defendant herein.

(168 N. C. 295)

NEWSOME v. HARRELL et al. (No. 107.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

1. PARTITION ⟸97—OWELTY—ENFORCEMENT.
Under 3 Pell's Revisal, § 2495, providing for the entry on the judgment docket of owelty charges in partition proceedings, such charges may be enforced by execution if the partition is by judicial proceedings; but, where it is by agreement, the procedure for the enforcement of owelty is by action in the superior court.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 322; Dec. Dig. ⟸97.]

2. LIMITATION OF ACTIONS ⟸60—OWELTY—JUDICIAL PARTITION.
Proceedings to enforce owelty in judicial partition are barred by the 10-year statute of limitations, notwithstanding the existence of a life estate.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 333–341; Dec. Dig. ⟸60.]

3. LIMITATION OF ACTIONS ⟸39—OWELTY—PARTITION BY AGREEMENT.
Where the remainder in lands after a life estate was partitioned by agreement, owelty awarded to one tract against another and made a charge on the latter may be enforced during the existence of the life estate, and is therefore barred within 10 years from the partition by Revisal 1905, § 399, barring in 10 years all actions for which no other limitation is prescribed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 172, 190–211; Dec. Dig. ⟸39.]

4. PARTITION ⟸97—AGREEMENT—EFFECT—OWELTY CHARGE.
In an action to enforce owelty charged upon a tract of land partitioned by agreement, no personal judgment can be rendered against the one receiving the tract.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 322; Dec. Dig. ⟸97.]

5. PARTITION ⟸97—OWELTY—ENFORCEMENT—PARTIES.
The personal representative of one receiving a tract of land charged with owelty in partition by agreement is not a necessary party in an action to enforce the charge against the land.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 322; Dec. Dig. ⟸97.]

Appeal from Superior Court, Hertford County; Bond, Judge.

Action by J. A. Newsome against Eula Harrell and another. Judgment for the plaintiff, and defendants appeal. Reversed.

Winborne & Winborne, of Murfreesboro, for appellants.

CLARK, C. J. This is an action to recover owelty of partition, $350, and that the judgment be declared a lien on the land owned by the defendants. On December 17, 1902, the tenants in common divided the land by a voluntary partition into five shares, subject to the life estate of their father, and executed a division deed. The plaintiff drew lot No. 2, and his brother Walter E. Newsome drew lot No. 1, which was to pay lot No. 2 $350 owelty. Walter Newsome died and devised the lot No. 1 to his wife, the feme defendant. The life tenant died December 1, 1907. The defendants plead the statute of limitations, and the only question before the court is: "Is the $350 charge barred by the statute of limitation?"

[1] The procedure for enforcing the payment of owelty in a judicial proceeding is by execution. Ex parte Smith, 134 N. C. 499, 47 S. E. 16; 3 Pell's Revisal, § 2495; Laws 1911, c. 9. The procedure for enforcing the payment of owelty in partition by agreement is by action in the superior court. Sumner v. Early, 134 N. C. 238, 46 S. E. 492; Keener v. Den, 73 N. C. 132.

[2] Proceedings to enforce payment of owelty in judicial partition is barred by the 10-year statute of limitations. Ex parte Smith, 134 N. C. 495, 47 S. E. 16. The existence of a life estate does not prevent the running of interest or the statute of limitations except as to minors. Rev. § 2497; Turpin v. Kelly, 85 N. C. 399.

[3] Does the 10-year statute bar the collection of the charge when the partition is by agreement? Since it must be collected by action, the 10-year statute bars Rev. § 399. When the sum is a lien or a charge on land, the 10-year statute applies. Aston v. Galloway, 38 N. C. 126; Rice v. Rice, 115 N. C. 43, 20 S. E. 185; Allen v. Allen, 121 N. C. 334, 28 S. E. 513. The plaintiff was not prevented from bringing this action during the life estate.

[4, 5] If the sum sued for was simply a personal debt, the three-year statute of limitations would apply. Rice v. Rice, 115 N. C. 43, 20 S. E. 185. But this action is to enforce the charge upon the land, and no personal judgment can be rendered against the defendants or the personal representative of Newsome. Halso v. Cole, 82 N. C. 161; Waring v. Wadsworth, 80 N. C. 345. The personal representative is not necessary in this action to enforce the charge on the land. Lee v. Eure, 82 N. C. 428; Id., 93 N. C. 5.

The headnote in Re Ausborn, 122 N. C. 42, 29 S. E. 56, that the statute of limitations does not run against a charge upon land for owelty in partition, is corrected after full discussion in Ex parte Smith, 134 N. C. 497, 47 S. E. 16.

The plea of the statute of limitations should have been sustained.

Reversed.

(169 N. C. 285)

STATE v. SERMONS. (No. 1.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

1. FISH ⟸10—ILLEGAL SALE OF FISH—STATUTES—CONSTRUCTION.
One selling oysters as a dealer without a license is within Revisal 1905, § 2411, providing for licenses to persons engaged in the business of purchasing, canning etc., of oysters, and directing that no license shall be issued prior to November 15th, and shall expire on March 15th following, and section 2395, making it a misdemeanor for any one to engage in the business

without a license, though he procured the oysters from an individual owner of oyster grounds.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 20; Dec. Dig. ⊂⊃10.]

2. FISH ⊂⊃8—REGULATION—POLICE POWER.
The state may, within its police power, regulate the taking and selling of fish.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 16; Dec. Dig. ⊂⊃8.]

3. LICENSES ⊂⊃40—REFUSAL OF LICENSE—OFFENSES—REMEDY.
One wrongfully refused a license under Revisal 1905, § 2411, providing for licenses to persons engaged in the business of purchasing, canning, or shipping oysters, cannot test his right to a license by carrying on the business without it, but his remedy is by mandamus to compel the issuance of a license.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 79–83; Dec. Dig. ⊂⊃40.]

4. FISH ⊂⊃9—REGULATION—STATUTES—CONSTRUCTION.
Revisal 1905, § 2395, making it unlawful to purchase or ship oysters as a business without a license, is unaffected by section 2383, as amended by Laws 1907, c. 969, and Laws 1913, c. 85, punishing any person buying or selling oysters in the shell which have been taken from public grounds or natural oyster beds between designated dates, as section 2383 forbids all citizens buying or selling oysters taken from public grounds or natural beds during the closed season, while section 2395 refers only to regular dealers in the oyster business, and permits them to sell only when regularly licensed.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 17, 18; Dec. Dig. ⊂⊃9.]

Appeal from Superior Court, Hyde County; Carter, Judge.

Cleveland Sermons was charged with selling oysters without a license, and the trial court adjudged that he was not guilty, and the State appeals. Verdict of guilty ordered.

The relevant facts embodied in a special verdict and the proceedings and judgment of the court thereon are as follows:

"The jury, having heretofore been duly impaneled, returned into court the following special verdict: 'That for 20 years last past the oyster bed in Hyde county known as Judith Narrows has been granted by the state of North Carolina, according to the law, and is now the private property of one Makely, who holds absolute title to same; that said oyster grounds are not now the property of the state of North Carolina; that on or about the 19th day of October the defendant purchased from the owner of said private oyster beds a quantity of oysters which the owner had taken from said private oyster bed; that on said date, between April 5, 1914, and November 15, 1914, the said defendant sold said oysters as a dealer without state license, according to section 2411 of the Revisal, to parties in Swan Quarter, Hyde county; that before said defendant began to offer said oysters for sale, and between April 5, 1914, and November 15, 1914, he applied to the proper party for license under said section of the Revisal to sell said oysters and that same was refused; that the defendant has not dealt in any oysters nor has he sold any oysters that did not come from the private oyster bed property, and has dealt in no oysters that came from the public grounds of the state of North Carolina. If upon these facts the court be of opinion that the defendant is guilty, we, the jury, find him guilty; but if the court be of opinion that he is not guilty, we find him not guilty.' Upon said special verdict found by the jury the court was of opinion that the defendant was not guilty, and adjudged that defendant be discharged."

The state excepted and appealed.

T. W. Bickett, Atty. Gen., and T. H. Calvert, Asst. Atty. Gen., for the State. J. C. B. Ehringhaus, of Elizabeth City, and S. S. Mann, of Swan Quarter, for Oyster Commission. Spencer & Spencer, of Swan Quarter, and Ward & Thompson, of Elizabeth City, for appellee.

HOKE, J. [1] Section 2411 of Revisal 1905 provides for issuing license to persons engaged in the business of purchasing, canning, packing, shucking, or shipping of oysters, and directs that no such license shall be issued prior to the 15th of November, and that same shall expire on the 15th of March following. Section 2395 makes it a misdemeanor for any one to engage in said business without having obtained the license as required. The defendant, having sold oysters as a dealer and without having license so to do, comes directly within the terms and meaning of the law, and we see no valid reason why a verdict of guilty should not have been entered.

[2] It is fully established that fish, including oysters and other shellfish, as well as game, being a valued source of food supply, come well within the police power of the state, and are subject to rules and regulations reasonably designed to protect them and promote their increase and growth, and that such rules and regulations may not be set aside or ignored because they indirectly affect or trench upon some private rights that are or would be ordinarily recognized. Daniels v. Homer, 139 N. C. 219, 51 S. E. 992, 3 L. R. A. (N. S.) 997; Rea v. Hampton, 101 N. C. 51, 7 S. E. 649, 9 Am. St. Rep. 21; Patsone v. Pa., 232 U. S. 138, 34 Sup. Ct. 281, 58 L. Ed. 539; Silz v. Hesterberg, Sheriff, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75; Lawton v. Steele, 152 U. S. 142, 14 Sup. Ct. 499, 38 L. Ed. 385.

It is chiefly urged for defendant that a conviction should not be had in this instance because it appears that the dealer had procured the oysters from an individual owner of the oyster grounds; but the statute makes no such exception, and we are not aware of any principle sustaining the position. The provision establishing a closed season and requiring dealers to operate only under a regular license are among the usual methods of regulating the industry, and it is well understood that the rights of individual owners are also subject to reasonable state regulations affecting their interests. State v. Sutton, 139 N. C. 574, 51 S. E. 1012; State v. Gallop, 126 N. C. 983, 35 S. E. 180; 13 A. & E. (2d Ed.) p. 573 et seq. As a matter of fact, however, the rights of the individual owner are not involved in this case, and the state here is not undertaking to

regulate his right to use or dispose of his property, but only the right of this defendant, a public dealer, to transact his business without license and in violation of positive law.

[3] True, it is said that he had applied for a license and been refused, but he applied at a time when the law provided that a license should not be issued. Revisal, § 2411. And, even if entitled thereto, he could not test his right by carrying on his business without it, but he should have applied for mandamus compelling the oyster commissioner or others to give him protection which he claimed the law and facts afforded. State v. Snipes, 161 N. C. 242, 76 S. E. 243.

[4] It was further contended that, as section 2383 of Revisal, as amended by chapter 969, Laws 1907, and chapter 85, Laws 1913 (Gregory's Supplement, § 2383), only prohibited persons from buying or selling oysters from public grounds, that this should be construed in connection with section 2395, with the effect that this latter section does not apply when oysters are shown to have been procured from private owners. But there is no necessary or essential connection betwen the two sections; the first applying to any and all citizens of the state, and forbidding that they should buy or sell oysters taken from public grounds or natural beds during a closed season except in specified and very restricted instances, and the other being a law referring only to regular dealers in the oyster business, providing that they could only sell, etc., when regularly licensed to do so, and intended and reasonably designed to render more effective the legislation in protection of the fish and oyster industry of the state.

There is error, and this will be certified that, on the facts established, a verdict of guilty should be entered.

Reversed.

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(169 N. C. 238)

## GODFREY v. ATLANTIC HORSE INS. CO. (No. 41.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

1. INSURANCE ⟸375—STIPULATIONS OF POLICY—WAIVER—POWER OF GENERAL AGENT.

The general agent of an insurance company can waive stipulations in a policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 948–951, 956–965; Dec. Dig. ⟸375.]

2. INSURANCE ⟸392—STIPULATIONS OF POLICY—WAIVER BY GENERAL AGENT.

It is a waiver of stipulations of a policy by the general agent that he receives premiums from insured knowing the local agent had waived them.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1041–1056, 1058–1070; Dec. Dig. ⟸392.]

Appeal from Superior Court, Pasquotank County; Carter, Judge.

Action by Samuel Godfrey against the Atlantic Horse Insurance Company. Judgment for plaintiff, and defendant excepted and appeals. Affirmed.

This is an action upon a contract of insurance upon a horse. The defendant relied upon the breach of certain conditions in the policy as a defense, and the plaintiff contended that these conditions had been waived by the defendant. Evidence was introduced supporting the contentions of the parties. The jury rendered the following verdict:

(1) Did Mendenhall, general agent, authorize Winder, agent, to waive the provisions in the policy as alleged? Answer: Yes.

(2) Did Winder waive the provisions of said policy as alleged? Answer: Yes.

(3) If so, did the general agent receive the premiums with knowledge of such waiver? Answer: Yes.

(4) After the horse became unwell, did the plaintiff, Godfrey, act with due diligence? Answer: Yes.

(5) What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $75 with interest.

I. M. Meekins, of Elizabeth City, for appellant. Ward & Thompson, of Elizabeth City, for appellee.

PER CURIAM. [1] We are of opinion that the evidence introduced by the plaintiff to show authority in the local agent to waive the provisions in the policy was competent, but, if not, the finding upon the third issue is conclusive against the defendant.

[2] It is well settled that the general agent of an insurance company has authority to waive stipulations in a policy (Gwaltney v. Assurance Society, 132 N. C. 929, 44 S. E. 659; Hardy v. Insurance Co., 154 N. C. 438, 70 S. E. 828), and if, as found by the jury, the agent received the premiums from the plaintiff with knowledge that the local agent had waived the stipulations, this would be a waiver by the general agent.

No error.

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(169 N. C. 240)

## PEARCE et al. v. WATERS. (No. 39.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

BOUNDARIES ⟸40 — LOCATION — QUESTIONS FOR JURY.

In an action involving the location of one line of a grant described as running north 60° west 600 poles to the highland on which a road passed and to the east of a swamp, where plaintiffs contended that this line ran to a certain point, though, in order to run to that point, it was necessary to extend the poleage 190 poles to reach the highland on which the road passed to the east of such swamp, and there was evidence tending to prove that there were highlands and a road answering this contention, and also a highland and road near where the poleage gave out answering defendant's contention that the line ended there, the court properly left the question as to which highlands and road were intended to the jury.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 196–204; Dec. Dig. ⟸40.]

Appeal from Superior Court, Washington County; Long, Judge.

Action by T. M. Pearce and others against W. W. S. Waters. Judgment for plaintiffs, and defendant appeals. Affirmed.

This is a civil action, tried upon these issues:

(1) Were the plaintiffs, at the time of beginning this action, the owners of the land in controversy represented on the Ange map from red 1 to red 2 and back to 1? Answer: Yes.

(2) If so, did the defendant trespass on said land? Answer: Yes.

(3) If so, what damages are plaintiffs entitled to recover? Answer: One penny.

From the judgment rendered, the defendants appeal.

A. O. Gaylord, of Plymouth, and Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellant. Ward & Grimes, of Washington, N. C., for appellees.

PER CURIAM. This is an action of trespass to determine the title to a small piece of Gallberry bear grass land, represented on the Ange official map by a small triangle between red 1 and at the circle of white G and red 2, or white D and red 5 or red 3 and back to red 1. The title of the land depends solely upon the location of one line of the John Gray Blount 9,000-acre grant, the material calls of which are as follows:

"Thence north 60° west 600 poles to the highland on which the road passes and to the east of Milady Hole Swamp; thence with the highland, the various courses thereof, to Moore and Jackson's corner, near the mouth of Flat Swamp, on the south side thereof."

The plaintiffs contend that the line north 60° west 600 poles runs to A on the map, although in order to run to A, the poleage must be extended 190 poles in order to reach the highland on which the road passes to the east of Milady Hole Swamp.

The defendants contend that the line north 60° west 600 poles stops at the end of the poleage by operation of law, and that the judge should have so charged the jury to find the location to be at the end of the poleage and to run the next call of the grant along the eastern end of the islands to G.

The defendant further contends that there is evidence of a road and highland near where the poleage gives out. We have examined carefully the evidence and the charge of the court, and we find that there is evidence tending to prove that there were highlands and a road, which answers the contentions of the plaintiff; and also highlands and a road near where the poleage gives out, which answers the contentions of the defendant. We think his honor very properly left the question to be determined by the jury as to which highlands and road east of Milady Hole Swamp were intended to meet the description in the grant.

His honor submitted the matter to the jury under the well-settled decisions of this court, and in a charge free from error. The matter seems to be one almost exclusively of fact, and we find nothing in the record which necessitates another trial.

No error.

(169 N. C. 265)

## STATE v. LIPKIN. (No. 57.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

1. STATUTES ⟸235 — INTERPRETATION — POLICE REGULATIONS.

Laws and regulations necessary for the protection of the health, morals, and safety of society are within the police power, and should be given such a construction as will suppress the mischief aimed at.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 316; Dec. Dig. ⟸235.]

2. LOTTERIES ⟸3—OFFENSES—WHAT CONSTITUTES.

Revisal 1905, § 3726, declares that any person who shall promote a lottery, or by such means sell or dispose of any property, evidences of debt, etc., shall be guilty of an offense. Defendant took orders for furniture, under contracts providing for weekly installments until the entire purchase price should be paid, but holding out the prospect that the purchaser might for advertising purposes be given the article before the payments had been completed. The contracts further provided that a lapse in payment should work forfeiture. *Held*, that as the purchasers had no control over the way in which the prizes were to be distributed, and as the prizes were ordinarily given before any advertising was done, the transaction was a "lottery," which term in common parlance means a scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value, obtains a token, which entitles him to receive a larger or smaller value, as some formula of chance may determine; the fact that the purchasers could at all events keep up their payments, and ultimately receive the furniture, not changing the nature of the transaction.

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. § 3; Dec. Dig. ⟸3.

For other definitions, see Words and Phrases, First and Second Series, Lottery.]

Appeal from Superior Court, Edgecombe County; Ferguson, Judge.

Chas. G. Lipkin was convicted of conducting a lottery, and he appeals. Affirmed.

The prisoner was indicted in the court below for conducting a lottery in violation of Revisal, § 3726, which provides that it shall be unlawful to open, set up, promote, or carry on a lottery, publicly or privately, by any name or style, or by such ways and means expose to sale any real or personal property therein described, or goods or chattels, or anything of value whatsoever, and imposing a fine or imprisonment as the punishment for the offense as a misdemeanor. It also provides that any person who engages in disposing of any species of property whatsoever, money, or evidences of debt, or in any manner distributes gifts or prizes upon tickets or certificates sold for that purpose, shall be subject to prosecution under that section. The following is a copy of the contract referred to in the testimony of Mrs. Emma Jacobs, who first got a wardrobe under a

similar contract, and afterwards contracted for a sewing machine by this instrument:

"Mutual Supply Company, Incorporated.

"Authorized capital, $25,000.

"Furniture, rugs, jewelry, etc. Complete house furnishers. Direct from factory to home. The $17.50 Furniture Society. Corner Ninth and Broad streets, Richmond, Va. Entrance 214 North Ninth street. When calling on us, bring this contract with you.

"Mutual Supply Co., Inc. Contract No. 4473.

"We hereby agree to sell to the holder of this contract, Mrs. Emma Jacobs, and said party agrees to purchase a sewing machine or any one of the articles enumerated on the next page for the sum of $17.50 on the following terms and conditions: Each customer agrees to pay 25 cents per week until the sum of $17.50 has been paid, or until their name is selected by the company as an advertising medium. In order to advertise our business on a broader principle, we will distribute among our patrons each week several pieces of furniture. Patrons who are selected to receive the furniture will not be required to make any further payments, and will then be entitled to receive their furniture at once, providing their payments have been made regularly.

"No method of any kind dependent upon or connected with chance in any form whatsoever, enters into this contract. We do not authorize agents to make statements or arrangements, verbal or otherwise, to add, change or erase the terms of this contract.

"No money can be lost by lapsing, as the amount paid in can be applied at any time to the purchase of any $17.50 article. The furniture which is distributed each week is given solely for advertising purposes and the Mutual Supply Co., Inc., reserves the right to make the selection in such a manner as it considers best for the benefit of the business. The consideration of twenty-five cents paid on receipt of this contract shall constitute a full acceptance of the terms and conditions mentioned herein.

"Each contract will entitle the holder to a separate article unless by special agreement in office. No money refunded if discontinued.

"Partly filled contract bought or loaned from others cannot be used for redemption of articles enumerated herein.

"I have read this contract before signing same and am acquainted with its contents and as evidence that I understand and fully agree to the printed terms of this contract, I make my first payment. Signature: Emma Jacobs.

"Address: Tarboro, N. C."

Attached to the contract was a card, so arranged with blank spaces as to enter therein the payments made in each week to the number of 70, which would be $17.50 by addition of the weekly payments. There is also shown on the back of this paper a list of the articles of furniture (value $17.50 each) to be selected from by the ticket holders, and a copy of the contract or substantial portions thereof, for the company, with a similar card for entering payments on the back. On each contract are these entries at the bottom: "When calling on us, bring this contract with you. Pay to agent only first payment. Our authorized collector will call weekly"—and the title of the concern, as follows: "Mutual Supply Company, Incorporated. Authorized capital $25,000.00. Furniture, rugs, jewelry, etc. Complete house furnishers. Direct from factory to home. The $17.50 Furniture Society, Corner Ninth and Broad streets, Richmond, Va. Entrance 214 North Ninth street. No other but the stipulated terms in this contract will be recognized."

Mrs. Emma Jacobs, a witness for the state, testified:

"I live in Tarboro. Mr. Lipkin, the defendant, came to see me last March. Said he was from Richmond; that he wanted to get up a club to establish his furniture. I signed contract for wardrobe. (Admitted to be identical with 4473, taken also by this witness.) Defendant collected 25 cents each week, and I was to get wardrobe. I was going away and paid $2.25 in advance, and he said this would be all right. He (defendant) never said anything, just said he didn't know when my name would be called out. I did not get away, and I received card saying my wardrobe was here. I think wardrobe was worth $25. I paid $3.75 in installments. I took out other contracts to get sewing machine and sideboard. I paid installments to Mr. Lipkin. I can't say how many came to see my sideboard, so many did. I was in my room. Mr. Lipkin came in and asked me if I did not want to join the club, and told me how it worked; that he did not know when my name would be called, and I would pay 25 cents a week until it was called, and, when I thought I was going away, I paid in advance. He said I would have to pay until my name was called out. It might be a long time, or a short time. I expected to have to fill my card clean out; that is, pay $17.50. I received notice from Richmond that my name had been called out, and then received wardrobe and paid in $3.75. Mr. Lipkin came to my house every Monday to collect. I don't remember any conversation, except he would just come and say for me to pay. I was perfectly satisfied with furniture I got. A good many people came there to see my furniture. I understood, if I got others to join, I would get piece of furniture. They told me, if I got piece, others would join. Others came and saw my piece and said they were going to join. I stopped paying after Mr. Lipkin was indicted, because I thought I was going away. I was perfectly satisfied, and have heard no one complain."

Oscar Lloyd, witness for the state, testified:

"I am a barber, single man, and live in Tarboro. I signed that contract of Mutual Supply Company, No. 4492, for the purchase of a brass bed at $17.50. (It is admitted this contract is identical with No. 4473, of Emma Jacobs.) Mr. Lipkin did not get me to sign, but he came round to collect. Mr. Lipkin, when I asked him, said I would have to pay until I got something. If I got out, I would lose what I had paid in. I paid in 75 cents—three installments. I have never gotten anything. I stopped paying because I thought I was not going to get anything. No one told me to stop. I expected to get something if I stayed in. I stopped because I got tired paying in and not getting anything."

R. B. Hyatt, witness for the state, testified:

"I am sheriff of Edgecombe, and I know the defendant. He told me that he was representing a furniture house in Richmond. I told him a drawing like that was a violation of law. He said he was going to try it, and that it was an advertising scheme. He went on for some time before I arrested him. He said some of the members were to be drawn out each week. He was arrested June 11th. At the trial before the recorder, when he was convicted, it was understood there would be no new contracts, but collections would be made on the contracts existing, and everybody was to act in good faith pending the appeal in this case. I can't be positive he said 'selection' or 'drawing.' 'Selection' might have been his word; I don't recall. I

know one was to come off every week, but I don't recall if it was a drawing or selection."

The state rested its case.

Defendant moved to dismiss the action or for judgment of nonsuit, under chapter 73, Acts 1913. Motion denied. Defendant excepted.

Mr. Abrams, only witness of defendant, testified:

"I live in Richmond, Va. I am office manager of the Mutual Supply Company. I have been with them one year. I am familiar with their manner of doing business. Many thousands of dollars worth of stock is kept on hand. When an agent sells a contract, it is executed in duplicate. One copy is left with purchaser, and the original is filed. I have charge of them. In selections of furniture to be given members, there is no drawing of any kind. The selection is made in the following way: Many pieces of furniture are given away. For instance, if Mrs. Jacobs benefits the company, she receives her piece of furniture. We receive information from our agents if customers are benefiting business. The agent soliciting the trade keeps a record, which is filed with company, showing what benefit customer is to business, and, when furniture is given, we expect her to recommend her friends. Emma Jacobs gave us several names and her friends bought furniture. That is the advertising feature spoken of in contract, and she was selected for reason of advertisement. The article furnished Emma Jacobs was worth $17.50. Mr. Lipkin, the defendant, is our local collector. He got those contracts. I did not say Emma Jacobs got a $25 wardrobe for $3.75. I said it was worth $17.50. Mrs. Gray Andrews, of this place, was of great benefit to company. I have no stock in Mutual Supply Company. The principal office is 214 North Ninth street, Richmond, Va. Our chief warehouse is at 30 North Seventh street. It is a three-story building. We have all kinds of furniture direct from factory to home. We do not store much furniture. We have a great deal on hand. Mrs. Andrews paid 25 cents. She was of much benefit. Somebody got a brass bed. We may give away our furniture if we wish. We have many thousand members. We have not been run out of Rocky Mount, but are doing business there to-day. We number the contracts because we have many alike, and every contract is numbered and filed according to number. The numbers have nothing to do with selections. At present we give away things to advertise. I do not know of any concern like ours in Richmond. The numbers are put on contracts for the purpose of bookkeeping. Our agent is collecting in Rocky Mount this week. The only trouble we have had is in Wilmington, and it was agreed here we were to take no new contracts pending this appeal. Complaint was made by a dissatisfied customer in District of Columbia, and the district attorney investigated and refused to prosecute."

The state and defendant closed the case. Defendant renewed his motion to nonsuit or dismiss under chapter 73, Acts 1913. Motion refused. Defendant excepted. In apt time the defendant requested the court to give the following instructions to the jury:

(1) If the jury find the evidence offered by the state to be true, then they will return a verdict of "not guilty."

(2) If the jury find the undisputed evidence offered in this case to be true, then they will return a verdict of "not guilty."

(3) The jury are instructed that, if they find the evidence offered by the state to be true, they will return a verdict of "not guilty," for that if section 3726 of the Revisal of 1905, under which this prosecution is had, undertakes to prohibit the carrying on of the business of the Mutual Supply Company, Inc., for which defendant is salesman or agent, as is shown here by the evidence and contract, it would be void as contravening the Constitution of the United States for the following reasons: (1) Because said section to that extent would be in violation of first section of article 14 of the said Constitution of the United States, because it would deprive the defendant of his liberty and property without due process of law; and (2) because it would deprive the defendant under the first section, article 14, of the Constitution of the United States, of the equal protection of the laws, in this, that the furniture allotted to certain customers for advertising purposes under the terms of the contract offered in evidence does not come within the prohibition of said section 3726 of Revisal 1905.

The court refused to give any of these instructions, and defendant excepted. The court instructed the jury, if they believed the evidence, to return a verdict of "guilty." Defendant excepted. Verdict of guilty and judgment thereon. Defendant appealed.

Melvin Flegenheimer, of Richmond, and J. M. Norfleet, of Tarboro, for appellant. Attorney General Bickett and T. H. Calvert, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1] It is well settled that laws and regulations necessary for the protection of the health, morals, and safety of society are strictly within the legitimate exercise of the police power, and, in the interpretation of such remedial statutes, the office of the judges, it has been said, is to make such a construction as will suppress the mischief and advance the remedy, and to defeat all evasions for the continuance of the mischief. Magdalen College Case, 11 Co. 71b.

[2] The word "lottery" is not a term of the common law, and to dispose of real or personal property by lot is not an offense which has a recognized and established legal definition, and therefore, in construing the statute, we must be guided chiefly by the meaning of the term as it is ordinarily used in a popular sense, and by reference to the mischief intended to be redressed. State v. Clarke, 33 N. H. 329, 66 Am. Dec. 723. A lottery, for all practical purposes, may be defined as any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token, which entitles him to receive a larger or smaller value or nothing, as some formula of chance may determine. This definition has generally been approved by the authorities. State v. Perry, 154 N. C. 616, 70 S. E. 387, and cases cited; Long v. State, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268. In the case last cited, as showing the strong trend of judicial thought in this country against lottery enterprises, the court said that it will appear, from the many cases decided upon the subject, to be difficult, if not impossible, for the most ingenious and subtle mind to devise any scheme or plan, short of

a gratuitous distribution of property, which has not been adjudged as in violation of the lottery or gambling laws of the various states, which are mostly alike. And we say that, no sooner is a lottery defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter, of the definition. But, in this way, it is not possible to escape the law's condemnation, for it will strip the transaction of all its thin and false apparel and consider it in its very nakedness. It will look to the substance and not to the form of it, in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent. The court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited, or if it has the element of chance. It is the one playing at the game who is influenced by the hope enticingly held out, which is often false or disappointing, that he will, perhaps and by good luck, get something for nothing, or a great deal for a very little outlay, This is the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing.

In Thomas v. People, 59 Ill. 160, it was urged, in defense of a similar scheme, that no plan of distribution had been decided upon; that the purchasers were to receive certain articles in a just and legal manner; and that a plan might be devised, at the proper time, which would neither violate the law nor be in contravention of good morals. The court replied that, if the prizes were distributed "in a just and legal manner," it should be done in an honest, upright, and equitable one, and there should be perfect fairness and equality. The plan would be utterly violated if any one of the numerous purchasers should fail to receive a prize. The distribution could not be in a "just and legal manner," unless the number of purchasers was the same as the number of prizes, and the prize received proportional, as nearly as possible, to the amount of money paid. It is barely possible, but most improbable, that the purchasers would be the same in number as the presents. We could not indulge in so unreasonable a presumption, even in a criminal proceeding. In ordinary affairs, we must reason upon probabilities, deduce conclusions from facts, and not indulge in mere conjectures. We have no right to harbor wild imaginings, to change a reasonable and probable result. The court then says:

"Had not this plan been watched by the vigilance of the law, can there be any doubt that numerous persons would have purchased tickets, prompted by the hope of gain? Are there not inseparably connected with it the same fascination and excitement and intense desire for gain, which gather around the gaming table? Like any other species of gambling, lotteries have a pernicious influence upon the character of all engaged in them. This influence may be as direct and the immediate consequences as disastrous, as in some kinds of gambling, which rouse the violent passions and stake the gambler's whole fortune upon the throw of a die. The temptations, however, are thrown in the way of a larger number and a better class. The evil may spread more widely and infect more deeply. It is said that the plan was undetermined, and that the wisdom of the 'advisory committee would have devised one, just and equal.' So chance is always undetermined. It neither forms nor designs. Intention is never attributed to it; its events are uncertain. The promise of the handbill that the distribution shall be in a just and legal manner is evasive. We are not bound to determine the intention from the language alone, but from all the facts, and the reasonable deductions from facts."

That case is a fair comment and a just criticism upon the facts of this one, showing the clear illegality of the transaction. It is not pretended here that the projector of this enterprise, either in the matter of volition, as to the giving of presents, or of approbation, as to the recipients of them, founds its action on any settled rule of conduct, or judges by any standard of comparison or selection, which would appear reasonable to itself or to others. State v. Shorts, 32 N. J. Law, 398, 90 Am. Dec. 668; Com. v. Wright, 137 Mass. 250, 50 Am. Dec. 306. So far as appears, the choice among those who are to receive its favors is based upon nothing more than its arbitrary will, exercised for its own benefit, in advancing its scheme by advertising, it may be admitted, but this does not alter the case, as all such concerns are organized and set up for just this purpose. Nor does it matter that the person who buys a chance for a trivial sum, in the expectation of winning something of much larger value, can go on with his contributions, and, after paying the full amount of $17.50, get the piece of furniture he may want. This has been held not to divest it of its gambling quality. State v. Perry, supra; De Florin v. State, 121 Ga. 593, 49 S. E. 699, 104 Am. St. Rep. 177; State v. Moren, 48 Minn. 555, 51 N. W. 618. In the case last cited, it is said that such a feature would probably operate as an additional incentive to purchase a chance in the lottery scheme, and does not take it out of the statute, as the vicious element still inheres in it. The sale of the ticket gave the purchaser the chance to obtain something more than he paid for it, and the other fact became an extra inducement for the purchase, making the general scheme more attractive and alluring. The difference between it and a single wager on the cast of a die is only one of degree. They are both intended to attract the player to the game and have practically the effect of inducing others, by this easy and cheap method of acquiring property of value, to speculate on chances in the hope that their winnings may far exceed their investment in value. This is what the law aims to prevent in the interest of fair play and correct dealing, and in order to protect the unwary

against the insidious wiles of the fakir or the deceitful practices of the nimble trickster. Call the business what you may, a "gift sale," "advertising scheme," or what not, but it is none the less a lottery, and we cannot permit the promoter to evade the penalties of the law by so transparent a device as a mere change in style from those which have been judicially condemned, if the gambling element is there, however deep it may be covered with fair words or deceitful promises. If it differs from ordinary lotteries, it is chiefly in the fact that it is more artfully contrived to impose upon the ignorant and credulous, and is therefore more thoroughly dishonest and injurious to society. So far as those who manage schemes of this character can be supposed to give the credulous persons who deal with them any chance whatever of a return in greater value for their investment, the chance lies in the purchase of the right to participate in the favor offered or held out to tempt the gambling instinct and thereby to prosper the business of the unlawful concern. Dunn v. People, 40 Ill. 465. All pay them money, at least in part, for the chance of winning a prize of greater or less value in proportion to what they hazard, however it may be glossed with some apparent safeguard against loss. Many will take the chance of the play, not expecting to continue the payments if they should lose at the first, second or third attempt, or at some later period. According to every correct idea of legal definition or conception, this must be gaming within the meaning of the law, whether we construe it in letter or in spirit. All new artifices designed to evade and cheat the law, and entrap the unwary or ignorant, are but aggravations of the offense, and, the more ingenious and deep-laid they are, the greater the wrong. Bell v. State, 37 Tenn. (5 Sneed) 507.

In the De Florin Case, supra, referring to the contention of the defendant that the purchaser of a ticket could continue to pay and get the goods, the court said:

"The fact that a member who was unlucky in the drawing of prizes might, by continuing to pay a dollar a week for thirty weeks, receive a suit of clothes regardless of the result of the drawings, does not make the transaction any the less a lottery; for the lucky members of the club won prizes varying in value from $1 to $29."

And the court quoted from Shumate's Case, 15 Grat. (Va.) 653, the following passage as a full answer to the position:

"It is true that a bet does imply risk, but it does not necessarily imply risk in both parties. There must be between them a chance of gain and a chance of loss; but it does not follow that each of the parties to the bet must have both these chances. If, from the terms of the engagement, one of the parties may gain but cannot lose, and the other may lose but cannot gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and of loss."

See, also, an elaborate and exhaustive discussion of the question by Justice Cobb in Meyer v. State, 112 Ga. 20, 37 S. E. 96, 51 L. R. A. 496, 81 Am. St. Rep. 17.

The ingredient of chance is, obviously, the evil principle which the law denounces and will eradicate, however it may be clothed, or however it may conceal itself in a fair exterior. It is, by this means, that cupidity is solicited or an appeal is made to avarice, for, if fortune be propitious, or chance should favor him, either in his selection as the winner of its favor, or in the mere turn of a wheel, or the throw of the dice, or the fall of the coin, a return of value is expected for the small consideration or trivial price paid for the privilege of being thus favored. State v. Shorts, 32 N. J. Law, 398, 90 Am. Dec. 668. The case of State v. Clarke, 33 N. H. 329, 66 Am. Dec. 723, appears to be very much in point. The court said of a similar enterprise:

"The jury were well warranted in finding that, according to some scheme upon which the defendants professed to act, there was a correspondence between the numbers placed on the books purchased and the different articles proposed as gifts or prizes, by which, when the book was purchased, the defendants ascertained what gift or prize the purchaser was entitled to have, according to their scheme. The defendants, on the evidence, appear to have held out that notion to the public, and the jury were at liberty to find that, so far, at least, the business was fairly conducted. The purchaser did not know, when he bought his book and paid his money, what prize or gift the number on it would entitle him to receive, and it was with him as much a matter of lot and chance as if he had drawn the number from a hat. He paid more than the book was worth, and the excess must be understood to have been paid for this chance. As to the real nature of the contrivance, it stands as if the excess had been paid for the chance, without any sale of a book to color the transaction."

The same contention was made there, as in this case, that the choice of persons to receive the furniture was not by lot or chance, but by the judgment of the company which proposed to sell; but the court rejected it, and thus showed its fallacy:

"With the purchaser, what prize he might obtain was a mere matter of lot and chance. The scheme involved substantially the same sort of gambling upon chances as in any other kind of lottery. It appealed to the same disposition for engaging in hazards and chances with the hope that luck and good fortune may give a great return for a small outlay, and as we think within the general meaning of the word lottery, and clearly within the mischief against which the statute is aimed." Randle v. State, 42 Tex. 580.

Defendant's counsel, in their able and learned argument, have cited us to People v. Elliott, 74 Mich. 264, 41 N. W. 916, 3 L. R. A. 403, 16 Am. St. Rep. 640; but, upon examining the case, we find this stated:

"It is not the drawing of the lots, but the disposing and selling of the chances, that brings the case within the statute. It is promoting the lottery for money by paying the money for the chances of receiving more. It is of little consequence where the drawing takes place. These views to some extent will be found supported in

the following authorities: (Citing many cases.) It is thought by counsel for defendant that this case is ruled by People v. Reilly, 50 Mich. 384 [15 N. W. 520, 45 Am. Rep. 47]. That case, however, is different. There the contingency was one upon which the parties interested could exercise their reason and judgment under an agreement upon which the money was paid and was in its nature executory. In this case the money was paid when the chance was obtained, and there was no opportunity for exercising the reason or judgment or any other faculty of the mind; and hence the lottery."

We think this substantially supports our view of the question. So far as we can see from the evidence, the managers of the "Mutual Supply Company" exercised no more than an arbitrary choice of its customers as recipients of its gifts; but, however that may be in fact, the vice of the whole scheme lies farther back than that, and is found in the "chance" which the customer takes when he pays his money under the terms of the contract and the temptation held out to arouse the gambling spirit, which is just as evil and debasing as if there were any other kind of chance taken, and, besides, if he fails once or twice, or more times to win the prize, and discontinues paying, he loses all that he has paid. So that if tempted by this cunning device, which so insidiously appeals to this gambling instinct, his money is risked in the hope of drawing a piece of furniture of much larger value, the person so investing it may lose or win, and in either event may retire, forfeiting what he had paid in the one case, and retaining what he has drawn in the other as the profit of his venture. The only difference between this case and that of State v. Perry, 154 N. C. 616, 70 S. E. 387, is that there the suit of clothing was drawn by lot; but there is the same element of chance here, even if in a less degree, as there is no rule or standard for the investor to determine what his luck will be, nor can the managers of the scheme forecast at the time of hazard what the result will be. Mrs. Jacobs, as the evidence shows, performed no services, if any at all, until after she had received the wardrobe, which she exhibited and extolled to her friends, who doubtless considered it a good return for so small an outlay in money, and concluded to take the same risk, hoping to be favored with the same kind of good fortune. The temptation was increased by holding out that they might not lose if they continued in the game to the end. State v. Perry, supra, where we held, citing 25 Cyc. 1639:

"Suit clubs, the members of which pay weekly dues and have weekly drawings for suits, the unsuccessful members being entitled to receive a suit eventually, after the payment of a stipulated amount, or to withdraw and take out in trade the installments which they have paid, are lottery schemes."

We further said in that case:

"It will be seen by examination of the authorities that chance is an essential element of a lottery, whether that chance be as to any return, or merely as to the amount or value of the return; and, as thus considered, where there is a hazard in which sums are ventured upon the chance of obtaining a greater value, the scheme partakes of the nature of a lottery; that is, something gained or won by lot. 5 Words and Phrases, pp. 4245 and 4246, where many cases are collected. The definition of the term 'lottery,' given above, has been approved by this court. State v. Lumsden, 89 N. C. 572."

In the view we take of the case, it comes within that principle, and the courts will not be deceived or misled by attractive names or professions of honest intentions. As said by the court in State v. Morris, 77 N. C. at p. 516, referring to the language of Justice Grier in Phalen v. Virginia, 8 How. 168, 12 L. Ed. 1030:

"The 'North Carolina Beneficial Association' is an imposing title, but the law has pronounced it in its lottery features to be a cheat and a nuisance to be suppressed like other public pestilences. Of all the forms of gambling, it is the most widespread and disastrous, entering almost every dwelling, reaching every class, preying upon the hard earnings of the poor, and plundering the ignorant and simple."

Having decided this question against defendant, it follows that, if we are right, there is nothing in the case involving the violation of defendant's rights under the fourteenth amendment to the federal Constitution. The state has the right to enforce all needful police laws and regulations for the preservation of the health, morals, and safety of the people, and especially for the suppression of lotteries. Boyd v. Alabama, 94 U. S. 645, 24 L. Ed. 302; Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079; Douglas v. Kentucky, 168 U. S. 488, 18 Sup. Ct. 199, 42 L. Ed. 553. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination of its police powers is not final or conclusive, but is subject to the supervision of the courts. This must needs be so, and it was so definitely held in Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; but no violation of private right is presented in this case.

We are also inclined to the opinion that the Legislature intended by the last words of section 3726, being the amendment made by Acts of 1874–75, c. 96, to enlarge the scope of the previous enactment so as to include enterprises of this kind; but it is unnecessary to decide this question, as it is sufficient to hold that the scheme is a lottery within the intent and meaning of the statute.

No error.

(168 N. C. 337)

F. S. ROYSTER GUANO CO. OF VIRGINIA, Inc., v. LUMBER CO. et al.

(No. 71.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

1. INJUNCTION ⟸163—TEMPORARY INJUNCTION—CONTINUANCE.

Where a permanent injunction is the sole object of the action and the evidence raises a serious question as to the facts affecting plaintiff's rights, a temporary injunction should be continued until final hearing.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357–371; Dec. Dig. ⟸163.]

2. MUNICIPAL CORPORATIONS ⟸680, 681 — STREETS—CONTROL OVER—NUISANCE.

While streets are subject to the control and management of city authorities, such authorities cannot alien or otherwise incumber the streets, but must hold them for public use only. Hence they have no authority to allow the erection of a hoist over a street which will impair its usefulness, such a permanent encroachment being a nuisance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1459–1466; Dec. Dig. ⟸680, 681.]

Appeal from Superior Court, Edgecombe County; Ferguson, Judge.

Action by the F. S. Royster Guano Company of Virginia, Incorporated, against the Lumber Company and others. A motion for injunction to the final hearing was denied, and plaintiff appeals. Reversed.

Gilliam & Gilliam, of Tarboro, for appellant. Allsbrook & Phillips, of Tarboro, for appellees.

BROWN, J. The object of this action is to enjoin the defendants from erecting across a public street of the town of Tarboro an electric trolley or hoist. The facts are, as set forth in the complaint and supported by affidavits, that the defendants have built an electric trolley or hoist, supported by posts across the alleged public street of the town of Tarboro, leading from the East Carolina Railway to the river, over which it is proposed to transport the logs and other articles of transportation from Tar river to the defendant's factory, and also much of its finished product. This hoist is about 12 feet above the level of the ground. Under it every team must pass in going to and fro from the plaintiff's factory and the public boat landing on Tar river. The street in question has been opened and in public use for a great many years, and is the only passageway to the plaintiff's factory or to the boat landing. Many affidavits tend to prove that the operation of this hoist is calculated to frighten teams and is attended with danger; that many customers of the plaintiff would be unwilling to patronize the plaintiff and risk their teams passing under it; that, by reason of the obstruction of this street by this electric hoist, the plaintiff would lose many customers, would have to abandon its plant, and would suffer irreparable damage. The defendants are private corporations. In August, 1914, Mr. H. C. Bridgers, who is likewise controlling owner of the Lumber Company, appeared before the board of commissioners of the town of Tarboro and asked permission to install an electric hoist across the street leading to the boat landing for the purpose of loading and unloading freight of that company. He stated to the board that the public would not be inconvenienced. At a regular meeting of the board on August 10th, the following proceedings were had, as appears from the minutes of said board:

"Commissioners J. D. Jenkins and M. P. Williams, as representing the committee appointed to investigate the request of Mr. H. C. Bridgers asking the board's permission to cross the street leading to the boat landing with electric hoist, reported they saw no objection to letting this hoist be installed, provided the bottom of said hoist be 12 feet above the street, and if this became a nuisance, that the board had a right to rescind order at a later date. On motion of Commissioner R. H. Hyman, it was ordered by the board that permission be granted Mr. Bridgers to cross the street with his hoist, provided the town had legal authority to do so, and if not, Mr. Bridgers was to remove the hoist."

[1] The above order of the commissioners is the authority under which the electric hoist was erected. That order seems to recognize the fact that the passway over which the hoist was located is a public street of the town. It is well settled that where a permanent injunction is the sole object of the action, and the evidence raises serious question as to the facts affecting the plaintiff's right, the temporary injunction should be continued to the final hearing. Stancill v. Joyner, 159 N. C. 617, 75 S. E. 853; Tise v. Whitaker, 144 N. C. 507, 57 S. E. 210.

[2] It is generally held that the public streets of a city are dedicated to the public and for public use. While they are subject to the control and management of the city authorities, they have not power to alien or otherwise incumber the streets, but must hold them for public uses only, and they have no right, generally speaking, to grant an easement or right other than of a public nature. A permanent encroachment or a permanent obstruction of it is in law a nuisance.

We have held, in Butler v. Tobacco Co., 152 N. C. page 416, 68 S. E. 12, 136 Am. St. Rep. 831:

"The town authorities hold the streets in trust for the purpose of public traffic, and cannot, in the absence of statutory power, grant to any one the right to obstruct the street, to the inconvenience of the public, even for public purposes, and for private purposes not at all, * * * for the entire street from 'side to side, and from end to end, belongs to the public.'"

In State v. Edens, 85 N. C. page 522, it is said:

"Any permanent obstruction to a public highway, such as would be caused by the erection of a fence or building thereon, is of itself a nuisance, though it should not operate as an actual obstacle to travel, or work a positive in-

convenience to any one. It is an encroachment upon a public right, and as such is not permitted by the law to be done with impunity."

This case is cited in the note of Hagerstown v. Whitmer, 39 L. R. A. 662, where there is a lengthy discussion of obstruction of public streets by buildings, fences, and the like. This case and notes fully and abundantly sustain the proposition that any reasonable interruption of the public use of a street is an unlawful obstruction and a permanent obstruction, in law a nuisance. See, also, Hibbard v. City of Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; Callahan v. Gilman, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831. In the latter case it is said:

"The primary purpose of streets is use by the public for travel and transportation, and the general rule is that any obstruction of a street or encroachment thereon which interferes with such use is a public nuisance. But there are exceptions to the general rule, born of necessity and justified by public convenience. An abutting owner engaged in building may temporarily encroach upon a street by the deposit of building materials. A tradesman may convey goods into the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers. But all such interruptions and obstructions of streets must be justified by necessity and must, also, be reasonable with reference to the rights of the public, which may not be sacrificed or disregarded."

See Abendroth v. R. R., 122 N. Y. 1, 25 N. E. 496, 11 L. R. A. 634, 19 Am. St. Rep. 461; White v. R. R., 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639; 28 Cyc. p. 873, where it is said:

"Except where authorized by the Legislature, a municipality has no power to grant the right to use a street in a manner not consistent with the right of the public."

We think his honor erred in dissolving the injunction.

Reversed.

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(168 N. C. 333)

**THOMPSON et al. v. BATTS et al. (No. 69.)**

(Supreme Court of North Carolina. Feb. 24, 1915.)

1. DEEDS ⟸13—ESTATES CREATED—REMAINDER—HEIRS OF GRANTOR.

At common law a remainder to the heirs of a grantor after a particular estate granted to another was void unless it was apparent from the instrument that the word "heirs" was intended to mean children, since no one could be the heir of a living person, and the estate reverted to the grantor himself at the termination of the particular estate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 21, 22; Dec. Dig. ⟸13.]

2. DEEDS ⟸105 — ESTATES CREATED — REMAINDER—STATUTE.

Under Revisal 1905, § 1583, providing that any limitation to the heirs of a living person shall be construed to mean the children of such person, unless a contrary intent appears, an antenuptial deed by a widower who had children by his first wife then living, to his second wife, conveying the land to her for life, remainder to her children, the issue of the marriage, and on failure of issue to revert to the heirs of the grantor, conveys the remainder to the children by the first wife, and the grantor could not devise the fee away from them; since that statute, though not applying where the remainder is granted to the heirs of the grantee of the particular estate, does apply to a remainder to the grantor's heirs after a particular estate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 278–291, 372–374; Dec. Dig. ⟸105.]

Appeal from Superior Court, Wilson County; Ferguson, Judge.

Action by T. J. Thompson and others against N. A. Batts and others for partition. From a decree finding the defendants sole owners of the property, the plaintiffs appeal. Reversed.

This is a proceeding for partition of a tract of land which originally belonged to Alfred Thompson, who was twice married. He had children by the first marriage, and no children by the second marriage.

On February 6, 1879, in contemplation of his second marriage, he executed a deed to his intended wife, Martha Jane, conveying the land in controversy for life, and with the following limitations:

"The aforesaid tract of land to descend to the heirs of the body of said Martha Jane in fee simple, the issue of such marriage, and on failure of issue to revert to the heirs of said Thompson."

Alfred Thompson died before his wife, leaving those represented by the plaintiffs as his heirs, and also leaving a will in which he devised the land to those represented by the defendants.

His honor held that, upon the death of Martha Jane without issue, the title reverted to Alfred Thompson and passed to the defendants by his will, and entered judgment accordingly, and the plaintiffs excepted and appealed.

F. A. & S. A. Woodard, of Wilson, Jacob Battle, of Rocky Mount, and Winston & Biggs and Robert C. Strong, all of Raleigh, for appellants. W. A. Finch and H. G. Connor, Jr., both of Wilson, for appellees.

ALLEN, J. [1] The plaintiffs contend that the words in the deed "the heirs of said Thompson" mean children, and that they take by way of contingent remainder; while the contention of the defendants is that, the word "heirs" being used in connection with the name of the grantor, there can be no remainder, upon the familiar maxim, "Nemo est hæres viventis," and that upon the happening of the contingency the estate reverted to the grantor and passed to them under his will. This position of the defendants seems to have prevailed at common law; the principle being that, as no one could be heir to the living, the attempted limitation to the heirs of a living person was void, and, being void upon the happening of the contingency and the determination of the intermediate estate, there was a reverter to the grantor.

Fearne says (page 51):

"A limitation to the right heirs of the grantor will continue in himself as the reversion in fee. As, where a fine was levied to the use of the wife of the conusor for life, remainder to the use of B. in tail, remainder to the use of the right heirs of the conusor, it was adjudged that the limitation of the use to the right heirs of the conusor was void, for that the old use of the fee continued in him as a reversion."

In Read & Morpeth v. Evington, Moore K. B. 284, it was ruled that:

"If a man seised in fee make a feoffment to the use of A. in tail or for life, remainder to the use of his own right heirs, the land, upon the death of A. without issue, returns to the feoffer as his ancient reversion, and does not rest in his right heir as a remainder by purchase."

Sir Edward Coke says:

"If a man make a gift in taile, or a lease for life, the remainder to his own right heirs, this remainder is void and he hath the reversion in him, for the ancestor during his life beareth in his body (in the judgment of law) all his heirs." Co. Litt. 22.

In Hargrave & Butler's notes, first American edition, from the nineteenth London edition of 1853, one of the notes to this section states the following case, being note 3:

"Feoffment to the use of a feoffee for forty years, remainder to 'B' in tail, remainder to the right heirs of the feoffor. It is the old reversion, and the feoffor may devise it; for the use returned to the feoffer for want of consideration to retain it in the feoffee till the death of the feoffor."

See, also, 2 Washb. Real Property, 692, and Robinson v. Blankenship, 116 Tenn. 394, 92 S. W. 854, 24 A. & E. Ency. L. 398.

The same principle is recognized in King v. Scoggin, 92 N. C. 99, 53 Am. Rep. 410, where the court says:

"It is true remainders are created by deed or writing, but the estate is sometimes created so that what is called a remainder is, in effect, only a reversion; as, for instance, when an estate is given to one for life, remainder to the right heirs of the grantor (2 Washburn on Real Property, 692; Burton on Real Property, 51), and this must be the kind of remainder classed with reversions which go to the donor or to him who can make himself heir to him."

This rule as to the effect of using the word "heirs" in connection with a living person was not invariable at common law, as is pointed out by Justice Walker in Campbell v. Everhart, 139 N. C. 511, 52 S. E. 201. He says:

"It appears to have been established by the authorities that prima facie the word 'heir' should be taken in its strict legal sense, but, if there was a plain demonstration in the will that the testator used it in a different sense, the court would assign that meaning to it; what was sufficient to show that the testator did not intend that it should have its technical construction depending largely upon the language employed in connection with it and the circumstances under which the word was used. Broom's Legal Maxims (8th Ed.) 521, marginal page 523. It was likewise held in the case of a will that the rule had no place, if the testator knew of the existence of the parents and intended his devise to take effect during his life. Broom, 524. * * * But the maxim was also extended to deeds, and a limitation (the word is here used in the sense of conveyance) 'to the heirs of a person' who is living was held to be void for uncertainty, as no one can in any proper sense be the heir of a living person, and it could not therefore be known who were to have the benefit of the conveyance, but it was likewise the rule in regard to a deed that, if anything appeared on its face to indicate that the grantor used the word 'heirs' as designatio personarum, or if a preceding estate was created so as to make the limitations to the heirs of the living person a contingent remainder depending for its vesting upon the event of the death of the ancestor before the life estate terminated, the word 'heirs' was construed to mean children."

[2] Assuming, however, that the principle prevails with us unimpaired, except, as changed by statute, it remains to consider the effect of Revisal, § 1583, which was adopted in this state in 1827, and reads as follows:

"Any limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will."

The learned counsel for appellees, adverting to the position of the plaintiffs that the word "heirs" in the deed means children under the statute, says:

"This would possibly have been so, had there been no intervening estate conveyed; but an estate having been conveyed to Martha Jane Edmundson with the contingent limitation over, which possibly might vest and thereby defeat any estate in the heirs of Alfred Thompson, would take this out of the terms of the statute."

And in support of his view he relies on Jones v. Ragsdale, 141 N. C. 200, 53 S. E. 842; Marsh v. Griffin, 136 N. C. 334, 48 S. E. 735.

We do not agree with counsel that the rule of construction declared by the statute does not operate when an intervening estate is conveyed, nor do we think the authorities cited support this contention, but that the effect of the decisions is that, where there is a conveyance to a living person with a limitation to his heirs, the statute is not applicable, which is not our case, because here the limitation is to the heirs of the grantor and not to the heir of the grantee.

The words in the habendum in the Marsh Case were:

"To her, the party of the second part, her heirs and assigns during her natural life, and at her death then to belong to her bodily heirs, to have and to hold in fee-simple forever."

And the court said:

"The contention that this deed gave her only a tenancy in common with her children is unfounded. The Code, § 1329, providing that a limitation 'to the heirs of a living person shall be construed to be the children of such person,' applies only when there is no precedent estate conveyed to said living person, else it would not only repeal the rule in Shelley's Case, but would pervert every conveyance to 'A. and his heirs' into something entirely different from what those words have always been understood to mean."

This language of the court was quoted with approval in the Jones Case and applied to a conveyance to—

"Zilphia S. Jones and her heirs by her present husband, Levy Jones, the land in controversy

* * * to have and to hold the said land and appurtenances thereunto belonging, to the said Zilphia Jones and her heirs by her present husband, and assigns to her only use and behoof."

We are therefore without decision upon the statute upon the facts presented here, and, as the case of the defendants rests upon the position that the limitation in the deed is to the heirs of a living person, we must give effect to the statute, and hold that "heirs" "shall be construed to be the children of such person," as no contrary intent appears in the deed.

An examination of the entire deed indicates very clearly that the grantor did not anticipate that he would survive his wife, or that there was a possibility of reverter to him. He conveys the land in lieu of dower, and immediately following the clause we have been considering provides:

"That the said Martha Jane shall have one year's provision for self and family out of the personal estate of said Thompson at his death, to be set apart to her in the usual way; and also two feather beds, now her own; in addition thereto it is agreed that the said Martha Jane shall receive a child's part of the personal estate of said Thompson at his death. And should said Thompson hereafter acquire any real estate the said Martha Jane may dower on the same."

Upon careful consideration of the case, being of opinion that "heirs" is to be construed children, and, as such, they take by way of contingent remainder, the judgment is reversed.

Reversed.

(168 N. C. 326)

## ZOLLICOFFER v. ZOLLICOFFER et al.

(No. 114.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

1. GIFTS ⇐=29—INTER VIVOS—STOCK CERTIFICATE—DELIVERY.

An owner of a stock certificate desired to give it to a grandchild. She requested the grandchild's father to take it and hold it for her, but he declined, stating that the owner was the one to hold it. The owner placed it in her Bible for safe-keeping, and thereafter stated that she had given the certificate to the grandchild. *Held* to justify a finding of the necessary delivery of the stock certificate, so as to make a gift inter vivos.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 50; Dec. Dig. ⇐=29.]

2. TRIAL ⇐=139—QUESTION FOR JURY—EVIDENCE.

Evidence, though slight, but more than a scintilla, carries the case to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 333–341, 365; Dec. Dig. ⇐=139.]

3. WITNESSES ⇐=139 — TRANSACTIONS WITH DECEASED PERSONS.

Testimony of a guardian, suing an executor to establish a gift made by testatrix to the guardian's ward as to what occurred between testatrix and the executor, was admissible as against the objection that the guardian could not testify as to any communication or transaction between himself and testatrix.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 582–597; Dec. Dig. ⇐=139.]

4. APPEAL AND ERROR ⇐=1053 — HARMLESS ERROR—GIFTS INTER VIVOS—SUIT TO ESTABLISH—EVIDENCE.

In a suit against an executor to establish a gift inter vivos made by testatrix, the admission of the subsequent will of testatrix, followed by the court's charge that the will did not create any trust in the property forming the subject of the alleged gift, was not erroneous.

[Ed. Note.—For other cases see Appeal and Error, Cent. Dig. §§ 4178–4184; Dec. Dig. ⇐=1053.]

5. TRIAL ⇐=260—ISSUES—REQUISITES.

Where the issues submitted presented the matters involved, it was not error to reject issues tendered by the defeated party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⇐=260.]

6. TRIAL ⇐=256—INSTRUCTIONS — REQUESTS —NECESSITY.

A party desiring more specific instructions on a subject than those given by the court must request them or he cannot complain on appeal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628–641; Dec. Dig. ⇐=256.]

Appeal from Superior Court, Halifax County; Bond, Judge.

Action by D. B. Zollicoffer, guardian of Catherine A. Zollicoffer, against E. T. Zollicoffer, executor, and another, executrix of Mrs. S. A. Thomas, deceased. From a judgment for plaintiff, defendants appeal. Affirmed.

The plaintiff, D. B. Zollicoffer, brought this action, as guardian, to recover for his ward, Catherine A. Zollicoffer, who is his daughter, a certain certificate for ten shares of stock in the Roanoke Bridge Company of the par value of $1,000. The bridge company has no interest in the action, being only a nominal defendant, and agreeing to transfer the stock on its books and issue a certificate therefor to whomsoever the court may direct. The stock stands upon the books of said company in the name of Mrs. S. A. Thomas, the defendants' testatrix. The plaintiff claims the stock as the property of his ward, for the reason that the defendants' testatrix, some seven months prior to her death and about four months prior to the making of her last will, gave the certificate of stock to his ward. The defendants admit that their testatrix intended at the time to give the stock to the ward of the plaintiff, her granddaughter and their younger sister, but contend that she failed to complete the gift, and afterwards revoked her intention, made a will giving the ward of the plaintiff $1,000 in cash, which has been paid, in lieu thereof, and bequeathed the stock to defendants as residuary legatees and devisees under her will.

The plaintiff married the only child and daughter of the defendants' testatrix. They had eight children living at the time of the defendants' testatrix's death. Mrs. Thomas left a will giving legacies to her daughter and each of her other grandchildren, and bequeathing the rest and residue of her estate, after paying the debts and legacies, to the defendants, who are her executor and

executrix, and the two eldest of her grandchildren. There was some evidence that Mrs. Thomas placed the certificate of stock, after she had indorsed it to Catherine A. Zollicoffer, in her Bible; and it is admitted that it disappeared therefrom, in some way unknown, prior to her death. Before placing it in the Bible, she had requested the plaintiff, who was not then guardian, to take it and keep it for his daughter, Catherine Zollicoffer, but he declined to do so, stating that she was the one to hold it for her.

At the trial, upon an issue submitted to the jury, they found that plaintiff is the owner of the certificate of stock, and, from the judgment on the verdict, the defendants appealed.

Mason, Worrell & Long, of Jackson, and George C. Green, of Weldon, for appellants. F. S. Spruill, of Rocky Mount, and William L. Knight and W. E. Daniel, both of Weldon, for appellee.

WALKER, J. (after stating the facts as above). [1] It seems to us, after making a careful analysis of this case, that the question presented by it is largely one of fact. Defendants contended that there was no evidence of a delivery of the certificate of stock to Catherine A. Zollicoffer or to any one for her. If there was such evidence, then it was the province of the jury to pass upon it and decide the issue. The certificate had been issued to Mrs. Thomas, and it does not appear to have been denied, and it would be vain to deny, that she wished to give it to her granddaughter, the ward of the plaintiff. She failed to do so in the best way conceivable; that is, by indorsement to her and delivery of the certificate, either to her personally, or to some one for her. Her effort to do so miscarried, because the plaintiff would not receive the certificate, at Mrs. Thomas' request, and hold it for his daughter, thinking that, for some reason, it was best for Mrs. Thomas to hold it for her. At any rate, Mrs. Thomas retained the certificate and placed it in her Bible for safe-keeping, but some one either abstracted it therefrom, or it was lost or destroyed accidentally. It can make no material difference, in our view of the case, how it disappeared, if there was a delivery or valid transfer of the certificate ever made. The whole case turns upon what Mrs. Thomas said or did in regard to it. There was testimony to the effect that she stated, after the stock was placed in the Bible, that she had given it to her granddaughter, Catherine Zollicoffer, and whether she had done so or not was manifestly a question for the jury. The judge submitted it to the jury, with proper instructions to find the fact, placing the burden of proving the issue upon the plaintiff.

[2] The evidence of the fact may have been very slight, but it was more than a scintilla, and, when this is so, it carries the case to the jury. Wittkowsky v. Wasson, 71 N. C. 451. We cannot say that the evidence did not reasonably warrant the verdict, or that there was only room for a mere guess or conjecture. Byrd v. Express Co., 139 N. C. 273, 51 S. E. 851. We decided in Gross v. Smith, 132 N. C. 604, 44 S. E. 111, that where a party stated that he had given personal property to another, in the absence of explanation, or restriction, it included the idea that he had delivered it, as delivery is essential to a valid gift. "All courts," we there said, "hold that delivery is necessary to the validity of the gift, but the fact of delivery may be found by the jury from the acts, conduct, and declarations of the alleged donor, just as any other material fact may be found in the same way from the acts, conduct, and declarations of a party to be affected thereby. What is a gift is a question of law, but whether or not there was a gift in any particular case is a question for the consideration of the jury upon the testimony." In Rooney v. Minor, 56 Vt. 527, it was held that the admissions of an intestate that she had made the gift did not prove the fact in the sense that it was conclusive, but that it was some evidence to be weighed by the jury upon the question of delivery. It tended to show the fact, though it was not sufficient in law to constitute a gift inter vivos, unless the jury should find therefrom that there had been a delivery. This is the very point in our case. In Sprouse v. Littlejohn, 22 S. C. 358, the same question was involved; and the court held that, while a gift of personal property is not complete without delivery, declarations of the alleged donor, to the effect that he had given the property, was competent evidence from which the jury might determine whether the gift had been made. The court says:

"It is true that delivery must be proved, but this is a question of fact for the jury; and, inasmuch as there can be no complete and legal gift without delivery, the very use of the term 'give' or 'I have given' may sometimes be intended to include the delivery; and where * * * such declarations have been used by the donor, and they are admitted by the court as competent, we think it ought to be left to the jury to say whether the gift has been proved, including the delivery, and it ought not to be laid down as a rule of law, to govern the jury, that such declarations in themselves are insufficient to prove the gift."

The question is fully discussed in that case, and no further argument in support of the proposition is required. Gross v. Smith, supra, was approved in Davis v. Railroad Co., 134 N. C. 300, 46 S. E. 515. See also, 20 Cyc. 1247, 1248.

Defendants' counsel rely on Davis v. Boyd, 51 N. C. 249, but the case is clearly distinguishable, for there it clearly appeared that there had been no delivery, as the slaves were in this state, and the alleged donee in Virginia. Delivery was therefore physically impossible. Besides, the evidence referred to the gift as having been made only by a

writing, which was invalid to pass the property. It was not pretended that there had been any actual delivery or transmutation of possession. If it had appeared conclusively, or it had been found, that Mrs. Thomas had not parted with the possession, and all she meant was that she had merely indorsed the certificate to her granddaughter and had not actually delivered it to her or to some one for her, the case would be different. The contrary rather appears, for the court told the jury that delivery was necessary to constitute a gift, and that plaintiff could not recover, unless they found there had been such a delivery, or, to use the language of the court, that the certificate "was given and delivered to the young lady." The court also very aptly illustrated what it meant by a delivery, so that the jury could not have misunderstood the question they were to decide, and they were sufficiently instructed that the mere indorsement and retention of the certificate by Mrs. Thomas would not constitute a gift of it.

[3] As to the question of evidence, we think the court confined the testimony of plaintiff, D. B. Zollicoffer, to what occurred between Mrs. Thomas and the defendant E. T. Zollicoffer, and in this view there could be no valid objection to it, as the witness was not speaking of any communication or transaction between him and Mrs. Thomas, but of one between her and a third party. Johnson v. Cameron, 136 N. C. 243, 48 S. E. 640; Bunn v. Todd, 107 N. C. 266, 11 S. E. 1043; Dobbins v. Osborne, 67 N. C. 259; McCall v. Wilson, 101 N. C. 600, 8 S. E. 225; Loftin v. Loftin, 96 N. C. 99, 1 S. E. 837; Ballard v. Ballard, 75 N. C. 191. We may add that it seems to have been admitted that Mrs. Thomas requested D. B. Zollicoffer to take and hold the certificate for his daughter, and that he refused to do so, and, if so, any error as to that communication or transaction would be harmless. But the court carefully excluded it.

[4] The introduction of the will of E. I. Thomas did not prejudice the defendants, as the court charged the jury that no trust was created thereby in the certificate, but only as to his own estate, for he had no interest in the stock. Exceptions were taken to the statement by the court of the contentions of the respective parties, but we can see no valid ground for objection. It was fair to both parties, and tended to present the case more fully and clearly to the jury and to aid them in weighing the arguments.

[5] The issues were sufficient to present all the matters involved, and therefore there was no error in rejecting those tendered by the defendants. Hatcher v. Dabbs, 133 N. C. 239, 45 S. E. 562; Albert v. Insurance Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693; Ratliff v. Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963.

[6] If defendants desired more specific instructions as to whether, in stating that she had given the stock to her granddaughter, Mrs. Wilson merely referred to her indorsement of it, and not to any actual delivery of it, and, if so, the jury should answer the issue, "No," they should have asked for it. Simmons v. Davenport, 140 N. C. 407, 53 S. E. 225, and cases cited.

The other exceptions require no special comment, as they are covered by those already discussed.

No error.

(168 N. C. 388)

ROBERSON et al. v. MOORE. (No. 67.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

1. WILLS ⟹608—ESTATE DEVISED—RULE IN SHELLEY'S CASE.

Under the rule in Shelley's Case, T., to whom a will loans land for his life, and at his death gives it to his heirs at law in fee simple forever, takes a fee simple.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 372–1378; Dec. Dig. ⟹608.]

2. WILLS ⟹466 — CONSTRUCTION — "LEND."

The word "lend" in a will passes the property to which it applies, the same as "give and devise," unless testator's intent to the contrary is manifest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 985; Dec. Dig. ⟹466.

For other definitions, see Words and Phrases, First and Second Series, Lend.]

Appeal from Superior Court, Martin County; Ferguson, Judge.

Submission of controversy without action by W. A. Roberson and another, as plaintiffs, and C. Moore, as defendant; the question being whether the title tendered by plaintiffs, under a contract of sale of land, was good. Judgment for plaintiffs, and defendant excepted and appeals. Affirmed.

Clayton Moore, of Williamston, for appellant. H. W. Stubbs and A. R. Dunning, both of Williamston, for appellees.

HOKE, J. The immediate grantor of plaintiffs was James G. Taylor, devisee of the tract of land in question, under the will of his father, Jesse Erwin Taylor, and, on the facts agreed, the title offered was properly made to depend upon the construction of the will of said Jesse, in terms as follows:

"Item 5. I loan to James G. Taylor during the term of his natural life the following described tract of land, beginning at a gum in Bee branch, Moye P. Taylor's corner, and running along said Taylor's line $4^{25}/_{100}$ chains; thence S. 55 W. to the line of the lands devised to my daughter, Mollie Smith, in Item 4; thence along said line and along Julian H. Purvis' line and Mrs. Ruth Taylor's line and N. P. Taylor's line to a dead elm in Bee branch; thence up said branch to the first station; containing 190 acres, more or less; and at the death of said James G. Taylor I give and devise the said land to his heirs at law in fee simple forever."

The case states that the James G. Taylor is now living and has two children, and de-

fendant contends that, under said clause, the devisee took only a life estate.

[1, 2] It is established by repeated decisions of the court that the rule in Shelley's Case is still recognized in this jurisdiction, and, where the same obtains, it does so as a rule of property without regard to the intent of the grantor or devisor. Jones v. Whichard, 163 N. C. page 243, 79 S. E. 504; Price v. Griffin, 150 N. C. page 523, 64 S. E. 372, 29 L. R. A. (N. S.) 935; Edgerton v. Aycock, 123 N. C. page 134, 31 S. E. 382; Chamblee v. Broughton, 120 N. C. page 170, 27 S. E. 111; Starnes v. Hill, 112 N. C. page 1, 16 S. E. 1011, 22 L. R. A. 598.

In Jones v. Whichard, a very accurate statement of the rule is given with approval from Preston on Estates, as follows:

"When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without interposition of another estate, of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

It is further held here and elsewhere that, in the construction of a will, the word "lend" will be taken to pass the property to which it applies, in the same manner as the words "give" and "devise," unless it is manifest that the testator intended otherwise. Sessoms v. Sessoms, 144 N. C. pages 121–124, 56 S. E. 687, citing Cox v. Marks, 27 N. C. page 361; King v. Utley, 85 N. C. page 59 and other cases.

Applying the principles as approved and stated in these cases, we think it clear that plaintiff's grantor, James G. Taylor, took a fee-simple estate; the devise giving him an estate in the property for life and then to his heirs general to take in succession forever.

There is no error, and the judgment below is affirmed.

Affirmed.

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(168 N. C. 250)

## COOK v. HIGHLAND HOSPITAL et al.
(No. 545.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

1. HOSPITALS ⟸5 — PATIENTS — RIGHT TO LEAVE INSTITUTION.

Where a patient in a sanitarium, who was not in such condition that she would be likely to imperil her health or safety, desired to leave, those in charge of the sanitarium cannot lawfully compel her to remain.

[Ed. Note.—For other cases, see Hospitals, Cent. Dig. § 12; Dec. Dig. ⟸5.]

2. HOSPITALS ⟸5—RULES—AGREEMENT TO ABIDE BY.

A patient, by agreeing to abide by the rules of a private hospital and to remain there for a fixed time, does not thereby surrender control of herself.

[Ed. Note.—For other cases, see Hospitals, Cent. Dig. § 12; Dec. Dig. ⟸5.]

3. FALSE IMPRISONMENT ⟸4—ACTIONS—DEFENSES.

That the head of a private hospital in good faith believed he was entitled to imprison a patient, who desired to leave, was no defense to an action for only compensatory damages.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 16; Dec. Dig. ⟸4.]

4. HOSPITALS ⟸5—PATIENTS—DUTIES TO IT.

Should a patient in a private hospital become insane after going there for treatment, it is the duty of those in charge to notify her relatives, and not to imprison the patient.

[Ed. Note.—For other cases, see Hospitals, Cent. Dig. § 12; Dec. Dig. ⟸5.]

5. HOSPITALS ⟸5—RULES—AGREEMENT TO ABIDE BY.

Where a patient does not abide by the rules of a private hospital according to her agreement, the remedy for those in charge is to discharge her.

[Ed. Note.—For other cases, see Hospitals, Cent. Dig. § 12; Dec. Dig. ⟸5.]

6. APPEAL AND ERROR ⟸1004—REVIEW—MATTERS REVIEWABLE.

A finding by the jury as to the amount of compensatory damages due a patient who had been imprisoned in a private sanitarium in a room next to a lunatic, approved by the trial court, cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. ⟸1004.]

7. APPEAL AND ERROR ⟸1005—REVIEW—FINDINGS.

A finding by the trial judge, denying defendant's motion to set aside the verdict for misconduct of the jury, where based upon the evidence, is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876, 3948–3950; Dec. Dig. ⟸1005.]

Appeal from Superior Court, Buncombe County; Cline, Judge.

Action by Beatrice Cook against the Highland Hospital and Robert S. Carroll. From a judgment for plaintiff, defendants appeal. Affirmed.

This was an action to recover damages on account of the unlawful detention of the plaintiff by the defendants in the defendant hospital, operated by the defendant Carroll, and for assaults committed on her and neglect of her while in the hospital, which acts are alleged to have been wrongful and committed willfully, wantonly, and maliciously by the defendants.

The defendants denied that any wrongful acts were committed by them, as alleged by the plaintiff, but aver that she regularly entered herself as a patient and agreed to be governed by the rules and regulations of the hospital, that she was nervous and not capable mentally of caring for herself, and that what was done was in accordance with the rules and regulations of the institution, and denied that she was assaulted or neglected while under their care.

The jury found for their verdict that the defendants wrongfully imprisoned the plaintiff and restrained her of her liberty, as alleged in the complaint, and that this was done wantonly, willfully, and maliciously by

the defendants, who also wantonly, willfully, and maliciously assaulted her as alleged in the complaint, and awarded compensatory damages, but no punitive damages. The defendants moved to set aside the verdict upon the ground of misconduct by a juror, but the court found upon the evidence that there was no misconduct as alleged, and denied the motion and entered judgment for plaintiff upon the verdict. Appeal by defendants.

Martin, Rollins & Wright, of Asheville, for appellants. Jones & Williams, of Asheville, and Oliver & Oliver, of Savannah, Ga., for appellee.

CLARK, C. J. The plaintiff was a young woman, about to be married, who came to Asheville, N. C., from Savannah, Ga., to rid her system of malaria and for recreation and rest. She was somewhat delicate and nervous, but the evidence is that her mind was perfectly clear. Having heard of the Highland Hospital, operated by Dr. Carroll, as a sanitarium, she entered that institution after visiting it, but it was concealed from her that it was in effect a private asylum. The defendant Carroll gave her two pamphlets, one entitled "Diets," describing most delicious and appetizing foods. The other contained a description of 60 different "Baths," most elegant and luxurious, and offering most enticing inducements to patients. These pamphlets filed in the record are the ne plus ultra of all that is elegant and luxurious in bathing and diets.

According to the evidence of the plaintiff and her sister, she entered the institution upon these representations and with no other thought than that she would be free to leave at will, could communicate freely with her family, and would receive the baths and diet mentioned in the pamphlets. She contracted for and received a front corner room, and her married sister returned to the hotel. This was on Sunday, August 4, 1912. On the next day she was informed that she would not be permitted to see her married sister nor communicate with her, and was told that she must have her hair shampooed. She testified that her hair had been shampooed just before leaving home, and she was suffering from cold, sore throat, and earache, and that her physical condition just at that time forbade her being subjected to this treatment, and she protested against her hair being shampooed. The nurses gave this information to the defendant Carroll, but he gave imperative orders that the plaintiff's hair "must be shampooed." Her evidence is that, in obedience to this order, two or three nurses took the plaintiff forcibly from her bed, while lightly clad, raised her forcibly from the floor, when she fell upon it, carried her to the bathroom, and shampooed her hair against her will. The plaintiff then demanded to leave the hospital, and to see her sister, and announced that she would not remain. The defendant Carroll was informed of this. He thereupon gave orders that the plaintiff was not to see her sister or leave the hospital. According to the defendant's testimony, the plaintiff stated that she would jump out of the window before she would stay there without seeing her sister. The defendant Carroll thereupon directed that she should be moved into a protected room or padded cell located in the rear, with diamond-shaped wire meshing on the inside and iron bars on the outside, a locked door, and an electric light at the ceiling inclosed with wire and operated from the outside. This room had scant furniture and, according to the report of the nurses, was infected with roaches. Adjoining this locked cell were raving lunatics shrieking to be let out. On each of the days prior to this time, and after the plaintiff was taken to the barred and locked cell, the plaintiff's married sister paid visits to the hospital, but was kept in ignorance of the treatment given to the plaintiff, and was not permitted to see her. The plaintiff was kept immured in the cell, above described, adjoining raving insane people, while her married sister returned to Savannah carrying assurance from the defendant Carroll to the family that the plaintiff was progressing nicely.

After five days the plaintiff was removed from the locked and barred cell to another back room, where she was restrained of her liberty against her will and prevented from communicating with any member of her family for more than 3 weeks, making 32 days in all, until her mother, after receiving a pathetic letter written by the plaintiff, who had bribed a colored maid to secure a pencil and mail a letter, came to the sanitarium and demanded her daughter.

The "Highland Hospital" was incorporated, but the defendant Robert S. Carroll was in sole and exclusive charge and, together with his wife, owned 99 shares out of the 100 shares of the capital stock. During the entire time the plaintiff was in the hospital, the defendant Carroll visited her only three times, according to the plaintiff's testimony, or five times, according to the defendant's testimony. The plaintiff was paying $35 per week for board, and was charged $15 per week extra for half the time of a trained nurse, who was only a student, and who was being paid only $8 per month by the defendants. The plaintiff was subjected to compulsory hypodermic injections twice every day during her stay, against her protest. Her breasts were forcibly massaged each day in such a forcible manner that she groaned under the treatment.

Instead of the luxurious diet described in the pamphlet, the food given the plaintiff was 8 ounces of milk and 1 ounce of lithia water 8 times a day at the beginning, which was increased to 6 ounces of milk, 1½ ounces of cream, and two raw crated eggs. She was read "Why Worry" and "Those Nerves" constantly during her stay. The defendant Car-

roll wrote only one letter to her family during the 32 days she was immured under his control. The plaintiff's arm was injured by the force used in dragging her to the bathroom to such an extent that she complained of it constantly during her stay in the hospital. She testifies that she was such a physical wreck by reason of her treatment that she could not make her wedding clothes after her return home, and that she could not hold her baby after it was born. She graphically describes her agony of mind during her illegal restraint among lunatics, in a private asylum, in a distant state, far from home and friends, without means of communication with her family, without money and clothes with which to escape, being forcibly detained against her will and having entered the institution, according to her testimony, without knowledge of its nature, and being duped into supposing that it was a rest cure, with luxurious diet and baths. She testifies that she returned home a nervous wreck, requiring careful treatment for many months, and indelibly stamped with her experience as a prisoner in a madhouse.

The defendants in their evidence deny the mistreatment, allege that the plaintiff was nervous and hysterical, but admit that she was restrained of her liberty; that she was placed in the "protected" room and afterwards removed to another "protected" room; that her hair was shampooed though she earnestly resisted; and that she was restrained of her liberty and kept in the institution against her will, and that the family were not informed of that fact. The defendant Carroll testified that he restrained her and kept her in the institution against her will; that her lack of self-control had reached hysteria, which was that she was "impulsive and would do unreasonable things." He did not testify that she was insane, but said that hysteria is "the borderland between sanity and insanity."

[1] The judge properly told the jury:

"If the plaintiff was 24 years of age, unmarried, and was there in the hospital, and she subsequently applied to the authorities of the hospital for, and demanded, her release—demanded that she be allowed to go from the institution and be allowed and suffered to leave there—and after such demand made, if you find it, and that it was communicated by the nurses, or through the proper channels, to Dr. Carroll, and after that, that she, either by words, or by locking doors, or by anything that comes up to the definition of imprisonment, that I have given you, she was imprisoned, so that she was unable to carry out her desires and wishes in that regard, then if you find these facts—after that, the court charges you, as a matter of law, that she would be wrongfully imprisoned and restrained of her liberty."

"If you were to find that she was in the institution, and that she was demanding to be released, which was properly communicated to the hospital authorities, but if you were to further find to your satisfaction that she was so nervous from any ailment or disease and so irrational that there was reasonable probability that, if so released at the time, she would do herself some bodily harm, under such circumstances the hospital would have the right to detain her and restrain her, under the law of necessity and humanity, until that condition as to her reasonable apprehension of doing herself bodily harm had passed. And within that rule or limitation it would not be a wrongful and unlawful imprisonment."

"Now it is for you, gentlemen, to say, from the testimony, the facts you find, and how this matter is. Even though she went in under this paper, and if you find, as she contends, that she was perfectly rational, and knew what she was doing—what she wanted and didn't want—and she wanted to leave the institution, and expressed it to the hospital authorities, and the hospital authorities knew of that fact, and then after that restrained her of her liberty, then it would be in law, as I am holding, wrongful detention, unless they were justified in restraining her under those rules of humanity and regard for her welfare, as I have just given you."

There was a conflict of evidence as to the treatment that the plaintiff received, but there is no controversy that the plaintiff was detained in the defendant's hospital against her will; confined for 32 days; that she was confined a considerable part of the time in a locked and barred cell; that she was denied all communication with her friends and subjected to having her hair shampooed and to massage of delicate portions of her body and to hypodermic injections daily against her will.

The defendants contend that they had a right to do these things because the plaintiff signed an agreement upon her entrance that she would be subject to the rules and regulations of the institution, and that she could not be set at liberty without danger to herself. The judge submitted this latter phase to the jury, who found against it. Besides, the defendants did not account for the fact that, though the plaintiff's sister visited the institution, they gave her no information as to plaintiff's condition and treatment, and that, during the whole 32 days that the plaintiff was restrained by them of her liberty and subjected to physical treatment against her protest, no information was given by the institution to her relatives, though this was practical, during the entire time, by wire or long distance phone.

[2] The judge properly told the jury that the plaintiff could not thus surrender control of herself to another by signing a paper at her entrance into the institution. 4 Cyc. 365; In re Lambert, 134 Cal. 626, 66 Pac. 851, 55 L. R. A. 856, 86 Am. St. Rep. 296; In re Baker, 29 How. Prac. (N. Y.) 488.

[3] The main defense relied upon by the defendants is that, if they acted in good faith, there would be no liability upon their part. Whether or not this would be a defense to a recovery of punitive damages we need not discuss, for the jury in their verdict denied the plaintiff, on the issue submitted for that purpose, any recovery of punitive damages. "Good faith" is not a defense to the recovery of compensatory damages when the jury find that there was illegal restraint of liberty and compulsory massage and hypodermic injections and other physical treatment upon a defenseless woman, who was in the absolute

power of the defendants and kept immured under lock and key and with barred windows, without information given by them to her family of her condition, and she denied all communication with them.

It is unnecessary to discuss in detail the exceptions taken, for they are all covered by what we have said.

[4] The plaintiff was not committed as insane, and, if she had been, the defendants do not account for the fact that they accepted her as sane by signing the agreement with her upon her entrance into the institution. If she subsequently became insane, it was the duty of the institution to have at once notified her mother and sister. The testimony of the defendants, however, is that she was not insane. Evidently the defendant Carroll believed that he had absolute control of the plaintiff and the right to imprison her if she opposed his orders or will, and the right to impose on her whatever treatment he thought best, and that the family need not be consulted any more than the plaintiff herself. The effect of being at the head of such institution is very often—too often—to render the person in charge callous and autocratic, and in his own opinion irresponsible to any one.

In this land, the law guarantees liberty to every one, subject to restraint only in the modes provided by the law, and even then there is the right to review the conduct of those in charge of those deprived of their liberty. The plaintiff was not committed to the care of the defendants by any legal proceedings adjudging her insane, and her signing the paper agreeing to be subject to the rules and regulations of the institution was not irrevocable. It did not subject her to the irresponsible power and control of the defendant. This is the whole controversy, and requires no further discussion.

[5] If the plaintiff did not abide by her agreement to obey the rules and regulations of the institution, the remedy of the defendants was to discharge her or, if her condition forbade this, to notify her relatives (neither of which they did) and not to imprison her and to force her to do their will.

[6] As to the amount of compensatory damages due the plaintiff by reason of her illegal detention, and the physical ill treatment that she received, the jury have assessed the amount, and it has been approved by the trial judge, and is not reviewable by us. Benton v. Railroad, 122 N. C. 1009 (30 S. E. 333), and cases there cited and citations to that case in the Anno. Ed.

The horrors of the imprisonment of a sane person in a private madhouse (and one is not the less such because it may be advertised as a "sanitarium") have never been more graphically related or probably more truthfully than by Charles Reade in "Hard Cash." Like the novels of Charles Dickens, it has aided to correct evils which till then oppressed and afflicted society without hindrance from those who administered the law.

[7] The finding by the judge of the facts upon the motion for misconduct of the jury was based upon the evidence and is not reviewable by us, and his conclusion of law thereupon to refuse the motion was correct. Lewis v. Fountain, 84 S. E. 278, at this term, and cases there cited. No error.

(168 N. C. 304)

## SAVINGS BANK & TRUST CO. v. JOHNSON et al. (No. 18.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

1. WILLS ⟸672—CONSTRUCTION—CREATION OF TRUST.

A will, after giving the testator's home place to his wife for life, with remainder to the children, gave all other property to the wife and children, share and share alike, after paying amounts thereinafter named. After certain legacies and a devise of land to certain children at specified valuations, the will provided that the wife and children should share equally in the real and personal property, the division not to be final until the youngest child was 21, if living, and that, if either died without children, their property was to be equally divided between their brothers and sisters. It appointed the wife, a son-in-law, and all of the adult children executors, to have entire control so long as might be necessary for the fulfillment of the will, and to act as guardians of the minor children. *Held*, that the provision that the executors should have entire control of the property did not create a trust, as, while no particular words are necessary for the creation of a trust, the intention must be clear and manifest from the whole will, and a trust was nowhere declared; the control of the property being given to the executors and not to trustees, and for the fulfillment of the will and not the execution of a trust, and being no more than the control which the law gave them as executors, and moreover, if they were to be trustees, there would have been no necessity for the appointment of guardians for the minor children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1579–1581; Dec. Dig. ⟸672.]

2. WILLS ⟸602—CONSTRUCTION—NATURE OF ESTATES CREATED.

The children took a determinable fee passing a present interest, subject to be defeated by their death without children before the youngest child reached the age of 21, and there should be a division of the property, with a further and final division upon the death of any of the children, as the provision as to dying without children clearly did not refer to the wife, and her interest was therefore absolute, and for her to take while the rights of the children were postponed would destroy the principle of equality which pervaded the whole will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351–1359; Dec. Dig. ⟸602.]

Appeal from Superior Court, Pasquotank County; Carter, Judge.

Action by the Savings Bank & Trust Company against S. H. Johnson and others. From a judgment construing a will, both plaintiff and defendants appeal. Reversed in part, and affirmed in part.

This is an action by the guardian of three of the devisees and legatees of J. B. Flora against his executors, to compel the delivery and payment of the devises and legacies, and the matters in controversy depend upon the

construction of the will of said Flora, which reads as follows:

I, J. B. Flora of the above county and state, and being of sound mind and memory do make, publish and declare this to be my last will and testament as follows:

1. My executor hereinafter named shall pay all my just debts out of the first money which may come into their hands belonging to my estate.

2. I give and devise unto my beloved wife Allie V. Flora, the home place where I now reside at the time of my death together with all the household and kitchen furniture therein so long as she may live and no longer and at her death to my children in fee simple share and share alike.

3. I give and devise unto my wife and children share and share alike all the balance of my property both real and personal property after paying the following amounts herein named.

4. I give to each of my sisters three daughters as follows: To Serena $100; to Georgia $100; and to Bettie $200; and to my brother John Flora's deceased three girl children, $100 each and to his son, Jerome Flora a note I have of $150—hereto attached.

5. I also give to D. G. Brockett $200.

6. I give to Jerome Flora, my son $4,000 and to Howard and Edward Flora and to Virginia Flora, my children $5,000 each to the equal amount I have given my daughter Ida J. Flora now Mrs. S. H. Johnson, having bought a home and given her. Also to Howard, Edward and Virginia I give and bequeath $583.90 with interest at 4% from May 28, 1913, this being their part received from a dividend of the Mutual Life Insurance Company. Ida and Jerome having had this amount paid to them.

6. I wish the farm known as the Baxter farm to be divided as follows: Commencing at the Smith line running down the lead ditch to the river, the eastern part, the old home to my son Howard value $12,000 the front part bound by the main road, Smith and Winslow to Edward, value $10,000, the road leading to both houses to be kept up equally by both. In case that neither one should not want it at the above valuation, it is to be had by the others and the same valuation and it is not to be sold by either Howard or Edward to any other party except a brother or sister unless they both agree to sell and this shall not be till they are both twenty-one years old. The team and farming utensils shall be equally divided between Howard and Edward the value of farm to include the team and farming utensils.

7. My wife and children shall share equally in both real and personal property, the division not to be final till my youngest child Virginia is 21 years, if living, and if either die without children, their property is to be equally divided between their brothers and sisters.

8. I hereby constitute and appoint my wife Alice V. Flora and all my children who may be of lawful age and S. H. Johnson to represent my daughter Ida my lawful executors to all intents and purposes to execute this my last will to have entire control thereof so long as may be necessary for the fulfillment of this will, to act as the guardian of my minor children should there be any.

9. And shall not be required to give any bonds and make only such returns to the court that is required by law. In case of minor children if in the judgment of the executors it is best, they may appoint the Savings Bank & Trust Company guardian.

In testimony whereof I have hereunto set my hand and seal this the 6th day of January, 1914.

J. B. Flora. [Seal.]

Witness:
H. G. Kramer.
E. W. Carr.

The estate is estimated to be worth $250,000, a considerable portion of which is a prosperous mercantile business.

The testator left a wife and five children surviving him; three of the children being under 21 years of age. All the debts of the testator and the legacies given in items 4 and 5 have been paid.

The executors contend that the language in item 8 appoints them trustees of the estate, and that they have the right to retain the whole of the estate, and to continue the mercantile business. His honor ruled against this contention, and the defendants excepted. The plaintiffs contend that they are entitled to have a division of the property now, and to enter into possession thereof. His honor ruled against this contention, and the plaintiffs excepted. Judgment was entered accordingly, and both parties appealed.

Aydlett & Simpson, of Elizabeth City, for plaintiff. Ehringhaus & Small, of Elizabeth City, for defendant.

ALLEN, J. [1] We agree with his honor that the words used in the eighth item of the will, in connection with the appointment of the executors, that they are "to have entire control thereof (the property) so long as may be necessary for the fulfillment of this will," do not create a trust. It is true no particular words are necessary for the creation of a trust, but the intention to do so must be clear and manifest (Haywood v. Wachovia Co., 149 N. C. 208, 62 S. E. 915; Haywood v. Wright, 152 N. C. 421, 67 S. E. 982); and in determining the intention of the testator the entire will must be considered and not separate parts of it (Taylor v. Brown, 165 N. C. 161, 81 S. E. 137). When so considered, we not only find no language in item 8 importing a trust, but, when we look at the other parts of the will, we nowhere find any trust declared.

The control of the property is given to the executors, not to trustees, and for the fulfillment of the *will*, and not to execute a trust, and no power or authority is conferred that did not exist under the law, as they had the right, as executors, to have control of the property "so long as may be necessary for the fulfillment of the will."

Again, in the same item, the executors are appointed guardians of the minor children, which would be unnecessary, if they were trustees; and upon an examination of the whole will the intention is clear that the testator contemplated a division of his property now, and another and final division upon the death of a child leaving no children, which would be in conflict with the position that the executors are to hold and control the property as trustees.

It also appears from the will that the wife and children are the objects of the testator's bounty, and he declares his intention

that they shall share equally in real and personal property. In item 2 he gives the wife his home place for life, and, after giving away certain specific amounts and making a devise of a tract of land, he provides in item 7 that his wife and children shall share equally in real and personal property. This devise to the wife is absolute, because the language in item 7, "if either die without children," does not refer to the wife but to the children, and, if absolute, it is inconsistent with the position that the whole property shall be held by trustees, and the part of item 8 relied on to create a trust applies with equal force to the property given to the wife as to that given to the children. If, however, it should be held that the language is sufficient to establish a trust, it would now be a passive and not an active trust, because it could only continue "so long as may be necessary for the fulfillment" of the will, and all the duties under the will have been performed, except the distribution of the property, and, if passive, the devisees and legatees would be entitled to the possession and use of the property. Perkins v. Brinkley, 133 N. C. 348, 45 S. E. 652; Lummus v. Davidson, 160 N. C. 487, 76 S. E. 474.

[2] The ruling upon the other question involved in the appeal is, in our opinion, erroneous. No language can be found in the will which limits the estate and interest given to the wife and children, except the words in the seventh item, "if either die without children"; and it is clear these do not refer to the wife, because, at the time of making the will, she had five living children, and it is improbable that the testator contemplated the death of all the children before the death of the wife, and in the contingency named "*their* property is to be equally divided between *their brothers* and *sisters*." It follows, therefore, that the interest of the wife is absolute, and that she is now entitled to the property devised and bequeathed to her. These provisions are in the item of the will which declares, "My wife and children shall share equally in both real and personal property," and this principle of equality, which pervades the whole will, would be destroyed if the wife can take now, and the right of the children is postponed.

The use of the language in this item, "the division not to be final till my youngest child Virginia is twenty-one years," also indicates a purpose to have a division before that time, and is without meaning, unless interpreted to give the right to a division of the property among the children now; but, if a child dies without leaving children, that there shall be another and final division. It follows, therefore, that the children take the whole interest in the property which may be defeated, upon dying without children, or as it is usually termed, a determinable fee, which passes a present interest, subject to be defeated, however, upon the happening of the contingency (Rees v. Williams, 165 N. C. 202, 81 S. E. 286), and following the principle which favors the early vesting of estates (Dunn v. Hines, 164 N. C. 120, 80 S. E. 410), and in accordance with the declared purpose that *final* division shall be had when Virginia becomes 21, the time for the happening of the contingency would be that fixed for final division, and the estates and interests will then be absolute.

The court may by decree protect the several interests until the estates become absolute, taking into consideration the protection afforded by the guardian bonds of the infants.

Reversed on plaintiff's appeal. Affirmed on defendant's appeal.

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(168 N. C. 366)

## LEGGETT v. ATLANTIC COAST LINE R. CO. (No. 66.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

1. CARRIERS ⟸247, 286—INJURY TO PASSENGER—CONDITION OF STATION.

Plaintiff, waiting in a railroad station to take a train, was entitled to the rights of a passenger, and common carriers of passengers being held to a high degree of care in maintaining safe conditions about their stations, for his injury, through its negligent failure to light the premises, defendant railroad was liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984–993, 1142–1148, 1150–1152; Dec. Dig. ⟸247, 286.]

2. CARRIERS ⟸347—ACCIDENT AT STATION—CONTRIBUTORY NEGLIGENCE OF ONE WAITING FOR TRAIN.

In an action against a railroad company for personal injuries to an intending passenger, caused by its negligence in failing properly to light its station premises, the question of plaintiff's contributory negligence was for the jury; his walking along the unlighted station platform at train time not constituting negligence per se.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350–1386, 1388–1397, 1402; Dec. Dig. ⟸347.]

3. DEATH ⟸103—PROXIMATE CAUSE—QUESTION FOR JURY.

Whether personal injuries received in falling down steps were the proximate cause of plaintiff's death was a question for the jury.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 141; Dec. Dig. ⟸103.]

Appeal from Superior Court, Martin County; Bond, Judge.

Action by Leggett, executrix, against the Atlantic Coast Line Railroad Company, for the death of plaintiff's intestate. Judgment as of nonsuit, and plaintiff appeals. Reversed and remanded.

Martin & Critcher, of Williamston, Winston & Matthews, of Windsor, and Winston & Biggs and R. W. Winston, all of Raleigh, for appellant. F. S. Spruill, of Rocky Mount, for appellee.

HOKE, J. There was evidence on part of plaintiff tending to show that, on the night of December 9, 1909, the intestate, with another, was in the waiting room of defendant's

passenger station at Everett, N. C., with the purpose of taking next train to Williamston, N. C.; that the train was late, and the schedule time was 6 p. m., at that time after dark; that the station was alongside of the tracks, some 18 feet from the main line, was something over 3 feet above the ground, and had a platform all around it without railing; that the tracks ran north and south, and the platform next the tracks was without steps; that there were steps all along the west end of the building, and at the east end the steps were 5 feet in length; that you entered from the west end, the usual way, came first to the colored waiting room, and further along the platform, about 18 feet, was the entry to the white waiting room, where intestate was, and on the night in question there was no light on the platform or in the station grounds, the only light spoken of in the testimony being a small lamp in the ticket office; that, about the time the train approached, the intestate and others went out of the waiting room for white people, and, as they endeavored to go along the platform to the steps, intestate fell to the ground and was seriously hurt; that he suffered much, and there is testimony permitting the inference that, after lingering, he finally died from the effect of the injuries then received.

[1] Upon this, the testimony as it now appears, we are of opinion that the plaintiff is entitled to have the cause submitted to the jury, and that the judgment of nonsuit should be set aside. The intestate, having gone upon the premises and being in the waiting room of defendant company at or about the schedule time of the train and with intent to become a passenger thereon, is generally held to be or entitled to the rights of a passenger, and it is well understood that common carriers are held to a high "degree of care in providing, at their passenger stations, places and conditions by which passengers may board and alight from their trains in safety" (Roberts v. Railroad, 155 N. C. 79, 70 S. E. 1080; Smith v. Railroad, 147 N. C. 448, 61 S. E. 266, 47 L. R. A. [N. S.] 179; Mangum v. Railroad, 145 N. C. 153, 58 S. E. 913, 13 L. R. A. [N. S.] 589, 122 Am. St. Rep. 437; Hutchinson on Carriers [3d Ed.] §§ 1005, 1006; Fetter on Carriers of Passengers, p. 592); that the duty of the company, in respect to keeping safe station premises, exists and extends not only to passengers but "to all who rightfully come upon its premises in pursuance of the invitation which it holds out to the public, and embraces all who come there on legitimate business to be transacted with its agent" (Pineus v. Railroad, 140 N. C. 450, 53 S. E. 297, 111 Am. St. Rep. 856); and that, on the facts as they are now presented, the obligation, in this instance to have the premises properly lighted, comes clearly within the principle (Beard v. Railroad, 143 N. C. 136-144, 55 S. E. 505, 508; Ruffin v. Railroad, 142 N. C. 120, 55 S. E. 86; Grimes v. Pa. Co. [C. C.] 36 Fed. 72; Hutchinson on Carriers [3d Ed.] § 936).

In Grimes v. Railroad, supra, it was held to be "the duty of a railroad company to properly light the platform connected with its depot within a reasonable time before the arrival and departure of its trains, so as to insure the safety of persons coming to the depot as passengers." And in Beard's Case, supra, Connor, Judge, delivering the opinion, said:

"There was no negligence in the * * * construction of the steps, but it was the duty of the defendant to have and maintain sufficient light along the platform and near the steps or to have a railing so that their employés could use them with reasonable safety. This was a positive duty, the failure to perform which makes the defendant liable, unless the danger in using them was so manifest and obvious that no prudent man would do so in the absence of lights."

[2] And these and other authorities are to the effect that, on the same or similar facts to the case before us, the question of contributory negligence is for the jury. Thus Connor, Judge, pursuing the subject, in Beard's Case, supra, and in reference to the conduct of plaintiff (in that case an employé of the company), said further:

"It cannot, we think, be said that, using his senses, members, and knowledge of surrounding conditions, as described by plaintiff, he was manifestly regardless of his safety. Common observation teaches us that many persons, clearly within the pale of ordinary prudence, feel their way along steps in the dark. We can hardly think that, by doing so they can be said to be clearly and obviously negligent."

And Fetter on Carriers of Passengers, p. 344, says:

"A passenger is not, as a matter of law, guilty of contributory negligence in walking along an unlighted platform to see if there is another coach at the rear end of a train he is about to board"—citing, among other cases, Buenemann v. Railroad, 32 Minn. 390, 20 N. W. 379, in same section; Ala. Gr. So. R. R. v. Arnold, 84 Ala. 159, 4 South. 359, 5 Am. St. Rep. 354.

[3] There was nothing to show that intestate was not observant of the care required under conditions provided for him, and the case in this respect is not unlike that of Darden v. Plymouth, 166 N. C. 492, 82 S. E. 829. While there are facts in evidence which tend to show that the injuries received on this occasion did not cause intestate's death, there is testimony also, as stated, which permits the inference that these injuries were the cause of such death or contributed to it in a way to render defendant liable. Penn v. Insurance Co., 160 N. C. 399, 76 S. E. 262, 42 L. R. A. (N. S.) 597; Meekins v. Railroad, 134 N. C. 217, 46 S. E. 493. It may be well to note that, in Penn's Case, the existence of an additional cause contributing to plaintiff's injury was held to defeat a recovery, but that was by reason of the express stipulation in the policy that the company "should be liable for injuries attributable directly and independently of all other causes, to external, accidental, and violent means."

There were exceptions by plaintiff also to the rulings of the court below on questions of evidence; but as these are not necessarily determinative, and may not arise on another trial or be presented in the same manner, it is considered best not to refer to them more directly.

There was error in the judgment of nonsuit, and this will be certified that the same may be set aside and a new trial had.

Reversed.

(168 N. C. 378)

## NORTH CAROLINA MUTUAL & PROVIDENT ASS'N v. EDWARDS et al.

(No. 31.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

1. JUDGMENT ⟸569—CONCLUSIVENESS.

Where no appeal was taken from an order denying an independent motion to set a judgment aside on account of plaintiff's inexcusable neglect, plaintiff was concluded on that question.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 998; Dec. Dig. ⟸569.]

2. JUDGMENT ⟸443—VACATING—FRAUD IN PROCURING JUDGMENT.

Relief against a judgment by setting it aside is allowable only when fraud is shown in the procuring or rendition of the judgment, or fraud extrinsic or collateral to matters in issue or tried, not known to the opposite party at the time, and for not knowing which he was not chargeable with neglect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 785, 836, 838; Dec. Dig. ⟸443.]

3. JUDGMENT ⟸414—VACATION—FRAUD—MATTERS AVAILABLE BEFORE JUDGMENT.

A judgment against defendant will not be set aside, where the jury determined all the issues in favor of the plaintiff, and where there was no showing of fraud in procuring the judgment, or conduct preventing the defendant from presenting any defense it had, since relief from a judgment will not generally be granted except where the fraud alleged was antecedent to the judgment and was or might have been litigated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 780; Dec. Dig. ⟸414.]

Appeal from Superior Court, Beaufort County; Bond, Judge.

Action by the North Carolina Mutual & Provident Association against Edmund Edwards and others. Judgment for defendants, and plaintiff appeals. No error, and judgment affirmed.

The judgment, at November term, 1912, had been entered by default final on a verified complaint, stating a definite amount due on a policy of insurance, and, so far as appears, was in all respects regular. In the present action to set the same aside, there was allegation with evidence, on part of plaintiff, tending to show: That the original policy had been procured by fraudulent representations on the part of the insured, etc. (2) That the demand had been fully adjusted between the company and the claimants under the policy, and it was contended further by plaintiffs that the judgment complained of had been procured by fraud. On answer, denying generally the averments in the complaint, issues were submitted and responded to by the jury as follows:

"(1) Was the issuance of policy for $250 mentioned in complaint procured by fraud on the part of Willie Edwards or Edmund Edwards? A. No.

"(2) Was any answer or representation made to the agent or examining physician of plaintiff company falsely by Sophia Johnson which was fraudulent or which was material to the risk assumed by the policy? A. No.

"(3) Had the $250 policy been settled or compromised before suit on it was brought, or judgment rendered? A. No.

"(4) If there was any defense to suit on said $250 policy, did the company know the facts concerning same when suit on said policy was brought? A. Yes.

"(5) Was anything done by either defendant, and, if so, by which ones, to prevent the plaintiff company from making any defense they had, if any, to the suit mentioned, or any agreement to drop said suit? A. Nothing by any one.

"(6) Did the plaintiff company pay anything on said policy before judgment rendered, and, if so, how much? A. Nothing.

"(7) When P. H. Bell brought said suit and prosecuted same as attorney, did he know that said policy had been procured by fraud, or that it had been paid or compromised if such had been done? A. No."

There was judgment on the verdict for defendants, and plaintiff excepted and appealed.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellant. Ward & Grimes, of Washington, N. C., for appellees.

HOKE, J. (after stating the facts as above). [1] The record shows that, at a former term and apparently as an independent proposition, a motion was made by defendant therein, the present plaintiff, to set the judgment aside on account of excusable neglect and same was denied. No appeal having been taken from such order, the present plaintiff would seem to be concluded on that question, and, in any event, there being no error shown, the judgment will be upheld. Smith v. Holmes Bros., 148 N. C. 210, 61 S. E. 631; Scott v. Life Association, 137 N. C. 516, 50 S. E. 221; Cowles v. Cowles, 121 N. C. 272, 28 S. E. 476; Clarke Code (3d Ed.) pp. 310, 311, and authorities there cited. The case presented, then, is an action to set aside a judgment taken according to the course and practice of the court and in all respects regular, on the ground of fraud.

[2, 3] While this is a well-recognized ground of relief against a judgment, it is allowable, as a rule, when fraud is shown in the procuring or rendition of the judgment and not when it affects only the validity of the original demand, unless, in this last case, plaintiff, in the judgment, or some one for whose conduct plaintiff is legally responsible, has wrongfully prevented the opposing party

from setting it up as a defense, or the judgment was rendered in a court where such defense was not available to him. Motter v. Davis, 151 N. C. 237, 65 S. E. 969; Levin v. Gladstein, 142 N. C. 482, 55 S. E. 371, 32 L. R. A. (N. S.) 905, 115 Am. St. Rep. 747; Owens v. Van Winkle Co., 96 Ga. 408, 23 S. E. 416, 31 L. R. A. 767, and editorial note; Black on Judgments, §§ 370–378; 23 Cyc. pp. 1010, 1024, 1025. In Black on Judgments, § 370, the position suggested is stated as follows:

"While it is true that equity will not generally listen to an impeachment of a judgment on the ground of fraud, when the fraud alleged was antecedent to the judgment and was or might have been litigated in the action at law, yet fraud practiced in the very matter of obtaining the judgment is regarded as perpetrated upon the court as well as upon the injured party, and a judgment so procured may be enjoined. The rule has been thus stated: 'The question of fraud which is open to examination in such case is as to something which intervened in the proceedings by which the judgment was obtained, and it must have occurred in the very concoction or procuring of the judgment, and not have been known to the opposite party at the time, and for not knowing which he is not chargeable with neglect or inattention. The fraud must consist in something of which the complaining party could not have availed himself in the court giving the judgment, or of which he was prevented from availing himself there by fraud.' Or, as otherwise stated, the fraud alleged must be extrinsic or collateral to the matters involved in the issues or the trial at law."

And, again:

"The rule is well settled and perfectly inflexible that if the defendant in an action at law had a good defense, purely legal in its nature, of the existence of which he was aware, and which he had an opportunity to set up, but neglected to defend himself, he cannot come into equity seeking relief against the judgment in that action, on the same grounds which constituted that defense, unless his failure to make the defense was due to circumstances of fraud, accident, or surprise, entirely unmixed with negligence or fault on his own part. In other words, a court of chancery will not entertain a party seeking relief against a judgment at law in consequence of his default upon grounds which might have been successfully taken in the said (law) court unless some reason founded in fraud, accident, surprise, or some adventitious circumstances beyond the control of the party be shown why the defense at law was not made."

And in 23 Cyc. p. 1024:

"When a defendant, in an action at law, has a good defense, but is prevented from setting it up by the fraud artifice, direct or misrepresentative of plaintiff, without negligence or fault on his own part, and a judgment is thereby obtained against him, it is a proper case for equitable relief, but he must show that he is free from the charge of negligence or lack of due attention to his case."

In the present case, the jury have determined all of the issues in favor of the defendants, who were plaintiffs in the judgment, and we are not required to pass upon the exceptions raised as to most of these issues, being of opinion that there is no testimony worthy of consideration tending to show fraud on the part of the defendants in procuring the judgment and none whatever which shows, or tends to show, that they or any one for whose conduct they are responsible have said or done anything which prevented the present plaintiff from presenting any defense it may have had to their demand. There is allegation and evidence tending to show fraud and misrepresentation on the part of the insured in obtaining the policy, and there are facts in evidence tending to show that these defendants had entered on an adjustment of their demand with the local agent of the company and had received part of an amount agreed upon between them, but both of these are legal defenses which could have been set up and made available in the action, and, as stated, we find nothing in the record to show that defendants are in any way responsible for plaintiff's default. On the contrary, the facts in evidence tend to show that the company was thrown off its guard and deprived of its opportunity to make defense against this claim by the conduct and representations to it of its own local agent, and, there being no proof or suggestion of any collusion between such agent and defendants, the results of his misconduct are in no way attributable to them. And this position is also in support of the judge's ruling, who at a former term declined to set aside the judgment for excusable neglect. Morris v. Liverpool, etc., Insurance Co., 131 N. C. 212, 42 S. E. 577.

There is no error, and the judgment in defendant's favor is affirmed.

No error.

(168 N. C. 353)

## In re WHITE'S ESTATE. (No. 106.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

TAXATION ⟸875 — INHERITANCE TAX — EXEMPTIONS—"RELATION OF CHILD TO DECEDENT."

Under Inheritance Tax Law (Pub. Laws 1913, c. 201) § 6, subsec. 1, providing that where the persons entitled to any beneficial interest are the lineal ancestors or issue, or where the beneficiary is "one who stood in the relation of child to decedent," the tax should be $1 for each $100 in value, and requiring the clerk of the superior court to "determine whether any person to whom property is bequeathed stands in the relation of child to the decedent," the question whether a beneficiary stands in such relation is a mixed question of law and fact, and the term extends to and includes all meritorious cases, where the parties have assumed and continued to live in the relationship of parent and child or in mutual recognition of such relationship; and hence the son of decedent's sister, who on his father's death and at the age of six years went to decedent's house to live, and grew up in the relation of son to decedent, and had regarded decedent as his father from whom he would inherit, though not regularly adopted, and who had cared for decedent until his death, was entitled to the tax rate of one standing in the relation of a child.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1690–1692; Dec. Dig. ⟸875.]

Appeal from Superior Court, Bertie County; Peebles, Judge.

Petition by John R. Lawrence to correct the assessment of the inheritance tax on the estate of J. H. White, deceased, by the clerk of the superior court. Petition denied, and petitioner appeals. Reversed.

The petitioner, claiming to stand in the relation of child of the testator, subject to the smaller tax imposed by the law, and that he is entitled to the exemption allowed in such cases, filed his petition before the clerk and alleged and prayed:

"First. That John H. White, deceased, died on or about the 12th day of July, 1913, leaving a last will and testament which has been admitted to probate and is recorded in Bertie county, and in which he appointed your petitioner as his executor under said will and testament; and your petitioner duly qualified as such executor on the 20th day of July, 1913, and is now the executor of said estate.

"Second. That said John R. Lawrence is the principal legatee and devisee in said will and testament, the same being referred to and made a part hereof for all purposes; and on the 13th day of June, 1914, the said clerk of the superior court of Bertie county duly appointed T. C. Bond as the appraiser to appraise the said estate for the purpose of assessing the inheritance tax under the provisions of chapter 201, § 15, of the Public Laws of 1913 of North Carolina, and the said Bond duly qualified, assessed said estate, and has filed his report in this court bearing date of June 26, 1914; and the same is referred to and made a part hereof for full description of same.

"Third. That the said John R. Lawrence is the only devisee and legatee in said will and testament and in the report of said assessor, whose share is liable for the inheritance tax, as provided for in chapter 201 of Public Laws of North Carolina of 1913. That the said John R. Lawrence was the nephew and foster child of the said John H. White, deceased, and was the son of the sister of said White and her husband, Thomas Lawrence. That Thomas Lawrence died when your petitioner was about six years of age, leaving surviving him his wife and three small children, John R. Lawrence, Bettie Lawrence, and Ida Lawrence, and without leaving any estate and property. That John H. White, who lived and died a bachelor, took and adopted his sister and her child, John R. Lawrence, into his household as members of his family, and the two small girls, Ida and Bettie Lawrence, went to live with their aunt, Bettie Wilson. That your petitioner's mother, the sister of said White, cared for his house and did the other duties pertaining to the same until the time of her death, which occurred when your petitioner was nine years old, and your petitioner remained there also cared for by his uncle and mother. That, before the death of his mother, the said White promised her that he would adopt the said John R. Lawrence, raise him, and leave him all of his property at the time of his death, and, after the death of his mother, your petitioner remained with the said White until he reached the age of 21 years, and was treated as a son by the said White, and in turn treated the said White as he would have his father. That the said John R. Lawrence worked in the field of said White, never receiving any compensation therefor, other than his board and clothes and a little spending money, just as any other man in similar circumstances in said locality would have treated a son, and he nursed and cared for said White when he was sick, and was in turn nursed and cared for by the said White. That the said White announced to the world that he had adopted his nephew as his child and heir, and he was so regarded by the neighbors in that community, though there was never any actual 'legal adoption.' That the said White repeatedly told him that he was going to leave him his property when he died, and he raised and brought up your petitioner to believe and feel that this would be the case. That during the said period of time the household of said John H. White, deceased, consisted of said White, your petitioner, and a hired man, James Q. White, and the other servants around the house and farm. That the said White was very affectionate to the said Lawrence, and said Lawrence was in turn very affectionate with his uncle, because he felt that he stood in the relation of parent to him and was, practically speaking, the only father he ever knew in his life, as his own father died before he could remember much about him.

"Fourth. That your petitioner reached the age of 21 years old, and was advised by said White that he should go away and learn something of the world, and that he was willing to allow him to go in the Northern part of the country and work, provided that he would return home and care for the said White whenever he needed him. That your petitioner went up into the Northern states, and followed the trade of boiler maker, and continued this work for several years. That he and the said John H. White always kept in touch with each other, and your petitioner generally came home once every year to see his uncle and foster parent, and was in turn visited by the said White at various intervals. The aforesaid relation of father and child was always continuing to exist during the said period, and correspondence by the use of the mail was kept up between them during this period. That when your petitioner would return home to visit his uncle, and when said uncle and foster parent would visit him, they would frequently advise together about the property and condition of said White and Lawrence, the said Lawrence aiding said White by suggestions, and said White aiding said Lawrence in this and other ways, and the said White always treated said Lawrence as his son and heir to his property. That about two years before the death of said White he advised your petitioner that he was getting too feeble and old to care for himself, and desired that he come home and take charge of him and his property until the time of his death, as he was the only child he ever had, and the one he felt nearest to in the world. That your petitioner had married in the meantime and had his wife and two small children, and was engaged in the millinery business in Gloucester, N. J. His said business was prosperous and in good condition, but, in obedience to the summons of his said foster parent and uncle, he immediately sold the same out at a great sacrifice, and returned home to care for his said uncle. That from then on to the death of said White he and his wife remained at the home of said White and cared for, and nursed the said White, who was very feeble and old, in the same manner as he would have cared for his own parents, and cared for said farm and other property of said White, managed the same, and had charge of said property in the same manner as said White would have had charge of same, if he had been able. That during this period the said White frequently advised him that he regarded him as the only child he ever had in the world, and that upon his death he would receive the bulk of his property and estate. And the aforesaid relation of father and child extended up to the death of said White, which occurred in 1913.

"Fifth. That your petitioner is advised and believes, and so avers, that, because of facts above stated, the said relation of father and child between White and himself began when your petitioner was about six years of age and continued until the death of said White in 1913,

and they stood in this relation, within the meaning of the inheritance laws of the state of North Carolina, and that, in assessing and appraising said estate of said White and the property devised by said White to your petitioner, the basis of the tax should be at the rate of $1 per hundred dollars instead of $3 per hundred dollars, as provided for for persons in the relation of nephew and uncle."

Upon the hearing, the clerk found the facts as stated in the petition to be true, but held, as a conclusion of law thereon, that defendant did not stand in this relation of child, within the meaning of the Inheritance Tax Law. On appeal, the judge of the district approved and affirmed the findings and judgment of the clerk, and petitioner appealed to this court.

Pruden & Pruden, of Edenton, and Gilliam & Davenport, of Windsor, for appellant.

HOKE, J. The law imposing a tax on inheritances (section 6, subsec. 1) provides, among other things:

"First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor or husband or wife of the person who died possessed of such property aforesaid, or where the person to whom such property shall be devised or bequeathed stood in the relation of child to the person who died possessed of such property aforesaid, at the rate of one dollar for each and every hundred dollars of the clear value of such interest in such property; and this clause shall apply to all cases where the taxes have not been paid by the executor or administrator or other representative of the deceased person. The clerk of the superior court shall determine whether any person to whom property is so devised or bequeathed stands in the relation of child to the decedent"

—and allows an exemption of $2,000 each on persons coming within the class described.

On persons taking beneficial interest in property by devise, inheritance, etc., and not coming within this description, a higher tax is imposed and no exemption allowed. Referring to the language of the statute, it is clear that the words used, "or where the person to whom such property shall be devised or bequeathed stood in the relation of child to the person who died possessed of such property," are in addition to lineal issue or ancestors, these last being expressly named, and that they are not restricted to persons formally adopted as children, for this could have been readily specified and expressed. The words, therefore, are more inclusive, and in our opinion, on perusal of the entire provision, including, "and the clerk of the superior court shall determine whether any person to whom property is so devised or bequeathed, stands in the relation of child to the decedent," the law referred and intended to refer the question to the courts, primarily to the sound, legal discretion of the clerk, as a mixed question of law and fact, and that the words extend to and include all meritorious cases, where the parties had assumed and continued to live in the relationship of parent and child, or where they lived in mutual recognition of such relationship. This was held to be the correct construction of the statute in the recent case of State ex rel. Shaw, Solicitor, v. Bridgers, 161 N. C. 246, 259, 76 S. E. 827, where the words in question were held to "include and apply to daughters-in-law who were in every way deserving and were treated and recognized as children by the testatrix." Speaking to the question in that case, the court said:

"In our view, however, these legatees should each be considered and dealt with as one standing in the relation of child to the decedent under clause 1, § 6, of the statute. This clause imposes a tax of three-fourths of 1 per cent. on legacies to the lineal issue or lineal ancestor of decedent or to his brother or sister or to 'one who stood in relation of child to such decedent'; this, in case of question, to be determined in the first instance by the clerk of the superior court. This provision, in our opinion, refers and was intended to refer to the case of widows or widowers, and other cases could be suggested to the decision of the courts and to relieve them, when legatees, from the higher rate imposed on strangers to the blood of the decedent in all cases where they were deserving of this favor. From a perusal of the will, showing the tenderest concern for these legatees, and from their known deserving, these daughters-in-law should be considered as standing in the relation of children and only be subject to the lighter tax imposed on the lineal issue of deceased."

And the position has been recognized as sound in principle in other jurisdictions. Ross on Inheritance Taxation, § 138; 37 Cyc. pp. 1571, 1572.

The interpretation adopted is required by the general and inclusive nature of the descriptive words, "one who stood in the relation of child to decedent," and is more insistent in view of the additional clause, "and the clerk shall determine whether any person to whom property is bequeathed stands in the relation of child." On the facts, as established, we are of opinion that the petitioner stood in the relationship of child to the decedent, within the meaning of the law, and this will be certified that judgment may be so entered and the taxes assessed and exemption allowed accordingly.

Reversed.

(168 N. C. 217)

TYLER v. MAHONEY et al. (No. 118.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

ATTACHMENT ⟸186—DAMAGES—RIGHT TO.

Where attached property was damaged through the negligence of the sheriff, defendants, who procured the attachment without cause, are liable as principals, notwithstanding plaintiff, whose property was attached, might have recovered against the sheriff and upon the attachment bond.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 600–607; Dec. Dig. ⟸186.]

Appeal from Superior Court, Bertie County; Bond, Judge.

Action by Perry C. Tyler against J. and E. Mahoney. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

Winston & Matthews, of Windsor, for appellant. Winborne & Winborne, of Murfreesboro, for appellees.

CLARK, C. J. This is an action to recover damages to his crops by an attachment levied in an action brought by the defendants against the plaintiff in 1908. That action was before this court (Mahoney v. Tyler, 136 N. C. 40, 48 S. E. 549), when it was held that, though the attachment had been wrongfully sued out, the defendant in that case could not recover damages therein, but must bring an independent action for that purpose. That was done by this action which was before this court. Tyler v. Mahoney, 166 N. C. 509, 82 S. E. 870. This court held therein that it was not necessary to prove malice in order to recover damages, saying:

"The effect of proving malice would be to authorize the jury, in case they saw fit, to award punitive damages, but it is not necessary to consider this question, as punitive damages are disclaimed in specific terms in the brief of the counsel for the plaintiff."

On the new trial the jury found upon the issues submitted to them that the defendants wrongfully sued out the attachment without probable cause, and that by the negligence of the sheriff the crops of the plaintiff were damaged thereby to the extent of $500. The fourth issue, "What sum, if anything, is plaintiff, Tyler, entitled to recover of the defendants Mahoney?" the court answered, as a legal inference, from the responses to the other issues, "Nothing."

This raises the only question presented by this appeal, and that is whether the plaintiff who wrongfully sues out a writ of attachment, which is levied upon the property of the defendant therein, is liable to such defendant for damages to the property caused by the sheriff while in possession of the property.

The plaintiff is not proceeding against the sheriff, nor against the attachment bond, but against these defendants who were the plaintiffs in the wrongful attachment because they put in motion the proceedings in which their crops were taken wrongfully and damaged.

The plaintiff herein having been put out of the possession of his property by abuse of the process of the law which was invoked by these defendants, they are responsible to the plaintiff (the defendant in that action) for the damage which he sustained thereby. The sheriff was their agent to execute the mandate of the court, issued at their instance. If the sheriff acted negligently, he might also be responsible, and the sureties on the attachment bond are also responsible, for the amount of the damage done. The plaintiff has not chosen to pursue either of these, as he might have done, but he has limited his demand to the principals at whose instance the process of the law was wrongfully put in motion.

In Mahoney v. Tyler, 136 N. C. 40, 48 S. E. 549, the only question was whether the defendant, Tyler, could proceed by motion in the cause to recover his damages for wrongfully suing out the attachment, or must resort to a separate civil action, and the latter was held to be his proper remedy. This suit was brought in consequence of what was there decided. It was also held that, by motion in that cause, Tyler could require the return of any property in the hands of the sheriff, if he desired to pursue that course. In this action he recovers all damages suffered by reason of defendant's tortious act. 4 Cyc. 880.

We are of opinion that the defendants are responsible to the plaintiff for the damage done to his crops by the sheriff in executing the attachment that was wrongfully sued out against him, as the jury find. In response to the fourth issue, the judge should have held that, as a matter of law, the defendants were liable to the plaintiff in the amount of the damage found to have been sustained by the crops while in the custody of the sheriff as found in the third issue, to wit: "$500 and interest from the date of the attachment." Allen v. Greenlee, 13 N. C. 371; Abrams v. Pender, 44 N. C. 261; Sneeden v. Harris, 109 N. C. 357, 13 S. E. 920, 14 L. R. A. 389; R. R. v. Hardware Co., 135 N. C. 73, 47 S. E. 234; s. c., 138 N. C. 175, 50 S. E. 571, 3 Ann. Cas. 720; s. c., 143 N. C. 54, 55 S. E. 422.

The case will be remanded to the end that the judgment may be so entered in the court below.

Reversed.

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(168 N. C. 296)

## HASSELL v. DANIELS' ROANOKE RIVER LINE STEAMBOAT CO. (No. 68.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

1. CORPORATIONS ⟸507 — ACTIONS — SUMMONS—SERVICE.

The summons issued against and served on an individual agent for a corporation does not confer jurisdiction over the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971–1974, 1976–2000; Dec. Dig. ⟸507.]

2. APPEARANCE ⟸8, 20—VOLUNTARY APPEARANCE—EFFECT.

The filing by a corporation defendant of a plea denying liability is an appearance by it and gives the court jurisdiction over it, and a subsequent motion to dismiss for want of service of process is properly denied.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 23–41, 91–102; Dec. Dig. ⟸8, 20.]

3. APPEAL AND ERROR ⊜914—PRESUMPTIONS —VALIDITY OF JUDGMENT.

In the absence of anything to the contrary in the record, the court on appeal will presume, in support of the judgment, that a corporation defendant filing a plea denying liability and moving to dismiss for want of proper service filed the plea first, so that the court acquired jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3693–3698; Dec. Dig. ⊜914.]

Appeal from Superior Court, Martin County; Ferguson, Judge.

Action by one Hassell against the Daniels' Roanoke River Line Steamboat Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover value of a bale of cotton, which was commenced before a justice of the peace and heard on appeal in the superior court. The summons was issued against and served on J. L. Davenport, agent for the Daniels' Roanoke River Line Steamboat Company. Judgment was rendered in favor of the plaintiff before the justice of the peace, and the defendant appealed.

In the superior court an order was made that the Daniels' Roanoke Steamboat Company be made a party defendant, and said company was entered upon the record as a defendant, but no summons was issued. The case on appeal to this court is entitled Hassell v. Daniels' Roanoke River Line Steamboat Company, and it states that:

The case was tried "on an appeal by defendant from the justice of the peace's court to recover the sum of $60 for the loss of one bale of cotton. The defendant denied owing the plaintiff anything. The pleadings will show the contentions fully of the parties. Before the trial began, the defendant company, through its attorneys, Martin & Martin and B. A. Critcher, made a motion to dismiss the proceedings, and they made a special appearance to make this motion, and same was entered of record, for the reason that no summons has ever been issued against Daniels' Roanoke River Line, and none has ever been served upon the defendant, but summons was only issued and served upon J. L. Davenport, agent. Motion overruled, and exception taken by defendant."

Both parties introduced evidence, and a verdict was rendered in favor of the plaintiff, and judgment entered accordingly, from which the defendant appealed.

Martin & Martin and B. A. Critcher, all of Williamston, for appellant.

ALLEN, J. [1, 2] If there was nothing in the record except that summons issued against and was served upon J. L. Davenport, agent for the Daniels' Roanoke River Line Steamboat Company, we would not hesitate to set aside the judgment rendered against the company upon the ground of want of jurisdiction of the party, the corporation (Mauney v. High Shoals Manufacturing Co., 39 N. C. 196; Young v. Barden, 90 N. C. 424); but it also appears that the company was entered on the record as a party, and that it filed a plea denying liability, and it nowhere appears that this was not done before the attempt to enter a special appearance for the purpose of the motion to dismiss because no process had been served. The filing of the plea denying liability was an appearance by the corporation, and, if made before the motion to dismiss, gave to the court as full jurisdiction of the party as if a summons had been regularly issued and served (Wheeler v. Cobb, 75 N. C. 25; Scott v. Life Association, 137 N. C. 515, 50 S. E. 221; Rackley v. Roberts, 147 N. C. 207, 60 S. E. 975), and, as every intendment and presumption is in favor of the validity of the judgment and the jurisdiction of the court, it must be assumed that the plea was entered, and after that time the motion to dismiss made (Mauney v. Gidney, 88 N. C. 204; Settle v. Settle, 141 N. C. 573, 54 S. E. 445; Spillman v. Williams, 91 N. C. 487).

[3] There is nothing in the record to rebut this presumption in favor of the judgment, and the form of the motion to dismiss strongly corroborates it because it is made upon the ground that no summons has ever been issued or served, and not upon the ground that there has been no appearance.

We are therefore of opinion that the motion to dismiss was properly overruled, and, as there is no other exception relied on, the judgment is affirmed.

No error.

(168 N. C. 315)

## PINNELL et al. v. BURROUGHS et al.

(No. 111.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

1. JUDGMENT ⊜668 — RES JUDICATA — PARTIES CONCLUDED.

A judgment which orders a sale of real estate to pay a decedent's debts is conclusive on the parties, whether heirs of decedent or heirs of a third person, though they did not contest the title to the property, which was directly involved, for if the property did not belong to decedent's estate, but to another who was a party, the latter must set forth his interest, or he will be estopped, so long as the judgment remains unreversed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1181–1183, 1188; Dec. Dig. ⊜668.]

2. EXECUTORS AND ADMINISTRATORS ⊜397—SALES BY EXECUTORS—VALIDITY—STATUTORY PROVISIONS.

Revisal 1905, § 341, making recitals of an executor's deed prima facie evidence of the validity of an order referred to or recited in the deed, where the record containing the original entries and papers have been lost or destroyed, implies that the proper parties were made defendants in a suit to sell a decedent's real estate to pay debts, and that they were served with process or voluntarily appeared, for otherwise the judgment could not be valid, for jurisdiction of the parties is a prerequisite to validity.

[Ed. Note.—For other cases, see Executors, and Administrators, Cent. Dig. §§ 1598–1604; Dec. Dig. ⊜397.]

3. EXECUTORS AND ADMINISTRATORS ⊂=397—SALES BY EXECUTORS—VALIDITY—STATUTORY PROVISIONS.

Recitals, in an executor's deed of real estate, that the executor was by decree of court, in a cause wherein persons named were parties, ordered to sell to pay a decedent's debts, because of the insufficiency of the personal property, and that, on the report of sale, the court confirmed it and by final decree ordered the executor to execute the deed, etc., are, when aided by Rev. § 341, making recitals of an executor's deed prima facie evidence of the validity of the orders referred in the deed, sufficient to show that all proper steps were regularly taken, so that the record could not be attacked collaterally.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1598–1604; Dec. Dig. ⊂=397.]

4. JUDGMENT ⊂=707—VOID JUDGMENT—COLLATERAL ATTACK.

A judgment against one not served with process nor appearing in person or by attorney is void and may be so treated whenever offered without any direct proceeding to vacate it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ⊂=707.]

5. JUDGMENT ⊂=497—VOID JUDGMENT—COLLATERAL ATTACK.

Where the record shows service of process on or appearance by defendant, when in fact there had been no service of process, a judgment against him is apparently regular and conclusive until vacated by a direct proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. ⊂=497.]

6. JUDGMENT ⊂=497—VOID JUDGMENT—COLLATERAL ATTACK.

A judgment against one as plaintiff is void, unless the record shows that he was plaintiff; but where the record shows that he was plaintiff, when in fact he was not, the judgment is conclusive until corrected by direct proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. ⊂=497.]

7. JUDGMENT ⊂=497—CORRECTION OF RECORD—DIRECT PROCEEDINGS.

A plaintiff may by direct proceeding, in the original cause, correct the record failing to speak the truth, but cannot assail it collaterally.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. ⊂=497.]

8. JUDICIAL SALES ⊂=53—VALIDITY—PRESUMPTIONS.

A purchaser at a judicial sale may, so long as the decree stands, presume that it has been rightly and regularly rendered, and he need not take notice of errors of the court or the laches of parties.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 104–107; Dec. Dig. ⊂=53.]

Appeal from Superior Court, Warren County; Ferguson, Judge.

Action by W. A. J. Pinnell and others against W. C. Burroughs and others. From a judgment for plaintiffs, defendants appeal. Reversed, and new trial ordered.

This action, to recover the possession of land, was brought by W. A. J. Pinnell, Robert L. Pinnell, and Lena Andrews, as children and heirs at law of Jackson Pinnell, against the defendants, who are the children of Lucy W. Pinnell, the widow of Jackson Pinnell, by her subsequent marriage with John H. Burroughs, who was her second husband. The land in dispute is that which was allotted to the widow of Jackson Pinnell, and plaintiffs alleged that at her death the defendants wrongfully took possession thereof. Plaintiffs further allege that Jackson Pinnell, at the time of his death, was seised of the said land, and that it descended to them, as his heirs at law. Defendants admit that Jackson Pinnell was, at one time, seised of the said land, but deny that it descended to plaintiffs, as his heirs. On the contrary, they aver that the "reversionary interest" therein, or the fee subject to the widow's dower, was sold under a judgment of the superior court of Warren county, where the land is situated, in a suit or proceeding entitled Henry B. Hunter, executor of Willis Lloyd, deceased, against Willis A. J. Pinnell (one of the plaintiffs in this action) and others, who were the other plaintiffs.

The court held that, in the state of the pleadings, the burden was upon the defendants, and they offered, as evidence, "the deed of Henry B. Hunter, executor of Willis Lloyd, deceased, to John H. Burroughs, as evidence of title in the defendants, they being the children of said John H. Burroughs, now deceased, to which the plaintiffs objected. The defendants proposed and offered to prove the loss of the records recited in the said deed, and further insisted that the deed could not be attacked collaterally." The court permitted the deed to be read as evidence. It had been proved November 25, 1870, and registered March 4, 1871, and was in the following words and figures:

"This indenture made and entered into this the 20th day of September, 1870, between Henry B. Hunter, executor of Willis Lloyd, party of the first part, and John H. Burroughs, party of the second part, all of Warren county, state of North Carolina, Witnesseth: That the said party of the first part was, by a decree of the superior court of the said county of Warren, made in a certain cause wherein the said party of the first part was plaintiff, and Willis A. J. Pinnell, an infant under twenty-one years old, and others, were defendants, ordered to sell, for the purpose of paying the debts of the said Willis Lloyd, which his personal property was insufficient to discharge, certain real estate of the said Willis Lloyd, to wit, the reversion after the life estate of Mrs. Lucy W. Burroughs, in a tract of land of 238 acres, situated in the said county of Warren, on the waters of Rich Neck, adjoining the lands of Jacob Parker, Henry Williams, and others, same being the tract which was assigned to the said Lucy W. Burroughs, then Lucy W. Pinnell; and whereas, the said party of the first part, in pursuance of the said decree, did on the 14th day of May, 1870, sell the said real estate at auction at the courthouse door in the town of Warrenton, when said party of the second part became the purchaser in the sum of one thousand dollars and paid the whole of the purchase money in cash; and whereas, upon report of the said sale to the said court, the same was in all respects confirmed, and said party of the first part was by final decree in said cause ordered to execute a deed for said real estate to the said party of the second part: Now, therefore, in consideration of the premises and of the said sum of

one thousand dollars, the receipt of which is hereby again acknowledged, the party of the first part has given, granted, bargained, sold, and conveyed, and doth by these presents give, grant, bargain, sell, and convey, unto the said party of the second part and his heirs forever, the real estate heretofore described. To have and to hold the same with all appurtenances thereto belonging to him the said party of the second part and his heirs forever. In testimony whereof the said party of the first part has hereunto set his hand and affixed his seal on the date first above written.

"H. B. Hunter, [Seal.]
"Executor of Willis Lloyd."

It was admitted that the plaintiff Willis A. J. Pinnell was heir at law of Willis Lloyd, deceased. The court was of the opinion, and so ruled, that, even if the defendants should show the loss of the records recited in the deed, the deed could not be considered as evidence of title against the plaintiffs, who are the heirs at law of Jackson Pinnell; the sale being had, as recited in said deed, by the executor of Willis Lloyd, and the property sold as the property of Lloyd to pay Lloyd's debts, and not the debts of Pinnell, and Pinnell's heirs are not bound by the recitals of said deed. The defendants duly excepted to this ruling and, in deference thereto, offered no other evidence. The court thereupon directed the jury to find for the plaintiffs, which was done, and defendants appealed, after reserving exceptions and assigning errors.

John H. Kerr, of Warrenton, and A. C. & J. P. Zollicoffer, of Henderson, for appellants. Thos. M. Pittman, of Henderson, for appellees.

WALKER, J. (after stating the facts as above). [1] We are of the opinion that there was error in the ruling of the court. It may be conceded that there is no connection proven between Jackson Pinnell and Willis Lloyd; and, in the view taken by us of the case, it was not necessary that it should have been shown. The object of the defendants was not to prove that the heirs of Jackson Pinnell had lost the title, which it is alleged had descended to them, by a sale of the land under the decree of the court in the suit by the executor of Willis Lloyd, but to show that the plaintiffs in this action were parties, as defendants and as heirs of Willis Lloyd, in the proceeding brought by the executor of Willis Lloyd to have the land sold for the payment of his debts. If they were parties to the latter suit, they are bound and concluded by the judgment rendered therein, and it can make no difference whether they acquired title to the land as the heirs of Jackson Pinnell, or as heirs of Willis Lloyd, as they are estopped by the judgment without regard to the source from which they may have derived title. If they had any other right or title to the land at the time they were called upon to answer the complaint, they should have disclosed it, and pleaded it, and, having failed to do so, they are concluded by the judgment as to the title, which was alleged to have been in Willis Lloyd, and will not be heard to aver against it in this action. Armfield v. Moore, 44 N. C. 157; Carter v. White, 134 N. C. 474, 46 S. E. 983, 101 Am. St. Rep. 853; Gregory v. Pinnix, 158 N. C. 147, 73 S. E. 814. The court, in Owen v. Needham, 160 N. C. 381, 76 S. E. 211, quoting from and approving Coltrane v. Laughlin, 157 N. C. 287, 72 S. E. 962, held it to be a well-recognized doctrine here and elsewhere that:

"When a court having jurisdiction of the cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matter contained in the pleadings, and, though not issuable in the technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined on the hearing"—citing Gillam v. Edmonson, 154 N. C. 127, 69 S. E. 924; Tyler v. Capeheart, 125 N. C. 64, 34 S. E. 108; Tuttle v. Harrill, 85 N. C. 456; Fayerweather v. Ritch, 195 U. S. 277, 25 Sup. Ct. 58, 49 L. Ed. 193; Aurora City v. West, 74 U. S. (7 Wall.) 82, 103, 19 L. Ed. 42; Chamberlain v. Gaillard, 26 Ala. 504; 23 Cyc. pp. 1502–1506.

It was stated again and applied to a proceeding for the sale of land for assets in Smith v. Huffman, 132 N. C. 600, 44 S. E. 113. One question involved directly in a proceeding to sell lands for assets is the intestate's ownership of the land; and if he is not the owner, and any other party to the record is the owner or has an interest therein, which would be prejudiced by a decree which does not recognize and protect it, he is estopped, so long as the decree stands unreversed, and the doctrine is said to be founded on the principles of justice and fair dealing, as we find declared in the foregoing cases. The party is estopped for the reason, in part, that he has been delinquent, as he had his day in court and a fair opportunity to assert his right, which he deliberately failed to do, and he will not afterwards be heard to call the matter in question, for the law does not permit the same question to be again litigated, under such circumstances. If it did, there never would be an end to controversy. The parties to the proceeding entitled Hunter, Executor of Willis Lloyd, v. Willis A. J. Penland and Others, are estopped as to the right and title being in the intestate, Willis Lloyd. But who were the parties? It is not necessary to inquire beyond the fact that Willis A. J. Pinnell, who is a party, as plaintiff, in this action, was one of them, for the court directed a verdict against the defendants, and if they are entitled to recover an interest in the land, in any view of the case, his direction was erroneous. This brings us to the consideration of the next question.

[2] We must take it that the records of the court had been lost or destroyed, because the court refused to consider the deed or its recitals as evidence of title, even if they had been lost. The statute (Revisal, § 341) makes

the recitals of an executor, administrator, or commissioner for the sale of land "prima facie evidence of the existence, validity, and binding force of the decree, order, judgment, or other record, referred to or recited in said deed," where the record or files containing the original entries and papers have been lost or destroyed. Isler v. Isler, 88 N. C. 576; Hare v. Hollomon, 94 N. C. 14; Everett v. Newton, 118 N. C. 919, 23 S. E. 961. The statute also makes the said deed, record, and decree valid and binding as to all persons mentioned or described therein, and who were parties or purported to be parties thereto. Chief Justice Smith said in Hare v. Hollomon, supra, that:

"The rule is indispensable when, as in the present case, the original papers in the cause have been lost or destroyed."

If the decree or judgment is to be taken as prima facie valid, as the statute provides, this necessarily implies that the proper parties were made defendants by service of process, voluntary appearance, or otherwise, because it could not be valid, unless the court had jurisdiction of the cause and the parties, which is prerequisite to its validity. Kello v. Maget, 18 N. C. 414.

[3] The recitals are sufficient to justify the inference, by the aid of the statute, that all proper steps were regularly taken for the sale of the land, and we have often held that such a record cannot be attacked collaterally. Apparently the heirs of Willis Lloyd were made parties, as the case could not proceed without them, and Willis A. J. Pinnell is one of them, which, with the facts stated and admitted in the first sections of the complaint and answer, gives rise to the presumption, prima facie at least, that:

"The others mentioned in the deed were his heirs, as they are the brothers and sisters of Willis A. J. Pinnell, all being children of Jackson Pinnell."

[4-6] The rule as to attacking records is well stated by Justice Reade in Doyle v. Brown, 72 N. C. 393:

"Where a defendant has never been served with process, nor appeared in person or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated whenever and wherever offered, without any direct proceedings to vacate it. And the reason is that the want of service of process and the want of appearance is shown by the record itself, whenever it is offered. It would be otherwise if the record showed service of process or appearance, when in fact there had been none. In such case the judgment would be apparently regular, and would be conclusive until, by a direct proceeding for the purpose, it would be vacated. A plaintiff needs not to be brought into court; he comes in. A judgment is of no force against a person as plaintiff, unless the record shows him to be plaintiff. If the record shows him to be plaintiff, when in fact he was not, then it stands as where the record shows one to be defendant, when he was not. In both cases the record is conclusive until corrected by a direct proceeding for that purpose."

And this rule has been followed ever since in all the cases upon the subject. Barefoot v. Musselwhite, 153 N. C. 208, 69 S. E. 71; Cooke v. Cooke, 164 N. C. 287, 80 S. E. 178, 49 L. R. A. (N. S.) 1034. Discussing the validity of judgments, with special reference to proceedings for the sale of land, Chief Justice Smith said in Sumner v. Sessions, 94 N. C. 376:

"It is true the record produced does not show that notice was served on the infant, or upon her guardian ad litem, nor does the contrary appear in the record, which, so far as we have it, is silent on the point. The jurisdiction is presumed to have been acquired by the exercise of it, and, if not, the judgment must stand, and cannot be treated as a nullity, until so declared in some impeaching proceeding, instituted and directed to that end. The irregularity, if such there be, may, in this mode, be such as to warrant a judgment declaring it null, but it remains in force till this is done."

This doctrine was approved in Rackley v. Roberts, 147 N. C. 201, 60 S. E. 975, Hargrove v. Wilson, 148 N. C. 439, 62 S. E. 520, and Burgess v. Kirby, 94 N. C. 575, and has been recognized in other cases too numerous to be mentioned. Some of the more important ones will be found in the last two cases above cited.

By his remark that the proof, which defendant proposed to offer, as to the loss of the record, would not avail them by making the recitals in the deed evidence of their title to the land, the presiding judge prevented the defendants from developing their case and made their defeat a certainty. They were not required to do the vain thing of going on with their proof, if, indeed, they had any more or needed it. The ruling was fatal to their case, and they did well to desist. The ruling was error, as also was the peremptory instruction to find for the plaintiff.

[7] The plaintiffs may, by a direct proceeding in the original cause, correct the record if it fails to speak the truth, but cannot assail it collaterally in this action. They may be barred of any remedy by the long delay, or for other reason, but we do not decide as to this; the facts not being now before us. If a judgment is irregular, a court will not always set it aside, and have declined to do so when the rights of bona fide purchasers for value and without notice of the irregularities would be prejudiced. Matthews v. Joyce, 85 N. C. 264; Sutton v. Schonwald, 86 N. C. 198, 41 Am. Rep. 455; England v. Garner, 90 N. C. 197; Harrison v. Hargrove, 120 N. C. 96, 26 S. E. 936, 58 Am. St. Rep. 781; Rackley v. Roberts, supra; Yarborough v. Moore, 151 N. C. 116, 65 S. E. 763.

[8] We cannot too often repeat what was said by the court in Sutton v. Schonwald, supra, as to the necessity of safeguarding the integrity of judicial sales, after they had stated that this wholesome doctrine is founded upon public policy, as well as the principles of equity:

"Purchasers should be able to rely upon the judgments and decrees of the courts of the country, and, though aware of their liability to be reversed, yet they have a right, so long as they stand, to presume that they have been

rightly and regularly rendered, and they are not expected to take notice of the errors of the court or the laches of parties. A contrary doctrine would be fatal to judicial sales and the values of title derived under them, as no one would buy at prices at all approximating the true value of property, if he supposed that his title might at some distant day be declared void because of some irregularity in the proceeding altogether unsuspected by him, and of which he had no opportunity to inform himself. Under the operation of this rule, occasional instances of hardship may occur, but a different one would much more certainly result in mischievous consequences and the general sacrifice of property sold by order of the court."

The recitals in the deed of Henry B. Hunter, executor, to John H. Burroughs, are explicit, as those in the deed which was the subject of consideration in Hare v. Hollomon, supra, and, as held in that case, are prima facie adequate to sustain the action of the court. Irvin v. Clark, 98 N. C. 437, 4 S. E. 30. They are fuller and more definite than some recitals which have been held sufficient to show the validity of titles acquired at judicial sales.

There must be a new trial, because of the error committed by the court in its ruling upon the legal force and effect of the deed as evidence. It may be that the defendants, who are the heirs of J. H. Burroughs, purchaser at the sale, will be able to prove more clearly, at the next trial, that the other defendants in the former suit, besides Willis A. J. Pinnell, were the heirs of Willis Lloyd.

New trial.

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(100 S. C. 43)

## STATE v. ADAMS. (No. 8996.)

(Supreme Court of South Carolina. Feb. 10, 1915.)

1. BASTARDS ⟸92 — TRIAL — EXCLUDING SPECTATORS.

In the absence of a showing of abuse of discretion, defendant cannot complain that, during his trial for bastardy, the court excluded from the courtroom all negroes and boys.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 228–239; Dec. Dig. ⟸92.]

2. BASTARDS ⟸60 — EVIDENCE — ACKNOWLEDGMENT.

An acknowledgment by defendant in bastardy, though made prior to birth of the child, tending to show his relations with prosecutrix and that he had opportunity of being the father, is admissible.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 166, 169; Dec. Dig. ⟸60.]

3. BASTARDS ⟸65—BURDEN TO COUNTY—EVIDENCE.

It is enough, on a prosecution for bastardy, that there be facts and circumstances in evidence from which an inference can be drawn that the child is likely to become a burden to the county.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 154, 175–177; Dec. Dig. ⟸65.]

4. BASTARDS ⟸92—APPEAL—EXCEPTION.

An exception, merely that the court erred in giving a quoted charge, will not be considered; it not specifying wherein the charge was erroneous.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 228–239; Dec. Dig. ⟸92.]

5. BASTARDS ⟸65—"ACCOMPLICE"—CORROBORATION.

Prosecutrix in bastardy is not an "accomplice," whose testimony must be corroborated.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 154, 175–177; Dec. Dig. ⟸65.

For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

Appeal from General Sessions Circuit Court of Florence County; C. J. Ramage, Special Judge.

Luke Adams was convicted, and appeals. Dismissed.

Defendants' exceptions are:

It is respectfully submitted that his honor, Judge C. J. Ramage, erred and invaded the right guaranteed to the accused by the Constitution of the United States and of this state, of a public trial, by putting "all the negroes and boys out of the courthouse" during the trial.

It is respectfully submitted that his honor erred in permitting the witness W. W. Floyd to testify to an alleged "acknowledgment," prior to the birth of the child, over the objection of defendant, because said alleged statement was made prior to the date of said birth of the child.

It is respectfully submitted that his honor erred in refusing to defendant a new trial upon the ground that there was no scintilla of evidence that the child was likely to become a burden to the county.

It is respectfully submitted that his honor erred in charging the jury as follows: "I charge you that it is for you to say whether or not you will take the testimony of the prosecutrix; whether or not you will believe her. That is a matter entirely for you. I charge you that, in a prosecution of any kind in a court of sessions, the only matter is to find out what is the truth of the matter. The jury may in its discretion believe one witness in preference to a dozen. A witness in a matter of this kind does not have to be corroborated. If you believe a party is telling the truth, you may accept the statement of that witness in preference to the others. * * * Mr. Early: I would ask your honor to charge the jury that a verdict may be had on the uncorroborated testimony of the mother. The Court: Yes, I have already practically charged that." Because:

I. It is reversible error for the trial judge to charge the jury that a conviction may be had upon the uncorroborated testimony of the prosecutrix in a bastardy proceeding, it being respectfully submitted that it is the duty of the trial judge to advise the jury against a conviction upon the uncorroborated testimony of the prosecutrix.

II. Said above-quoted charge invaded the province of the jury in violation of the constitutional inhibition, being a charge in respect to matter of fact, in that it advised the jury how to weigh and consider the evidence.

III. It is respectfully submitted that the verdict is contrary to the law and evidence, in that there is no scintilla of evidence that the child was likely to become a burden on the county.

P. H. Arrowsmith, of Lake City, for appellant. C. E. Early and D. G. Baker, both of Florence, for respondent.

GARY, C. J. The defendant was convicted under an indictment charging him with being the father of a bastard child. The prosecutrix and three other witnesses testified for

the state. The defendant did not testify, nor offer any testimony. He appealed upon exceptions, which will be reported.

[1] The first exception cannot be sustained, for the reason that it has not been made to appear that the discretion of his honor, the presiding judge, was erroneously exercised.

[2] The second exception must be overruled for the reason that the testimony tended to show the relations between the defendant and the mother of the child, and that he had the opportunity of being the child's father.

[3] The third exception cannot be sustained, as there were facts and circumstances from which the inference could be drawn that the child was likely to become a burden to the county.

[4] The fourth exception will not be considered, as it fails to specify in what particulars the charge therein quoted was erroneous.

[5] The fifth exception cannot be sustained, for the reason that the prosecutrix did not occupy towards the defendant the relation of an accomplice.

Appeal dismissed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

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(99 S. C. 501)

BELL v. BELL et al. (No. 8985.)

(Supreme Court of South Carolina. Dec. 1, 1914.)

APPEAL AND ERROR ⊜1106—TRANSCRIPT—INACCURACIES—DISPOSITION OF CAUSE.

Where a comparison of the transcript with the testimony as shown by the master's notes reveals material omissions and misstatements due to the negligence of both parties as to an issue of fact, the case will be remanded for trial of such issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8951-8954; Dec. Dig. ⊜1106.]

Appeal from Common Pleas Circuit Court of Richland County; R. Withers Memminger, Judge.

Action by Richard Bell against Alice Bell and another. From a judgment for defendants, plaintiff appeals. Remanded, with directions.

J. B. McLauchlin, of Columbia, for appellant. R. B. Herbert and R. Beverley Sloan, both of Columbia, for respondents.

PER CURIAM. The respondent has moved the court to have this cause reargued chiefly because the testimony in the case was incorrectly, though unintentionally, typed by the appellant. The appellant admits some errors in transcribing the testimony from the master's notes, and some of them are material; but the manner of the commission of them was explained by appellant. The fault lies equally with appellant and respondent; it was the business of both to see that a correct copy of the testimony was furnished the court. And no excuse has been made therefor, except that which always follows negligence. These omissions refer almost entirely to the issue of notice from Bell to Lakin; they do not refer to the issue of estoppel by Alice. On that last issue we have no reason to open the case; we are content to abide the opinion we have expressed thereabout. As matter of law, plainly if Lakin had verbal timely notice from Bell that the title was not good, he cannot hold it against Bell, although reputable counsel advised him rightly that his paper title was good. We have examined with some care, since the motion was made, the master's notes of testimony. They are very much defaced, but a comparison of that testimony with the testimony furnished the court reveals three omissions and one misstatement. These errors are all relevant to the issue of notice. We ought to have had the full and correct testimony, for the issue was one solely of fact, and was dependent upon the credibility of the witnesses, and credibility depended much upon consistency of the witnesses. We express no opinion upon the weight of the omissions, but we are of the opinion that they are sufficient to warrant a retrial of the issue of notice. Yet there is no time now to retry the cause here. For that reason, and because the issue depends upon the credibility of the witnesses, we direct a trial of it by a jury. The cause is therefore remanded to the circuit court, with direction to submit this issue to a jury, to wit:

"Did Isaac Lakin have notice of the claim of title in the premises by Richard Bell before he (Lakin) paid to Alice Bell the purchase price therefor?"

Let the answer be yes or no, as the jury may conclude.

Let Lakin be the actor therein.

And let the verdict be reported back to this court.

Another issue of betterments, held in abeyance, may be renewed before the circuit court before the master, in the event the jury shall decide the issue of notice for Lakin.

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(143 Ga. 74)

COBB COUNTY CHEMICAL MINING CO. v. KIRKPATRICK. (No. 159.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. INSTRUCTIONS—GROUNDS FOR NEW TRIAL.

The special grounds of the motion for a new trial all complain of certain portions of the charge to the jury. The excerpts from the charge complained of, when taken in connection with the entire charge, afford no ground for a new trial.

2. SUFFICIENCY OF EVIDENCE.

The verdict was supported by the evidence, and the court did not err in refusing a new trial.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between the Cobb County Chemical Mining Company and W. L. Kirkpatrick. From the judgment, the Mining Company brings error. Affirmed.

R. W. Crenshaw and Anderson & Rountree, all of Atlanta, for plaintiff in error. Westmoreland Bros. and Frank L. Neufville, all of Atlanta, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 105)

## WOODWARD LUMBER CO. v. H. C. VAN ORMER & SON. (No. 171.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

FORECLOSURE OF MECHANIC'S LIEN—PETITION.

This case is controlled by the decisions in the cases of Pike Bros. Lumber Co. v. Mitchell, 132 Ga. 675, 64 S. E. 998, 26 L. R. A. (N. S.) 409, and Rome Brick Co. v. West, 134 Ga. 65, 67 S. E. 400. It follows that the court did not err in sustaining the demurrer filed to the petition.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action between the Woodward Lumber Company and H. C. Van Ormer & Son. From the judgment, the Lumber Company brings error. Affirmed.

James M. Hull, Jr., and Lansing B. Lee, both of Augusta, for plaintiff in error. Pierce Bros., of Augusta, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 95)

## THOMPSON v. SIMMONS. (No. 165.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. BOUNDARIES ⟸48 — INSTRUCTIONS — "ACQUIESCENCE."

The action was in ejectment, and the ownership of the locus in quo turned upon the location of the boundary line between the parties to the cause. In an instruction upon the rule that acquiescence for seven years, by acts or declarations of adjoining landowners, shall establish a dividing line, the court charged: "Acquiescence is defined in this way: To acquiesce means to rest satisfied without opposition, to submit without opposition or question, to yield assent; that is the definition. It must be done by acts or declarations on the part of those who are claimed to have acquiesced in it." Such instruction was not erroneous.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232–242; Dec. Dig. ⟸48.

For other definitions, see Words and Phrases, First and Second Series, Acquiesce.]

2. INSTRUCTIONS.

The evidence authorized a charge on the subject of acquiescence; and, in so far as the requests to charge on that subject were pertinent and legal, they were sufficiently covered by the general charge.

3. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

Error from Superior Court, Newton County; L. S. Roan, Judge.

Action between D. A. Thompson and M. S. Simmons. From the judgment, Thompson brings error. Affirmed.

Rogers & Knox, of Covington, for plaintiff in error. C. C. King, of Covington, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 94)

## CLOWER v. GEORGIA RY. & ELECTRIC CO. (No. 164.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. INSTRUCTIONS.

As applied to the pleadings and evidence, when considered in connection with the entire charge, there was no error in any of the excerpts from the charge complained of requiring the grant of a new trial.

2. VERDICT SUSTAINED.

The verdict was supported by the evidence.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between Mrs. C. L. Clower and the Georgia Railway & Electric Company. From the judgment, Mrs. Clower brings error. Affirmed.

Westmoreland Bros., of Atlanta, for plaintiff in error. Colquitt & Conyers, of Atlanta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 111)

## VORNBERG et al. v. DUNN et al., Com'rs of Roads and Revenues. (No. 174.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. COUNTIES ⟸34—COUNTY SEAT—REMOVAL—PETITION FOR ELECTION—SUFFICIENCY.

Where certain citizens of a county, representing themselves to be "registered voters and poll tax payers" of the county, petition the "ordinary" of the county to call an election and submit to the people of the county the question of the removal of the county site to a named town in the county, the notice is not void because it was directed to the "ordinary" of the county, instead of to the court of "ordinary."

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 34–37; Dec. Dig. ⟸34.]

2. COUNTIES ⟸34—COUNTY SEAT—REMOVAL—ELECTION—SUFFICIENCY OF PETITION.

The calling of the election by the "ordinary" as authorized by the statute determined at least prima facie that the petitioners were of the class and were of a sufficient number as required by the statute for the purpose of calling an election at which the question of the removal of the county site to a named town within the county should be voted upon.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 34–37; Dec. Dig. ⟸34.]

3. COUNTIES ⟸35—COUNTY SEAT—REMOVAL—STATUTE—ELECTION.

Where such an issue as set out in the preceding headnotes has been submitted to the people to vote upon, and the result has been declared by the ordinary of the county, and an appeal as provided for by statute is made to the Secretary of State, who certifies his findings to the Legislature, and that body enacts that the removal of the county site be had in accordance with the findings of the Secretary of State, and the preamble of the act recites that two-thirds of the legal voters of the county have voted in favor of such removal, the enrolled act of the Legislature, reciting the facts necessary to authorize the removal, will be held to have conclusively determined that the election resulted in two-thirds of the legal voters of the county favoring the removal, as required by statute.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 38-45; Dec. Dig. ⟸35.]

4. TAXATION ⟸302—EXCESSIVE LEVY—WHAT CONSTITUTES.

The tax levy in this case was not shown to be excessive.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 496; Dec. Dig. ⟸302.]

5. DENIAL OF INJUNCTION.

The court did not err in refusing an injunction.

Error from Superior Court, Murray County; A. W. Fite, Judge.

Equitable petition by F. E. Vornberg and another against D. R. Dunn and others, as Commissioners of Roads and Revenues of Murray County. Judgment for defendants, and plaintiffs bring error. Affirmed.

W. W. Sampler, of Spring Place, and Hendricks & Hendricks, of Nashville, for plaintiffs in error. W. C. Martin and W. E. Mann, both of Dalton, Jesse M. Sellers, of Chatsworth, H. H. Anderson, of Spring Place, and Little, Powell, Hooper & Goldstein, of Atlanta, for defendants in error.

HILL, J. The Legislature of this state in 1913 (Acts 1913, p. 423), after reciting that:

"Whereas, heretofore on the 19th day of August, 1912, a petition was filed with the ordinary of the county of Murray, and state of Georgia, signed by two-fifths of the registered voters, as shown by the registration list last made out, in and for said county, asking for an election to be held in said county of Murray for the purpose of changing and removing the county site of said county from the town of Spring Place to the town of Chatsworth, in said county; and, whereas, on the said 19th day of August, 1912, the ordinary of said county of Murray, upon the due consideration of said petition so filed with him, did pass an order for an election to be held in the various militia districts of said county, on the 30th day of September, 1912, for the purpose of changing and removing the county site of said county as asked for by petitioners, which said order was duly published in the Murray News, the newspaper in which the sheriff of said county publishes his legal notices, as provided by section 486 of volume 1 of the Code of 1910; and, whereas, on the 30th day of September, 1912, said election was held in said county for the purpose of changing said county site, in accordance with said order from said ordinary, and at said election so held there were 862 votes for removal to Chatsworth and 427 votes for removal to Eton, and 155 votes against removal; and, whereas, afterwards said election was contested, contesting the right of the votes cast for removal to Eton, to be counted, on the ground that said election was called for removal to Chatsworth, said contest being heard by the Secretary of State; and, whereas, the Secretary of State decided said contest as follows: That there were 1017 legal votes cast in said election, 862 for removal to Chatsworth, and 155 votes against removal, now, therefore"

—enacted that the county site of Murray county be removed from Spring Place to the town of Chatsworth in the county of Murray. In pursuance of this act of the Legislature, and by virtue thereof, the board of county commissioners of Murray county did, on the 1st day of September, 1914, in addition to the general tax levy, order that there be assessed, levied, and collected a special tax of 60 cents on the $100 of all taxable property in the county of Murray for the year 1914 as a jail fund to be used in erecting a new jail for that county at Chatsworth. The commissioners also adopted an order on the 10th day of September, 1914, inviting sealed proposals for the erection and completion of a jail building, to be located on the new courthouse square in the town of Chatsworth. It was provided that the building should be commenced on or before the 15th day of October, 1914, and should be completed on or before November 30, 1914, at a cost not exceeding $12,000. Certain details of the specifications and the time when payments should be made were set out, which it is not necessary here to detail.

To the levy of this special tax, F. E. Vornberg and C. W. Brown brought their equitable petition against D. R. Dunn, J. A. McGhee, and T. H. Hemphill, as commissioners of roads and revenues of Murray county, seeking to enjoin them from opening, accepting receiving, or approving bids from any contractor, or contracting with such, for the purpose of the erection of the jail building as contemplated; and that T. P. Ramsey, the tax collector of Murray county, be enjoined and restrained from collecting the tax levy of 60 cents on the $100 to be used as a fund for erecting the jail as proposed. It was prayed: (a) That the call of the election to remove the county site from Spring Place to Chatsworth in Murray county, and all subsequent proceedings in furtherance of the call, and the election held in pursuance thereof, be declared illegal and void as being in violation of article 11, § 1, par. 4, of the Constitution of the state as embodied in Civil Code 1910, § 6597, which provides that:

"No county site shall be changed or removed, except by a two-thirds vote of the qualified voters of the county, voting at an election held for that purpose, and a two-thirds vote of the General Assembly."

It was further prayed: (b) That the act of 1913, cited supra, be declared illegal and void as being in violation of the same provision of the state Constitution above quoted, and for the further reason that the bill which the Legislature sought to enact was neither in

whole nor in part read three times, on three separate days, in the Senate and House, as required by article 3, § 7, par. 7, of the Constitution of Georgia.

At the conclusion of the interlocutory hearing, the court refused the injunction, and granted a supersedeas as to the collection of the jail fund tax upon the plaintiffs giving a good and sufficient bond to be approved by the clerk of the superior court of Murray county, payable to the defendants, to answer and pay all damages that may be sustained in consequence of delay incident to the prosecution of the case. To this judgment, the plaintiffs in error excepted.

[1] 1. Section 486 of the Civil Code, as amended by the act of 1911 (Acts 1911, p. 54), so far as pertinent to the present case, is as follows:

"Whenever two-fifths of the electors qualified to vote for members of the General Assembly (as shown by the registration list last made out) of any county of this state shall petition the ordinary for the removal or change of the county site of said county, said ordinary shall at once grant an order directing an election to be held at the various election precincts in said county, not less than forty, nor more than sixty days thereafter."

The petition asking the ordinary to call an election for the purpose of voting on the question of removal of the county site from Spring Place to Chatsworth was addressed, "To the Honorable Ordinary of Murray County." It is insisted that this petition is void for the reason that it is addressed to the "ordinary" of Murray county, instead of to the "court of ordinary" of Murray county, and that therefore no legal call for an election was made. This contention is without merit, as a glance at the above-recited section of the Code will show. The voters of Murray county were strictly within their rights when they followed the exact language of the Code and addressed the petition to the "ordinary," instead of to the "court of ordinary."

[2] 2. It is further insisted that the submission by the ordinary to the voters of Murray county is void because it is signed by poll tax payers, instead of by electors qualified to vote for members of the General Assembly. The petition recites that:

"We, the undersigned registered voters and poll tax payers of Murray county, respectfully petition your honor to call an election in said county," etc.

Subsequently, the ordinary issued the notice of election to the voters of Murray county, as required, wherein it was stated that a petition had been filed by two-fifths of the poll tax payers of the county. "All persons qualified to vote in other elections are qualified to vote in this election, and the election shall be held at all the precincts in said county. Said election shall be held and conducted and return made as provided by law." It is insisted that: (1) The election notice, order, and judgment of the ordinary is illegal and void because, being a court of record, its ordinary determined that the election was called on a petition signed by two-fifths of the poll tax payers of Murray county, whereas the law on the date of the issuance of the notice of election, judgment, and order of the ordinary, required two-fifths of the electors qualified to vote for members of the General Assembly, as shown by the registration list made out preceding the call of the election for the county site removal of the qualified voters of the county. Also, that (2) the notice of election, order, and judgment of the ordinary called an election to remove the county site from Spring Place to Chatsworth, thereby limiting the privilege of the voters and requiring them to vote as between Spring Place and Chatsworth only, thereby prohibiting all of the qualified voters of the county from exercising their unrestricted choices as to any place or preference in the county for removal other than to Chatsworth. (3) That on the petition and notice of election, an election was held and 155 legal votes were cast against removal and 527 legal votes were cast for removal to Eton, a town in the county of Murray, and 862 legal votes were cast for removal to Chatsworth, a town in the county of Murray; that neither Eton nor Chatsworth received a two-thirds majority of the votes cast in the election, and for this reason any attempt to declare the election legal and remove the courthouse from Spring Place to Chatsworth is unconstitutional and void, as being in violation of the state Constitution (Civil Code, § 6597), quoted above. The election resulted in the filing of a contest and objections to the election before the Honorable Philip Cook, Secretary of State, who, after taking testimony in the case, directed by appropriate order that:

"The petition and order provided only for submitting the question to the voters as to changing the county site from Spring Place to Chatsworth. This was the only question by the petition which the ordinary had jurisdiction to pass upon and the only question which by his order he did pass upon and submit in the election. This being true, all votes cast for Eton are illegal, because under the petition and order there was no provision for voting for other than against removal and for removal to Chatsworth. * * * I find that in an election held September 30, 1912, in the county of Murray, for the removal of the county site to Chatsworth, that there were cast 1,017 legal votes, 135 legal votes against removal and 852 votes for removal to Chatsworth."

This finding of the Secretary of State is also excepted to as being in violation of the provision of the Constitution above quoted. The finding of the Secretary of State was certified to the General Assembly of the state, to the effect that two-thirds of the legal votes cast in the election were in favor of removal to Chatsworth, and the Legislature passed the act as recited above, removing the county site from Spring Place to Chatsworth.

The calling of the election by the officer authorized by the statute determined at least prima facie that the applicants, or petition-

ers, for the order calling for an election for the removal of the county site, were of the class, and were of a sufficient number as required by the statute in such cases. See Barrett v. Ashmore, 137 Ga. 545, 73 S. E. 825.

[3] 3. According to the ruling in Crutcher v. Crawford, 105 Ga. 180, 31 S. E. 139, the enrolled act of the Legislature of 1913 conclusively determined that the election for the removal of the county site from Spring Place to Chatsworth was held as provided by law, and that it resulted in two-thirds of the voters favoring the removal from Spring Place to Chatsworth. That was a case where the General Assembly passed an act to change the county site of Fannin county from Morganton to Blue Ridge (Acts 1895, p. 420). The preamble of that act recites that on the 13th day of August, 1895, an election was held in that county for the purpose of changing the county site, and that:

"At said election so held two-thirds of the legal votes cast at said election were in favor of the removal of said county site from the town of Morganton to the town of Blue Ridge, in said county."

An equitable petition was filed by certain citizens and taxpayers against the county commissioners to enjoin them from building a jail in Blue Ridge for the county of Fannin. We think the decision in the Crutcher Case, which decides that it is to be presumed that, before passing the act changing the county site, the Legislature ascertained that the place to which it was changed had received the necessary majority of the votes cast at the election to determine that question. This court was requested to review and reverse the decision in that case, and other cases in which a like ruling was made. As that decision was made by the entire bench of six justices, and the present case is decided by less than the entire bench, one member being absent on account of sickness, it could not be overruled, although some members of the court may not be satisfied with the reasoning contained in that opinion. This also renders it unnecessary to discuss the question of whether there is a difference between a location of a county site, in which there may be a choice between various places, and a removal of a county site from one particular place to another, relatively to the question of whether there must be a specified majority of the votes cast for all places, or a majority of those cast for the two competing places.

[4] 4. The other assignment of error is that in levying the tax of six mills on all of the taxable property in Murray county, which amounts to $2,659,620, there will be raised the total sum of $15,957.72; whereas, the proposed jail building, when completed, is not to exceed a cost of $12,000, and that the county commissioners have no right or authority to raise a sum greater than will be necessary to complete the building. This tax levy, as shown by the answer, is not so excessive as to render it void. Some margin may be allowed for uncollected taxes, which is always the case, and for commissions of the tax collector, etc. We cannot say, as a matter of law, that the margin is too great for these purposes.

[5] 5. Upon a review of the whole case, we think the court was right in refusing an injunction.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(142 Ga. 104)

## GIBSON v. GROSS. (No. 170.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. EASEMENTS ⟸17, 61 — CREATION — GRANT IN DEED—INJUNCTION.

Where the owner of a lot of land, which is bounded on one side by a street of a city, locates a way thereon in such manner as to intersect with the street, and thereafter sells the part of the lot located at such intersection, and, in describing the land to be conveyed, the deed recites the street as one boundary and the way as another, referring to it interchangeably as an "avenue" and as an "alley," and the deed contains the further recital "to have and to hold said tract or parcel of land unto" the grantee "heirs and assigns, together with all and singular the rights, members and appurtenances thereof, to the same in any manner, belonging to her forever in fee simple," the grantee will acquire an interest in the way so located, and the owner cannot subsequently close it without his consent. Wimpey v. Smart, 137 Ga. 325, 73 S. E. 586, and citations.

(a) Under the principle above announced, where a purchaser of an entire tract of land, in possession under a bond for title with a part of the purchase money paid, lays out a way as indicated above and negotiates a sale of the part thereof lying at the intersection of the way and the street to a third person, and causes a deed of the character above mentioned to be executed by his obligor directly to such vendee, and the deed so executed contains recitals as above indicated, if subsequently, after having obtained a deed from the obligor in the bond for title to the entire lot described therein, with the exception of the smaller lot carved out as above stated, the obligee undertakes to close the way so laid out, he may be enjoined at the instance of the grantee, to whom he caused the deed to be made.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 45–49, 102, 130–144, 148; Dec. Dig. ⟸17, 61.]

2. PLEADING ⟸356—STRIKING OUT—AMENDMENT.

In a suit against the person referred to in the preceding note as the obligee in the bond for title by the person to whom he had caused the deed to be made to enjoin him from closing the alley, the court properly struck an amendment to the plea, which tended to contradict unambiguous recitals of the deed by setting up that the way referred to in the deed as an alley or avenue was not such in fact or so intended, and which did not seek to reform or cancel the deed upon allegations of fraud or mutual mistake. In this connection see Manry v. Waxelbaum Co., 108 Ga. 14 (2), 33 S. E. 701; Ozmore v. Coram, 133 Ga. 250, 65 S. E. 448; Dolvin v. Amer. Harrow

Co., 125 Ga. 706, 54 S. E. 706, 28 L. R. A. (N. S.) 785.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1111–1119; Dec. Dig. ⟸356.]

3. APPEAL AND ERROR ⟸518—BILL OF EXCEPTIONS—AMENDMENT TO PLEADINGS.

Where it is desired to review, by direct bill of exceptions, the ruling of the trial court in rejecting an amendment to the pleadings, the proffered amendment, either literally or in substance, must be set out in the bill of exceptions or attached thereto as an exhibit. The mere general reference in the bill of exceptions to the rejected amendment is too general and indefinite to raise any question for adjudication. Cornwell v. Leverette, 127 Ga. 163, 56 S. E. 300.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342–2355; Dec. Dig. ⟸518.]

4. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict.

Error from Superior Court, McDuffie County; H. C. Hammond, Judge.

Action between Sterling Gibson and M. L. Gross. From the judgment, Gibson brings error. Affirmed.

J. B. Burnside, of Thomson, and L. D. McGregor, of Warrenton, for plaintiff in error. Callaway, Howard & West, of Augusta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 80)

## WARD v. GEORGIA TERMINAL CO.

(No. 161.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

EMINENT DOMAIN ⟸101—STREETS—CHANGE OF GRADE—RIGHT OF ACTION.

The alteration and change of grade of a portion of a street in a city, permitted and sanctioned by lawful authority, whereby the value of land abutting on another part of the street beyond a cross-street is lessened, is not a ground of action, where the landowner has the same communication to other parts of the city through intersecting streets, though with less convenience over the street which was altered.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 269, 270; Dec. Dig. ⟸101.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by A. C. Ward against the Georgia Terminal Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Westmoreland Bros. and Etheridge & Etheridge, all of Atlanta, for plaintiff in error. Colquitt & Conyers, of Atlanta, for defendant in error.

EVANS, P. J. The Georgia Terminal Company, the successor of the Gate City Terminal Company, acquired an area of territory between Foundry and West Hunter streets, in the city of Atlanta. Mangum street traversed this territory, extending northward beyond Foundry street and southward beyond West Hunter street. The company acquired the property on both sides of Mangum street between Foundry and West Hunter streets. With a view of erecting terminals and railroad yard facilities upon their property, they applied to the municipality of Atlanta for permission to change Mangum street between West Hunter and Foundry streets, so that its course would run in the main along Jones alley. The change in the street and the construction of the railroad terminals necessitated excavations of varying depths, reaching about 30 feet at the street immediately north of West Hunter street. Connection was made with the original Mangum street by broadening West Hunter street and grading the addition so as to reach on a declivity the point where Mangum street touches West Hunter street. The plan of the company, showing the alterations in location and grade of Mangum street, and the other changes in that vicinity, was fully set out in a petition to the city council of Atlanta, and approved by the municipality. The General Assembly of Georgia sanctioned the action of the mayor and general council. Acts 1907, p. 408. The terminal company was proceeding to make the alteration in Mangum street as thus authorized, when A. C. Ward, alleging that he was the owner of certain property abutting on Mangum street 52½ feet south of West Hunter street, sought to enjoin the terminal company from further prosecution of the work of excavation and alteration in Mangum street between West Hunter and Foundry streets. The court denied the injunction, and dissolved the restraining order, upon the defendant's giving bond in the sum of $5,000, payable to the plaintiff, to indemnify him for any damage which may accrue to him from the closing of Mangum street, as set forth in his petition. The court further provided that the company should obligate itself not to oppose any amendment offered by the plaintiff praying for damages, and that any judgment which might be obtained should be entered upon the bond as in case of appeals. The bond was given and the work completed by the terminal company. Thereafter the plaintiff amended his petition, alleging that the change in the grade of Mangum street rendered ingress and egress to his property from the north end of Mangum street more difficult, and depreciated the market value of his property in the sum of $5,000. The case came on to be heard, and upon the conclusion of plaintiff's evidence a nonsuit was granted.

There is no suggestion that the change in the grade and course of Mangum street was not legally authorized. No complaint is made on that score. The plaintiff's lot is situated in another block, more than 50

feet from that part of Mangum street where the change in grade and course was made. So that no question of a public nuisance is raised; and, if the plaintiff can recover at all, it must be under that provision of the Constitution which prohibits private property from being taken or damaged without just compensation. If the plaintiff's property abutted that portion of the street which was vacated, and his means of access to his property was interfered with, he would be entitled to remuneration for the damages sustained by the interference with his right of access. Atlantic & Birmingham Railway Co. v. McKnight, 125 Ga. 328, 54 S. E. 148. Or, if the effect of the changing of the grade of Mangum street was to substantially convert that portion of Mangum street upon which the plaintiff's property abuts into a cul-de-sac, he could maintain an action for his damages. But this is not the case. The plaintiff's property is separated from the block where the change in the grade of the street was made by a cross-street that gives him the same access to his property into different parts of the city that he had before, in addition to his outlet through the new street where the grade was changed, and also there is no interference with Mangum street south of the plaintiff's property. In a situation like the plaintiff's the rule is thus adduced by Mr. Elliott, from a large number of cases collated in the notes to 2 Roads and Streets, § 1181:

"Owners of land abutting upon neighboring streets, or upon other streets of the same city, at least when beyond the next cross-street, are not, however, entitled to damages, notwithstanding the value of their lands may be lessened by its vacation or discontinuance."

In Smith v. City of Boston, 7 Cush. (Mass.) 254, it was held that the discontinuance of a part of a street in a city by order of the mayor and aldermen, whereby the value of lands abutting on other parts of the street and on neighboring streets is lessened, is not a ground of action against the city by the owner of such lands, if still accessible by other public streets. In that case Chief Justice Shaw said:

"The petitioner had free access to all his lots, by public streets. The burden of his complaint, therefore, is that in going to some of his houses, in some directions, he may be obliged to go somewhat further than he otherwise would. So must the inhabitant of the south end of the city, or the citizens of other towns, with their teams or carriages, who would have had a right to use the discontinued way. Upon the question of public convenience, it is the province of the mayor and aldermen, upon a balance of all considerations bearing upon it, to decide. It is not to be presumed that they will discontinue a highway once laid out, unless the considerations in favor of the discontinuance decidedly preponderate."

In City of East St. Louis v. O'Flynn, 119 Ill. 200, 10 N. E. 395, 59 Am. Rep. 795, it was held that:

"A lot owner in a city cannot maintain an action against the city for the vacation of a portion of a public street not bordering upon his lot, and not necessary to afford him access thereto. The damage, in such case, to his lot, though in a greater degree, is of the same nature as that to all other property in the city."

Likewise it was held in Dantzer v. Indianapolis Union Railway Co., 141 Ind. 604, 39 N. E. 223, 34 L. R. A. 769, 50 Am. St. Rep. 343, that:

"Depreciation in the value of property by the added inconvenience of access thereto consequent on the vacation of a part of a street at a point some distance therefrom is an injury not different in kind, but only in degree, from that suffered by the community in general, and will not sustain a right of action for damages."

The same rule was followed in Enders v. Friday, 78 Neb. 510, 111 N. W. 140, 15 Ann. Cas. 685. That case is annotated in 15 Ann. Cas. 685, where a very considerable number of authorities are collated, and where the general rule is announced that property owners whose lands do not abut upon the portion of the street vacated, and access to whose property is not cut off, are not entitled to compensation caused by such vacation. One of the chief reasons for the doctrine is, according to Allen, J., that:

"To hold otherwise would be to encourage many trivial suits, that it would discourage public improvements if a whole neighborhood were to be allowed to recover damages for such injuries to their estates, and that the loss is of a kind which purchasers of land must be held to have contemplated as liable to occur and to have made allowance for it in the price which they paid." Davis v. Hampshire County, 153 Mass. 225, 26 N. E. 850, 11 L. R. A. 750, 752.

Even in the case of an unauthorized obstruction of a street, so as to make the obstruction a public nuisance, a plaintiff cannot maintain an action for damages to his property, unless it is shown that he suffers some special injury not shared by the general public. East Tenn., Va. & Georgia Railway v. Boardman, 96 Ga. 356, 23 S. E. 403.

In the instant case the evidence discloses that the plaintiff's access to his property from the south is not disturbed. He has the same communications to other parts of the city through West Hunter street with the streets intersecting it, and also through Mangum street, though the change of the grade of that street has made travel along it less convenient than it was before the change was made. The damage which he has sustained is of the same kind which is shared by the public generally. It does not differ in kind, but only in degree; and, under the overwhelming weight of authorities, he has no right of action. Whatever loss he has sustained is damnum absque injuria. There was no error in granting a nonsuit.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 117)

MIDDLE GEORGIA INTERURBAN RY. CO. v. KILBY LOCOMOTIVE & MACHINE WORKS et al. (No. 175.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

GRANT OF INJUNCTION—DISCRETION.

Under the pleadings and evidence, there was no abuse of discretion in granting the injunction prayed for on condition that the plaintiff should give a bond to pay the defendant such amount as the latter might recover against the former, and refusing the injunction if such bond should not be given.

Error from Superior Court, Butts County; Robt. T. Daniel, Judge.

Action between the Middle Georgia Interurban Railway Company and the Kilby Locomotive & Machine Works and others. From the judgment, the railroad company brings error. Affirmed.

C. L. Redman and J. I. Moore, both of Jackson, and Holbrook & Corbett, of Atlanta, for plaintiff in error. W. E. Watkins, of Jackson, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(75 W. Va. 565)

STATE v. DECKER.

(Supreme Court of Appeals of West Virginia. Feb. 2, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸1158—ACTION TRIED TO COURT—DEMURRER TO EVIDENCE.

On writ of error to a judgment rendered in a case tried by the court in lieu of a jury, this court will consider the case as if upon a demurrer to the evidence, regarding the plaintiff in error as demurrant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066, 3070, 3071, 3074; Dec. Dig. ⟸1158.]

2. INTOXICATING LIQUORS ⟸146 — WRONGFUL SALE—RECEIVING ORDERS.

One who, without a state license to sell spirituous liquors, prior to July 1, 1914, received orders therefor, even though he did not solicit them, is guilty of violating clause "c," § 1, c. 32, Code 1913 (sec. 1113).

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 159, 160, 163; Dec. Dig. ⟸146.]

Error to Circuit Court, Lincoln County.

A. A. Decker was convicted of selling, etc., spirituous liquors without a state license, and he brings error. Affirmed.

D. E. Wilkinson, of Hamlin, for plaintiff in error. A. A. Lilly, Atty. Gen., and John B. Morrison and J. E. Brown, Asst. Attys. Gen., for the State.

WILLIAMS, J. Defendant was convicted upon an indictment found at the June term, 1913, charging him with "selling, offering and exposing for sale, soliciting and receiving orders for spirituous liquors" without a state license therefor, and was adjudged to pay a fine of $25 and to be confined in jail for 60 days, and brings error.

[1, 2] Defendant having waived a jury, the case was tried by the court. We do not see that he committed any error. The rule of this court is to consider the case as if upon a demurrer to the evidence; plaintiff in error being regarded as the demurrant. Board of Education v. Parsons, 24 W. Va. 551. Hence, if the evidence is such as would have justified the court in overruling a motion to set aside a verdict of a jury found upon it against the plaintiff in error, the finding of the court must be sustained. Dempsey v. Norfolk & Western Ry. Co., 69 W. Va. 271, 71 S. E. 284, 34 L. R. A. (N. S.) 682, and Butcher v. Sommerville, 67 W. Va. 267, 67 S. E. 726. But, independent of this rule, we think defendant's guilt is shown by his own admission that he received orders for spirituous liquors. The proof is that he occupied a building at Yawkey, in Lincoln county, which he rented from C. W. Eagler who conducted a licensed saloon in McCorkle, Kanawha county, and sold malt and other soft drinks in this building; that he had on hand, in his store, blank orders for liquors, containing a list of prices at which Eagler sold it, and also envelopes addressed to him at McCorkle. Persons would come into defendant's place of business, fill out orders for such quantities of liquor as they might want, inclose them, together with the money, in the addressed envelope, and turn it over to defendant. He would then deliver it to the hack driver who operated a hack line between the two points. On the day following, the party making the order would come to defendant's place of business and receive from him the package of liquor left in his care by the hack driver. Defendant admits all this, and, if it does not amount to receiving orders for liquor, we fail to see what could properly be so regarded. The statute (clause "c," § 1, c. 32, Code 1913 [sec. 1113]) makes the receiving of orders for spirituous liquors, as well as the soliciting of them, an offense. The two terms are connected by the disjunctive "or," not the conjunctive "and." Defendant denies that he solicited orders, but the receiving of them alone was a violation of the statute.

The judgment is affirmed.

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(75 W. Va. 559)

HORSE CREEK COAL LAND CO. v. TREES et al. (No. 2660.)

(Supreme Court of Appeals of West Virginia. Feb. 2, 1915.)

*(Syllabus by the Court.)*

1. QUIETING TITLE ⟸35 — REMOVAL OF CLOUD—POSSESSION—PLEADING AND PROOF.

To confer jurisdiction in equity to remove cloud from legal title to leased premises, aver-

ment and proof of possession by plaintiff are indispensable.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 73, 74; Dec. Dig. ⊂⊃35.]

2. MINES AND MINERALS ⊂⊃77—LEASE—LESSOR—RIGHT TO EQUITABLE RELIEF.

Equity will deny relief, at the suit of a lessor, based on locations for operations elsewhere than as prescribed by the lease, where, with knowledge thereof, he accepts, without complaint, his share of the productions therefrom.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 204; Dec. Dig. ⊂⊃77.]

3. MINES AND MINERALS ⊂⊃77—OIL LEASE—FORFEITURE—ENFORCEMENT.

Equity will not enforce a forfeiture. It will not divest a vested estate by enforcing a forfeiture for the breach of a subsequent condition. In such case the party is left to his legal remedy.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 204; Dec. Dig. ⊂⊃77.]

Appeal from Circuit Court, Lincoln County.

Suit by the Horse Creek Coal Land Company against Joseph C. Trees and others. From decree for plaintiff, defendants appeal. Reversed, injunction dissolved, and cause remanded.

Chilton, MacCorkle & Chilton and T. S. Clark, all of Charleston, and R. G. Altizer, of Pittsburgh, Pa., for appellants. Watts & Watts and Price, Smith, Spilman & Clay, all of Charleston, for appellee.

LYNCH, J. To secure reversal of a decree overruling their demurrer, striking their answer from the file, and denying their motion to dissolve an injunction restraining operation of oil and gas wells drilled by them, previously awarded upon the bill of the Horse Creek Coal Land Company, alleging noncompliance with the terms of the lease, and for that reason praying declaration of the forfeiture thereof and its cancellation as a cloud on plaintiff's title to the demised premises, the defendants John C. Trees, as lessee, and the United Fuel Gas Company, as his assignee, obtained this appeal.

The duration prescribed for exercise of the rights conferred by the lease was "two years from its date and as much longer as gas or oil is produced from the leased premises in paying quantities." No bonus or rental for delay in testing the lands for oil and gas was required by the contract. It did, however, provide for speedy commencement and diligent prosecution of drilling operations, specifying the time for drilling the requisite number of wells to develop the leased premises while oil can be gotten in paying quantities, and for forfeiture for neglect or refusal to perform the terms and conditions so prescribed. The compensation fixed was one-fourth of all oil produced and saved, delivered into tanks or pipe lines to the credit of the lessor, and $250 per annum in advance for each gas well so long as the gas be marketed therefrom.

Under the permission granted, Trees, the original lessee, assigned the gas rights to the Hope Natural Gas Company, which reassigned them to the United Fuel Gas Company. Trees, or one of the companies holding under him, drilled four wells on the lands. In two of them gas in paying quantities was discovered, but not utilized, because, according to the contention of defendants, there was no market available or accessible for such production; the lands being remote from any locality affording an opportunity for its consumption at that time. Hence the wells were "plugged" to hold the gas in storage for future use; but plaintiff was paid or tendered the compensation therefor pursuant to the requirements of the lease. The third well produced neither oil nor gas, the fourth oil in small but not in paying quantities, the bill alleging its initial capacity as 20 barrels per day but thereafter only about 3 barrels; the answer of defendants replying that such production at no time exceeded 3 barrels for the same period of time. Except as noted, these facts are virtually conceded to be true.

To the bill, specifically alleging the terms and conditions of the lease and the particulars as to noncompliance therewith, appellants demurred for want of requisite averments to confer jurisdiction in equity to cancel the lease as a cloud on plaintiff's title, because complainant did not allege possession on its part, or to declare and enforce a forfeiture of the lease contract.

[1] As to the first ground, it may be said, without argument, that according to the well-settled rule, enforced by numerous decisions of this and other states, the averment of possession in a plaintiff who seeks removal of cloud from title is an essential prerequisite to the maintenance of a bill for that purpose. Only in case he has such possession is a plaintiff permitted to resort for such relief to an equitable proceeding. Otherwise he must avail himself of the complete and adequate remedy afforded either by an action of unlawful entry and detainer, if brought within the limitation prescribed by statute, or then or thereafter by process of ejectment. And to avail him the possession must be actual, not merely such as follows in the wake of the legal title. Moore v. McNutt, 41 W. Va. 695, 24 S. E. 682; Christian v. Vance, 41 W. Va. 754, 24 S. E. 596; Sansom v. Blankenship, 53 W. Va. 411, 44 S. E. 408; Poling v. Poling, 61 W. Va. 83, 55 S. E. 993; Kellar v. Craig, 126 Fed. 630, 61 C. C. A. 366.

[2, 3] And, as to the second ground, it may be observed the law is equally well established by similar authority. Indeed, the real foundation of equitable jurisdiction was based in a large measure on the necessity for relief against the rigid and harsh rules as to forfeiture applied and enforced by courts of the common law as distinguished from courts

of equity. So that it is now a common and trite legal maxim that, while equity will relieve against forfeiture, generally it will not enforce one. On this subject our decisions are uniform and consistent. Craig v. Hukill, 37 W. Va. 520, 16 S. E. 363; Railroad Co. v. Triadelphia, 58 W. Va. 520, 52 S. E. 499, 4 L. R. A. (N. S.) 321; Spies v. Railroad Co., 60 W. Va. 389, 55 S. E. 464; Headley v. Hoopengarner, 60 W. Va. 646, 55 S. E. 744; Pheasant v. Hanna, 63 W. Va. 613, 60 S. E. 618; Adams v. Railway Co., 64 W. Va. 188, 61 S. E. 341; Newton v. Kemper, 66 W. Va. 130, 66 S. E. 102.

Nor, when analyzed in view of the facts upon which they are based, do the authorities cited and relied on by the learned counsel for plaintiff impinge upon or contravene the rule applicable and applied to the facts now under review. On the contrary, they are concordant, not at variance. Between them there is no conflict. They are harmonious, and announce the same doctrine. The facts only are dissimilar. To differentiate them from the facts of this case would unduly prolong this discussion, without serving any useful purpose. We note the difference in a few of them.

Guffy v. Hukill, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, 26 Am. St. Rep. 901, was an action of unlawful entry and detainer, based on a forfeiture for failure to operate for oil and gas within the prescribed period; the lease in terms assigning as cause therefor a breach of the covenant to drill within 90 days from its date. Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107, Oil Co. v. Gas Co., 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566, and Oil Co. v. Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027, were suits in equity, in which relief was sought and granted on the ground of abandonment by the lessees of operations under the leases.

In Starn v. Huffman, 62 W. Va. 422, 59 S. E. 179, we said that after the lapse of two years and three months, no mining having been done, equity will cancel a coal lease for failure to operate. The lease there canceled expressly required the immediate beginning of active operations, and fixed one year as the duration of its term.

While Brewster v. Zinc Co., 140 Fed. 801, 72 C. C. A. 213, cited, declares:

"There is no insuperable objection to the enforcement of a forfeiture in a court of equity when that is more consonant with the principles of right, justice, and morality, than to withhold equitable relief"

—it adds that:

"A suit, the primary and only purpose of which is to establish a forfeiture as matter of record and to cancel the thing forfeited, in this instance a lease, is a suit to give effect to and therefore in aid of the enforcement of a forfeiture; and the equity which it presents must be strong enough to overcome the general indisposition of courts of chancery towards granting such relief."

The gravamen of Brewster's complaint was drainage of oil from his premises through wells on contiguous lands, and it was therefore based on actual and permanent injury to his proprietary rights, occasioned by failure of the lessee to protect his lands from drainage. But the relief here sought has no such substantial basis. Plaintiff's oil and gas remain in its lands. Its only complaint is that the lessee has not brought to the surface and delivered to it these valuable mineral products as rapidly as demanded by the explicit requirements of the lease. Besides, the principles of the Brewster Case, as to enforcement of forfeitures, do not accord with the views expressed by this court in Craig v. Hukill, 37 W. Va. 520, 16 S. E. 363.

In Jennings v. Carbon Co., 80 S. E. 368, the bill charged fraudulent drainage of oil from plaintiff's lands, admitted by defendants' demurrer, which we overruled upon remanding the cause. Chandler v. French, 81 S. E. 825, did not involve a forfeiture. The lessee did nothing towards compliance with his contract for an unreasonable length of time; and we said in a coal lease:

"There is an implied covenant by the lessee to begin mining within a reasonable time, and if he does not do so he will be presumed to have abandoned his right, and a court of equity will, at the suit of the lessor, cancel the lease as constituting a cloud upon his title."

Upon the facts stated and authorities cited and analyzed, can we say enforcement of the forfeiture urged by appellee, and virtually granted by the decree below overruling the motion of appellants to dissolve the injunction and striking out their answer, actually established that degree of justice and fairness which courts of equity are required to administer as between litigants? To that inquiry we feel constrained to return a negative reply, based in part on Hukill v. Myers, 36 W. Va. 639, 15 S. E. 151, and Oil Co. v. Coulehan, 65 W. Va. 531, 64 S. E. 836.

Conceding failure by the lessees to exercise the most available judgment in the location and continuity of operations for oil and gas, there is no allegation or evidence of a fraudulent refusal to comply with the terms of the lease, or to respond to the repeated and urgent demands for the additional expenditure of their moneys in continuous developments. So far as oil or gas has been found, they have paid or tendered appellee its share of the proceeds arising from such productions as have resulted from their activities. They have not wasted any oil. The bill does not charge waste. They have drilled four wells, at considerable cost to themselves alone. Out of three wells they have derived no adequate return upon their investment, and will not derive any such return from two of them. Considering these expenditures on one hand, and no outlays on the other, does justice demand a virtual ejection of defendants from the leased premises and an appropriation of their investments for operation

and their equipment and appliances to the sole and exclusive use and benefit of the appellee? Plainly, what has been said shows that result to be unwarranted. The leased lands were located in a new, untried, and undeveloped oil and gas territory, many miles from a readily available market for the product chiefly developed from them. If they contain oil, it has not been destroyed or diminished. It remains intact. When produced, appellee will receive its due proportion. Though it has not obtained the desired revenues as promptly as anticipated, it had and has other remedies to which it may resort under reasonable limitations. Where by an enforced forfeiture gross injustice would result to either party to the act or contract, equity will even interfere and grant relief against such enforcement. Hukill v. Myers, supra; Oil Co. v. Coulehan, supra.

Again, conceding that because of the interpolation of the terms and conditions as to the location and drilling of wells between the largest and the two smaller tracts as indicative of an intent to limit the earlier operations to the first tract, as appellee insists, it knew that contrary to these provisions the lessee began his tests on the smaller tracts, and, so knowing, it made no complaint until long after their completion with the result noted. Virtual acquiescence in such deflection from the contract, interpreted as appellee contends, will operate as a waiver of strict compliance with such terms.

What has been said sufficiently suggests the ultimate conclusion that the decree must be reversed because erroneous, the injunction dissolved, and the cause remanded, with direction to sustain defendants' demurrer to the bill, with leave to amend, should appellee be so advised, and, if not, to dismiss it, and for further proceedings therein in conformity with the principles herein announced and otherwise according to the rules governing courts of equity.

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(75 W. Va. 566)

## HUBBARD v. ROBRECHT et al.

(Supreme Court of Appeals of West Virginia. Feb. 2, 1915.)

*(Syllabus by the Court.)*

FRAUDULENT CONVEYANCES ⇐176 — SECRET TRUST — RIGHT TO ENFORCE — FRAUD OF CREDITORS.

Upon a bill in equity brought by a father against his son to procure legal title to property which the father alleges he bought and paid for with his own means, and caused to be conveyed to his son, by deed apparently absolute, but upon secret trust that his son would thereafter convey it to him, whenever requested by him so to do, equity will refuse relief, if it appears that the purpose of the father, in such plan, was to hinder and delay his creditors, then existing, in the collection of their debts. In such case it is immaterial whether the son had actual knowledge of the father's fraudulent intent or not, or whether the alleged trust was express or implied.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 537–541; Dec. Dig. ⇐176.]

Appeal from Circuit Court, Ohio County.

Suit by Nelson C. Hubbard, executor, etc., against Henry Robrecht and others. From a decree for defendants, plaintiff appeals. Affirmed.

See, also, 46 W. Va. 741, 34 S. E. 801.

John P. Arbenz, of Wheeling, for appellant. Henery M. Russell and White & Allen, all of Wheeling, for appellees.

WILLIAMS, J. John Robrecht, claiming to be the equitable owner of property in the city of Wheeling, known as the St. Charles Hotel, to which his son Henry Robrecht held legal title, brought this suit to compel a conveyance of it to be made to him, and also to enjoin his son Henry from selling or incumbering it. It had been owned originally by John Robrecht, and was sold under decree of court in a suit brought by Elijah Marling's executor against John Robrecht and others, in the year 1879, and purchased by the Bank of the Ohio Valley to satisfy a lien which it held thereon. The bank then leased the property either to John Robrecht or his son Henry; the latter being the ostensible lessee. The lease continued until the 2d of January, 1883, when the bank sold it, ostensibly to Henry Robrecht, for $16,000, and executed to him a deed therefor, absolute on its face. Two thousand dollars of the purchase money was paid at the time by Henry Robrecht's check, and for the balance he executed his seven notes for $2,000 each, payable, respectively, on the 2d day of January of each succeeding year thereafter, until and including the 2d of January, 1890, when the last one became payable, and immediately executed to Wm. B. Simpson, one of the officers of the bank, as trustee, a deed of trust upon the property to secure the payment of said notes, together with interest notes on said sum of $14,000, which he had given, to be paid monthly.

The bill alleges that when said conveyance was made to Henry there was an agreement between him and his father that the deed should be executed to Henry, but that he was to hold it in trust for his father, and was to convey it to him whenever he should thereafter request him to do so; that John Robrecht negotiated for the purchase of the property for himself, agreed with the bank upon the terms of purchase, and paid all of the purchase price that has been paid with his own money and means, and that his son paid no part of it; that plaintiff has had continous possession of the property, carrying on the hotel business therein ever since said purchase; that his son Henry is insolvent, and was attempting to borrow money upon

the promise of securing the lender by deed of trust upon the property. Henry Robrecht answered, denying that there was ever any trust agreement between himself and his father, and averring that he purchased the property on his own account and paid for it with his own money, and that he has himself been in possession and control of the property and has continously conducted a hotel business therein on his own account ever since said purchase. He also avers that, at the time of the purchase, John Robrecht was largely indebted, many of his creditors having obtained judgments against him, on some of which executions had been returned unsatisfied; that those judgments were then valid and subsisting liens and did not become barred by limitation until long afterwards; that they were all barred at the time plaintiff brought this suit; that if plaintiff did, in fact, purchase the property and procure title to be conveyed to defendant, with the expectation that defendant would convey it to him when requested, all of which is denied, he did so for the purpose of hindering, delaying, and defrauding his creditors, and therefore is not entitled to relief, even if he should be able to prove his allegations in respect to the trust. Defendant admitted that he had made some attempts to borrow money and intended to secure its payment by trust deed on the property. On the 27th of April, 1898, on motion of plaintiff, the court granted a temporary injunction according to the prayer of the bill. Defendant moved a dissolution of the injunction, and, on the court's refusal to dissolve it, he appealed to this court, and it sustained the lower court. Robrecht v. Robrecht, 46 W. Va. 741, 34 S. E. 801. The case seems to have dragged along from that time (1899) until December 30, 1912, when the decree appealed from was made. John Robrecht died testate, pending the suit, and appointed Nelson C. Hubbard his executor. The executor qualified as such and in October, 1912, caused the suit to be revived in his name. On final hearing, on pleadings and proof, the chancellor denied relief to plaintiff, dissolved the injunction which had theretofore been awarded, and dismissed the suit, and, upon the prayer of defendant's answer, which was also a statutory cross-bill, he perpetually enjoined plaintiff, his agents and servants, from interfering with defendant's possession, and the executor has appealed.

Numerous depositions were taken on behalf of both plaintiff and defendant, the last apparently taken in 1905, and the testimony is voluminous, constituting much the greater part of the printed record, and it could not possibly serve any useful purpose to incumber the reports by detailing it in this opinion. Nearly all of plaintiff's evidence was taken to prove the alleged secret trust agreement between John Robrecht and his son, to explain why it was made, and to prove that plaintiff paid for the property with his own money, and has ever since said purchase, been in possession of it, conducting the hotel business therein in his own name and right, while defendant's evidence was taken to negative those claims, and to prove that defendant purchased the property in his own right and paid for it with his own money, and has been in continuous possession of it himself. It is proven that both plaintiff and defendant, together with a number of plaintiff's children, lived together in the hotel continuously, until plaintiff's death, and that they were so occupying it, under a lease from the bank, at the time of the purchase. A good deal of the money that went to pay for the property seems to have been derived from the hotel business conducted in the property. Bills for expenses incurred in running the hotel were sometimes rendered against John Robrecht, sometimes against Henry, and sometimes against the hotel, without naming either as proprietor. For some time prior to the purchase, and always thereafter, until this suit was brought, the bank account was kept in the name of Henry Robrecht, and checks thereon were sometimes signed in Henry's name, by John Robrecht, and sometimes by Henry Robrecht himself. John Robrecht says Henry signed checks only when he (John) was away from home, which appears to have been on many occasions and for several days at a time. John Robrecht was a labor contractor, and he says he had, during that time, many contracts for street paving and work of like kind, which required him to be away from home much of the time. But there is conflict between father and son respecting those contracts; the latter claiming to have been himself the contractor and his father only a superintendent of the work for him.

From the great mass of irreconcilably conflicting testimony, it would be difficult to determine which one of the two contestants has prevailed in the matter of proof; and in view of the admitted fact that, at the time of the purchase, there were numerous unsatisfied judgments against John Robrecht, it is not necessary, in order to decide the case properly, to determine that question. In our view of the law, plaintiff's prayer cannot be granted, even if he has succeeded in proving a secret trust between John Robrecht and his son Henry; nor does it affect the case if it be conceded that John Robrecht paid for the property wholly with his own means. Hence we do not decide those controverted facts. Counsel for plaintiff admits that John Robrecht was involvent, and argues in his brief that, if he had desired to avoid payment of his debts, he could have done so by going into bankruptcy under the bankrupt act which was in force until 1878. That would have been a lawful way to do it, for many of the debts, which he owed when the property in controversy was bought, he owed prior to 1878. But he chose a method to hinder and

delay his creditors, if not to wholly defeat them in the collection of their debts, that is positively forbidden by law. Assuming that John Robrecht did buy the property for himself and have the title conveyed to his son Henry upon a secret trust for himself, and paid for it wholly with his own money, the question arises: Why did he do it? There can be but one answer to the question, we think, and that is: He did it to keep his creditors from taking it for their debts. It matters not that he did it, as he says, at the suggestion of some one of the bank's officers, in order to protect the bank; neither does it strengthen his case that he may have then entertained an honest purpose to pay all his debts ultimately. He had no right thus to conceal his money from his creditors by investing it in property, held by another in secret trust for himself. It was a violation of law even to hinder or delay them in the collection of their debts. Section 1, c. 74, Code 1913; Edgell v. Smith, 50 W. Va. 349, 40 S. E. 402; Halfpenny & Hamilton v. Tate & McDevitt, 65 W. Va. 296, 64 S. E. 28. The fact that the plan was suggested to him by the bank's officer makes his case no stronger; the act is his, no matter by whom it was suggested. The same principle applies and governs the case as if John Robrecht had owned property and had conveyed it to his son to hinder, delay and defraud his creditors. It is fully proven that John Robrecht's purpose was to hinder and delay, if not entirely to defeat, his creditors; and the actual effect has been to defeat them, for this suit was not brought until all their debts became barred. His conduct cannot be explained on any other theory. While the plan adopted may have saved the bank from the annoyance of suits by John Robrecht's creditors, it was not necessary as a means of protection to its property. It was complete owner when it sold it, and would have had a vendor's lien for any unpaid purchase money superior to any of the judgment liens in favor of John Robrecht's creditors.

Frank P. Jepson, chief witness for plaintiff, and cashier of the bank at the time of the sale, was asked on cross-examination if it was not the purpose, in carrying on the transaction in that way, to keep the judgment creditors of John Robrecht from knowing that he was the real party interested, and replied as follows:

"It was the purpose, I presume, but only for such time as would enable John Robrecht to get on his feet."

And again, when asked what trouble the bank officers anticipated from a conveyance of the property to John Robrecht, he replied:

"In order that the judgment creditors would not jump on the property—have another sale and impair the value of our security."

John Robrecht himself testified that Frank Jepson, and he thought also Mr. Simpson, two of the bank officers, suggested to him that he select one of his children to whom title could be conveyed, and said to him:

"You better let it go that way, so the creditors won't jump on you, and so the bank get their money and the creditors get their money and afterwards we could get ours; so the creditors stand back and the bank and creditors get their money afterwards."

Although it appears that John Robrecht was an illiterate German, still the foregoing statement clearly shows that he understood what he was saying, and discloses that his purpose was to stay the hands of his creditors. Mrs. Tannebaum, his daughter, testified on his behalf, and was asked to state what she knew, if anything, about the controversy between her father and her brother Henry about the ownership of the St. Charles Hotel, and replied as follows:

"Well, as near as I know anything about it, it was the understanding that it was signed in Hen's name, to keep the creditors from getting it, until Pap could get it back, and then Hen was to turn it over to us. That was my understanding of it."

Wm. B. Simpson, an officer of the bank and trustee in the deed of trust, testified for plaintiff, and was asked on cross-examination the following question, and answered as follows:

"You don't mean to say, do you, that the deed was made to Henry Robrecht by the bank for the protection of John Robrecht against some outside matters, and that the bank, which made the deed, didn't know of those outside matters? A. I don't know. As I told you, that is what Mr. Robrecht told me. I don't know anything about the transaction with the bank, but in talking with John he led me to believe, and so stated to me on more than one occasion, that that was the reason; that Henry was protecting him from some unjust claim in some way."

In view of the foregoing testimony, by John Robrecht and other witnesses of his, there can be no room to doubt that his purpose, in having title to the property conveyed to his son, assuming that he was in fact the purchaser, was to delay his creditors in the collection of their debts. His purpose being fraudulent, the rule is well settled, by repeated decisions by this as well as by other courts, that equity will not relieve him from the consequences of his act. His suit rests upon his own unjust and fraudulent conduct, and to grant relief to his personal representative would be to assist his estate to reap the reward of his fraudulent act. That would be inequitable. Even though it be proven that the alleged secret trust existed between John Robrecht and his son, and that the latter was a willing participant in the fraud, equity will not grant relief. In such case the maxim, "In pari delicto potior est conditio defendentis," applies, and equity will leave the guilty parties in the situation in which they placed themselves. So that, if it be assumed that plaintiff has proven all his testator alleged in his bill respecting the trust agreement with his son Henry, he cannot prevail. Equity will not enforce an agreement made between parties for the purpose of ac-

complishing a fraud. McClintock v. Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816; Craig v. Craig, 54 W. Va. 183, 46 S. E. 371; Edgell v. Smith, supra; Halfpenny & Hamilton v. Tate & McDevitt, supra; section 1, c. 74, Code 1913 (sec. 3829). If we assume that no express agreement between John Robrecht and his son existed, and that he caused the land to be conveyed to his son without his knowledge, and simply on the faith that, as he had always been an affectionate and dutiful son, he would thereafter convey it to him whenever requested so to do, plaintiff still cannot recover. In such case the fraud would prevent any valid resulting trust from arising. The case turns solely on the question of law that John Robrecht's purpose, in any event, is clearly shown to have been a fraudulent one, wherefore equity refuses relief. The executor occupies no better position than did his testator. He stands in his testator's shoes, and cannot enforce any rights the latter did not have.

The decree is affirmed.

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(75 W. Va. 588)

## DENT v. McDOUGLE, Judge, et al.

(No. 2824.)

(Supreme Court of Appeals of West Virginia. Feb. 2, 1915.)

*(Syllabus by the Court.)*

1. BASTARDS ⟸33 — COMPLAINT — CONTINUANCE OF PROCEEDINGS—COUNTY.

Although the complainant in a bastardy proceeding has signed and acknowledged a paper, avowing misapprehension under which she made the complaint and lack of intention to make it, releasing the accused from all claims of every kind and character that she might or could allege against him, on account of his paternity of her child, and directing the warrant to be returned, and caused the same to be filed in the circuit court, with the warrant and complaint, that court has jurisdiction, by virtue of section 3 of chapter 80 of the Code of 1913 (serial sec. 3929), to order the proceedings to be had in the name of the county court of the county.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 69–79; Dec. Dig. ⟸33.]

2. BASTARDS ⟸39 — CONTINUANCE OF PROCEEDING IN NAME OF COUNTY—MERITS.

Such order is purely preliminary in character and does not affect the merits of the proceeding.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 98; Dec. Dig. ⟸39.]

3. BASTARDS ⟸35—PROCEEDINGS—JURISDICTION OF JUSTICE.

The jurisdiction of the justice, in such a proceeding, is purely initiative and does not extend to any matter affecting the merits, wherefore he cannot, in the course thereof, either expressly or impliedly, pass upon a question of compromise or satisfaction of the claims or demands of the complainant, and the circuit court is not bound to do so, until after it has determined preliminary questions relating to the form and status of the case.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 80–90; Dec. Dig. ⟸35.]

Petition by E. S. Dent for a writ of prohibition against Honorable Walter E. McDougle, Judge of the Circuit Court of Wirt County, and another, to restrain him from proceeding with the trial of a bastardy proceeding. Denied.

Willie Fought, of Burning Springs, and J. W. Martin, of Elizabeth, for petitioner. C. N. Matheny and Smith D. Turner, both of Parkersburg, for respondents.

POFFENBARGER, J. The defendant in a bastardy proceeding seeks a writ of prohibition to prevent further prosecution of the charge, on the grounds of compromise with the prosecutrix, or dismissal by her, and non-intervention by the county court of the county.

The mother of a bastard child, after having accused him of the paternity thereof, and caused a warrant for his arrest to be issued, on the 30th day of July, 1914, signed, sealed, and acknowledged a paper, called a "memorandum," on the 3d day of August, 1914, in which she declared she had signed and sworn to the complaint under a misapprehension and had not intended, by making the same, to institute a bastardy proceeding, and directed the warrant to be withdrawn and the proceeding to be discontinued. Said paper purports also to release the accused of all claims she may have against him on account of his paternity of the child, for a valuable consideration, but without indication as to what constitutes such consideration. On the 7th day of August, 1914, the officer to whom the warrant had been delivered returned the same unexecuted, together with the release and agreeably to the direction therein given. Later, the warrant was again placed in his hands and executed on the 7th day of September, 1914, when the accused entered into the statutory recognizance which, together with the complaint, warrant, and release, was transmitted and delivered by the justice to the clerk of the circuit court of the county, who docketed the proceeding in the usual way.

The petition avers that, after the return of the warrant unexecuted, the county court, upon a request made to it to assume the prosecution of the charge, declined to do so; but the return substantially denies the making, by said court, of any order of refusal to prosecute, and exhibits a certificate of the clerk, saying there is no record in his office of any action in any bastardy case against the accused.

When the case came up on the docket of the circuit court, the girl was not in court, but an attorney, claiming the right to do so, appeared for her and charged the defendant with having induced her absence. His authority to appear for her was not questioned at the time, but the infancy of the girl was admitted, and the defendant, relying upon his

compromise with her, denied that he had kept her away from court. He was there, in discharge of his recognizance, which, together with the complaint, warrant, and "memorandum," were before the court. He made no motion for discharge or dismissal, nor did he plead or prove any unwillingness of the county court to prosecute. In view of the absence of the complainant and the presence of the memorandum, the court entered, over the objection of the accused, an order directing the prosecution to proceed in the name of the county court, and he excepted to the entry thereof.

[1] By the filing of the complaint and issuance of the warrant, the proceeding was instituted. The jurisdiction of the justice, as in felony cases, was limited to the initiation thereof. To try and determine, he had none. Nor was it within his province to say what constitutes a valid compromise, discharge, or dismissal. His function is prescribed by the statute and limited to the examination of the complainant under her oath, reduction of the examination and complaint to writing, the taking of her signature, issuance of the warrant, requirement of a recognizance in a prescribed amount, and transmission of the papers to the circuit court, the last-named duty arising by necessary implication. All of these duties are substantially, if not wholly, ministerial. Nowhere does the statute authorize him to enter any final order in the proceeding. It being purely statutory, the statute is the measure and limit of his jurisdiction.

Finding the proceeding on its docket in conformity with the statutory provisions authorizing it, the circuit court had jurisdiction vested in it by section 3 of chapter 80 of the Code, serial sec. 3929, namely, to order it to be had in the name of the county court, and that is all that has been done. No order affecting the merits thereof has been entered. To vest such jurisdiction in the circuit court, no previous order of the county court, authorizing prosecution in its name, is necessary, for the statute does not, in terms nor by implication, require it. The section reads as follows:

"After such accusation shall have been made, proceedings thereupon may be had in the name of the woman or, if the court so order, in the name of the county court."

The statute assumes willingness on the part of the county court to prosecute, until the contrary appears, at least. The order so authorized having been made, the validity or effect of the alleged compromise comes up later in the progress of the case.

[2, 3] That the circuit court is the tribunal upon which said section 3 confers authority to order the proceedings to be had in the name of the county court is perfectly manifest. That court and no other has jurisdiction of the proceeding. It would be inconsistent with the general provisions and spirit of the chapter to say the county court has jurisdiction to determine whether the proceeding in the circuit court shall be had in the name of the complainant or in its own name, for the question necessarily arises in the latter court. Before the county courts were deprived of their jurisdiction to try causes, bastardy proceedings were conducted in them (Acts 1872–73, c. 150), and section 3 of that chapter provided that the proceedings should be in the name of the woman or of the overseers of the poor. By chapter 54 of the Acts of 1882, the jurisdiction was vested in the circuit courts and, of course, section 3 of that act, amending the same section of the old act, confers jurisdiction upon the circuit courts as other sections thereof do.

This conclusion does not imply any obligation on the part of the county court to prosecute, nor deny its power to obtain a dismissal. Nor does it in any way predetermine the effect of the alleged compromise. Nothing is now decided except that the circuit court had authority to determine that the proceedings shall be conducted in the name of the county court. What course the proceedings shall take in its name depends upon the future attitude and action of the interested parties, their motions, pleadings, and evidence.

Agreeably to this conclusion, the prayer for a writ of prohibition will be denied and the writ refused.

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(75 W. Va. 591)

## STATE v. MILLER. (No. 2747.)

(Supreme Court of Appeals of West Virginia. Feb. 2, 1915.)

*(Syllabus by the Court.)*

1. HOMICIDE ⇐300—INSTRUCTIONS—SELF-DEFENSE—EVIDENCE.

Refusal to give instructions correctly stating the law of self-defense, in a trial on an indictment for murder, when there is evidence appreciably and directly tending to prove legal excuse for the killing, is reversible error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616–620, 622–630; Dec. Dig. ⇐300.]

2. CRIMINAL LAW ⇐376 — CHARACTER EVIDENCE—ADMISSIBILITY.

It is error to admit evidence, in such a case, tending to prove bad character or degradation on the part of the accused, over his objection and in the absence of evidence adduced by him to establish good character on his part.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836–839, 841, 843; Dec. Dig. ⇐376.]

3. WITNESSES ⇐337—PRIVILEGE OF ACCUSED — CROSS-EXAMINATION — CHARACTER EVIDENCE.

It is likewise error to require the prisoner, testifying on his own behalf, in a criminal case, over objection made by his attorney, to admit, on cross-examination, acts of degradation, not relevant nor material to the issue.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1113, 1129–1132, 1140–1142, 1146–1148; Dec. Dig. ⇐337.]

Error to Circuit Court, Cabell County.

E. E. Miller was convicted of voluntary manslaughter, and brings error. Reversed and remanded for new trial.

Daugherty & Riggs and Marcum & Shepherd, all of Huntington, for plaintiff in error. A. A. Lilly, Atty. Gen., John B. Morrison and J. E. Brown, Asst. Attys. Gen., and Henry Simms, of Huntington, for the State.

POFFENBARGER, J. On an indictment for murder, the plaintiff in error was convicted of voluntary manslaughter, in the criminal court of Cabell county, and sentenced to imprisonment for a period of five years, and the circuit court refused to allow him a writ of error. Then he obtained one from this court.

[1] Assuming lack of evidence tending to prove self-defense, the trial court refused instructions which would have advised the jury as to the right of such defense and the elements thereof; and, for the state, it is insisted here that he had waived it, by his assignment, as a reason for the shooting, of his sudden discovery of Johnson, the slain man, in company with his wife on a bed in Johnson's room in a hotel in which the wife was employed. If there was evidence tending to maintain the issue of self-defense, this admission did not preclude consideration thereof by the jury, nor justify the action of the court in its refusal of the instructions, correctly declaring the law of self-defense. State v. Michael, 82 S. E. 611. In that case, the prisoner said he had shot in self-defense, and the court omitted to recognize, in its instructions, the right of the jury to find him guilty of manslaughter, a lower degree of crime, and, for that, a new trial was allowed. Here the court denied the defense of excusable homicide, because the prisoner assigned a reason for the shooting, inconsistent with that theory. Hence the principle of the Michael Case is clearly applicable.

The eyewitnesses to the shooting were the accused and his wife. The former said:

"They were on the bed, and I seen him throw himself over on my wife, that way, and kind of raised, and I jerked the little boy out of the door, and he jumped off and grabbed a brick, and he didn't get straight with it, until I went to shooting. * * * He just sprang out-off of the bed and grabbed the brick. It lay right at the foot of the bed. I saw it there not 30 minutes before."

Asked, on cross-examination, why he shot Johnson, he said "Because I caught him there with my wife;" but later he said: "Well, I thought he was aiming to hit me with that brick." Still later, this question was asked, "You thought you had to do something—was that the reason you shot?" and he answered: "Yes, sir; the reason I shot him, I caught him on the bed with my wife." The wife said:

"Mr. Johnson jumped off of the bed and grabbed the brick, that is next to the foot of the bed. When he raised with the brick, I heard the report of a gun."

Sufficiency of this evidence to justify the giving of instructions declaring the law of self-defense is beyond doubt. There was a clear hostile overt act by one who had reason to believe an attack would be made upon him, but there is no evidence that, at the time of his seizure of the brick, a deadly weapon, the attack he might have to resist would be a deadly one. There is no proof of any antecedent hostile demonstration of any character on the part of the accused. The brick may have been seized as a mere weapon of defense, but the motive was a question of fact for the jury. Seizure of the deadly weapon for defense against a mere anticipated assault is a circumstance indicative of purpose to repel it in a felonious manner, if it should be made, and this the jury might take into consideration. In view of the suddenness of the encounter, it was their province to consider and weigh the probability of an attack by the deceased, with the brick, in anticipation of the expected immediate attack upon him.

"The sufficiency of an overt act or hostile demonstration to show a design, real or apparent, to do great bodily harm, which will warrant acting in self-defense, is a matter of fact for the jury, to be determined according to all the evidence." Wharton, Homicide, p. 399; State v. Edwards, 79 S. E. 1005.

[2] Though not made a ground of the motion for a new trial, the admission of evidence reflecting upon the accused, in the absence of any effort on his part to prove good character, is complained of. This error is not available as ground for reversal, because not relied upon in the motion for a new trial. Hill v. Norton, 82 S. E. 363; State v. Henaghan, 81 S. E. 539. But, since a new trial must be allowed for the error in the rulings on instructions, it is proper to say, for the purpose of such trial, the evidence of the bad character of the accused is not admissible, unless he endeavors to prove good character on his part. State v. Sheppard, 49 W. Va. 582, 39 S. E. 676.

[3] The prisoner himself was required, over the objection of his attorney, to admit acts of degradation, wholly irrelevant to the issue. Since he was a party as well as a witness, we think the objection of his attorney was the equivalent of a claim of privilege on his part, and the court should have sustained the objections and excluded the questions. State v. Hill, 52 W. Va. 296, 298, 43 S. E. 160; State v. Prater, 52 W. Va. 132, 43 S. E. 230.

For the error in the rulings upon instructions, herein noted, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(169 N. C. 277)

STATE v. HAYNIE. (No. 537.)

(Supreme Court of North Carolina. March 3, 1915.)

1. HIGHWAYS ⟸163—OBSTRUCTION—"CARTWAY"—PRIVATE EASEMENT.

A mere right of way which a deed gives the grantee over the grantor's remaining lands is not a "cartway," for obstruction of which indictment will lie under Pub. Loc. Laws 1913, c. 40, § 23.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 444–446; Dec. Dig. ⟸163.

For other definitions, see Words and Phrases, First and Second Series, Cartway.]

2. CONSTITUTIONAL LAW ⟸292—DUE PROCESS—HIGHWAYS.

Pub. Loc. Laws 1913, c. 40, § 23, in terms establishing as lawful cartways private roads used for cartways for ten years, but making no provision for compensation, if construed as applying to a private way already used for such time would be a taking of private property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 807; Dec. Dig. ⟸292.]

3. STATUTES ⟸265—RETROSPECTIVE OPERATION.

Statutes tending to destroy private rights should be construed not only strictly, but as not retrospective in operation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 346, 347; Dec. Dig. ⟸265.]

Appeal from Superior Court, Madison County; Cline, Judge.

R. H. Haynie was convicted, and appeals. Reversed and dismissed.

Indictment for obstructing a way. It requires only a consideration of the following facts, which appear in the record, to understand the questions presented. We give here a statement of them, which, we think, presents the case fully and fairly:

This was a criminal action brought by the state at the instance of D. P. Miles, prosecutor, against the defendant, R. H. Haynie. The defendant was first tried in the recorder's court of Madison county, upon a warrant issue by that court for an alleged violation of chapter 40, § 23, of the Local Public Laws of the 1913 Session of the General Assembly of North Carolina, which, as alleged, consisted in the obstruction of a cartway over the lands of the defendant, Haynie, and was convicted in that court, and the defendant appealed to the superior court, and was there tried upon such warrant before his honor E. B. Cline, judge presiding, and a jury, at the September term, 1914, of Madison county superior court. The lands owned by the defendant, Haynie, as well also as those owned by the prosecutor, D. P. Miles, originally belonged to C. A. Nichols and wife, Bettie J. Nichols. By deed bearing date March 1, 1894, Nichols and wife conveyed to Miles the lands lying back of the Haynie lands, which at that time still remained unsold and belonged to Nichols. This deed granted to Miles a right of way "at such convenient points as they may designate" over the unsold lands of C. A. Nichols and wife, and reserved to Nichols, his heirs and assigns, a similar right of way over the lands conveyed to Miles. This deed was acknowledged before E. F. Vandiver, a justice of the peace for Buncombe county, whose certificate was attached, but the clerk of the court of Madison county, in ordering the registration of said deed, failed to pass upon the certificate of E. F. Vandiver, as aforesaid. On this and the further ground that said deed only purported to convey, at most, a private and indefinite right of way in which the public generally could acquire no interest, the defendant's counsel objected to said deed being admitted in evidence, but the objection was overruled, the deed admitted, and the defendant excepted.

Subsequent to the execution of the abovementioned deed to the prosecutor, D. P. Miles —to wit, on the 19th day of November, 1904— C. A. Nichols and wife, Bettie J. Nichols, conveyed by deed (set out as defendant's Exhibit B), to the defendant, R. H. Haynie, the land over which the said defendant is alleged to have obstructed the cartway. This placed the Haynie lands, or the servient tenement, between the main road and Miles' lands, or the dominant tenement.

According to the evidence of Mr. Miles, the state's witness, as set out in the record, when he went into possession of the land conveyed to him by Nichols and wife, there was an old road across the land now owned by Haynie, and they sometimes came out over that old road, and sometimes zigzagged over Haynie's lands, according to the whim of the teams or the drivers, and when the road was miry they went anywhere over the land of Haynie they wanted to. The witness further testified that the road across the defendant Haynie's land was not a public road, but that it was simply a private road. The state at no time offered any testimony to attach any public interest to the road, but relied on the statute aforesaid to give to said road a public character, after having shown that said road had been used as a private road or private cartway for ten years or more. At the conclusion of the state's testimony the defendant moved for judgment as of nonsuit under the statute, on the ground that, taking all the testimony as true, the defendant was not guilty. The motion was overruled, and the defendant excepted.

The defendant then introduced testimony further showing the private nature of the right of way existing over the defendant's lands, and also to the effect that part of said road had been blocked by the defendant and his agents for at least ten years prior to the present indictment; that people who wanted to get back to the Nichols land just went where they pleased indiscriminately over the Haynie lands; and that the road had never been kept up by the public. The state put other witnesses on the stand, but never offered any testimony showing that the road in question was ever kept up as a public road,

or that any petition had ever been filed to establish a cartway over the land of the defendant in the manner prescribed by law, but the state relied on the deed made by Nichols and wife to D. P. Miles, together with the statute (chapter 40, § 23, of the Local Public Laws of 1913 aforesaid), for the conviction of the defendant. In short, the state never went further than to show that the road in question was only a private right of way granted by one individual for the private and exclusive use of another individual, in which the public was not intended to acquire, nor did it acquire, any interest at all whatsoever.

At the conclusion of all the testimony, the defendant renewed his motion to dismiss the action, for that, according to all the testimony, the road was only a private road, and had never been kept up as a public road, and no petition had ever been filed or cartway established in the manner prescribed by law; but the motion was again overruled, and defendant excepted.

The court instructed the jury that if there was a private road, that if it was used as a cartway for as much as ten years prior to the issuance of the warrant in this case, and that if the defendant obstructed it by building a fence across it, without leaving any means of passage through it, that then said defendant would be guilty under the statute aforesaid. Public Local Laws of 1913, c. 40, § 23. He was convicted, a fine was imposed on him, and the costs adjudged against him, and he was further required to open and keep open the said road, from which judgment he appealed, having reserved his exceptions.

Smathers & Ward, for appellant. T. W. Bickett, Atty. Gen., and T. H. Calvert, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1] This statement of the facts shows that what is termed in the case a "cartway" was only a private way over the lands of C. A. Nichols remaining after he had sold the other tract to D. P. Miles, and its use, or the private easement over it, was restricted to him. Besides, there was no certain or definite description of the way, and Miles, or the persons who lived with him on his land, members of his family or tenants, used to go in almost any direction over the Haynie land. This surely is not sufficient proof of a right of way, and much less of a cartway, and still less of a public way. It is virtually conceded that this is so, if we are to follow Boyden v. Achenbach, 79 N. C. 539, and the very numerous line of decisions which have affirmed it, and to be found at the foot of that case as reported in the annotated edition of 79 N. C. at marginal page 543, bottom pages 487, 488, among the most recent of which are State v. Lucas, 124 N. C. 806, 32 S. E. 553; Milliken v. Denny, 141 N. C. 227, 53 S. E. 867; Tise v. Whitaker, 146 N. C. 376, 59 S. E. 1012; Bailliere v. Shingle Co., 150 N. C. 633, 64 S. E. 754; Snowden v. Bell, 159 N. C. 500, 75 S. E. 721.

This being the case, it was clearly not within the power of the Legislature to appropriate the land of defendant, or any part thereof, however small, to a public use without just compensation. Railroad Co. v. Davis, 19 N. C. 451; Johnston v. Rankin, 70 N. C. 550; Brown v. Power Co., 140 N. C. 333, 52 S. E. 954, 3 L. R. A. (N. S.) 912. And it cannot, under the guise of calling it a cartway, take away this protection from the owner. Besides, a cartway is, at least, a quasi public road, and to convert an ordinary private way, if properly established, into a cartway, is a taking of private property for a public use (Cook v. Vickers, 141 N. C. 101, 53 S. E. 740) which entitles the owner to compensation. If the public needs it, let it pay a fair price for it, as we have so often said. State v. Jones, 139 N. C. 613, 52 S. E. 240, 2 L. R. A. (N. S.) 313. As the Chief Justice said in Railroad Co. v. Oates, 164 N. C. at page 171, 80 S. E. at page 400:

"A man's land should stand condemned when, and only when, every step which the law prescribed to that end has been complied with."

The state cannot even impose a new or additional burden on the land, or increase an easement in it, without just compensation. Brown v. Power Co., supra. This private way is not within the descriptive words of the Public Local Laws of 1913, c. 40, § 23. It was not a cartway, or used as a cartway, and no particular way which had been marked out and located, by contract or user, had been so used by the public for a period of ten years. It is straining the meaning of the statute and misconstruing the evidence in this case to say that this private way, if it had been delineated, was intended to be affected by the statute.

[2, 3] But, if we should admit that it does come within its letter or its spirit, another fatal objection arises; namely, that the Legislature has condemned this way to the public use without making any provision for compensation, and, what is worse, without, after the ten years had expired, giving the owner time or opportunity to stop the public user, if there had been any, and save his rights. This is taking private property without due process of law and withdrawing from this landowner the equal protection of the law. He has had no notice, hearing, or judgment. It would be an arbitrary and despotic exercise of power, if the Legislature had intended to exercise it, which it manifestly did not, as we have shown. This statute, while called a public local law, was evidently promoted to subserve some private end, as acts of the kind usually are, and they deprive people summarily of rights, which cannot so easily be taken from them otherwise and by the ordinary course of judicial procedure. This statute shortens the time by ten years for barring

such rights, if, under Boyden v. Achenbach, supra, they can be divested at all by such a user. It goes further, and declares that private property shall be devoted to a public use —that is, that a private way shall become a public way after ten years' user, when the time has already elapsed—which the highest federal court has held is a violation of the federal Constitution, and we have held that it is a violation of our own. The property is taken against the will of the owner, without his having a day in court. Hart v. Lamphire, 3 Pet. 280, 7 L. Ed. 679; Sohn v. Waterson, 17 Wall. 596, 21 L. Ed. 737; Wheeler v. Jackson, 137 U. S. 245, 11 Sup. Ct. 76, 34 L. Ed. 659; MacFarland v. Jackson, 137 U. S. 258, 11 Sup. Ct. 79, 34 L. Ed. 664. In Sohn v. Waterson, supra, the court held that an existing right of action cannot be divested by shortening the period of limitation to a time which has already run. See, also, State of Tennessee v. Sneed, 96 U. S. 69, 24 L. Ed. 610, Terry v. Anderson, 95 U. S. 633, 24 L. Ed. 365, and Koshkonong v. Burton, 104 U. S. 668, 26 L. Ed. 886, where the court held that in this country, where the legislative power is limited by written Constitutions, declaratory laws, so far as they operate on vested rights, can have no legal effect in depriving an individual of his rights or to change the rule of construction as to the pre-existing law. Courts will treat such laws with all the respect that is due to them as the expression of the opinion of the individual members of the Legislature as to what the rule of law previously was, but beyond that they have no binding effect, and, if the judge is satisfied that the legislative construction is wrong, he is obliged to disregard it. The court then proceeds to declare that such statutes will be construed prospectively, rather than retrospectively, as giving the rule for the determination of rights in the future, rather than those which are already vested, and therefore relate to the past. Any other doctrine would be inconsistent with right and reason. And our law is the same; for our Constitution is as fully adequate to protect the individual against such an encroachment upon his rights as is the federal Constitution. We have held distinctly that a statute will not be construed as retrospective in its operation unless it was clearly intended so to be, and especially where such a construction would take away rights under a former law, though they may be of a kind which the Legislature could divest by proper action if so minded. Elizabeth City v. Commissioners, 146 N. C. 542, 60 S. E. 416. Statutes which restrict private rights or the use of property, and especially those which tend to destroy them, should be strictly construed in favor of the citizen. Nance v. Railroad Co., 149 N. C. 371, 63 S. E. 116. It would be contrary to the plainest dictates of justice to hold otherwise. If this statute should be given retrospective operation, so that the ten years already passed would bar the right, it would be the same as appropriating the property directly without any reference to the lapse of time.

There is no evidence of a dedication to the public in this case, and we have seen that, under Boyden v. Achenbach, supra, there has been no such user as will presume it or give the public any right or easement in the way. That the defendant is not indictable under the facts of this case, where the public has acquired no such right in the way and the public authorities have not assumed the obligation to work the road and keep it in order, is expressly decided in State v. Stewart, 91 N. C. 566; State v. Lucas, 124 N. C. 804, 32 S. E. 553; State v. Purify, 86 N. C. 682.

"A 'public highway' is one established by public authority and kept in order by the public, under the direction of the law; or else it is one used generally by the public for 20 years, and over which the public authorities have exerted control, and for the reparation of which they are responsible." State v. Purify, supra (by Ruffin, J.), citing State v. McDaniel, 53 N. C. 284, and Boyden v. Achenbach, supra.

The proof in this case is that the public authorities had never exercised any control over this way, and that it was not regarded, in any sense, as a public way, nor even a cartway, as that term is understood in the law. A right of way was granted to Miles as purchaser from the former owner of the land, C. A. Nichols, but it was confined to him, and was strictly a private right to cross Nichols' land between Miles' home and the public road. This is not a cartway. The distinction between the two is clearly drawn in Warlick v. Lowman, 103 N. C. 122, 124, 9 S. E. 458. There has been neither condemnation, dedication, which must be with the sanction of the public authorities, nor such user by the public as to presume a grant or dedication. The following cases show conclusively that defendant is not indictable at common law or under any statute of this state: State v. McDaniel, 53 N. C. 284; Kennedy v. Williams, 87 N. C. 8; Stewart v. Frink, 94 N. C. 489, 55 Am. Rep. 619; Warlick v. Lowman, supra; Burwell v. Sneed, 104 N. C. 121, 10 S. E. 152; State v. Summerfield, 107 N. C. 898, 12 S. E. 114; State v. Wolf, 112 N. C. 894, 17 S. E. 528; State v. Fisher, 117 N. C. 739, 23 S. E. 158. They were nearly all decided since the statute in regard to the obstruction of roads and cartways was passed. Acts of 1872-73, c. 189, § 6; Code, § 2065; Revisal, § 3784, referred to by the Attorney General. Besides, the way subject to this private use or easement is neither a "highway, cartway, millroad, or road leading to a church or other place of worship," and is not within the letter or spirit of that section, as a bare reading of it will disclose, and as this court has repeatedly decided. See cases supra. Many others might be cited to the same effect.

The Attorney General frankly says, in his brief, that the defendant was indicted under the act of 1913, and almost admits that it is not applicable, for the reasons above stated.

and falls back upon Revisal, § 3784, which, as we have seen, does not apply. He also concedes that the deed admitted in evidence was defectively probated and registered, after a careful examination of the statute relating to the same.

For these reasons, we are unable to agree with the court below, but think the motion to nonsuit should have been sustained.

Judgment will be entered in the superior court dismissing the prosecution, with costs as allowed by law.

Reversed.

(168 N. C. 229)

## STARLING v. SELMA COTTON MILLS.

(No. 149.)

(Supreme Court of North Carolina. March 3, 1915.)

1. NEGLIGENCE ⟸41—CONDITION AND USE OF LAND—LIABILITY AS TO CHILDREN.

Defendant, whose reservoir seven or eight feet deep was within a brick wall surrounded by a post and slat fence, which had become so dilapidated that a five year old boy, with other small children of operatives, had been accustomed to play around the reservoir, as known to defendant, and who was not a trespasser there, crawled through a hole in the fence to get a drink, and fell into the reservoir and was drowned, was guilty of culpable negligence rendering it liable for the boy's death; and the liability would have been the same even if the boy had been a trespasser.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 56; Dec. Dig. ⟸41.]

2. JUDGMENT ⟸570—NONSUIT—"RES JUDICATA."

The fact that a nonsuit had formerly been taken is not "res judicata."

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028–1034, 1036–1040, 1042–1045, 1165; Dec. Dig. ⟸570.

For other definitions, see Words and Phrases, First and Second Series, Res Adjudicata.]

Appeal from Superior Court, Chatham County; Connor, Judge.

Action by W. C. Starling, administrator, against the Selma Cotton Mills. Judgment of nonsuit, and plaintiff appeals. Reversed.

Manning & Kitchin, of Raleigh, for appellant. A. Jones & Son and Douglass & Douglass, all of Raleigh, for appellee.

CLARK, C. J. This is an appeal from a judgment of nonsuit. The plaintiff's intestate, a bright little boy five years of age, was drowned in a reservoir on defendant's premises Saturday afternoon, February 20, 1909. The reservoir was about 50 feet around, with a brick wall around it. It was 2 or 3 inches from the top of the brick wall to the water on the inside. Rev. Mr. Morris testified that there had been a fence around the reservoir, and that there was still "* * * a piece of one there at the time of the drowning of the little boy, Alma Starling." He testified that the fence was put up with post-oak posts skinned and the bark taken off, and slatted up between the posts which were 8 feet apart, with slats fastened with small nails. These slats were 3 inches apart at the bottom, and wider apart going up, till they were 8 inches apart at the top. The fence was 3½ or 4 feet high. This reservoir was close to the mill and near the tenement houses of the operatives, and their small children played around it almost every day, rolling their hoops up and down the platform on the side of the reservoir. The father of Alma Starling, who was a mill operative, lived 210 feet from the reservoir. The witness testified further:

"The fence around the reservoir was decayed and rotted and falling down. Some of it had fallen off. There were several places around the reservoir where the slats had fallen off, mostly on the side of the street where they had hauled coal. The slats had fallen off at the bottom. There was one hole in the fence I could crawl through. That hole was something like 10 feet from the place where the body was found. There were three places where the fence had rotted down. I had talked with Mr. Rose, the superintendent, about the condition of the fence, and heard him speak about it. It had been in that condition for some time. Pretty soon after this drowning I got orders to put the fence up. The reservoir was about 15 feet from the mill. There was a passageway between the reservoir and the mill. There is a sloping earth bank on the outside that leads up to the top of the wall on which the fence was built."

The water on the inside he said came within 2 or 3 inches of the top of this wall. The posts were 8 feet apart, and the wall was 16 or 18 inches broad at the top. The slope of the wall on the outside was gradual.

There is also evidence that small children were playing about the reservoir and all around it every day. The reservoir was 25 or 30 steps from the front end of the mill. Small children of all sizes played around the reservoir, where there was a grassy place and trees for the children to play.

One of the little companions of the deceased boy testified that Alma went through the hole in the fence to get some water to drink in the tin cup, and fell in and was drowned; that he easily went through the hole near the bottom of the fence, which was 12 to 18 inches wide.

There were several witnesses who testified to the same effect, that the reservoir, which was 7 or 8 feet deep, was surrounded by a fence which had been suffered to become dilapidated, with many holes through it, and that children five or six years old and under were in the habit of playing around the reservoir, and that the management of the mill knew of it.

[1] It does not admit of debate that the fact that such a dangerous place was unguarded by a secure fence where children of that age were allowed to play was culpable negligence on the part of the officers of the defendant. The very fact that a fence had been put up, of itself, shows that these authorities were aware of the danger. To per-

mit it to become dilapidated was negligence. It may be that, if the defendant had put on evidence, a different state of facts could have been shown or matters in excuse. But, upon the evidence before us, it was clearly error to grant a nonsuit.

This case has no resemblance to Briscoe v. Power Co., 148 N. C. 396, 62 S. E. 600, 19 L. R. A. (N. S.) 1116. That decision was put upon the ground that the child was a trespasser and of an age to be guilty of contributory negligence. But even in that case it was said that, even when children are trespassers, liability will be enforced in many cases where there would be no liability if the injury had been sustained by persons of maturer age. The humane judge who wrote that opinion says on page 411 of 148 N. C., on page 606 of 62 S. E., 19 L. R. A. (N. S.) 1116:

An "infant who enters upon premises, having no legal right to do so, either by permission, invitation, or license or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity, or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, provided the facts are such as to impose the duty of anticipation or prevision; that is, whether under all of the circumstances he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury."

But in this case these children were not trespassers. They were five or six years old, and were at their usual playground, where they went every day, which fact was necessarily known to the management of the mill. This playground was in the immediate proximity to the reservoir and to the mill, and the officials knew the danger to the children of the children falling in there either in their play or in attempting to get water to drink, as this little boy did. The outside bank was sloping, and the children could climb up easily and would be tempted to do so naturally. On the inside the water came up within 2 or 3 inches of the top, and the wall on the inside was perpendicular, with the water 7 or 8 feet deep. A more dangerous situation could not have been devised. The management of the mill were aware of the danger, as is shown by their putting a fence around it. Indeed, the danger was self-evident. The children were those of the operatives of the mill, and were, so to speak, on their own grounds. They were not trespassers certainly. There is much evidence that the fence was dilapidated, and direct testimony that the little boy went through a hole in the fence near the ground. There was evidence that his playmate told him that it was dangerous, but the child was too young to be guilty of contributory negligence.

[2] The fact that a nonsuit had been formerly taken is not res judicata. Hood v. Telegraph Co., 135 N. C. 627, 47 S. E. 607, and cases there cited; Helms v. Telegraph Co., 143 N. C. 394, 55 S. E. 831, 8 L. R. A. (N. S.) 249, 118 Am. St. Rep. 811, 10 Ann. Cas. 643; Tussey v. Owen, 147 N. C. 338, 61 S. E. 180; Lumber Co. v. Harrison, 148 N. C. 333, 62 S. E. 413. Nor can we sustain the motion that a cause of action is not stated.

The judgment of nonsuit is reversed.

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(168 N. C. 397)

## OWENS v. BRANNING MFG. CO. et al.

(No. 37.)

(Supreme Court of North Carolina. March 3, 1915.)

1. MORTGAGES ⟸362 — FORECLOSURE UNDER POWER OF SALE—PURCHASE BY MORTGAGEE.

While the right to foreclose a mortgage by a sale under the provisions of the instrument, without the interposition of the court, is recognized and to some extent regulated by statute, the utmost degree of good faith is required in exercising such right, and the mortgagee may not directly or indirectly become the purchaser, and, if he does, the sale is ineffective at the election of the mortgagor, and the relationship of mortgagor and mortgagee will continue to exist.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1080–1084; Dec. Dig. ⟸362.]

2. MORTGAGES ⟸362 — FORECLOSURE UNDER POWER OF SALE—PURCHASE BY MORTGAGEE.

Where an assignee of the debt secured by a mortgage, who purchased the property at a sale conducted in the name of the mortgagee, had entire control of the sale, the sale was voidable at the election of the mortgagor, though no actual fraud or imposition appeared.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1080–1084; Dec. Dig. ⟸362.]

3. MORTGAGES ⟸373—POSSESSION BY MORTGAGEE—LIABILITY FOR WASTE.

An assignee of a debt secured by a mortgage, whose purchase of the property at a sale controlled by him, under a power of sale, was voidable, was liable for spoil and waste committed or intentionally authorized by him, and hence was liable for the value of timber which he sold to a third party; the mortgagor having elected to treat him as still a mortgagee, notwithstanding the sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1104; Dec. Dig. ⟸373.]

4. ACCORD AND SATISFACTION ⟸13—RECONVEYANCE TO MORTGAGOR — LIABILITY FOR WASTE.

Whether a reconveyance to a mortgagor by an assignee of the secured debt, who purchased at a sale under a power of sale, was an accord and satisfaction of the mortgagor's claims against him for waste, depended upon the agreement between the parties.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 98–109; Dec. Dig. ⟸13.]

Appeal from Superior Court, Tyrrell County; Carter, Judge.

Action by H. W. Owens against the Branning Manufacturing Company and Alonzo Melson. From a judgment for plaintiff, the defendant Melson appeals. Affirmed.

There was allegation with evidence on part of plaintiff, tending to show that plaintiff, owning a tract of land in said county, on which there was valuable timber of pine and

gum, mortgaged same to one John E. Sykes, the mortgage containing power to foreclose by sale, and afterwards said Sykes sold and transferred the notes to defendant Alonzo Melson; that said Melson held the same till 1910, when he caused the property to be advertised and sold at public sale and bought same, the notice being signed both by Sykes and Melson, for $31, and took a deed from said Sykes as the mortgagee; that in September, 1911, said Melson sold and conveyed the timber trees on said land to his codefendant, the Branning Manufacturing Company, for $225, granting said company, for five years from date, the right to cut and remove said trees and to construct on the land "all roads, rollways, cartways, railways, etc., as may be required for the purpose, etc."; that said company, acting under said grant and conveyance, cut and removed all the timber from said land to the estimated value of $800 to $1,200, and afterwards Melson conveyed back the land to plaintiff, same, so denuded of timber, being worth not more than $50. Defendants denied that the sale was invalid, contending that it was conducted and made by Sykes, the mortgagee, and was, in all respects, fair and regular, denied that the timber on said land was worth anything like the amount claimed by plaintiff, alleged that plaintiff took a deed for the land, after the timber was cut, in accord and full satisfaction of any claim he may have had by reason of the cutting. And the Branning Manufacturing Company, in separate answer, alleged that it purchased and paid full value for the timber and cut same under a deed purporting to confer the right to do so, and without any notice or knowledge of any claim or rights of plaintiff in the property, etc.

On issues submitted, the jury rendered the following verdict:

"(1) Was the sale of John E. Sykes mortgage of the land in controversy valid? Answer: No.

"(2) Has there been any accord and satisfaction as alleged in the answer? Answer: No.

"(3) Did the defendants wrongfully cut the timber on the land in controversy as alleged? Answer: Yes.

"(4) What damage, if any, has plaintiff sustained by reason of the wrongful cutting of said timber? Answer: $500."

The court set aside the verdict against the Branning Manufacturing Company and entered judgment against defendant Melson for $500, the amount of damages assessed, less the mortgage debt and interest; the said debt not having been paid nor any credits entered thereon. Defendant Melson, having duly excepted, appealed, assigning for error that the court charged the jury, if they believed the evidence, they would answer the first issue, "No."

M. Majette, of Columbia, and I. M. Meekins, of Elizabeth City, for appellant. Aydlett & Simpson and Ehringhaus & Small, all of Elizabeth City, for appellee.

HOKE, J. [1] The right of foreclosure of a mortgage by sale under the provisions of the instrument and without the interposition of the court has long been recognized in this state and is, to some extent, regulated with us by our statute law. Averitt v. Elliot, 109 N. C. 560, 13 S. E. 785; Joyner v. Farmer, 78 N. C. 196; Revisal 1905, §§ 640-1042 et seq. In exercising such a right, however, the utmost degree of good faith is required, the mortgagee being looked upon as a trustee for the owner as well as the creditor; and, in applying the principle, it is very generally held that such a mortgagee is not allowed, either directly or indirectly, to become the purchaser at his own sale, and, where this is made to appear, the transaction, as between the parties and at the election of the mortgagor, is ineffective as a foreclosure, and the relationship of mortgagor and mortgagee will continue to exist. Pritchard v. Smith, 160 N. C. 79, 75 S. E. 803; Jones v. Pullen, 115 N. C. 465, 20 S. E. 624; Gibson v. Barbour, 100 N. C. 192, 6 S. E. 766.

[2] Under well-considered decisions here and elsewhere, the position extends to the case of assignees of the mortgage or the debt secured by it when it is shown that such an assignee, by himself, his agent or attorney, was in control and charge of the sale; the mortgagee only participating by allowing the use of his name for the purpose. Whitehead v. Hellen, 76 N. C. 99; Kornegay v. Spicer, 76 N. C. 95; Dyer v. Shurtleff, 112 Mass. 165, 17 Am. Rep. 77; Gaines v. Allen, 58 Mo. 537; 27 Cyc. p. 1485.

In the present case, and on perusal of the facts in evidence, we concur in the view of his honor that, in any aspect of the testimony, the sale, in this instance, was in the entire control of the defendant Melson, assignee of the mortgage debt; and he having bought and taken the conveyance, under such circumstances, and plaintiff having elected to disregard it, we must hold that, as between plaintiff and said defendant, there has been no valid foreclosure of the mortgage. It is not necessary, in cases of this character, that actual fraud or imposition should be established. The agent and attorney of defendant in this matter is known to be an upright man and an honorable practitioner, and we are well assured that neither existed, but the principle prevails by reason of the position of advantage held by the mortgage creditor and of the temptation and opportunity to exercise it to the debtor's prejudice if a purchase by the trustee or vendor, at his own sale, should be upheld.

[3] Having held that there has been no foreclosure, and it appearing that defendant Melson has acquired the property under circumstances stated by conveyance of the mortgagee, and for which he has heretofore paid nothing, so far as appears, it follows that said defendant has taken over and holds the property as mortgagee, the plaintiff having so

elected to treat him, and, as such, he must account to the mortgagor for spoil and waste done upon the land which he committed or intentionally authorized (Green v. Rodman, 150 N. C. 176, 63 S. E. 732; Morrison v. McLeod, 37 N. C. 108; Jones on Mortgages [6th Ed.] § 1123); and the principle has been applied to the case where one, knowingly and wrongfully, sells the timber on a tract of land to a lumber company with a view and purpose of having same cut and removed (Locklear v. Paul, 163 N. C. 338, 79 S. E. 617, citing Dreyer v. Ming, 23 Mo. 434).

[4] The subsequent reconveyance of the land to the mortgagor by the defendant Melson may or may not have been in accord and satisfaction of said mortgagor's claims and demands, according to the agreement between them, and this, under a charge to which there is no exception, has been resolved by the jury against the defendant.

There is no error, and, the mortgage debt having been very properly deducted from the amount awarded, the judgment against the defendant is affirmed.

No error.

(163 N. C. 293)

## HOBBS v. CITY OF WASHINGTON et al.

(No. 28.)

(Supreme Court of North Carolina. March 3, 1915.)

1. MUNICIPAL CORPORATIONS ⟸848 — LIABILITY FOR INJURIES—CONDITION OF PUBLIC BUILDINGS—CITY LOCKUP.

That a city lockup was in a filthy and unsanitary condition did not render the city liable in damages to a person confined by its chief of police therein, even though it would have otherwise been liable, where the person so confined was arrested for a violation of the state law, and was placed therein without its authority, express or implied.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1804, 1805; Dec. Dig. ⟸848.]

2. MUNICIPAL CORPORATIONS ⟸747 — TORT OF OFFICERS—LIABILITY.

The unauthorized act of a chief of police in arresting a person without a warrant, in the absence of any emergency requiring such an arrest, and detaining him until the next morning without procuring a warrant, in violation of Revisal 1905, § 3178, authorizing arrests without a warrant in certain cases if the officer shall apprehend that the person may escape if not immediately arrested, and section 3182, providing that every person arrested without a warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant, or committed to the county prison, and, as soon as may be, taken before a magistrate, who on proper proof shall issue a warrant, did not render the city liable in damages.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1570–1577; Dec. Dig. ⟸747.]

3. MUNICIPAL CORPORATIONS ⟸744—INJURY TO PERSON ARRESTED—LIABILITY OF OFFICER—UNSANITARY CONDITION OF LOCKUP.

A city chief of police who, in violation of Revisal 1905, §§ 3178, 3182, arrested a person without a warrant and detained him until the next morning, and, though the arrest was for an offense against the state, placed him in the city lockup, which was in a filthy condition, instead of in the county jail, was liable in damages.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1565; Dec. Dig. ⟸744.]

Hoke and Allen, JJ., dissenting.

Appeal from Superior Court, Beaufort County; Bond, Judge.

Action by E. H. Hobbs against the City of Washington and George N. Howard. From a judgment for plaintiff, defendants appeal. Reversed as to the City and affirmed as to Howard.

H. C. Carter, Jr., of Washington, N. C., for appellants. Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellee.

CLARK, C. J. On the night of June 27, 1912, the plaintiff, who was at that time a minor, but is now of age, was arrested, together with several other boys, upon the complaint of the owner of a boat to the defendant Howard, the chief of police of Washington, that some one had stolen it. Two of the police officers were sent by the defendant Howard, chief of police, to the wharves to ascertain and apprehend the guilty parties. The boat was seen in the river, and when it came ashore the plaintiff and the other boys were arrested, and afterwards confined in the city lockup. The plaintiff was kept in the city lockup overnight on the charge of removing his boat from the wharf, but next morning was acquitted by the recorder of the charge.

[1] The complaint alleges that the lockup was in a filthy and unsanitary condition. The defendant the city of Washington had in its employment a janitor whose business it was to keep the lockup in a clean and sanitary condition, but the jury find that the lockup was, in fact, in an unsanitary condition, which is to the discredit of the city. We need not, however, consider the debated proposition whether the city, under such circumstances, would be liable for damages, because the plaintiff was arrested for a violation of the state law, and his being placed in the city lockup was without its authority, express or implied, but was the unauthorized act of the defendant Howard. Such action by Howard imposes no liability upon the city, any more than if he had imprisoned the plaintiff in a pig pen on the premises of an individual which would not have imposed any liability upon the owner of the lot, without his concurrence in the act.

[2] As to the defendant Howard, the jury find that he arrested the plaintiff without any warrant, and detained him in confinement until next morning without procuring one. Upon emergency, which does not appear to have been the case here, one may be arrested without a warrant (Revisal, 3176–3178), but as soon thereafter as possible the

warrant must be procured (Revisal, 3182). This was not done in this case.

The action of Howard, being unauthorized, created no liability as to the city. McIlhenney v. Wilmington, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470.

[3] Howard was liable, not only because he arrested the plaintiff without a warrant and without procuring one until next morning, but because he imprisoned the plaintiff in a lockup that was filthy and without any authority of law, since, the arrest being for an offense against the state, the plaintiff should have been placed in the county jail.

As to the city of Washington, the nonsuit should have been granted. As to Howard, no error.

HOKE and ALLEN, JJ., dissenting.

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(168 N. C. 330)

## PRITCHARD v. DAILEY. (No. 112.)

(Supreme Court of North Carolina. March 3, 1915.)

1. CONTRACTS ⟸94—VALIDITY—FRAUD.
The fraud justifying the setting aside of a contract must be a misrepresentation of a fact, made with knowledge of its falsity and with intent to deceive, calculated to deceive, and actually deceiving when relied on, as the party complaining had a right to do.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420–430, 1160, 1164, 1165; Dec. Dig. ⟸94.]

2. FRAUD ⟸11—SALE OF STOCK—EVIDENCE.
Representations by a seller of corporate stock as to what could be done to the property of the corporation, how profitable it was, and how much could be made by the investment, were not representations of facts, but amounted only to a statement of opinion, and were not actionable fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. ⟸11.]

3. FRAUD ⟸58—EVIDENCE—SALE OF STOCK—RELIANCE ON REPRESENTATIONS.
In an action for fraud in the sale of corporate stock, evidence *held* to show that the buyer did not rely on the representations made by the seller in the negotiations for the sale.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55–59; Dec. Dig. ⟸58.]

Appeal from Superior Court, Bertie County; Bond, Judge.

Action by John L. Pritchard against J. W. Dailey. From a judgment for defendant, plaintiff appeals. Affirmed.

This is a civil action, tried upon these issues:

(1) Did J. L. Pritchard within time fixed by the paper writing signed by J. W. Dailey, copied in complaint, tender the certificate of stock and demand return of his $1,000 paid for the same? Answer: No.

(2) Did defendant, J. W. Dailey, by fraudulent or by false statements which he knew or should have known were false, cause and prevent J. L. Pritchard from surrendering said stock and demanding repayment of the $1,000 he had paid for same? Answer: No.

(3) If so, what damage is the plaintiff, J. L. Pritchard, entitled to recover of defendant, J. W. Dailey? Answer.

From the judgment rendered, the plaintiff appeals.

Winston & Matthews, of Windsor, for appellant. Ward & Grimes, of Washington, N. C., for appellee.

BROWN, J. This action is brought to recover damages of defendant for fraud and deceit in selling to plaintiff ten shares of stock in the Southern Lime & Fertilizer Works of Washington, N. C. There was a corporation in said city called the Southern Lime Company, which was practically reorganized under the name of the Southern Lime & Fertilizer Company, and all of its property conveyed to the latter. The stockholders, officers, property, and business conducted were the same. This transpired before the transaction between the plaintiff and defendant.

In December, 1910, the defendant sold the plaintiff ten shares of stock in said corporation, for which the plaintiff paid $1,000. The defendant was secretary and treasurer of the corporation, and the stock was sold on behalf of the corporation, and payment for it made by check payable to him as such treasurer.

The certificate of stock sent to the plaintiff, accepted and retained by him, was the certificate of the Southern Lime & Fertilizer Works. The fact that in the conversations and correspondence between the plaintiff and defendant the corporation is called the Southern Lime Company is immaterial. The plaintiff knew, when he received his certificate and retained it, what the correct corporate name was.

Shortly after the agreement to purchase the stock, the plaintiff wrote the defendant, inclosing the following contract, and told him to sign it, or return his check, which had been given the defendant:

"$1,000. December 26, 1910.

"On January 1, 1912, I agree to pay to John L. Pritchard the sum of one thousand dollars for ten shares of capital stock in the Southern Lime Company of Washington, North Carolina, provided said ten shares of capital stock be delivered to me on that day or not later than ten days thereafter. J. W. Dailey.

"George T. Hardy."

The defendant executed it, and returned it as demanded.

The plaintiff bases his right to recover upon two alleged causes of action: First, fraud and deceit of defendant in the original purchase of the stock; second, to recover on the contract of December 26th upon the ground that he was beguiled by the fraud and falsehoods of the defendant from tendering the stock and demanding a compliance within the stipulated period.

1. The plaintiff tendered the proper issues based on his first cause of action. His honor declined to submit them. In this we think his honor committed no error, as there

is not sufficient evidence of fraud in order to avoid the original transaction upon that ground.

[1] The material elements of fraud, a commission of which will justify the court in setting aside a contract or other transaction, are well settled: First, there must be a misrepresentation or concealment; second, an intention to deceive, or negligence in uttering falsehoods with the intent to influence the action of others; third, the misrepresentations must be calculated to deceive, and must actually deceive; and, fourth, the party complaining must have actually relied upon the representations.

[2] The evidence in this case as to what took place between the plaintiff and the defendant, when the plaintiff agreed to purchase the stock, does not come up fully to the requirements of the law.

The representations of the defendant seem to be what are called "promissory representations," looking to the future as to what can be done to the property, how profitable it was, and how much could be made by the investment. Representations which merely amount to a statement of opinion go for nothing. One who relies on such affirmations made by a person whose interest might prompt him to invest the property with exaggerated value does so at his peril, and must take the consequences of his own imprudence. Cash Register Co. v. Townsend, 137 N. C. 652, 50 S. E. 306, 70 L. R. A. 349; Kerr on Fraud and Mistakes, p. 83.

[3] Again, the evidence fails to show that the plaintiff relied upon the representations of the defendant. On the contrary, the plaintiff's own evidence shows that he wrote the paper writing dated December 26, 1910, mailed it to the defendant, and demanded the execution of it or the return of his check. This demand was complied with by the defendant in his letter of January 2, 1911, who says:

"I am not only signing it, but I have got a good man to sign it with me, who owns $8,000 stock in this company and has as much faith in the undertaking as I have. Inclosed you will find certificate of stock for ten shares, which I hope you will draw dividends on for a number of years."

This certificate of stock was issued by the Southern Lime & Fertilizer Works, and the plaintiff accepted and retained it. This is inconsistent with the theory that the plaintiff relied upon any representations made by the defendant in the original negotiations for the sale of the stock. Hamrick v. Hogg, 12 N. C. 350; Stafford v. Newsom, 31 N. C. 509; McEntire v. McEntire, 43 N. C. 297; Gerkins v. Williams, 48 N. C. 12.

Then, again, there is no evidence in this case which tends sufficiently to prove that the defendant not only made the false representations, but knew them to be false and made them with the intention to deceive.

In Terault v. Selp, 158 N. C. 363, 74 S. E. 3, it is said:

"Nor can fraud exist where the intent to deceive does not exist; for it is emphatically the action of the mind that gives it existence. * * * It is not sufficient that the representation be false in * * * fact; the defendant must be guilty of a moral falsehood."

2. The second cause of action is based upon the allegations that the defendant, by false and fraudulent representations, prevented the plaintiff from presenting his stock, and demanded payment therefore under the contract of December 26th.

This issue was properly submitted to the jury, and has been found by them in favor of the defendant. The evidence in this respect was conflicting, and we find no exception to it that needs discussion.

The charge of his honor was full and clear in respect to this issue, and free from error.

No error.

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(168 N. C. 340)

ROSSER v. BYNUM & SNIPES. (No. 138.)

(Supreme Court of North Carolina. March 3, 1915.)

1. ACCORD AND SATISFACTION ⟸11—ACTS CONSTITUTING.

A creditor receiving and collecting a check sent by his debtor on condition that it shall be in full payment for a disputed account is bound thereby, and the transaction is an accord and satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75–82; Dec. Dig. ⟸11.]

2. ACCORD AND SATISFACTION ⟸27—ACTS CONSTITUTING.

Where a buyer of lumber sent to the seller a check for a specified sum, with the words "for lbr. to date," before any dispute had arisen as to the amount due, and the seller collected the check, the question whether the transaction was an accord and satisfaction and binding on the seller was for the jury.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 31, 59, 83, 97, 110, 135, 150; Dec. Dig. ⟸27.]

3. TRIAL ⟸235—EVIDENCE—INSTRUCTIONS.

Testimony of the drawer of a check that certain words were on the check when received by the payee, and testimony of the payee that the words were not on the check when received by him, must be submitted to the jury without comment as to the existence and applicability of negative and positive testimony, and it was error to charge that the testimony of the existence of the words on the check was positive testimony and entitled to more weight than the testimony that the words were not on the check, which was negative testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 539–541, 543–548, 551; Dec. Dig. ⟸235.]

4. EVIDENCE ⟸111—RELEVANCY OF EVIDENCE.

On the issue of the existence of the words "for lbr. to date" on the face of a check drawn by a buyer of lumber to the seller, evidence of similar words by the drawer on other checks, to show a custom by him to make such entries, was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 247–253; Dec. Dig. ⟸111.]

Appeal from Superior Court, Lee County; Peebles, Judge.

Action by one Rosser against Bynum & Snipes. From a judgment for defendant, plaintiff appeals. Reversed, and new trial granted.

Plaintiff offered evidence tending to show that, during 1911, beginning in May, he sold and delivered to defendants an amount of lumber at a stipulated price, and the balance due thereon was $107.01. Defendant pleaded payment, and, in support of the plea, there was evidence tending to show that the lumber was all delivered prior to August 31, 1911, and defendant put in evidence a check of defendant's on Bank & Trust Company in plaintiff's favor, of date August 31st, for $392.73. On face of said check were the words "For lbr. to date"; offered testimony tending to show that said check had been paid plaintiff and that the word "lbr." meant lumber. In reference to this check and the entry thereon, the court held that, if the jury should find that "lbr." meant lumber and was on the check when plaintiff took it, that closed every particular of indebtedness for lumber up to that date and plaintiff could not recover unless he showed that, after that time, more lumber was delivered. Plaintiff excepted.

There was evidence of plaintiff to the effect that there was indebtedness for lumber and a balance still due thereon over and above the amount covered by defendant's checks. Plaintiff testified further that the word "lbr." was not on the check of August 31st, when the same was drawn or taken by him. Defendant F. R. Snipes testified that said words were on the check when same was taken by plaintiff, and defendant was allowed, over plaintiff's objections, to introduce a number of other checks, drawn by defendant, showing lumber entries thereon and tending to show a custom of defendant to make entries of that kind on checks given in the course of its business and of this transaction. Plaintiff excepted.

In reference to the word "lbr.," appearing on the check, and the testimony in reference thereto, the court concerning other things charged the jury as follows:

"Now the defendant pleaded payment, and he says he paid this check. The burden upon that issue is upon the defendant. He must satisfy you by the greater weight of evidence that this check was given for that lumber, and that those words 'lbr. to date' mean for lumber, and that those words were written on there at the time when the check was accepted by the plaintiff. The plaintiff swears that those words were not on there. The law says that when one man swears to a negative fact and another swears to a positive fact, if they are both men of equal credibility, the jury ought to give more weight to a man who swears to a positive fact than a man who swears to a negative fact, for instance, if a witness were to go on the stand and say that he was in the courthouse yesterday, and Sheriff Petty was in the courthouse, and another should go on the stand and swear that he was in the courthouse yesterday, and Sheriff Petty was not in there, the laws says, both sides being of equal credibility, you ought to give more faith to the one who swore that Sheriff Petty was in the courthouse than the one who swore that he was not, because he might have been there and the man not have seen him or not had his attention called to it, and he might have been honestly mistaken, whereas a man who swears that he was in there could not be mistaken. Petty was either here, or else that man told a willful falsehood. Now, here Rosser swore that those words were not on there when he accepted the check. Snipes swears that they were on there. Here is one man swearing to a negative and one to a positive fact, and it is for you to say which one is right and which one is wrong."

Plaintiff excepted.

There was verdict for defendant, judgment, and plaintiff appealed, formally assigning for error the exceptions above noted.

A. A. F. Seawell, of Sanford, and W. D. Siler, of Siler City, for appellant. Williams & Williams, of Sanford, for appellee.

HOKE, J. We do not concur in the view of the trial judge that, if the words "lbr. to date" were on the check of August 31st when plaintiff took it, they would necessarily conclude as to every particular of indebtedness for lumber up to that date.

[1] It is well recognized that when, in case of a disputed account between parties, a check is given and received clearly purporting to be in full, or when such a check is given and, from the facts and attendant circumstances, it clearly appears that it is to be received in full of all indebtedness of a given character or all indebtedness to date, the courts will allow to such a payment the effect contended for. The position is very well stated in Aydlett v. Brown, 153 N. C. 334, 69 S. E. 243, as follows, "When a creditor receives and collects a check sent by his debtor upon condition that it shall be in full for a disputed account, he may not thereafter repudiate the conditions annexed to the acceptance," and is upheld and approved in numerous decisions of the court. Armstrong v. Lonon, 149 N. C. 435, 63 S. E. 101; Kerr v. Sanders, 122 N. C. 635, 29 S. E. 943; Pruden v. R. R., 121 N. C. 511, 28 S. E. 349; Petit v. Woodlief, 115 N. C. 125, 20 S. E. 208; Koonce v. Russel, 103 N. C. 179, 9 S. E. 316. A proper consideration of these and other cases on the subject will disclose that such a settlement is referred to the principles of accord and satisfaction, and, unless the language and the effect of it is clear and explicit, it is usually a question of intent to be determined by the jury.

[2] On perusal of the record, we do not find that any dispute had arisen between the parties when this check was given, and, applying the doctrine as stated, we do not think the words, if they were on the check when received, are sufficiently definite or conclusive to be allowed the effect given them by his honor, and that the question should be referred to the jury as to the intent of such an entry, and we must hold that there was error

in the charge in reference to the testimony bearing on this matter.

[3] As to the second proposition, the writers on evidence lay it down as the general rule that positive evidence is entitled to more weight than negative evidence (Moore on Facts, pp. 1337, 1338), and our decisions hold that, while a judge is not required to lay this down as a rule of law, it will not be considered as reversible error when he does this in proper instances. State v. Murray, 139 N. C. 540, 51 S. E. 775; Glenn v. Bank, 70 N. C. 191; Smith v. McIlwaine, 70 N. C. 287. But, on the facts presented here, this is not a case of positive and negative evidence, within the meaning of the rule. Smith v. McIlwaine, supra; Reeves v. Poindexter, 53 N. C. 308.

In Smith's Case, it was held:

"A plaintiff being examined in his own behalf, and swearing that the defendant promised to pay a certain debt, the defendant swearing that he made no such promise, both witnesses being of equal credibility, is not entitled to have the jury charged by the court that, as a rule of evidence, the positive testimony was entitled to more weight than the negative testimony. Such rule is subject to so many exceptions, as not to be of much practical use, and, if carelessly administered, may work much mischief."

And in Reeves' Case that:

"Where A. swears that B., C., and D. had an important conversation together, and D. swears that no such conversation took place, it was held that the rule giving preference to affirmative, over negative, testimony, does not apply, for, there being a direct contradiction, the jury must be guided by other tests in ascertaining the truth."

And Judge Manly delivering the opinion, in illustration of the principle, said:

"With respect to the rule it is clear that its applicability to any state of facts must depend upon whether the negative testimony can be attributed to inattention, error, or defect of memory. 1 Stark, 517. If two persons admit they were in a room together, and one swears that while there he heard a clock in the room strike, and the other swears that he did not hear it, it is a case for the application of the rule, according to all elementary writers. But in the case supposed, if two persons were placed in a room where a clock was, for the express purpose of ascertaining by their senses whether it would strike or not, a variance between their testimony could not be well attributed to mistake or inattention, and the real question would be as to the credit of the witnesses. In the case before us, the defendant proves by a witness that the parties held a certain conversation, in which a witness, previously introduced by the plaintiff, participated, and plaintiff's witness, being recalled, denies that any such conversation was held; this is not a question between affirmative and negative testimony, wherein the latter may be ascribed to inattention, but it is a question between witnesses who contradict each other, and the question is: To which side, under all the circumstances, is credit due?"

In the case before us there is a direct contradiction between the witnesses on a material fact to which their attention was directed, and the issue should have been submitted to the jury without comment as to the existence and application of the rule referred to.

[4] On the disputed question as to the existence of the entry, "lbr. to date," on the face of the check, we think his honor correctly ruled that significant and similar entries by defendant on other checks and tending to show a custom to make such entries by the parties in this and transactions of like nature was competent, and that the same were properly received in evidence. Parrott v. R. R., 140 N. C. 546-549, 53 S. E. 432, citing 1 Wigmore, § 92; Mathias v. O'Neill, 94 Mo. 527, 6 S. W. 253.

For the reasons stated, we are of opinion that reversible error has been shown, and plaintiff is entitled to a new trial of the issues.

Error.

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(168 N. C. 298)

H. WEILL & BROS. v. DAVIS. (No. 145.)

(Supreme Court of North Carolina. March 3, 1915.)

1. MORTGAGES ⟸340—ASSIGNMENT—OPERATION AS TRANSFER OF LAND.

An assignment of a mortgage operates upon the security, and not the land itself, being insufficient to vest the legal title in the assignee that is necessary to support a power of sale; but where there was sufficient reference to the land in the assignment and a manifest intention of the assignor to convey, since he as mortgagee had a legal title, title passed sufficient to sustain a power of sale in the assignee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1036-1038; Dec. Dig. ⟸340.]

2. MORTGAGES ⟸224 — ASSIGNMENT — CONSTRUCTION AS TRANSFER OF LAND.

Where, in an assignment of a mortgage, it is clear that title to the land itself was intended to pass, as well as to the security, the form of expression is immaterial.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 591-595, 597; Dec. Dig. ⟸224.]

3. MORTGAGES ⟸241 — ASSIGNMENT — CONSTRUCTION AS TRANSFER OF LAND.

In deciding whether an assignment of a mortgage by reference to the land itself passed legal title thereto, the whole instrument must be considered.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 624-626; Dec. Dig. ⟸241.]

4. MORTGAGES ⟸333—POWER OF SALE—EXTENT.

The power to sell land given to a mortgagee depends strictly upon the estate limited to him in the mortgage, such a power being appurtenant and not in gross.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1013; Dec. Dig. ⟸333.]

5. COVENANTS ⟸21—CONSTRUCTION—ESTATE CONVEYED.

A general covenant will be restricted to the estate and premises purported to be conveyed, and cannot be construed to enlarge the estate granted.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 20; Dec. Dig. ⟸21.]

6. DEEDS ⟸93—CONSTRUCTION—INTENT OF PARTIES.

Rules of construction of instruments, such as deeds, do not prevent the ascertainment of the intention of the parties; that being the

cardinal object of the application of the rules themselves.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. ⊂⊃93.]

7. MORTGAGES ⊂⊃340—POWER OF SALE—WHO MAY EXECUTE—ASSIGNMENT—CONSTRUCTION.

In an assignment of a mortgage, where express reference was made to the land as part of the consideration of the assignment, and as "the premises therein conveyed" (in the mortgage to the assignors) and where words of inheritance were used in connection with whatever was conveyed thereby, where the assignors covenanted for seisin in fee and right to convey, against incumbrances, and of warranty, and where words appropriate to the conveyance of land were used, and the grant was expressed to carry full power to sell the land and apply the proceeds to the mortgage debt, the intention of the assignors to convey the land by assignment of the mortgage was effectually expressed, so as to authorize the assignee to exercise the power of sale in the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1036–1038; Dec. Dig. ⊂⊃340.]

Appeal from Superior Court, Wayne County; Bond, Judge.

Action by H. Weill & Brothers against D. G. Davis. Judgment for defendant, and plaintiffs appeal. Reversed.

The facts of the case are these: W. H. Davis conveyed certain land to D. G. Davis, who alleged that the deed did not include all of the land contracted to be sold and conveyed to him. He executed a mortgage to W. H. Davis to secure the purchase money, or a part thereof, consisting of three notes, amounting, in all, to $500. These notes and the mortgage were assigned by W. H. Davis and wife to James M. McGee, trustee, who sold the land, after due advertisement under the power contained in the mortgage, and executed a deed for the same to the plaintiffs, who were the purchasers. The following verdict was returned by the jury:

"(1) What sum is due by defendant, D. G. Davis, on notes referred to in complaint? Answer: $500 and interest from October 30, 1906. (2) Did W. H. Davis agree to convey to defendant, D. G. Davis, land which was not included within the boundaries of deed made in pursuance of said contract? Answer: Yes. (3) If so, what damage, if any, did the defendant, D. G. Davis, sustain thereby? Answer: $550. (4) What was the rental value of land described in complaint that defendant kept possession of during year 1914? Answer: $75. (5) Are plaintiffs the owners and entitled to the possession of lands described in the complaint? Answer: No."

The court adjudged that the assignment of W. H. Davis and wife and the deed of James M. McGee, trustee, to the plaintiffs, were void and of no effect, and that the mortgage by D. G. Davis to W. H. Davis and wife be canceled as having been satisfied, as appeared from the verdict; the judge holding that the assignment did not confer any power on James M. McGee to sell under the mortgage, and that plaintiff acquired no right superior to that of the defendant, D. G. Davis. The agreement of the parties as to the question involved and the assignment of W. H. Davis and wife to James M. McGee are as follows:

"Plaintiffs claim title under an assignment of a mortgage from one W. H. Davis to James McGee, trustee, and a deed from McGee, assignee, to the plaintiffs in foreclosure of the mortgage. It is agreed that if the assignment is sufficient to authorize the said McGee, trustee, to make the sale and pass the title of the land to the plaintiffs, they are the owners of the land; if the assignment was not sufficient to authorize McGee, trustee, to make the sale and pass the title, the plaintiffs are not the owners of the land.

"The assignment was duly registered in the office of the register of deeds in said Wayne county on the 20th day of June, 1913, Book 115, page 359, and is in these words and figures:

"North Carolina, Wayne County.

"This indenture, made this 20th day of June, 1913, by and between W. H. Davis and wife, Louvenie E. Davis, of the county of Wayne, state of North Carolina, parties of the first part, and James M. McGee, trustee, of said county and state of North Carolina, party of the second part witnesseth: That, whereas, the said parties of the first part are the holders of two certain notes amounting to $500 and secured by first mortgage on real estate to secure the payment of the same, which mortgage deed is duly recorded in the registry of Wayne county, in Book 91, at page 262. Said parties of the first part for and in consideration of the premises therein conveyed and the sum of $10.00, have bargained and sold and by these presents doth bargain and sell said notes and securities thereto belonging to the said W. H. Davis and wife, Louvenie E. Davis, their heirs and assigns. And the said parties of the first part covenant to and with the said party of the first part, that they are seised of said premises in fee, and have right to convey the same in fee simple, and that the same is free from any incumbrances whatever, and that they will warrant the title to the same against the lawful claims of all persons whatsoever. Granting to the said parties of the first part, their heirs, executors and assigns, full power and authority to advertise said lands agreeable to the terms of said mortgage and apply the proceeds of the said sale to the discharge of said debt and interest on the same, and any surplus pay to the said D. G. Davis and wife, agreeably to the terms thereof. In testimony of which the said parties of the first part have hereunto set their hands and seals the day and year first above written.

"W. H. Davis. [Seal.]
"Louvenie Davis. [Seal.]"

"Probate in regular form."

"His honor, being of opinion that the assignment was insufficient to authorize the assignee to make the sale and pass the title of the land, answered the issue as a matter of law as follows: Are plaintiffs the owners and entitled to the possession of the land described in complaint? Answer: No."

Plaintiffs excepted and assigned as error that:

'His honor erred in holding as a matter of law that the assignment was insufficient to authorize McGee to make the sale and pass the title to the plaintiff, and in answering the issue as above set out."

Dortch & Barham, of Goldsboro, for appellants. D. H. Bland and H. B. Parker, both of Goldsboro, for appellee.

WALKER, J. (after stating the facts as above). [1, 2] The contention of the defendant, and the court held in accordance there-

with, is that the assignment of W. H. Davis and wife to James M. McGee operated only upon the mortgage as a security for the debt, and not upon the land itself, which is necessary to be conveyed in order that the power of sale, which is appendant, or appurtenant, to the legal title, may pass to the assignee. This statement of the law is abstractly correct, but it does not apply to this case, as we hold that there is a sufficient reference to the land in this assignment to pass the legal title thereto, and consequently the power of sale to James M. McGee. Speaking to this question, in Williams v. Teachey, 85 N. C. 402, Chief Justice Smith said:

"It is just as necessary to the operation of a conveyance that its subject-matter should be specified, as the names of the parties between whom it operates. The assignment of a note secured by mortgage carries with it the mortgage security, the mortgagee being then a trustee for the owner of the note, the trusts of which may be enforced, and we are not prepared to say that an assignment of the mortgage deed is more than an expression in terms of what is implied in law from the act of assigning the debt secured. Hyman v. Devereux, 63 N. C. 624; 1 Jones Mortg. § 805. We are aware that in many of the states the strict legal relations of the parties resulting from the making of a mortgage have been changed, 'for the most part by statute,' remarks a recent author, 'so that a mortgage is regarded as a mere pledge, and the rights and remedies under it are wholly equitable, so that a second system has grown out of the first.' 1 Jones, Mortg. § 17. It is held that the mortgage, though conveying land, passes but a chattel interest, incidental to, and partaking of, the nature of the debt intended to be protected, and hence upon the death of the mortgagee it may be assigned by his personal representative. * * * Such is not the law in this state, and the distinction is maintained between the legal estate in the mortgagee and the equitable estate in the mortgagor created by the execution of the mortgage deed, while the latter is subject to dower and to sale under execution. Hemphill v. Ross, 66 N. C. 477; Ellis v. Hussey, 66 N. C. 501; Isler v. Koonce, 81 N. C. 378."

The court then decides that an assignment which does not in terms profess to act upon the land, the subject-matter of the deed of mortgage, nor upon the estate or interest which the assignor may have therein, but only upon the mortgage itself, is not sufficient to pass the land, or the legal title thereto, and the power of sale, which is only an incident, does not therefore pass. It will be found that the cases, upon which the defendant relies, are like Williams v. Teachey, in respect to the fact that the words of the assignment in all of them, with perhaps one exception, are identical, or substantially so, with those used in the assignment construed in that case, as they referred only to the mortgage itself, without any sufficient inclusion of the land or the legal title therein, and in the excepted case, when first here, Justice Connor said:

"The exceptions raise two questions of law: '(1) Can the administrator buy up the outstanding mortgages on his intestate's land and then exercise the power of sale therein to foreclose the heirs of his intestate? (2) Can the assignee of a mortgage on land exercise the power of foreclosure without first registering the assignment? If the expression 'buy up the mortgage' be understood as simply taking an 'assignment of the mortgage,' as distinguished from taking a conveyance of the land with the transfer of the power of sale conferred upon the mortgagee, it is settled by numerous and uniform decisions of this court that he cannot do so. Williams v. Teachey, 85 N. C. 402; Dameron v. Eskridge, 104 N. C. 621 [10 S. E. 700]; Hussey v. Hill, 120 N. C. 312 [26 S. E. 919, 58 Am. St. Rep. 789]." Morton v. Lumber Co., 144 N. C. 31, 56 S. E. 551.

It will be observed that the language of the assignment was treated as "an assignment of the debt and mortgage," which would only transfer to the assignee the debt and the security for it, as in Williams v. Teachey. It does not seem that the instrument itself was before the court, as the case was heard upon the pleadings. When the case came here the second time, it appeared that the bank had not affixed its seal, and the assignment was, for that reason, held to be insufficient as a deed which would pass the legal title. We were not called upon to construe the words of the assignment, having decided the other question as we did, and the writing, in its entirety, was not brought under review. None of the cases holds that when the language, by clear intendment, refers to the land, as embraced by the assignment, the land or legal title will not pass, without regard to the form of expression used, as the latter is not material, if, by fair and reasonable construction, it appears certainly what was meant.

[3-7] The assignment in this case is informally drawn, but enough appears to show that in making it the parties intended it should pass the land. We must consider the entire instrument in order to determine what thing was intended to be conveyed. We may concede the proposition that a power of sale given to the mortgagee to sell the land depends strictly upon the estate limited to him in the mortgage, as it is appendant, or appurtenant, and not a power in gross (31 Cyc. 1041), and, also, that a general covenant will be taken as restricted to the premises and estate purported and intended to be conveyed, and to protect which is its object, and cannot be construed so as to enlarge the estate granted (11 Cyc. 1059); but these rules of interpretation do not prevent us from ascertaining, from the language used, what the parties intended to convey. It was said in Gudger v. White, 141 N. C. 507, 54 S. E. 386, citing Kea v. Robeson, 40 N. C. 373, and Rowland v. Rowland, 93 N. C. 214:

"We are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice, and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust

results. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire instrument, 'after looking,' as the phrase is, 'at the four corners of it.'"

This was approved in Bryan v. Eason, 147 N. C. 284, 61 S. E. 71; Triplett v. Williams, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. (N. S.) 514; Beacom v. Amos, 161 N. C. 357, 77 S. E. 407.

It is pertinently said, in Triplett v. Williams, supra, 149 N. C. at pages 397, 398, 63 S. E. at page 80 (24 L. R. A. [N. S.] 514):

"All parts of a deed should be given due force and effect. * * * Words deliberately put in a deed, and inserted there for a purpose, are not to be lightly considered, or arbitrarily thrust aside. * * * To discover the intention of the parties 'is the main object of all constructions. When the intention of the parties can be ascertained, nothing remains but to effectuate that intention.' * * * The inclination of many courts at the present day is to regard the whole instrument without reference to formal divisions. The deed is so construed, if possible, as to give effect to all its provisions, and thus effectuate the intention of the parties. When an instrument is informal, the interest transferred by it depends, not so much upon the words and phrases it contains, as upon the intention of the parties as indicated by the whole instrument"—citing Elliott v. Jefferson, 133 N. C. 215, 45 S. E. 558, 64 L. R. A. 135; Salisbury v. Andrews, 19 Pick. (Mass.) 250; Walsh v. Hill, 38 Cal. 481; Mining Co. v. Beckleheimer, 102 Ind. 76, 1 N. E. 202, 52 Am. Rep. 645; Doren v. Gillum, 136 Ind. 134, 35 N. E. 1101; 1 Jones, Real Property, § 568.

By this wholesome rule, it will therefore be seen, we are permitted to ascertain not only what estate passes by the deed, but also the thing intended to be conveyed, whether the land itself or simply a mortgage of it. The general scope of the assignment indicates that the first parties, W. H. Davis and wife, intended to part with everything and to retain nothing in themselves. They expressly referred to the land as a part of the consideration and as "the premises therein conveyed," that is, in the mortgage to them, where it was fully described; they use words of inheritance in connection with the thing conveyed, which Chief Justice Smith thought important, as a factor in determining the meaning in Williams v. Teachey, supra, at page 405 of 85 N. C., and the assignor's covenant "that they are seised of said premises in fee and have the right to convey the same." Why say this, if the land itself had not been conveyed? There are also covenants against incumbrances and of warranty in the assignment, and finally it is expressed in so many words that the grant shall carry full power and authority to sell the lands and apply the proceeds to the payment of the debts and the surplus to pay to D. G. Davis, none of which could be done if the land or an estate therein is not conveyed. The intention to convey the land is so manifest that it is impossible not to see it, unless we close our eyes to the terms of the deed. Because the assignment is inartificially drawn is no reason for disappointing the intention of the parties, if otherwise clearly and sufficiently expressed. We should not omit reference to the further fact that words appropriate to convey the land or an estate therein are also used; that is, "Said parties have bargained and sold and by these presents do bargain and sell to James M. McGee," which immediately follow the words, "the premises therein conveyed," which refer to the land described in the mortgage. While we will adhere to the principle stated in Williams v. Teachey, supra, and cases following it, the difference in a mortgage of land, as considered in this and in other states, is but a technical one, and we are not disposed to carry it beyond what the words of the instrument imperatively require. It is sufficient if the assignment was intended to operate upon the land, and not merely upon the mortgage itself as the security, which would be no more than is implied by an assignment of the debt itself. Hyman v. Devereux, 63 N. C. 624; 1 Jones on Mortgages, § 805; Williams v. Teachey, supra, at page 404 of 85 N. C.

There was error in the judgment of the court, and it is reversed. The fifth issue will be set aside, and, upon the agreement of the parties, judgment will be entered in the court below for the plaintiffs, to the effect that they are the owners of the land and entitled to the possession thereof, with costs to the plaintiff.

Reversed.

(163 N. C. 219)

## LOCKVILLE POWER CORPORATION v. CAROLINA POWER & LIGHT CO. (No. 140.)

(Supreme Court of North Carolina. March 3, 1915.)

1. CORPORATIONS ⟸444—DEEDS—EXECUTION.
A deed, reciting that it was executed July 15, 1876, by the D. Mfg. Co., and was made in pursuance of a resolution of the D. Mfg. Co., passed by its stockholders, and the deed was signed by the president and two stockholders, attested by a witness, and was in the form of a deed with corporate seal attached, was sufficiently executed both at common law and under the statutes then in force. Code, § 685; Rev. Code, c. 26, § 22.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1779–1781; Dec. Dig. ⟸444.]

2. ACKNOWLEDGMENT ⟸29—SUFFICIENCY—ADMISSION IN EVIDENCE.
Probate of a deed "Personally appeared before me F., probate judge for said county, W., the subscribing witness to the foregoing conveyance, and made oath according to law that he witnessed the execution of the same by the parties for the purpose therein set forth. Let this deed and certificate be registered"—signed by F., as probate judge, was sufficient for its admission in a suit involving the holder's title.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 151–159; Dec. Dig. ⟸29.]

3. DEEDS ⟸86 — REGISTRATION — COPY OF SEAL.
It was not necessary that the register of deeds copy the seal of a corporation deed or make an attempted imitation thereof on the

book, he placing on the book in brackets in lieu of the seal, the words "D. Mfg. Company, North Carolina," which taken together with recitals in the deed must have been intended to signify that there was a seal.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 226; Dec. Dig. ⟸86.]

4. ADVERSE POSSESSION ⟸71—COLOR OF TITLE—IMPERFECT DEED.

Where plaintiffs held under what purported to be a deed of a former owner, alleged imperfections in execution and probate did not prevent its being color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415–429; Dec. Dig. ⟸71.]

5. EVIDENCE ⟸353—DOCUMENTARY EVIDENCE—DEEDS.

Where plaintiff held under a deed executed to him by a trust company and beneficiaries who signed jointly with the trust company, the objections that the wives of the beneficiaries had not joined went to the amount of estate conveyed, and not to the admissibility of the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404–1428, 1430, 1431; Dec. Dig. ⟸353.]

6. HUSBAND AND WIFE ⟸15—CONVEYANCE OF PROPERTY BY HUSBAND — JOINDER BY WIFE.

Where, in a conveyance of property by a trust company, the beneficiaries joined therein, not for the purpose of conveying title, but as recited in the deed, "In consideration of the Trust Company executing this conveyance, the said parties agree to indemnify and save harmless the Trust Company against any liability it may have incurred by reason of its having accepted or held the title or by having executed this conveyance," it was not necessary that the wives of the beneficiaries should have joined.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 13, 16, 37, 84, 90–99, 283; Dec. Dig. ⟸15.]

7. APPEAL AND ERROR ⟸1078—WAIVER OF ERROR—FAILURE TO URGE OBJECTIONS.

Exceptions not brought forward in appellant's brief will be taken as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. ⟸1078.]

Appeal from Superior Court, Chatham County; Connor, Judge.

Action by the Lockville Power Corporation against the Carolina Power & Light Company. From a judgment for plaintiff, defendant appeals. No error.

James H. Pou, of Raleigh, and W. H. Hayes, of Pittsboro, for appellant. H. A. London & Son, of Pittsboro, and Manning & Kitchin, of Raleigh, for appellee.

CLARK, C. J. This was an action to recover damages by reason of the defendant's dam backing water on the plaintiff's land and water power at Lockville. The jury found that the plaintiff was the owner of the land and water power, and that the defendant's Buck horn dam wrongfully ponded water within 200 feet of the plaintiff's mill site at Lockville and awarded damages therefor.

The defendant's main contention was the insufficient execution and probate of two deeds offered in evidence by the plaintiff. One deed was from the Deep River Manufacturing Company to the American Iron & Steel Company July 15, 1876, and the other from the Virginia Trust Company to the plaintiff dated September 4, 1906.

[1] The plaintiff offered in evidence the registered copy of the deed of the Deep River Manufacturing Company to the American Iron & Steel Company dated July 15, 1876, and registered in Chatham county, where the land lay, on October 9, 1876. Two objections were made to the competency of this deed in evidence: (1) That it was not properly executed as the deed of a corporation. (2) That the proof of its execution was not such as to authorize its probate and registration. This instrument on its face recites:

"This deed executed July 15, 1876, by the Deep River Manufacturing Company, party of the first part," etc., and "this deed is made in pursuance of a resolution of the Deep River Manufacturing Company passed by its stockholders on July 3, 1876."

It appears therefore from the instrument itself that it was intended as a deed, and that its execution was authorized by a resolution of its stockholders. It is signed by the president and two stockholders. It is in the form of a deed, and its corporate seal is attached. The execution of the deed was sufficient at common law and under the statute then in force. Code, § 685; Rev. Code, c. 26, § 22; Bason v. Mining Co., 90 N. C. 417. In the latter case the court cites with approval Morawitz on Corporations, § 169:

"If a contract purporting to be sealed with the seal of a corporation is offered in evidence and it is proved to have been signed and executed by the proper agent, the presumption is that the seal was also regularly affixed by the proper authority, and a contract under seal executed by an agent within the scope of his apparent powers will be held valid and binding upon the corporation until evidence to the contrary has been adduced."

The statute then in force provided:

"Any corporation may convey land and all other property transferable by deed of bargain and sale or other proper deed sealed with the common seal and signed by the president, or presiding member, or trustee, and two other members of the corporation and attested by a witness."

This deed was signed by the president of the corporation and two stockholders, with the common seal affixed, and it was attested by a witness. Bason v. Mining Co., supra, has been cited and approved; Clayton v. Cagle, 97 N. C. 302, 1 S. E. 523; Shaffer v. Hahn, 111 N. C. 8, 15 S. E. 1033; Heath v. Cotton Mills, 115 N. C. 207, 20 S. E. 369; Clark v. Hodge, 116 N. C. 765, 21 S. E. 562; Barcello v. Hapgood, 118 N. C. 730, 24 S. E. 124; Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748.

[2] The probate of the deed is as follows (after reciting the state and county, probate court, and date):

"Personally appeared before me, W. F. Foushee, probate judge for said county, J. H. Wissler, a subscribing witness to the foregoing conveyance and made oath according to

law that he witnessed the execution of same by the parties for the purposes therein set forth. Let this deed and certificate be registered. William F. Foushee, probate judge."

In Quinnerly v. Quinnerly, 114 N. C. 147, 19 S. E. 99, it is said:

"There was no evidence to show that the probate here was insufficient. The presumption is that it was properly taken. In Starke v. Etheridge, 71 N. C. 245, it is said: 'The probate of a deed is but a memorial that the attesting witness swore to the factum of the instrument by the parties whose act it purports to be. The officer who takes the probate does not look into the instrument or to the interests acquired under it, and, as the probate is ex parte, it does not conclude.' * * * The probate" of this deed not having been impeached by any evidence, it "is conclusive of sufficient and proper proof."

This is followed Moore v. Quickle, 159 N. C. 129, 74 S. E. 927; Kleybolte v. Timber Co., 151 N. C. 635, 66 S. E. 663; Cozad v. McAden, 150 N. C. 206, 63 S. E. 944; Cochran v. Improvement Co., 127 N. C. 386, 37 S. E. 496.

[3] It is also objected that the register of deeds failed to copy the seal or to make an attempted imitation thereof on his book. He did, however, put on the book in brackets in lieu of the seal, which he did not attempt to imitate, the words "Deep River Mfg. Co., North Carolina," which taken together with the recitals in the deed must have been intended to signify that there was a seal. The original deed in evidence bears the seal, duly affixed. In Aycock v. R. R., 89 N. C. 323, the court said:

"As the purpose of requiring registration is to give notice of the terms of the deed, and this is fully accomplished in the registry, we can see no reason why some scroll or attempted imitation of the form of the seal should be required in addition to the words spoken in the grant."

To same purport, Heath v. Cotton Mills, 115 N. C. 207, 20 S. E. 369.

[4] Even if there had been a defect in the execution of the deed, it was color of title which made the grantee's title perfect by continuous adverse possession under known and visible boundaries from the date of the deed to the date of the sale by the grantee therein to the Virginia Trust Company in February, 1899. The evidence is full and complete as to the continuous and adverse possession of the property under that deed by the plaintiff and those under whom it claims. In Norwood v. Totten, 166 N. C. 648, 82 S. E. 951, it was held that a defectively executed deed could be used in evidence as color of title. To the same point Seals v. Seals, 165 N. C. 409, 81 S. E. 613; Simmons v. Box Co., 153 N. C. 257, 69 S. E. 146. A deed is good as color of title, though improperly admitted to probate. Brown v. Brown, 106 N. C. 451, 11 S. E. 647; Davis v. Higgins, 91 N. C. 382.

[5, 6] The defendant also excepted to the introduction of the deed from the Virginia Trust Company and others to the plaintiff dated September 4, 1906, because the wives of the beneficiaries who signed that deed jointly with the Virginia Trust Company did not join in its execution with their husbands. This cannot defeat the reception of the deed as evidence, for if it had any effect it would merely touch the amount of the estate conveyed by the deed. It was not necessary for the wives to sign because their husbands joined in the deed, not for the purpose of conveying title to the property, but, as stated in the deed itself, in order to indemnify the Virginia Trust Company. The words which they used in the deed are as follows:

"In consideration of the Virginia Trust Company executing this conveyance the said parties of the second part agree to indemnify and save harmless the Virginia Trust Company against any liability it may have incurred, or any claims and demands that may be asserted against it, by reason of its having accepted or held the title to the land or other property, herein before prescribed, as trustees for the parties of the second part, or those under whom they claim as beneficial owners, or by reason of its having executed this conveyance."

The deed from the American Iron & Steel Company to the Virginia Trust Company was an absolute deed in fee simple without any trust, express or implied, and the legal title to the property was vested absolutely and without conditions in the Virginia Trust Company, and that company certainly could convey a valid title to its grantee without any others joining in the execution of the deed. The objection of the defendant to this deed is upon the ground of the declaration therein that certain parties named paid the purchase money for the property.

Even if the parties joining in the deed executed by the Virginia Trust Company had been vested with the legal title, their execution of the deed would have conveyed their title subject only to the contingent right of dower of their wives. The joinder and privy examination of the wife is not necessary to a conveyance by the husband of his realty, except in a deed of his duly "allotted" homestead. Const. art. 10, § 8; Mayho v. Cotton, 69 N. C. 289; Joyner v. Sugg, 132 N. C. 580, 44 S. E. 122; Bruce v. Strickland, 81 N. C. 267.

[7] Most of the other exceptions taken on the trial have been abandoned, as they have not been brought forward in the defendant's brief. Rule 34 of this court (164 N. C. 551, 81 S. E. xii). And it does not seem to us that the other exceptions require discussion.

No error.

(168 N. C. 309)

## CULLIFER v. ATLANTIC COAST LINE R. CO. (No. 72.)

(Supreme Court of North Carolina. March 3, 1915.)

1. TRIAL ⇐314—JURY—MISCONDUCT OF OFFICER.

The clerk, authorized by the court and counsel to receive the verdict of the jury, must accept it as tendered him, and he cannot advise the jury as to the verdict tendered and direct them to again retire to consider the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 472, 473, 747, 748; Dec. Dig. ⇐314.]

2. NEGLIGENCE ⇐83—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

Where plaintiff is guilty of contributory

negligence, defendant must exercise ordinary care to avoid the consequences thereof, and where, by exercising due care, he can discover the peril of plaintiff in time to avoid injury, he must do so, or he is liable for the consequences; and an instruction that, if he could have prevented the injury after discovery of plaintiff's peril, he was liable, was erroneous.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. ⊂⊃83.]

Appeal from Superior Court, Edgecombe County; Ferguson, Judge.

Action by Lillie Cullifer against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed, and new trial granted.

This is a civil action, tried upon these issues:

(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: No.

(2) Was the plaintiff guilty of contributory negligence, which brought about her own injury? Answer.

(3) Notwithstanding any negligence on the part of said plaintiff, could the defendant, by the exercise of due care and prudence, have prevented the injury after the perilous condition of the plaintiff was discovered? Answer: No.

(4) What damages, if any, is plaintiff entitled to recover? Answer.

From the judgment rendered, the plaintiff appealed.

Fountain & Fountain, of Tarboro, Claude Kitchin, of Scotland Neck, and G. M. T. Fountain & Son, of Tarboro, for appellant. F. S. Spruill, of Rocky Mount, for appellee.

BROWN, J. [1] Exception No. 3 of the plaintiff is based upon the following facts: After the case was given to the jury by the judge, it was agreed by counsel, with the approval of the court, that the clerk should take the verdict. The clerk went to the courtroom to receive the verdict, and, without asking them whether or not they had agreed upon their verdict, he asked them to hand him the issues, and the issues were handed to him, answered as follows by the jury: The first issue, "Yes;" the second issue, "Yes;" the third issue, "No;" the fourth issue, "Twenty-five hundred dollars." That the clerk thereupon handed the issues back to said jury and said to them that they had better retire to their rooms and reconsider the issues and see if answers were not in conflict with the judge's charge. That one of the jurors asked, "In what respect?" The clerk said to him that he could not instruct him as to that. That they could retire and see for themselves, and the jury immediately retired to their room. The next morning, which was Sunday, about 20 minutes after 10 o'clock, the jury returned the verdict of record. To this the plaintiff excepted for that the verdict of record is not the proper verdict, and before judgment moved for a new trial, and that both verdicts be set aside. The court, being of opinion that the defendant was entitled to judgment on the verdict as returned to the clerk, overruled the plaintiff's motion, and the plaintiff excepted.

It was error upon the part of the clerk to have given any instructions whatever to the jury. It was not for him to say whether they had followed the charge of the court or not. When the jurors tendered to him the issues, on Saturday night, it was his duty to have accepted them under the instructions of the court and the agreement of counsel, and not have undertaken to advise the jury as to their attitude. In so doing, he overstepped his authority.

[2] The plaintiff tendered an issue as follows:

"Notwithstanding any negligence on the part of said plaintiff, could the defendant, by the exercise of due care and prudence, have prevented the injury?"

The court refused to submit this issue, as tendered, but submitted it modified, so as to read:

"Notwithstanding any negligence on the part of said plaintiff, could the defendant, by the exercise of due care and prudence, have prevented the injury after the perilous condition of the plaintiff was discovered?"

The plaintiff excepted, and this is her second exception.

His honor erred in refusing to submit the issue as tendered by the plaintiff. It is well settled in this state that, where the plaintiff is guilty of contributory negligence, the defendant must exercise ordinary care and diligence to avoid the consequences of the plaintiff's negligence, and if, by exercising due care and diligence, the defendant can discover the situation of the plaintiff in time to have avoided injury, the defendant is liable if it fails to do so. Denmark v. Railroad, 107 N. C. 189, 12 S. E. 54; Willis v. Railroad, 122 N. C. 906, 29 S. E. 941; Pierce v. Railroad, 124 N. C. 85, 32 S. E. 399, 44 L. R. A. 316; Powell v. Railroad, 125 N. C. 371, 34 S. E. 530; Bogan v. Railroad, 129 N. C. 155, 39 S. E. 808, 55 L. R. A. 418; and many other subsequent decisions of this court.

The defendant seeks to avoid the consequences of this error upon the part of the court by attempting to show that his honor charged the law correctly, and that the jury must have understood that the answer to the third issue was not to depend solely upon whether the engineer did actually discover the plaintiff's condition, but whether the engineer, by exercise of ordinary care, could have discovered it. We have examined the charge with great care, and we find that his honor did instruct the jury once to that effect, but he instructed them otherwise and erroneously in other parts of his charge. In view of the language of the issue, together with the conflicting charge, we think the jury were most probably misled. New trial.

(168 N. C. 289)

## MORAN v. BOARD OF COM'RS OF CHOWAN COUNTY. (No. 46.)

(Supreme Court of North Carolina. March 3, 1915.)

1. STATUTES ⊂⊃64—PARTIAL INVALIDITY—ISSUANCE OF SCHOOL BONDS—"NECESSARY EXPENSE."

The validity of an election under Pub. Loc. Laws 1913, c. 479, authorizing an election on the question of the issuance of bonds for the construction of a school, and the validity of the bonds issued thereunder, do not depend on the validity of the provisions of the act for an annual county tax for the maintenance of the school, attacked as in conflict with Const. art. 7, § 7, prohibiting any county to levy any tax, except for its necessary expenses, except by a vote of a majority of the qualified voters, though the maintenance of schools is not a "necessary expense" of the county.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66, 195; Dec. Dig. ⊂⊃64.

For other definitions, see Words and Phrases, First and Second Series, Necessary Expenses.]

2. STATUTES ⊂⊃64—PARTIAL INVALIDITY—EFFECT—ISSUANCE OF BONDS.

Any invalidity of Pub. Loc. Laws 1913, c. 479, authorizing an appropriation by the state for the maintenance of a school created by the act, when the school has been established and equipped, and a specified sum has been appropriated for maintenance by the county, because in conflict with Const. art. 5, § 4, prohibiting such an appropriation, except by vote of the people, does not affect the validity of a provision authorizing an election on the question of the issuance of bonds for the construction of the school, nor the validity of bonds issued as authorized by the vote of the people at the election.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66, 195; Dec. Dig. ⊂⊃64.]

3. SCHOOLS AND SCHOOL DISTRICTS ⊂⊃21—CREATION OF SCHOOLS—STATUTES—VALIDITY—"PUBLIC SCHOOL."

Pub. Loc. Laws 1913, c. 479, providing for the erection in a county of a school to be known as a county farm life school, provides for a "public school" in the constitutional sense, though children from other parts of the state may attend the school on the payment of tuition, and though children between the ages of 6 and 21 must pay tuition.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 39, 40; Dec. Dig. ⊂⊃21.

For other definitions, see Words and Phrases, First and Second Series, Public School.]

Appeal from Superior Court, Chowan County; Justice, Judge.

Controversy submitted without action between James E. Moran, plaintiff, and the Board of Commissioners of Chowan County, defendant. From a judgment for defendant, plaintiff appeals. Affirmed.

H. L. Leary, of Edenton, for appellant. Pruden & Pruden and W. S. Privott, all of Edenton, and S. Brown Shepherd, of Raleigh, for appellee.

CLARK, C. J. This is a controversy submitted without action. Chapter 479, Public Local Laws 1913, entitled "An act to establish a farm life school in Chowan county," provides for the creation in "Edenton graded school" district, in Chowan county, of a school to be known as "Chowan County Farm Life School." After providing for the course of study and the purposes of the school and for its control and management, the act authorizes an election in said Edenton graded school district for the submission to the qualified voters thereof of the issue of bonds, in an amount not to exceed $25,000, and for the levy and collection of taxes to pay the principal and interest of said bonds, the proceeds of which to be used for the "construction and equipment" of said school. The election was held in conformity with law, and was regular in all respects, and the result was duly canvassed, and, being in favor of the issue of the bonds by a vote of 197 out of a total registered vote of 246, the county commissioners propose, pursuant to said act, to issue said bonds to an amount not to exceed $25,000, as authorized by the act and by the election held thereunder.

[1] The plaintiff, who was not a resident in said school district, attacks the validity of the bonds upon the ground (1) that by section 7 of said act the county commissioners of Chowan county shall provide annually, by taxation or otherwise, not less than $2,500 for the maintenance of said school. It is true article 7, § 7, of the Constitution, prohibits any county to levy any tax, "except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein"; and it has been held that the maintenance of schools is not a "necessary expense" of the county. Rigsbee v. Durham, 98 N. C. 81, 3 S. E. 749; Goldsboro Graded School v. Broadhurst, 109 N. C. 232, 17 S. E. 781; Rodman v. Washington, 122 N. C. 39, 30 S. E. 118; Bear v. Com'rs, 124 N. C. 204, 32 S. E. 558, 70 Am. St. Rep. 586; Hollowell v. Borden, 148 N. C. 255, 61 S. E. 638; Ellis v. Trustees, 156 N. C. 13, 72 S. E. 2. But there is nothing in this act which makes the validity of this election, and of the bonds issued thereunder, dependent upon the validity of this appropriation by the county commissioners for its maintenance. This case is not like Winston v. Trust Co., 158 N. C. 512, 74 S. E. 611, as is explained in Briggs v. Raleigh, 166 N. C. 150, 81 S. E. 1084. Nor is it like McCrackin v. Railroad, 168 N. C. —, 84 S. E. 30, where the issue of bonds was submitted to the voters with conditions named in the act.

This graded school election having been duly and regularly had and the bonds voted in accordance with law, the appropriation by the county commissioners for the maintenance of the school, after the buildings shall have been erected and equipped, may still be provided for by an act of the General Assembly authorizing an election by the county or by the school district, or possibly by private subscriptions, or by a donation from some wealthy and patriotic citizen or "other-

wise." But it is sufficient now to say that the validity of the bonds for the erection and equipment of the school buildings is in no wise dependent upon the source from which the maintenance shall come. Doubtless the object of this litigation is to obtain legislation to authorize a vote of the people on the question of maintenance, if it cannot be procured from other sources.

[2] The act is also attacked upon the ground that section 14 authorizes an appropriation out of the state treasury of $2,500 per year for the fuller maintenance of the school when it shall appear that it has been established and equipped, and that $2,500 has been appropriated for that purpose by the county. It is contended that Const. art. 5, § 4, prohibits such appropriation out of the state treasury, except by a vote of the people of the state. It does not now occur to us that there is any distinction between the validity of such appropriation, and many similar appropriations, such as to the Jackson Training School, the Cullowhee High School, and others. But, if this provision were invalid, it in no wise affects the validity of the bond issue authorized by the vote of the people of the Edenton graded school district.

[3] The validity of the school is also attacked upon the ground that some details of the act are unconstitutional, in that it admits children from other parts of the state to the school upon the payment of tuition, and that children between 6 and 21 are required to pay tuition, and that it is not a public school in the sense of the Constitution. The validity of this legislation, however, has been recognized in Whitford v. Com'rs, 159 N. C. 160, 74 S. E. 1014, and discussion is unnecessary.

Affirmed.

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(169 N. C. 242)

## HOUSE et al. v. WESTERN UNION TELEGRAPH CO. (No. 105.)

(Supreme Court of North Carolina. March 10, 1915.)

TELEGRAPHS AND TELEPHONES ⟸66—DELIVERY OF MESSAGE — SUFFICIENCY OF EVIDENCE.

In an action for negligence in the transmission of a telegram, evidence *held* insufficient to show that the message was delivered to an agent of the telegraph company, so as to bind the company.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 61-63; Dec. Dig. ⟸66.]

Appeal from Superior Court, Hertford County; Connor, Judge.

Action by Pattie E. House and others against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Reversed.

This is an action to recover damages for negligence in the transmission and delivery of a telegram. The defendant denied that it received the telegram. The following is the evidence relied on by the plaintiff to prove a delivery to the defendant:

J. J. House testified as follows:

Dr. Green wrote the telegram after we left Ahoskie, and we tried to send it at every station until we got to Whaley, Va. It was early in the morning and the stations were not open. When we reached Whaley, Dr. Green gave the telegram to J. H. Ellen. He came to the car, bareheaded. I don't know where he came from. I had known Ellen seven or eight months. When I saw Ellen before he was at Aulander. I saw him in the telegraph office. Ellen received the telegram, and Dr. Green paid him for it. Dr. Green read the message to J. H. Ellen, and said to him: (That the message was important; that we wanted it sent at once; that my wife's life depended upon this). The message was taken by Ellen. We paid Ellen 25 cents. I was present when the message was delivered to J. H. Ellen. Mr. Brinkley, the baggagemaster in charge of the car in which we were riding when we reached Whaley, called Ellen. Dr. Green handed the message to Ellen. I am quite sure I heard all that passed between the three —that is, Brinkley, Dr. Green, and Ellen— while they were together.

Pattie E. House testified:

I heard Dr. Green read the message to some one. I was in the baggage car. I remember to whom the message was addressed. Dr. Green told the person to send the message at once; that delay would probably be the cause of my death. I cannot say that any one replied that he understood the message.

J. N. Vann testified as follows:

I have known J. H. Ellen three or four years. I knew him in 1911. I think I was in Whaley in fall of 1911. I have seen Ellen at Whaley. I don't know that I was there in December, 1911. I think I saw Ellen in 1911. Q. What was he doing when you saw him? A. He was in the employment of the Atlantic Coast Line Railroad Company. I never saw him receive or send messages. The Western Union Telegraph Company's office and the Atlantic Coast Line Railroad Company's office at Whaley are all in one. I frequently saw J. H. Ellen around there. I cannot say what he was doing when the trains passed, but I saw him frequently in the office. He came from the office—a little barrel-off place—to the trains. I have seen him at Aulander. Ellen was employed by the A. C. L. to the best of my knowledge and belief.

Dr. Green testified:

I wrote a telegram to Dr. Payne. We tried to send it at the first station we found open. I don't remember the words of the telegram. I gave it to Mr. Brinkley, the baggagemaster. It was early in the morning, and only two stations were open. Whaley was the first. I was in the baggage car with Mrs. House, Mr. House, and Mr. Brinkley. I first gave the telegram to Mr. Brinkley. When we got to Whaley, a man came out to the door. He had papers in his hand. The man took the telegram and signed a paper. That is the man (pointing to man in the courtroom). Mr. Brinkley said, 'I have a telegram for you,' and asked him to read it. I took the telegram and read it to him. He was standing at the car door. Brinkley understood the message and told the man to send it off. I paid the man 25 cents. He accepted 25 cents and said he would send off the telegram as soon as he could. I have stated all that I remember that occurred between J. H. Ellen and myself. I read the telegram to him and paid him 25 cents for same. He said he would send it at once. I wrote it between Ahoskie and Tunis, I think. I am not sure whether the

train was running or not when I wrote it. Ellen did not come into the car. He was standing at the car door, and I was in the door with Mr. Brinkley standing by me. I don't know how far the telegraph office is from the train; I suppose some 20 feet. I did not carry the message to the office because I did not have time. I don't think I told him it was for Mrs. House.

At the conclusion of the evidence, the defendant moved for judgment of nonsuit, which was denied, and the defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant appealed.

George H. Fearons, of New York City, George Cowper and W. D. Boone, both of Winton, and Alf. S. Barnard, of Asheville, for appellant. D. C. Barnes, of Murfreesboro, and E. T. Snipes, of Ahoskie, for appellees.

PER CURIAM. There is no evidence that Ellen, to whom the telegram was delivered at Whaley, was the agent of the defendant company, and therefore there is an entire failure of proof on the material fact of a delivery of the telegram to the defendant company. The only evidence tending to connect Ellen with the telegraph company is that of Mr. House, who says that he had seen Ellen in the telegraph office at Aulander; while, on the other hand, a witness for the plaintiff, Mr. Vann, testifies that Ellen was in the employment of the railroad company. We are therefore of opinion that the motion for judgment of nonsuit ought to have been allowed.

Reversed.

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(168 N. C. 312)

## BROWN v. MITCHELL. (No. 115.)

(Supreme Court of North Carolina. March 3, 1915.)

1. EVIDENCE ⟸442, 445—PAROL EVIDENCE—CONTRADICTING WRITTEN AGREEMENT—SUBSEQUENT CONTRACT.

Evidence offered by the seller of a mule that after it had been delivered to the buyer, and within half an hour after a written contract of sale had been delivered by the buyer to the seller, and before the seller had handed such paper to a third person who was to keep it for the parties, the buyer agreed that the title to the mule should remain in the seller until payment was made, was admissible if considered as made at the time of the contract as being an agreement to secure payment not inconsistent with the contract, and if made subsequently to the contract the rule excluding parol evidence did not apply.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874–1897, 2052–2065; Dec. Dig. ⟸442, 445.]

2. SALES ⟸19, 20 — CONDITIONAL SALES — CONSIDERATION FOR SUBSEQUENT CONTRACT.

The pre-existing debt created by a sale was a sufficient consideration for an agreement that the title should remain in the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 31, 32; Dec. Dig. ⟸19, 20.]

Appeal from Superior Court, Hertford County; Connor, Judge.

Action by W. A. Brown against Wright Mitchell. Judgment for defendant, and plaintiff appeals. New trial.

This is an action begun before a justice of the peace and heard on appeal, its purpose being to recover a mule from the defendant. The plaintiff testified that on the 22d day of February, 1913, he sold and delivered to the defendant a mule for $20, and took from defendant a paper writing in words and figures as follows:

"I, Wright Mitchell, promise to pay W. A. Brown the sum of twenty dollars for one bay mule, if said mule should get well and able to work any time in the limited time of 12 months. If said mule does not get well and able to work in this limited time above mentioned, I am not to pay said W. A. Brown anything.

"This 22d day of February, 1913.

"Wright Mitchell."

Plaintiff delivered the mule to the defendant and took from defendant above paper. It was agreed that plaintiff should deliver said paper to E. J. Gerock, a merchant at Ahoskie, to keep for said parties. Plaintiff offered to show that after the mule had been delivered to the defendant, and within half an hour after said paper had been delivered by defendant to plaintiff, and before plaintiff had handed it to said Gerock, the defendant agreed that title to said mule should remain in plaintiff until payment was made, if same became enforceable. Defendant objected. As there was no offer to show that any part of the agreement between the parties had been omitted by mistake, and as said alleged parol agreement, in the opinion of the court, assailed the written part thereof, and, further, that if it was a subsequent promise there was no consideration therefor, the evidence was excluded and plaintiff excepted. Plaintiff offered evidence tending to show that the mule recovered and was able to work within the time fixed by the written contract. Verdict and judgment for defendant, and plaintiff excepted and appealed.

W. W. Rogers, of Ahoskie, and Winborne & Winborne, of Murfreesboro, for appellant. Geo. Cowper and W. D. Boone, both of Winton, for appellee.

ALLEN, J. [1] The evidence offered by the plaintiff to prove that it was agreed that the title to the mule should remain in the plaintiff until payment was made does not come within the rule excluding parol evidence when there is a written contract. In the first place, if the agreement had been made cotemporaneously with the writing, it would fall within the principle that, where a part of the contract is in writing and a part not, the part in parol may be proven, because there is no inconsistency between a promise to pay and an agreement to secure payment (Evans v. Freeman, 142 N. C. 61, 54 S. E. 847; Wilson v. Scarboro, 163 N. C. 384, 79 S. E. 811), and if made subsequent to the writing, which appears to be the case here, the rule excluding parol evidence would have no application (Freeman v. Bell, 150 N.

C. 148, 63 S. E. 683; McKinney v. Matthews, 166 N. C. 580, 82 S. E. 1036).

In the Evans Case the court quotes a section from Clark on Contracts that:

"Where a contract does not fall within the statute, the parties may at their option put their agreement in writing, or may contract orally, or put some of the terms in writing and arrange others orally. In the latter case, although that which is written cannot be aided by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract."

And comments on the section as follows:

"In such a case there is no violation of the familiar and elementary rule we have before mentioned (against varying or contradicting a written agreement), because in the sense of that rule the written contract is neither contradicted, added to, nor varied; but, leaving it in full force and operation as it has been expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out and present it in its completeness, the same as if all of it had been committed to writing."

And this is approved in the Wilson Case.

In Freeman v. Bell, supra, the court says:

"It is well settled that the rule that parol evidence will not be admitted to contradict or modify a written contract does not apply where the modification takes place after the execution of the contract."

And this was approved in the McKinney Case.

[2] We are also of opinion that the pre-existing debt is a sufficient consideration to support the agreement. 1 Jones on Ch. Mort. § 81; 6 Cyc. 1013; 5 Ruling Case Law, 420; McMurtie v. Riddell, 9 Colo. 503, 13 Pac. 181; Louthain v. Miller, 85 Ind. 163; Close v. Hodges, 44 Minn. 205, 46 N. W. 335; Paine v. Benton, 32 Wis. 491; Collerd v. Tully, 78 N. J. Eq. 557, 80 Atl. 491, Ann. Cas. 1912C, 78; State v. Surles, 117 N. C. 720, 23 S. E. 324.

In the case from Indiana the court says:

"We have no doubt that an antecedent debt is a valuable consideration, and that it will support a mortgage or other contract."

And in the New Jersey case, after quoting a passage from the opinion of the Vice Chancellor:

"This passage from the opinion assumes that, in order to make a chattel mortgage good, there must be then a present consideration when it is given. It has, however, been held by this court that a precedent debt is a good consideration for a chattel mortgage."

And further, after citing the case of Knowles Loom Works v. Vacher, 57 N. J. Law, 490, 31 Atl. 306, 33 L. R. A. 805:

"We not only held that a chattel mortgage given for a pre-existing debt was valid, but also that it was entitled to priority over an antecedent conditional sale not recorded."

The New Jersey case is also reported in 24 Ann. Cas. 78, and the editor in an extended note cites a great number of cases in support of the position that:

"The authorities unanimously support the holding of the reported case to the effect that a precedent debt is a good consideration for a chattel mortgage."

In the citation from Ruling Case Law the author says:

"There has probably never been any doubt that as between the parties a mortgage given to secure a pre-existing debt is as valid and effective as one given for a debt contemporaneously incurred; such a mortgage is not without consideration, because the debt affords a sufficient consideration for it."

In the Surles Case the defendant was indicted for disposing of mortgaged property, and one of the defenses was that the mortgage was not valid because executed to secure a pre-existing debt, and the court says of this contention:

"In his charge his honor told the jury that the mortgage rested on a good consideration, whether it was given, as testified by defendant, for a balance due on a former debt, or whether, as testified by the witness Green, for supplies furnished after the date of the mortgage. The defendant excepts, but on what ground it is not clear. His honor was correct in the ruling."

It was also held in Potts v. Blackwell, 57 N. C. 67, a case which has been frequently cited and approved, that a mortgagee for a pre-existing debt is a purchaser for value.

These authorities fully sustain the position that, if a written chattel mortgage had been executed, the pre-existing debt would have been a sufficient consideration to support it, and, as a chattel mortgage or conditional sale by parol is recognized as valid in this state (McCoy v. Lassiter, 95 N. C. 88; Odom v. Clark, 146 N. C. 550, 60 S. E. 513), the same effect must be given to it as if it had been in writing.

Being therefore of opinion that the evidence offered by the plaintiff was competent and that there is a sufficient consideration to support the agreement, a new trial is ordered.

New trial.

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(168 N. C. 357)

## HARRIS et al. v. NATIONAL COUNCIL JUNIOR ORDER UNITED AMERICAN MECHANICS. (No. 148.)

(Supreme Court of North Carolina. March 10, 1915.)

1. INSURANCE ⟸817—BENEFIT INSURANCE—VIOLATION OF CONDITIONS — BURDEN OF PROOF.

In an action on a benefit certificate, the burden of proof is on the company to show noncompliance with conditions avoiding the policy, where a prima facie case has been made out by showing a demand introducing the certificate sued on, and proving the debt.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1999-2002; Dec. Dig. ⟸817.]

2. INSURANCE ⟸805—BENEFIT INSURANCE—APPEAL TO NATIONAL LODGE—NECESSITY.

A by-law of an order requiring the local lodge to appeal to the national lodge, for failure of the secretary manager of the national council to pay a death claim, does not apply to a member, so as to preclude him from appealing to the courts, whether the local lodge acts or not.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1987, 1988; Dec. Dig. ⟸805.]

Appeal from Superior Court, Chatham County; Carter, Judge.

Action by Stella W. Harris and others against the National Council Junior Order United American Mechanics. From a judgment for plaintiffs, defendant appeals. No error.

This is a civil action, tried at January term, 1915, superior court of Chatham county, Carter, Judge, upon these issues:

(1) Are the plaintiffs the legal dependents of W. R. Harris, deceased? Answer: Yes.

(2) Did the defendant issue to W. R. Harris the benefit certificate for $500, as alleged in the complaint? Answer: Yes.

(3) Was the deceased, W. R. Harris, in sound bodily health at the time he was enrolled in the funeral benefit department of defendant? Answer: Yes.

(4) Was W. R. Harris, at the time of his death, a member in good standing in Silk Hope Council, No. 328, Junior Order United American Mechanics of the United States of America, as alleged in the complaint? Answer: Yes.

(5) Was W. R. Harris, at the time of his death, a member in good standing in the funeral benefit department of the defendant, as alleged in the complaint? Answer: Yes.

(6) What sum, if anything, are plaintiffs entitled to recover of defendant? Answer: $500, with interest from October 1, 1912.

From the judgment rendered, defendant appealed.

Douglass & Douglass, of Raleigh, for appellant. Siler & Milliken, of Siler City, and R. H. Hayes, of Pittsboro, for appellees.

BROWN, J. This is an action brought to recover $500 on a benefit certificate No. 24, issued by the National Council Junior Order United American Mechanics to Silk Hope Council, No. 328, of the same order, for the legal dependents of W. R. Harris.

The certificate contains these conditions:

"Upon the condition that the said Silk Hope Council, No. 328, is now and shall be at the time of the death of the said W. R. Harris, in good standing in the funeral benefit department of the National Council Junior Order United American Mechanics of the United States of North America; that is to say, that it has paid all assessments due to the funeral benefit department at the time of the death of the said W. R. Harris, and has complied with all laws, rules and regulations governing the funeral benefit department, and is in good standing with the National Council and State Council, having jurisdiction over said council. Also, upon the further condition that the said W. R. Harris was not received to membership nor retained as a member in violation of the laws and decisions of the order, and that at the time of his death he was a beneficial member in good standing of said Silk Hope Council, No. 328, and entitled to death benefits in accordance with the constitution and laws of that council and the State and National Council now in force or hereafter adopted prior to said death.

"[Beneficiary Degree Seal.]"

The defendant moves to nonsuit:

[1] (1) Because the plaintiff has failed to show by affirmative evidence that the conditions recited were complied with. The plaintiff offered evidence of a demand, introduced the certificate sued on, and proved the death of the assured, and thus made out a prima facie case. Doggett v. Golden Cross, 126 N. C. 477, 36 S. E. 26.

It is well settled that, in an action upon a life insurance policy, the burden of proof is upon the insurance company to show nonpayment of dues or other matters to avoid the policy, when the certificate of insurance has been put in evidence and the death has been shown. Wilkie v. Junior Order, 147 N. C. 637, 61 S. E. 580.

[2] (2) Because the plaintiff failed to comply with the rules and regulations of the order in respect to appeals to the National Judiciary:

Section 23 of the rules and by-laws reads as follows:

"In case of the refusal of the secretary manager to approve a death claim, and the council desires to appeal from his decision, it shall be the duty of the council within sixty days to file with him a bill of particulars, giving all the facts of the case, whereupon it shall be the duty of the secretary manager to prepare his reason for refusal to pay such claim, and forthwith present all papers in the case to the National Judiciary for final adjudication."

The insured was a member of the local council, but the beneficiaries are not and are given no right of appeal. If the council refuses to act, the beneficiaries have no protection, except the courts. In this case, the council refused or failed to act. It was admitted that the deceased died on the 5th day of July, 1912; that proof of death was filed in August; and that this action was not begun until the 18th day of February, 1913, more than six months after the proof of the death was filed. By delaying this long, the council had lost its right to appeal.

The plaintiffs are not responsible for the laches of the local council. They are not even members of it, and cannot have a voice in its management. They cannot thus be deprived of their right to appeal to the courts. The point is expressly decided in Kelly v. Trimont Lodge, 154 N. C. 100, 69 S. E. 766, 52 L. R. A. (N. S.) 823. In that case Mr. Justice Manning, speaking for this court, said:

"Where the question involved is the enforcement of a property right, such as is presented in this case, we hold that the courts can be invoked by a member to aid him in the enforcement or protection of such rights, without resorting, in the first instance, to the tribunals of the order."

The motion to nonsuit was properly overruled.

The remaining two assignments of error, set out in the appellant's brief, are without merit and need no discussion.

No error.

(168 N. C. 386)

## HYATT v. HOLLOMAN. (No. 108.)

(Supreme Court of North Carolina. March 10, 1915.)

1. TAXATION ⟸533, New, vol. 11 Key-No. Series—FAILURE TO LIST NOTE—EFFECT ON RIGHT OF ACTION—"ACTION ON NOTE."

An action by an assignee of a note and chattel mortgage to recover possession of a horse, subject to the mortgage from a purchaser, is not an "action on the note," within the Revenue Act (Acts 1911, c. 50, § 41, subd. 11; Acts 1913, c. 203, § 40, subd. 12), providing that no suit shall be brought on a note, etc., which has not been listed for taxes.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Action on a Note.]

2. TAXATION ⟸533, New, vol. 11 Key-No. Series—FAILURE TO LIST—EFFECT ON RIGHT TO SUE—PAYMENT AT TRIAL.

Under the Revenue Act (Acts 1911, c. 50, § 41, subd. 11; Acts 1913, c. 203, § 40, subd. 12), failure to list a note would not prevent recovery, where the amount of the tax was tendered and paid into court.

Appeal from Superior Court, Hertford County; Connor, Judge.

Action by J. H. Hyatt against Hugh Holloman. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a civil action, tried at July special term, 1914, Hertford county, superior court, Connor, judge, upon these issues:

(1) Is the plaintiff Hyatt the owner of and entitled to the possession of the property described in the complaint? Answer: Yes.

(2) Is the defendant Hugh Holloman in the wrongful possession of said property, and does he wrongfully withhold possession thereof from plaintiff Hyatt? Answer: Yes.

(3) What was the value of said property when the defendant Hugh Holloman replevied and retook the same? Answer: $100.

(4) Did the plaintiff Hyatt, with a view to evade the payment of taxes, fail or refuse to give in to the assessing officer the note and debt referred to in the pleadings? Answer: Yes.

His honor rendered judgment in favor of the plaintiff and against the defendant for the possession of the horse taken in the claim and delivery proceedings in this action. The defendant appealed.

Alex. Lassiter, of Aulander, and Winborne & Winborne, of Murfreesboro, for appellant. Winston & Matthews, of Windsor, for appellee.

BROWN, J. The facts in evidence are that one Pell Powell executed and delivered to Godwin & Co. a note for $300, secured by a chattel mortgage on a number of horses. Godwin & Co. transferred the note to the plaintiff. The horse in question was one of those conveyed in the chattel mortgage securing the note, and had come into the possession of Holloman, subject to the mortgage by purchase from Pell Powell.

[1] The only ground upon which the defendant resists the judgment is that the owner of the note had not listed it for taxes and paid the taxes thereon, and that therefore the note could not be collected under the revenue act until the taxes were paid and the note listed.

The section of the Revenue Act of 1911 (Acts 1911, c. 50, § 41), relied on by the defendant, is in these words:

"(11) If any person shall, with a view to evade the payment of taxes, fail or refuse to give in to the assessor or the assistant assessor any bonds, notes, claims or other evidence of debt which are subject to assessment and taxation under this act, the same shall not be recoverable by action at law or suit in equity before any of the courts of this state until they have been listed and the tax paid thereon."

This provision is also brought forward in the Revenue Act of 1913, being subsection 12 of section 40 of chapter 203, Acts of 1913, Public Laws.

The contention of the plaintiff that this is not an action on the note, and that no judgment can be rendered upon the note against this defendant, and that therefore the case does not come within the purview of the statute, is well taken. The mortgage is on a horse, and is mere evidence of the right of possession and title. The mortgagor had disposed of the mortgaged property subject to the mortgage.

The plaintiff, the assignee of the mortgage, simply took it from one who had no right to it. This, being an action against a stranger in possession of property for the recovery thereof, cannot be considered in any sense an action on the note, within the meaning of the statute, as no recovery can be had on the note against this defendant.

[2] If that were not so, the record shows that the plaintiff paid to the clerk of the court the sum of $10, a sum sufficient to pay the taxes on the note, and filed with it a written statement insisting that he had properly listed and paid all taxes on the note, but nevertheless paid the same into the court and asked that it be applied to the payment of the taxes on the note. The evidence was conflicting as to whether this particular note had been listed for taxes and the taxes paid.

Under our Revenue Law, solvent credits are listed in a lump sum under oath, and the taxpayer deducts therefrom the amount of his individual personal indebtedness. It is therefore difficult to ascertain whether a particular note of small amount is included. Nevertheless, in deference to the verdict of the jury, the plaintiff, the assignee of this note, offered to pay the taxes and paid a sum sufficient in court. This all took place long after the tax listing time was over, and it is too late to correct the tax list.

We have said in Martin v. Knight, 147 N. C. 564, 61 S. E. 447, that a failure to list a solvent credit pursuant to the statute does not prevent recovery in an action thereon, but postpones the recovery of judgment until it is listed and the taxes are paid.

We think it was proper for the court to

permit the plaintiff to pay the sum of money into court in order that it may be applied to the payment of the taxes. It was not the purpose of the General Assembly to confiscate property for the nonpayment of taxes, whether it be real or personal.

In the taxation of real estate, the law is very liberal, and gives the landowner 12 months within which to redeem it after the land has been sold. It is therefore not to be supposed that the Legislature intended to confiscate the property of a citizen simply because it is in the form of a note or other solvent credit. We think, therefore, that the whole purpose and spirit of the statute was complied with when the plaintiff, who is the mere assignee of the note, pays into court the sum sufficient to reimburse the county for any loss of taxes thereon.

The judgment of the superior court is affirmed.

(168 N. C. 360)

## WILLIAMS v. ATLANTIC COAST LINE R. CO. (No. 147.)

(Supreme Court of North Carolina. March 10, 1915.)

1. MASTER AND SERVANT ⟸286—SAFE PLACE TO WORK—OBSTRUCTION NEAR TRACK—QUESTION FOR JURY.

That a brakeman was brushed off a box car, while climbing a side ladder, by striking the eaves of a warming shed placed close to the track, is evidence of negligence in failing to furnish a safe place to work, sufficient to take the question to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. ⟸286.]

2. MASTER AND SERVANT ⟸228—CONTRIBUTORY NEGLIGENCE—STATUTE.

Under Laws 1913, c. 6, abolishing contributory negligence as a defense in an action by employés, such defense could not be raised on a motion to nonsuit.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. ⟸228.]

3. MASTER AND SERVANT ⟸289—INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In an action for injuries to a brakeman, brushed off a box car by the eaves of a warming shed close to the track, the brakeman's contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. ⟸289.]

Appeal from Superior Court, Wayne County; Bond, Judge.

Action by J. M. Williams against the Atlantic Coast Line Railroad Company. From a judgment setting aside the verdict, plaintiff appeals. Reversed, and judgment directed to be entered upon the verdict.

This is an action to recover damages for personal injury, caused, as the plaintiff alleges, by the negligence of the defendant, in that it failed to provide him a reasonably safe place in which to work. Evidence was introduced by the plaintiff, and the jury returned the following verdict:

(1) Was the injury to plaintiff caused by the negligence of the defendant, as alleged? Answer: Yes.

(2) If so, did the plaintiff by his own negligence contribute to such injury? Answer: No.

(3) What damage, if any, is plaintiff entitled to recover? Answer: Eight thousand dollars.

His honor set aside the verdict as a matter of law, upon the ground that in no view of the evidence was the plaintiff entitled to recover, and the plaintiff excepted and appealed.

Langston, Allen & Taylor, of Goldsboro, for appellant. O. H. Guion, of Newbern, for appellee.

ALLEN, J. The plaintiff was a brakeman, working in the yards of the defendant company at Rocky Mount, and while ascending a box car by the side ladder, in the performance of his duties, was struck by the eaves of a small shanty about 7 feet high, in such close proximity to the track that it was impossible to clear the shanty in the act of climbing the side of the car. The shanty was located about 15 feet south of a car shed. The plaintiff mounted the car about 5 car lengths from the shanty, but could not go to the top, as there was no end ladder on the car, until after he passed the car shed, because of the overhanging eaves. The train was running at a speed of 10 to 12 miles per hour. The shanty could not be seen from where he mounted the car, because a line of posts supporting the car shed obstructed his view. Immediately upon passing the car shed, he began to ascend the car, as his duties required him to do, looking up, and was struck by the shanty and seriously injured. Plaintiff knew that there was a shanty in the railroad yards, but did not know of its location with reference to the track, and had not been warned of its dangerous proximity to the track, and had been working on the job but three days when the injury occurred.

The plaintiff admitted that one standing on the ladder would have nothing to prevent him from seeing the shanty after he left the shed, and that a person in the act of climbing could not pass the shanty without being knocked off, unless he was paying particular attention, and then only by squeezing himself close to the ladder. The contention of the defendant is that these facts present no case for the consideration of a jury, that they furnish no evidence of negligence on the part of the defendant, and on the contrary prove the contributory negligence of the plaintiff.

[1] The correctness of the first position depends on the duty resting upon the defendant, and whether the facts show a breach of this duty, which proximately caused the injury complained of. In Buchanan v. Lumber Co., 84 S. E. 50, at the last term, Justice Hoke, speaking for the court said:

"It is fully established with us that an employer, in the exercise of reasonable care, must provide for his employés a safe place to do his work, and a failure of duty in this respect will constitute negligence. Cook v. Cranberry Co., 161 N. C. 39 [76 S. E. 473]; Jackson v. Lumber Co., 158 N. C. 805; Tanner v. Lumber Co., 140 N. C. 475 [53 S. E. 287]. An examination of the authorities will show that the position is very insistent in the case of railroads where a breach of duty in this respect is not unlikely to result in serious and often fatal injuries."

And this principle was applied to evidence tending to show that, for a week or more, the defendant's road had been left with a limb or snag deep in the ground at one end and leaning over towards the railroad track in such manner that it day by day scraped along the sides of the engine and cars, and where it was liable, at any time, to cause an injury of some sort to the train or its employés.

In Texas & Pacific Ry. Co. v. Swearingen, 196 U. S. 61, 25 Sup. Ct. 164, 49 L. Ed. 382, the negligence alleged on the part of the company was the existence, in close proximity to a switch track, of a scale box, by striking against which the plaintiff was injured while doing duty as a switchman, and the court, dealing with the question of negligence, said:

"Prima facie, the location of scales where the tracks were only the standard distance apart, and where a space of less than two feet was left for the movements of a switchman between the side of a freight car and the scale box, incumbered, as he would be in the nighttime, with a lantern employed for the purpose of signaling, did not incontestably establish the performance by the defendant company of the duty imposed upon it to use due care to provide a reasonably safe place for the use of a switchman in its employ. And so far from the proof making it certain that the necessity of the situation required the erection of the structure between tracks Nos. 1 and 2 as existing, there was proof that the railway company owned unoccupied ground, intended for other tracks, to the south of track No. 4, justifying the inference that the distance between tracks Nos. 1 and 2 might have been increased, and the employment of the scales thus rendered less hazardous to switchmen, or that the scales might have been removed to a safer location. It was therefore properly a question for the determination of the jury whether or not the scales were maintained in a reasonably safe place, and, if not, whether the plaintiff had notice thereof."

This statement of the law is peculiarly pertinent to the case before us, in view of the evidence for the plaintiff that the shanty, which caused the injury, was used for employés working around the transfer shed to warm in, and that there would have been no danger if it had been turned round.

In Georgia Pac. Ry. v. Davis, 92 Ala. 308, 9 South. 253, 25 Am. St. Rep. 47, the plaintiff, a brakeman, was injured while on a side ladder by a rock projecting from the side of a cut, and it was said by the court that:

"In view of the exigencies of the service, involving the use of ladders on the sides of cars by employés, and this while the train is in motion, and in view of the custom of resorting to such use, which the evidence here goes to show, we do not hesitate to affirm that it was the part of ordinary care on the part of the defendant—assuming, as the jury might have found, the truth of this testimony—to construct and maintain its roadway so as not only to admit of the safe passage of its cars, but also free from any projection or obstruction which would endanger the persons of employés in the use of these side ladders while the train is proceeding on its way, and that the defendant's failure in this regard rendered it liable to the plaintiff for any damages resulting to him from such failure, unless his own negligence proximately contributed thereto."

This principle was applied in Dorsey v. Construction Co., 42 Wis. 584, in behalf of a conductor of a freight train, who was injured while ascending a side ladder by coming in contact with a cattle chute placed near the track, in Flanders v. Railroad, 51 Minn. 193, 53 N. W. 544, in behalf of a brakeman, who was descending a ladder and was injured by striking a section house, and in Allen v. Railroad, 57 Iowa, 623, 11 N. W. 614, in behalf of a brakeman injured by striking a cattle chute while getting off a moving train.

Heilig v. Railroad, 152 N. C. 471, 67 S. E. 1010, is also in point. In that case the plaintiff, an employé, was injured while riding on the steps of the engine, according to custom, by coming in contact with the posts of a coal chute. A judgment of nonsuit entered in the superior court was set aside, this court saying:

"It [the railroad] cannot permit obstacles to exist so close to the tracks traversed by such engines as to endanger the life and limb of its employés using its engines in accordance with a custom so long established."

The facts in all these cases were more favorable to the defendant than in the case before us, because in them the structures causing injury were built for convenience in operating the railroad, while in this case the shanty was to enable employés to warm, and could have been easily turned, without inconvenience to any one, so that it would have been safe to pass it. Applying these authorities to the evidence, we are of opinion there was evidence of negligence, in that the defendant failed to provide a reasonably safe place for the plaintiff to work, and that this failure of duty was the cause of his injury.

[2, 3] The second contention of the defendant as to the contributory negligence of the plaintiff, cannot be raised upon a motion to nonsuit, as the injury occurred after the enactment of chapter 6, Pub. Laws 1913, which abolishes contributory negligence as a defense in actions by employés for personal injury; but, if considered as the law was before that statute was adopted, it could not be held upon the evidence, as matter of law, that the plaintiff by his own negligence contributed to his injury. It is true he knew the general location of the shanty, but he had not passed it on the car, and did not know its distance from the track. He had not been warned of danger, and had the right to assume that the defendant had performed its duty to provide him a reasonably safe place to work.

It is also true that he could have seen the

location of the shanty after he passed the car shed; but the shanty was not then more than 15 or 20 feet distant, and, as the train was running 10 or 12 miles an hour, he had only a second of time, and was engaged in performing a duty, climbing to the top of the car, which would naturally cause him to look up. In Buchanan v. Lumber Co., supra, a similar contention was made by the defendant, and the court said in dealing with it:

"He was only out on this running board where the hands were accustomed to ride on their way to work, the train being in motion, and the duty on him, under such circumstances, to observe and note an obstruction of this character and correctly estimate its proper effect, a small stick, leaning over towards the rail, was a very different obligation from that incumbent on defendant company and its employés charged with the especial duty of keeping the track and roadbed in a reasonably safe condition. In the latter case it would undoubtedly import menace tending to inculpate, whereas to the intestate it might very well be a question of debate, and one that, under our law, must be referred to the jury. * * * The prayer, in effect, requested the court to rule on the question of intestate's conduct as a matter of law, and his honor submitted it for the consideration of the jury, and the position, as we have stated, is in accord with our decisions."

Also in Railroad v. Swearingen, supra:

"The record shows that there was evidence tending to establish that the track scale box was not erected in a reasonably safe place, and that, although the plaintiff knew that the scale box was situated adjacent to track No. 2, he did not know that it was so near that it could not be passed, in the performance of his duties as a switchman, without danger. This is apparent when it is borne in mind that the plaintiff testified, in substance, that prior to the accident he had not closely inspected the scale box, or taken measurements of the distance from the box to the north rail of track No. 2, and that he did not do more than cursorily observe the structure from a distance, and that he was unaware of the nearness of the scale box to the north rail of track No. 2. * * * The plaintiff was entitled to assume that the defendant company had used due care to provide a reasonably safe place for the doing by him of the work for which he had been employed, and, as the fact that the defendant company might not have performed such duty in respect to the scale box in question was not so patent as to be readily observable, the court could not declare, in view of the testimony of the plaintiff as to his actual want of knowledge of the danger, that he had assumed the hazard incident to the actual situation."

In Dorsey v. Construction Co., supra, the evidence of contributory negligence was stronger than in this case, and the court held it was a question for the jury, saying:

"The safety of railroad trains depends largely upon the exclusive attention of those operating them to the track and to the trains themselves. It is not for the interest of railroad companies, or of the public—with like, if not equal, concern in the safety of trains—that persons so employed should be charged with any duty or necessity to divert their attention. And it appears to us very doubtful whether persons operating railroad trains, and passing adjacent objects in rapid motion, with their attention fixed upon their duties, ought, without express proof of knowledge, to be charged with notice of the precise relation of such objects to the track. * * * Be that as it may, the question cannot well be considered as arising here. For, though it certainly appears that the respondent knew of the general relation of the cattle chute to the track, it does not appear that he knew, or had such means of information as would charge him with knowing, its precise relation to the track, its distance, and its danger. * * * What constitutes negligence, or that want of care on the part of the person receiving the injury, which deprives him of any remedy, and neutralizes, as it were, the wrong of the party by whom the injury is inflicted, is a question depending on various circumstances. What may be negligence under some circumstances and conditions may not under others. As observed by counsel, it is not a fact to be testified to, but can only be inferred from the res gestæ—from the facts given in evidence. Hence it may, in general, be said to be a conclusion of fact to be drawn by the jury under proper instructions from the court. It is always so where the facts, or rather the conclusion, is fairly debatable, or rests in doubt. * * * Under this rule, it appears quite manifest that the court could not hold the respondent, as matter of law, guilty of contributory negligence. It was a question for the jury whether, under all the circumstances, he could have avoided the accident by the exercise of reasonable care. His general knowledge of the position and danger of the cattle chute, his means of knowledge at the time of its nearness to him, his necessity of being where he was when he was injured, and his care or want of care for his own safety, under all the circumstances, were proper questions for the jury."

We are therefore of opinion there is error in the ruling of his honor, and the judgment of nonsuit is set aside, and the verdict reinstated.

Judgment will be entered in the superior court upon the verdict.

Reversed.

(100 S. C. 87)

## GRAY v. MARION COUNTY LUMBER CO.

(No. 9006.)

(Supreme Court of South Carolina. Feb. 27, 1915.)

1. JUDGMENT ⇐320—MODIFICATION—REMEDY BY APPEAL.

An order of a circuit judge which restrains a party from exercising rights awarded to him by a decree of another circuit judge pending appeal from the decree is invalid as a modification of the decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 618; Dec. Dig. ⇐320.]

2. COURTS ⇐207—INJUNCTION PENDING APPEAL—JURISDICTION.

The Supreme Court may, on its own motion pending appeal from a decree dismissing a suit to declare the rights of defendant under a timber deed terminated and to remove the cloud thereof from plaintiff's land, maintain by injunction the status quo on plaintiff giving to defendant a bond conditioned to save defendant harmless in the event he establishes his rights on appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 736; Dec. Dig. ⇐207.]

Appeal from Common Pleas Circuit Court of Marlboro County; T. H. Spain, Judge.

Action by A. A. Gray against the Marion County Lumber Company. From an order of

injunction pending action and disposition of case on appeal, defendant appeals. Modified.

M. C. Woods, of Marion, for appellant. Townsend & Rogers, of Bennettsville, for respondent.

FRASER, J. The following statement appears in the case:

"This is an action to declare all rights of defendant-appellant under a certain timber deed terminated, and to remove the cloud thereof from plaintiff's land. The cause was heard on its merits by Judge Memminger, at the spring, 1914, term of the circuit court for Marlboro county, and resulted in a decree, filed after the term had ended and his honor had left the Fourth circuit, which concluded in the following words: 'From these conclusions of law and facts, it follows that plaintiff is not entitled to the relief prayed for and that the complaint should be dismissed. It is therefore so ordered.' Within due time plaintiff gave notice of his intention to appeal to the Supreme Court from the order of Judge Memminger. In the meantime the defendant entered upon the land in question, cut out a right of way, and prepared to build a logging road there across. On an ex parte application, Judge Spain issued an order of injunction prohibiting the defendant from entering upon the land in question pending the appeal. Defendant gave notice of a motion to dissolve such order of injunction, and, after argument of counsel, Judge Spain granted an order dissolving the order of injunction upon the ground that the same had been obtained without notice. The plaintiff then applied to Judge Spain and obtained a rule to show cause, and a temporary restraining order pending the hearing of the rule, why the defendant should not be enjoined pending the determination of the case by the Supreme Court. To such rule the defendant made due return, which his honor held insufficient. He thereupon issued an order of injunction pending the action and until the Supreme Court shall have decided the main case. At this time the case on appeal from Judge Memminger's order had not been agreed upon or settled, and the return had not been filed in the Supreme or circuit court; the time for service of the proposed case having been extended by counsel. Within due time defendant gave notice of his intention to appeal to the Supreme Court, and the cause now comes before this court on the exceptions set forth in the record."

In the exceptions the appellant takes two positions: (1) That the easement is separate and perpetual. (2) That the circuit judge had no jurisdiction to make the order. The second only needs to be considered.

[1] The plaintiff brought suit to declare all rights under the deed terminated. Those rights included the right to cut and remove the timber, and also the right of way. Judge Memminger, who heard that case, held "that the plaintiff is not entitled to the relief prayed for and that the complaint be dismissed." When therefore another circuit judge made an order suspending the defendant's rights as declared by Judge Memminger's decree, it was unquestionably a modification of that decree.

In the recent case of Middleton v. Ice & Fuel Co., 97 S. C. 459, 81 S. E. 158, Mr. Justice Watts, delivering the opinion of this court, says:

"His honor, Judge Rice, had neither power nor authority to review, reverse, or modify the decree of Judge Gary, who has passed the same while presiding in Bamberg county, even though he was the resident judge of the circuit of which the county of Bamberg is a part. He committed an error in his attempt to interfere with Judge Gary's decree. If there was any error in the judgment and decree of Judge Gary, there is, under the Constitution and laws of this state, another tribunal for the correction of the same."

[2] But while Judge Spain was without authority to modify the action theretofore had by Judge Memminger, of the same court, it yet does not follow that this court may not now, of its own motion, make an order of a character somewhat like that which Judge Spain undertook to make. The main case heard by Judge Memminger is on appeal here; the cause is on the docket, ripe for a hearing, and would have been heard contemporaneously with the appeal from Judge Spain's order, except for a lack of time under the allotment theretofore made to the Fourth court by this court. Therefore, to now undo Judge Spain's order would give warrant to the defendant to go upon the plaintiff's land and cut timber, the cutting of which is now in issue before this court. The status, under the circumstances, ought to be preserved.

It is therefore ordered that the defendant must not go upon the premises in dispute and cut timber, or do any act to enforce its alleged rights under the contract in issue, until the main cause has been heard and decided by this court. Ordered further, that the plaintiff make to the defendant a bond, with sureties to be approved by the clerk of the circuit court for Marlboro, in the sum of five hundred dollars, conditioned to save harmless the defendant by reason of this order, in the event the defendant shall establish its right in the said action.

Modified.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

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(100 S. C. 110)

## Ex parte CUDD.

## WERTZ v. WERTZ et al.

(No. 9011.)

(Supreme Court of South Carolina. March 1, 1915.)

PARTITION ⟸104—SALE—REFUSAL OF PURCHASER TO PERFORM—LIABILITY.

A purchaser at partition sale of a tract in gross may not be relieved from liability on the ground that a part of the tract had been taken to widen a street, where no one having the right so to do had given any part for a street, and where the municipality had never acquired the same by condemnation.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 341-351, 375, 377, 380-395; Dec. Dig. ⟸104.]

Appeal from Common Pleas Circuit Court of Spartanburg County; Geo. E. Prince, Judge.

Partition by Margaret M. Wertz, as executrix, and in her own right, against J. B. Wertz and others. From an order compelling R. E. Cudd, purchaser, refusing to perform his purchase, to pay the loss sustained on a resale, he appeals. Affirmed.

The following is the order of Circuit Judge Prince:

The plaintiff and defendants were tenants in common of a lot of land on North Liberty street, in the city of Spartanburg. It was left to them by their father and grandfather, J. B. Wertz, at the termination of a life estate given in the will of said J. B. Wertz to his wife, Maggie L. Wertz. This action was brought for the purpose of partition, and under a decree of the court the property was advertised and exposed for sale by the master on November 4, 1912. At that sale R. E. Cudd bid the property off for $7,600. He subsequently refused to comply, claiming that the property was eight feet less in depth than advertised and as stated by the master at the sale. The property was again advertised by the master at the risk of Cudd and sold on the 6th day of January, 1913, under the terms of the former decree for $7,051 and at an additional cost of $10.30. The master then petitioned this court for a rule to show cause against Cudd why he should not be required to pay into the master's hands $549 difference in the price and $10.30 additional cost, with interest on same from January 6, 1913, and interest on $7,600 from November 4, 1912, to January 6, 1913. Mr. Cudd made return that, when he was bidding on the property in November, he asked the master if he was selling 143 feet, and that rough plat exhibited at said sale represented that the lot was 143 feet deep; that he subsequently ascertained that the original plat which had been made by Stribling, surveyor, had been misplaced at the sale, and that said plat showed by a dotted line across the front end of said lot that 8 feet had been cut off next to the sidewalk for the purpose of widening the street; that he understood that he was buying 143 feet back or west of said line, and as a matter of fact there was only 135 feet back of said line. At the hearing before me the master testified orally that he did state to Mr. Cudd that he was selling 143 feet, and he also stated that he sold the lot as a whole, and not by front foot or side foot.

It appears to my satisfaction that the heirs and distributees of J. B. Wertz did own 143 feet in depth from the edge of the sidewalk, and that the master sold the same. It has not been made to appear that any party having the right so to do has ever given the city the right to the 8 foot strip of land, nor has the city ever acquired same by condemnation. This being the case, the master was selling and would have conveyed to the purchaser 143 feet as advertised and as stated by him at the sale. The necessary conclusion follows that Mr. Cudd must pay the difference in the prices, which is $549, and also $10.30 additional cost on the second sale, together with interest on both items from January 6, 1913, and also legal interest on $7,600, the first bid, from November 4, 1912, to January 6, 1913, and also the costs of this proceeding, and it is so ordered. Let the master have the right to enter up judgment against R. E. Cudd for said sums.

John Gary Evans and R. B. Pasley, both of Spartanburg, for appellant. Johnson & Nash, Lyles & Daniel, of Spartanburg, for respondents.

WATTS, J. For the reasons set out in the order of his honor, Judge Prince, circuit judge, it is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

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(100 S. C. 107)

## ASHE et al. v. STANDARD OIL CO.

(No. 9010.)

(Supreme Court of South Carolina. March 1, 1915.)

TRIAL ⟸139—TAKING CASE FROM JURY.

Where there is any competent, relevant evidence to go to the jury that presents any issuable fact pertinent to the case from which more than one inference can be drawn, it should be left to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. ⟸139.]

Gage, J., dissenting.

Appeal from Common Pleas Circuit Court of Orangeburg County; I. W. Bowman, Judge.

Action by Annie E. Ashe and another against the Standard Oil Company. Judgment for defendant, and plaintiffs appeal. Reversed.

Wolfe & Berry and Raysor & Simmons, all of Orangeburg, for appellants. Willcox & Willcox and Henry E. Davis, all of Florence, and Moss & Lide, of Orangeburg, for respondent.

WATTS, J. This was an action by the plaintiffs against the defendant for damages for personal injuries alleged to have been sustained by the plaintiff, Annie E. Ashe, wife of Jacob E. Ashe, by reason of negligence of the defendant. The action was for actual and punitive damages. The cause was heard before his honor, Judge Bowman, and a jury, at the June term of the court, 1914, for Orangeburg county, and after all of the testimony, both for plaintiff and defendant, was in, defendant moved for a direction of verdict in its favor upon several grounds. After argument the court directed a verdict in favor of defendant, whereupon plaintiffs appeal and by nine exceptions allege error on the part of circuit court in so directing a verdict, and contend that there was sufficient evidence to carry the case to the jury.

It is not necessary to consider the exceptions seriatim, because the law is so plain that, if there is any competent, relevant evidence to go to the jury that presents for them any issuable fact pertinent to the case from which more than one inference can be drawn, then it should go to the jury for their determination. After a careful study and analysis of the evidence of the whole case, and especially that of the plaintiff, we are constrained to hold that there was at least one point that the jury should have passed

upon; it was for them to determine from all the facts, surroundings, circumstances, and evidence in the case: Was there any negligence on the part of defendant in placing its wagon and team of mules where it placed them and leaving them unattended as testified to?

The verdict must be set aside and reversed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur.

GAGE, J. I dissent. The plaintiff testified Mr. Dukes, the driver, was at the back of the wagon when she was kicked. I think the testimony fails to show any lack of care under the circumstances.

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(100 S. C. 121)

## TURNER v. COLUMBIA NAT. LIFE INS. CO. (No. 9016.)

(Supreme Court of South Carolina. March 1, 1915.)

1. INSURANCE ⟸668 — ACTION ON HEALTH POLICY—QUESTION FOR JURY—TIME OF CONTRACTING ILLNESS.

On evidence in an action for money alleged to be due under a health indemnity policy, *held*, that the time when insured contracted a disease was for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732–1770; Dec. Dig. ⟸668.]

2. INSURANCE ⟸668—ACTION ON HEALTH POLICY—QUESTION FOR JURY—WAIVER.

On evidence in such action, *held*, that the question of insured's waiver of his claim was for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732–1770; Dec. Dig. ⟸668.]

3. TRIAL ⟸260—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

The refusal of defendant's requested instructions was not error, where the court's general charge practically covered the grounds complained of.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⟸260.]

4. WITNESSES ⟸255 — DOCUMENTARY EVIDENCE—REFRESHING MEMORY.

In an action on a health indemnity policy, insured's proofs of loss can be used to refresh his recollection of the statements made therein.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874–890; Dec. Dig. ⟸255.]

Appeal from Common Pleas Circuit Court of Spartanburg County; T. S. Sease, Judge.

Action by J. C. L. Turner against the Columbia National Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant objected to the admission of the proofs of loss on the ground that plaintiff could not prove his case by introduction of written statements that he may have made in a formal proof, filling out of the blanks in regard to the alleged details of his sickness, and that there was no such issue, whereupon the court said:

"He can refresh his memory by that if he desires to do so, or, if there are any marks on these papers made by the company, it would be competent to that extent. In other words, the date of the receipt or any marks on it made by the company after it left his hands, than that would be competent; but the contents of the paper, what he wrote in there, would not be competent, because they would be self-serving declarations."

Defendant's sixth exception was as follows:

Error in admitting in evidence and in allowing the plaintiff to examine and refresh his memory from the "Proofs of Loss" which he sent to the company, unsworn to, over objection of defendant's attorney; it being submitted that the same were incompetent, amounting to no more than self-serving declarations. It is further submitted that they were irrelevant and injurious to the defendant, in that there was no issue made by the defendant as to the failure of plaintiff to furnish such proofs of loss, and it was an error to allow them to be used in evidence for any purpose.

Bomar & Osborne, of Spartanburg, for appellant. Gwynn & Hannon, of Spartanburg, for respondent.

WATTS, J. This was an action for the recovery of $360 by plaintiff against defendant, alleged to be due plaintiff under a health indemnity policy issued by defendant. The cause was tried at the June term of court, 1914, for Spartanburg county, before Judge Sease and a jury, and resulted in a verdict for the plaintiff in the sum of $250. After entry of judgment, defendant appeals and bases his exceptions (1) in the refusal to direct a verdict in favor of defendant, (2) errors in his charge, and (3) error in the admission of evidence. It is contended that:

"Under the terms of the policy, in so far as the health feature is concerned, there is no liability until the policy becomes of force, and under the terms of the policy it could not become of force until 12 o'clock noon on the 10th day of November, 1912, and according to the undisputed testimony the plaintiff had contracted the disease from which he suffered prior to that hour, and under the terms of the policy he is not entitled to recover unless the disease is contracted while the policy is of force."

[1] The plaintiff in his proof of loss, which he signed and forwarded, stated that his illness began about 12 o'clock noon, November 10th. In his evidence at the trial he testified:

"Q. In both of these proofs of loss you state that your illness commenced on November 10th? A. That was partial. I was not confined to the house. Q. In the proof that is dated December 24th you state that your illness began at 2 o'clock of November 10th. That was correct, was it? A. Yes, sir; I suppose. * * * Q. Did you feel any of those aching pains and soreness early in the morning of the 10th of November? A. I could not say, but I think we started up there in the morning, and I noticed it at Columbus, and I noticed somewhere about 1 or 2 o'clock. Q. Did you feel any aches or pains that morning? A. Not that I remember of. Q. Did you feel any aches and pains prior to 12

o'clock noon of that day? A. It was at Columbus the first that I remember feeling. Q. What time did you get to Columbus? A. I think it was about half past 1 or 2 o'clock."

Dr. Ezell testified that, if he suffered from the aches and pains on November 10th, he had, in his opinion, contracted it before that time, but on cross-examination said that he had got the cause of the disease in his system, but that he had not the disease, but contracted it and got it in his system. This question was an issuable fact for the jury to determine as to when he had the disease. The seeds of disease might have been in his system and never developed, might have laid dormant for a long time, and a change of climate or want of care might have developed it. It is for the jury to say, under all of the facts and circumstances, when he contracted the disease. He testified that he felt it at Columbus at 1 o'clock November 10th. I do not understand (and no one holds the medical profession in greater respect than I do) that they think their opinion as to a hypothetical case, or even one that they are treating—that their opinion is infallible and no flaws can be discovered in it, and in a common-sense matter of the question that the jury had to solve on this point their opinion is as good as any expert, and the evidence of Dr. Ezell does not necessarily warrant the conclusion claimed by the appellant.

[2] Exceptions 2, 3, 4, and 5 complain of error in the judge's charge to the jury and in refusing defendant's request to charge as to waiver. There was sufficient proof to submit this question to the jury. They had the sworn proof of loss, dated December 24, 1912, wherein he claimed that he was sick on November 10th, 2 o'clock p. m., and an acceptance of premium November 18, 1912, and a notification that renewal premium on the policy was due on January 26, 1913, and letter of January 30, 1913, that he would not have to sue company in order to get a settlement as company pays claims promptly. All of this with proof of loss in their possession after December 24, 1912.

[3] As to the other points made by the exceptions, we think that his honor's general charge practically covered the grounds complained of, and we see nothing in his charge that could be prejudicial to the defendant; and, as to the fifth exception, it is overruled for the reason we have said that the question of waiver was properly submitted to the jury.

[4] The sixth exception is overruled, as his honor was clearly right in his ruling and remarks that he made at the time. This exception is clearly taken under a misapprehension of his honor's ruling.

All exceptions overruled. Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(100 S. C. 84)

## GOODLETT v. GOODLETT et al.
(No. 9003.)

(Supreme Court of South Carolina. Feb. 25, 1915.)

1. INTEREST ⟸37—CONTRACTS—SUFFICIENCY.
Where the holder of a demand note of a deceased, bearing 7 per cent. interest, notified the administrator that it would have to be paid, unless he wished to renew it at a higher rate, and the administrator wrote that he would like to keep the money, and at the instance of the administrator an heir inclosed a check, which was the proper amount for 8 per cent. interest, and it was so credited, as well as a later check, an express agreement in writing to pay 8 per cent. is made out.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 77, 78; Dec. Dig. ⟸37.]

2. USURY ⟸66—EXPRESS AGREEMENT AS TO RATE.
Under the statute permitting such a rate to be stipulated for in writing, the transaction was not usurious, as the administrator and the heir would be bound personally.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 139; Dec. Dig. ⟸66.]

3. INTEREST ⟸37—RENEWAL NOTE—CONSIDERATION.
Interest in the estate was a sufficient consideration for the agreement to pay 8 per cent. interest on the note.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 77, 78; Dec. Dig. ⟸37.]

4. PAYMENT ⟸82—RECOVERY BACK.
Payments voluntarily made with full knowledge of the facts cannot be recovered.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 254–266; Dec. Dig. ⟸82.]

Appeal from Common Pleas Circuit Court of Greenville County; R. W. Memminger, Judge.

Action by Spartan Goodlett against Max H. Goodlett and others. From the judgment rendered, plaintiff appeals. Modified.

B. M. Shuman, of Greenville, for appellant. Cothran, Dean & Cothran, of Greenville, for respondents.

HYDRICK, J. This is an action against the administrator and heirs at law of M. W. Goodlett on a demand note given by him to the plaintiff for $1,500, dated November 28, 1900, and bearing interest from date at 7 per cent. per annum.

M. W. Goodlett died October 5, 1907. On October 1, 1908, after some preliminary correspondence about the note, plaintiff wrote the administrator that, if he wished to keep the money any longer, he must renew the note and pay a higher rate of interest. On October 15th the administrator replied that he would like to keep the money, and inclosed a check for $120, without saying what it was for. Plaintiff credited it on the note as interest at 8 per cent. On September 2, 1909, the defendant O. M. Goodlett sent plaintiff a check for $120, for interest on the note, and it was so credited. This was done at the instance of the administrator.

The defendants set up these payments as

usurious, and seek, under the statute, to defeat the recovery by plaintiff of any interest or costs, and to recover, as a counterclaim, $480, double the usurious interest so alleged to have been taken. This contention was sustained.

[1] The master, whose report was confirmed, found that the letters which passed between the plaintiff and the administrator and O. M. Goodlett, taken together, amounted to an express agreement in writing to pay 8 per cent. interest on the note, and, as defendants have appealed from this finding, we may say, in passing, that we concur in that finding. In Bank v. Sarratt, 77 S. C. 141, 57 S. E. 621, 122 Am. St. Rep. 562, it was held that the payment of interest by check was such an agreement in writing as to satisfy the statute; the rate paid being one that the statute allowed to be stipulated for in writing. In Utley v. Cavender, 31 S. C. 282, 9 S. E. 957, it was held that a subsequent agreement in writing to pay a higher rate of interest from a post date did not make the transaction usurious; the rate stipulated for being permissible by the statute.

[2] But, holding that the agreement to pay a greater rate of interest than that stipulated for in the note was not binding on the estate of M. W. Goodlett, the master concluded that, notwithstanding the agreement was in writing, it made the transaction usurious. In this he was in error. Without deciding whether the administrator could have bound the estate to pay interest on the note at the rate of 8 per cent., for we do not deem the decision of that question necessary, there can be no doubt that the agreement was binding upon the administrator and the defendant O. M. Goodlett personally, and, the rate being permissible by agreement in writing, the agreement did not have the effect of tainting the transaction with usury, no more than if any third person, a stranger to the transaction, had made such an agreement for the benefit of the estate. It must not be inferred that an agreement in writing to pay an unlawful rate would not be usurious. It would. So, also, would the payment of a greater rate than 7 per cent. without an agreement in writing.

[3, 4] There is no force in the contention of respondent that there was no consideration for the agreement to pay 8 per cent. In the first place, the payments were voluntarily made with full knowledge of the facts, and could not therefore be recovered. Hardaway v. Railway, 90 S. C. 475, 73 S. E. 1020, Ann. Cas. 1913D, 266. Besides, plaintiff is not seeking to enforce the agreement, even against the administrator and O. M. Goodlett, personally, as he might have done, for their interest in the estate and consequent interest in having the note paid, or carried by plaintiff, was a sufficient consideration for their promise. In Sanders v. Bagwell, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743, cited by appellant, no consideration was proved, but here the consideration was proved; but plaintiff sued to recover only the face of the note, with interest at 7 per cent., allowing the two payments of interest above mentioned to go as general credits on the note, and he was entitled to judgment as prayed for.

The judgment of the circuit court must be modified to conform to the views herein announced.

Judgment modified.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

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(100 S. C. 144)

CAMPBELL v. STEWART et al. (No. 1920.)

(Supreme Court of South Carolina. March 8, 1915.)

1. PARTITION ⟸16 — TITLE TO MAINTAIN SUIT.

Where, in a partition suit, defendant raises title, it is incumbent on plaintiff to prove title before partition can be had.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 52; Dec. Dig. ⟸16.]

2. PARTITION ⟸20—TITLE—ADVERSE POSSESSION.

Where plaintiff in partition denies the title set up by defendant in the answer, defendant may show title by adverse possession.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 64–67; Dec. Dig. ⟸20.]

3. APPEAL AND ERROR ⟸1022 — REVIEW — FINDINGS OF FACT.

If there is any testimony to sustain the finding of a referee concurred in by the court, the appellate court cannot review the finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⟸1022.]

Appeal from Common Pleas Circuit Court of Chester County; J. W. De Vore, Judge.

Partition suit by Rosa Campbell against James Stewart and others. From a judgment for defendants, complainant appeals and brings exceptions. Exceptions overruled.

The following is the report of Referee J. C. McLure:

To His Honor, the Presiding Judge of the Sixth Circuit:

By order of this court it was referred to me as special referee to take the testimony herein, determine the issues of law and fact, and report my conclusions to this court. Pursuant to this order I have held references and taken the testimony herewith submitted, and now would respectfully report my conclusions thereon.

This is an action for partition brought by the plaintiff, as an heir at law of J. M. Stewart, deceased, against the other heirs of said deceased. The complaint alleges that at his death J. M. Stewart was seised of a tract of 383 acres, and with the usual formal allegations prays for a partition thereof among his heirs at law, the plaintiff and defendants herein. In the complaint is also a claim for rents and profits, but at the hearing this claim was abandoned, and I may say properly abandoned, since there was not proof to sustain it. The defendants James Stewart, William Stewart, Nannie Stewart, and Samuel Stewart answer and join in the prayer of the complaint as to 228 acres of said tract,

but deny that plaintiff has any interest in 150 acres thereof. The answer of the guardian ad litem for the minor defendants is only formal, and the other defendants default. So the only issue before me is as to the title to the 150-acre tract.

In the argument, defendants' attorney relies upon the defenses of presumption of a grant and adverse possession. Plaintiff's attorney insists that these defenses are not before me, because not pleaded. So we must first consider the allegations of the answer.

As I understand his position, plaintiff's attorney does not contest the rule that these defenses can be proven under a general denial, but contends that the denial in the answer in this case is not general. I cannot agree to this opinion. In paragraph one of the answer the title of plaintiff's intestate is expressly denied, and in paragraph 3 all allegations of the complaint, after paragraph 2, are denied, "except as hereinafter admitted," and nowhere is there any admission of plaintiff's title to any share in this 150 acres. Also in paragraph 5 of the answer it is alleged inter alia that "all the other brothers and sisters recognized and acquiesced in James Stewart's possession and ownership," and "he is now entitled to the said premises absolutely." It seems to me the allegations or denials of the answer are general enough to allow proof of adverse possession and presumption of grant, and I so hold.

Now what proof does the defendant James Stewart bring to support these defenses? He relies upon (1) payment of part of purchase price at time of purchase; (2) erection of a house; (3) usual cultivation; and (4) return of premises in his name and payment of taxes by him.

As to part payment of purchase price, I find that this payment was not in fact made, certainly not at the time claimed. The witnesses who testify on the point all agree that the purchase price was $400, and this was the amount of the mortgage, so I must think James Stewart is mistaken in this claim.

As to the building of a house on the premises, James Stewart himself, in his testimony, only claims that he and his brother did most of the work on the house. This, which I find to be true, is of course a circumstance to be considered, but, standing alone, it seems to me to lack a good deal of that exclusive possession, which would prove these defenses.

So as to the cultivation of the premises. I find that all hands worked on both tracts, as well as some rented from others were worked "through"; that is, without distinction as to any one person working any particular field. The two brothers did the heavy work, such as plowing, and the plaintiff worked whenever her services were needed, at any work suitable for a woman. This, standing alone, would lack much proving adverse possession by James Stewart.

As to the payment of taxes, I lay little stress on the mere manual act of handing the money to the treasurer, for the proof is clear that the money to pay the taxes came from the crops made on both places. But when we come to the return for taxation being made in the name of James Stewart, it seems to me we have a very strong circumstance to support his claim, especially since it appears that this was done under the express direction of the father. Plaintiff objects to the testimony as to this direction by the father, and of course James Stewart would be barred from testifying on this point, but I hold that his brother's testimony on this point is a declaration against interest, and hence admissible. See Shell v. Boyd, 32 S. C. 362, 11 S. E. 205. Under the law (Civ. Code, § 297) all lands are to be assessed in the name of the person "having the legal title and right of possession," so it seems to me that this conduct on the part of the father was a distinct recognition of James Stewart's title. In connection with the minor circumstances above mentioned, I find it sufficient proof of adverse possession and of a grant, and I sustain those defenses, and find that plaintiff has no interest in the 150-acre tract.

I find that the parties are seised of the 228-acre tract in shares as follows: The plaintiff and each of the defendants being a son or daughter of J. M. Stewart, each the one-tenth of said premises, and the remaining defendants, viz., Rebecca Stewart, the widow, and Reid Stewart and George Stewart, the children of Thomas Stewart, a predeceased son of J. M. Stewart, own a one-tenth interest jointly. I cannot state the respective shares in this last-mentioned tenth interest, as the record does not show the date of death of Thomas Stewart, and I cannot tell whether these children inherited from their father entirely, or partly directly from their grandmother and aunt. However, as to this, no doubt the parties can agree upon a decree.

I therefore recommend that as to the 150 acres the complaint be dismissed, and that the 228-acre tract be sold and the proceeds after payments of costs be divided among the parties according to their respective interests as above stated.

All of which is respectfully submitted.

Finley & Marion, of Yorkville, for appellant. Gaston & Hamilton, of Chester, for respondents.

WATTS, J. This was a suit for partition between the plaintiff and defendants, as heirs at law of John M. Stewart, of a tract of real estate containing 383 acres of land in Chester county. One of the defendants, John Stewart, by answer in the cause, alleged that title to 150 acres of said tract was in him, and asked that this be not partitioned, but that title be decreed in him for the same, and William Stewart, Samuel Stewart, and Nannie Stewart, by their answer, unite with James Stewart in asking that his prayer by his answer made be granted. All of the other defendants in the cause failed to file answers and made default. The cause was referred to J. C. McLure, Esq., as special referee, to take the testimony and determine all issues of law and fact and report to the court his conclusions thereon. He made his report, which should be set out in the report of the case, and, upon exceptions being filed thereto, the matter was heard by his honor, Judge De Vore, who on August 10, 1914, filed his decree overruling the exceptions to special referee's report and confirmed the same. From his honor's decree plaintiff appeals and by six exceptions challenges the correctness of his rulings and asks reversal.

[1-3] The first exception was not argued by appellant, as appellant says in his printed argument:

"We do not desire to discuss question raised by Exception 1, but desire to direct the court's attention to questions raised in exceptions 2–6."

The questions raised by the exceptions are practically questions of fact alone, with a complaint that the referee and circuit judge in their findings in respect to adverse possession and presumption of a grant are wholly erroneous because neither in law nor fact

have these claims been made out, and that, in applying the law to the facts of the case, the circuit judge erred. The circuit judge concurred with the referee in his findings of fact that the plaintiff had no interest in the 150-acre tract claimed by the defendant James Stewart, and adjudging that the plaintiff was not entitled to partition thereof. As this was a suit for partition, and defendants, by answer, raised the issue of title to the 150-acre tract of land, it was incumbent on the plaintiff to prove title before partition can be had, and the denial of title, as set up in the answer of defendants, was sufficient for them to introduce evidence of adverse possession for the statutory period and to show affirmatively adverse possession in defendants by an answer which contains a general denial of plaintiff's title. The testimony amply sustains the concurring findings of the special referee and circuit judge, and in this appeal the appellant cannot reverse the finding of fact on the legal issues. If there is any testimony to sustain that finding, we cannot find any errors of law on the part of the ruling and finding of the circuit judge, as complained of. All exceptions are overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

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(100 S. C. 96)

## EASLER v. COLUMBIA RY., GAS & ELECTRIC CO. (No. 9008.)

(Supreme Court of South Carolina. March 10, 1915.)

1. CARRIERS ⟸316—PASSENGERS—INJURIES TO PASSENGERS—MALPRACTICE OF CARRIER'S SURGEON—LIABILITY.

A passenger suing for a personal injury and for the malpractice of the carrier's surgeon, in treating him for the injuries, has the burden of proving the incompetency of the surgeon.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285–1294; Dec. Dig. ⟸316.]

2. CARRIERS ⟸283—PASSENGERS—INJURIES TO PASSENGERS—MALPRACTICE OF CARRIER'S SURGEON—LIABILITY.

A carrier employing a surgeon to treat gratuitously passengers sustaining personal injuries is not liable where the surgeon is reasonably competent, though he neglects a passenger sustaining an injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1119–1124, 1140, 1141; Dec. Dig. ⟸283.]

3. CARRIERS ⟸283—PASSENGERS—INJURIES TO PASSENGERS—MALPRACTICE OF CARRIER'S SURGEON—LIABILITY.

Though a carrier must call a surgeon to treat an injured passenger in a sudden emergency, it need not do so where the natural guardian of an infant injured passenger is present and dissents from its calling a surgeon.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1119–1124, 1140, 1141; Dec. Dig. ⟸283.]

4. CARRIERS ⟸283—PASSENGERS—INJURIES TO PASSENGERS—MALPRACTICE OF CARRIER'S SURGEON—LIABILITY.

Where a carrier injured an infant passenger and refused to surrender him to his parent, but insisted on taking him to the carrier's surgeon, who treated him, the carrier was liable for the malpractice of the surgeon, without reference to its exercise of care in employing a competent surgeon.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1119–1124, 1140, 1141; Dec. Dig. ⟸283.]

5. CARRIERS ⟸295 — INJURIES TO PASSENGERS—LIABILITY.

Where a passenger signaling a car to stop was flung from the car and thrown to the ground while on the platform to alight, and the accident was caused by the carrier's negligence, the carrier was liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1191–1197, 1199, 1213–1215, 1219, 1220; Dec. Dig. ⟸295.]

Appeal from Common Pleas Circuit Court of Richland County; W. A. Holman, Special Judge.

Action by Bennis Lorin Easler, an infant, by his guardian ad litem, H. R. Easler, against the Columbia Railway, Gas & Electric Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Elliott & Herbert, of Columbia, for appellant. J. B. McLauchlin, of Columbia, for respondent.

GAGE, J. Action for tort to the person; verdict for plaintiff for $1,000; appeal by defendant.

History: The electric car was running towards College place in the northern suburbs of Columbia. The plaintiff, a boy 14 years old, was a passenger. He rang for the car to stop, rose and went forward to the platform occupied by the motorman, and got upon the step. He was thrown to the ground and his shoulder bones injured. His mother, living hard by, came out to the scene, and, it is alleged, desired to take the boy into her house. The conductor, it is alleged, demurred, and carried the boy to the end of the line and back into the city to the company's surgeon for treatment, as he was bound to do by the company's rules. He was treated by that surgeon and discharged for well.

There are two exceptions, but the second was withdrawn, and the first only was argued, and on it turns the case.

The defendant's fifth request was this:

"In the complaint it is alleged that the defendant, through its doctor, negligently treated the plaintiff. I charge you there is no evidence in this case which will warrant you in giving any verdict on account of such alleged treatment on the part of the physicians employed by defendant."

The court declined to charge the request, and that is the issue here.

The exception thereabout indicates the error of the refusal, to wit:

"The error being that there was no act of omission or commission shown on the part of defendant's physician, and defendant had no power to direct the medical services of its physician, and was only chargeable with reasonable care in employing said physician, and the evidence therefore failed to show any negligence, and the request was proper, and should have been charged."

The exact issue the appellant has made in argument is this: That the defendant acquits itself when it has used ordinary care in the gratuitous employment of a reasonably competent surgeon; and, that done, the company is not liable for the surgeon's tort.

The respondent contends at the outset that the request embodied no such idea, and that no such idea was expressed in argument to the court below, and that the issue which it embodied may not now be made here.

[1] It is true the complaint contained no allegation of negligent employment, nor did the answer contain any allegation of competency. And it is true that no witness for the defendant was asked to testify to the competency of the surgeon; but no witness for the plaintiff testified directly to his incompetency, and the burden of proving that was on the plaintiff. There was no reference in the court's charge to the matter of negligent employment.

A critical construction of the request doubtless sustains respondent's view; but the exception, made after the trial, it is true, suggests the idea; and we shall consider the issue now suggested in appellant's argument, but in the light of the testimony of the witnesses.

[2] It is true that if a carrier shall (1) employ a surgeon to treat a patient, (2) and if the surgeon be reasonably competent, (3) and if the service to the patient be gratuitous, and (4) if the surgeon neglect the patient, then the master is not liable for the ill consequences to the patient. In that case, if the carrier owed any duty, he performed it when he selected a reasonably competent surgeon. In that case the carrier, as the alleged master of the surgeon, is not held liable for maltreatment, and on the theory that he has no power to direct the surgeon about his work.

[3, 4] But in the case at bar there was testimony—denied by the defendant, it is true—that the boy was taken away from the mother against her consent. Her testimony is short, and this is the pith of it:

"I went out immediately, and the conductor had the boy up and was pushing him to the car. Conductor said his arm was broke. I kept pleading with him to let me take him to the house, and he said it was against the rules of the company to let him go without some of the officers was there. They put him back on the car and took him to the end of the line—about three-quarters of a mile. I protested against this. He didn't offer to bring me back with the boy. Mr. Davis, who works for the company, brought the boy back home later. His arm was broken; he was bandaged up and suffered awful. Dr. Boyd came out one time. He said for the boy to come down every day. Boy started back to work, and Father had to stop him. I never told the company not to take him and treat him free, and did not tell them to do so. They gave me no chance to do so. The boy kept on going down there to be treated."

If that be true, and of it the jury judged, then there was evidence which warrants the jury in giving a verdict on account of the treatment of the physicians. (Language of request.)

It may be the duty of the carrier to call a surgeon to serve an injured passenger in a sudden emergency; but it is not the duty of the carrier to do so when the natural guardian of the injured passenger is present and dissents therefrom.

It is manifest the defendant had no right to the custody of the boy against the mother's consent; the forcible taking of custody was in itself a wrong; the relation of carrier and passenger was not immediately terminated; and, if the boy was injured while thus in the defendant's custody, no matter if by a surgeon, then the defendant is liable for such injury. The carrier is estopped to deny that it inflicted the injury. The court, in effect, so charged the jury, and there is no exception thereabout.

Thereupon follows another inquiry necessary to be proved to sustain the plaintiff's action: Was the boy injured by malpractice of the surgeon? Certain surgeons swore that he was; three swore that he was not; and betwixt them the jury decided for the plaintiff.

[5] But the verdict may be sustained independently of the alleged tort of the surgeon. If the plaintiff was flung from the car and his shoulder broken, and if he was so thrown by the sole negligence of the company, then the defendant is liable.

The verdict is conclusive against the defendant on those issues.

In any view of the case, the verdict must be sustained, and the judgment affirmed.

It is so ordered.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(100 S. C. 100)

## WAKEFIELD v. SPOON. (No. 9009.)

(Supreme Court of South Carolina. March 1, 1915.)

1. APPEAL AND ERROR ⟸1050—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

In an action for the price of fertilizers sold by plaintiff to defendant, who relied on the defense that he sold as agent of plaintiff for a commission, error in admitting in evidence a contract between plaintiff and a company offered to prove a fact negatived by the contract was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. ⟸1050.]

2. PRINCIPAL AND AGENT ⊂⊃20 — EVIDENCE OF AGENCY—ADMISSIBILITY.

A note given by a third person to the company for fertilizers sold the third person by defendant, and the payment thereof by the third person's check to defendant, could be considered in determining the issue of agency set up as a defense to the action for the price.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 37, 38; Dec. Dig. ⊂⊃ 20.]

3. EVIDENCE ⊂⊃271—SELF-SERVING DECLARATIONS—ADMISSIBILITY.

A note and mortgage given by a third person to plaintiff for fertilizers sold the third person by defendant were inadmissible in favor of defendant as declarations by him that plaintiff owned the fertilizers.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068–1079, 1081–1104; Dec. Dig. ⊂⊃271.]

4. APPEAL AND ERROR ⊂⊃1048 — HARMLESS ERROR.

Error in allowing an incompetent question not answered by the witness is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4145, 4151, 4158–4160; Dec. Dig. ⊂⊃1048.]

5. INTEREST ⊂⊃18—GOODS SOLD—"ACCOUNT STATED."

Under Civ. Code 1912, § 2516, allowing interest in cases of account stated, and in cases wherein any sum shall be ascertained to be due, a seller suing for the price of goods cannot recover interest, where the goods were sold at different times, and payments made on separate days, and the buyer never acknowledged any statement of account to be true or due; the essence of an "account stated" being that an account is actually stated, and that the parties thereto agree expressly or impliedly that it is a true statement, and is due or will be due at some future time.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 32–34; Dec. Dig. ⊂⊃18.

For other definitions, see Words and Phrases, First and Second Series, Account Stated.]

Appeal from Common Pleas Circuit Court of Anderson County; John S. Wilson, Judge.

Action by T. T. Wakefield against P. E. Spoon. From a judgment for plaintiff, defendant appeals. Conditionally affirmed.

The exceptions are as follows:

Because it was error in the court to overrule the motion of the defendant for a new trial which was made on the grounds: (a) That the contract between the plaintiff and the Anderson Oil & Phosphate Company was allowed in evidence over the objection of the defendant. (b) Because the letters of the plaintiff to the defendant, introduced by the defendant, showed clearly that the defendant was an agent of the plaintiff for the distribution of fertilizer at Iva. (c) And on the further ground that the interest included in the verdict in favor of the plaintiff was unlawful; there being no agreement in writing to pay any interest, and the plaintiff's complaint showing that he had sued on an open account unliquidated.

(2) Because the testimony, including the admissions of the plaintiff, shows clearly that this defendant had accounted to the plaintiff for all of the fertilizers he had sold as agent.

(3) Because the testimony of the plaintiff shows that the defendant had paid him everything that he owed him for fertilizers, either as agent or individual.

(4) It is respectfully submitted that it was error in the court to allow the note made by E. H. Simpson to Anderson Phosphate & Oil Company to be introduced in evidence in this case over the objection of the defendant, as the same was not relevant to the issues.

(5) It is respectfully submitted that the court was in error in allowing the witness, Mr. Vandiver, to answer the question, "When under this contract you take notes of the customers to—we will say—Mr. Wakefield or Mr. Spoon that will release him from his liability to you?" the defendant having objected to this question.

(6) Because the testimony, both of the plaintiff and the defendant, shows that the plaintiff received $144 on the 21st of December, for which he did not give the defendant credit, and it is respectfully submitted that the defendant is entitled to credit for that amount.

(7) Because the testimony, both of the plaintiff and the defendant, shows that the plaintiff failed to give the defendant credit for $1,494.91, as shown by the checks introduced in evidence, payable to the plaintiff and indorsed by him.

(8) Because it was error in the court to refuse to admit in evidence the note and mortgage of L. F. Sherard to T. T. Wakefield, taken by this defendant to secure the payment of a note for fertilizer to the said Wakefield, as it is respectfully submitted that this was a circumstance competent to show the agency of the defendant.

(9) Because the court erred in allowing the testimony of E. H. Simpson and the introduction in evidence of Exhibit F, the note of the witness made to the Anderson Oil & Phosphate Company, as the same had nothing to do with the issues between the plaintiff and the defendant.

Julius E. Boggs, of Easley, and A. H. Dagnall, of Anderson, for appellant. Bonham, Watkins & Allen, of Anderson, for respondent.

GAGE, J. When this cause was tried on circuit, the late and lamented Julius E. Boggs appeared for the defendant. In this court the appearance is by Mr. Dagnall; and that gentleman asked for a serious consideration of the cause because of Mr. Boggs' illness at the trial.

The action is for the purchase price, and interest thereon, of commercial fertilizers, alleged to have been sold by plaintiff to defendant during the years 1909 and 1910, and on an alleged promise by defendant to pay therefor on the 1st of November of each of the said years. The defendant denied that he had bought fertilizers, but that he sold them to farmers for the plaintiff for a commission on the price. He further alleged that he had fully accounted with plaintiff, and he owed him nothing. The jury found for the plaintiff $1,688.81 principal and $442.23 interest thereon. The defendant appeals, and has made nine exceptions. Let them be reported. They shall not be considered in order, and some of them not at all. We shall follow the argument of Mr. Dagnall.

The major issue of fact below was the character of the contract betwixt the parties: Was it that of vendor and vendee, or was it that of principal and agent? The jury found the fact for the plaintiff, and that concludes the issue, unless the jury was furnished incompetent and hurtful testimony, or was denied competent and helpful testimony. The appellant charges by exception

that such testimony was admitted, and such testimony was denied.

[1] The argument at bar stressed the illegal admission of the contract betwixt the plaintiff and the Anderson Phosphate & Oil Company. That contract was plainly incompetent as res inter alios acta. But it was admitted by the court to show, by its terms, that when the products of the Anderson Company were sold by anybody on a credit, and notes were made therefor (as in the case at bar), such notes of any purchaser should name therein as payee the Anderson Company. And the inference to be drawn from that practice was that the simple naming of the Anderson Company as payee did not constitute that company as the real party in interest, and did not negative the plaintiff's contention that he, as principal and owner and vendor, sold outright the fertilizers to the defendant as vendee.

An inspection of the contract shows that there is no such provision in it which requires the name of the Anderson Company to be inserted in all notes as payee. The contract, therefore, did not show the fact it was introduced to show; it inferentially showed the contrary, and was therefore not hurtful to the defendant.

[2] There was another objected paper offered in evidence, in reply, by the plaintiff. It was a note by Simpson to the Anderson Company for fertilizers sold Simpson by defendant, and the payment thereof by Simpson's check to Spoon. The court considered that as a circumstance to show that, although the note was payable to the Anderson Company, Spoon treated it as his own, and accepted payment of it. The evidence was competent; its relevancy was only remote; and the judgment of the court thereabout will not be disturbed.

[3] There was another paper offered by defendant and ruled out as incompetent; it was a note and mortgage of Sherard to plaintiff for fertilizers sold Sherard by Spoon. At most that was only a declaration by Spoon that Wakefield, and not Spoon, owned the fertilizers, and it was therefore incompetent.

[4] There was put to Vandiver, by plaintiff's counsel, a question deemed incompetent by the defendant's counsel. It may have been, but the witness did not answer the question. Reference to the question is made in the fifth exception. All the other exceptions, except a part of the first, next to be considered, refer to matters of fact; and they were not pressed by Mr. Dagnall.

[5] There remains yet to be considered the only question of importance in the case. The court charged the jury:

"So your verdict will be either we find for the plaintiff so many dollars * * * and, if you find interest, make the calculation," etc.

The appellant contends that interest was not allowable on the principal amount, and the charge was equivalent to a contrary instruction. The contention is sound. It is true the allegation of the complaint is:

"That the accounts became due and payable on or before the 1st day of November, 1909, and the 1st day of November, 1910, respectively."

But there is no testimony tending to prove that allegation. The obligation to pay was not evidenced by writing. Thereabout the plaintiff testified:

"I never have got him that far along. Q. Why didn't you have him to give you his note? A. I never have gotten him that near a settlement, sir."

The statute declares what sums of money shall draw interest. Code, § 2516. Before that enactment there was much contrariety of opinion about when interest is allowable. The statute does not embrace in its terms a transaction like this. The sum of money here was not "ascertained" by plaintiff's own testimony; nor is this an "account stated." The fertilizers were sold and delivered at separate days. There were many payments made by defendant on separate days. There is no evidence that the defendant acknowledged any statement of the account to be true, and to be then due. There is no testimony that the defendant was furnished with a copy of the account before the action was begun. The essence of an account stated is: (1) That the account be actually stated; and (2) that the parties thereto shall agree expressly or impliedly that it is a true statement, and is due to be paid, then or at some other specified time.

In the case at bar the plaintiff testified, "I have tried again and again to get a settlement out of him." There is no testimony that the defendant ever expressly or impliedly agreed that he was at any specified time due and owing the defendant any specified sum of money.

We are therefore of the opinion that the court should have charged the jury that interest was not allowable. The sum of $442.23, which the jury found as interest, must therefore be remitted, on the record by the plaintiff, within 20 days after the filing of this opinion, else there shall be a new trial.

It is so ordered.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

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(100 S. C. 135)

## WICHMAN v. ATLANTIC COAST LINE R. CO. (No. 9018.)

(Supreme Court of South Carolina. March 1, 1915.)

1. CARRIERS ⟹188—FREIGHT OVERCHARGE—LIABILITY.

Where the plaintiff directed goods to be shipped to him at C., and the shipper consigned them there, and defendant's connecting carrier turned them over to defendant, to be carried to W., without authority or direction thereto, defendant's possession was tortious, and plaintiff

was not required to pay the freight charges beyond C.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 853–858; Dec. Dig. ⊂⊃188.]

2. CARRIERS ⊂⊃195—FREIGHT OVERCHARGE—PAYMENT—WAIVER.

Plaintiff's acceptance of the goods at W. and his payment of freight thereon was not a ratification of defendant's act in carrying them beyond C. to W., since he paid, under protest, to get possession of his goods, which defendant wrongfully possessed and withheld from him.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 435, 873–876; Dec. Dig. ⊂⊃195.]

3. CARRIERS ⊂⊃20 — "OVERCHARGE ON FREIGHT"—RECOVERY.

Civ. Code 1912, § 2573, requiring every claim for freight overcharge to be adjusted and those on shipments from without the state to be paid within 40 days after filing of such claim with a penalty of $50 for each failure to be recovered by the consignee, applied to consignee's claim for a payment of freight on goods taken beyond the point to which they were consigned, since it was an "overcharge on freight."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 33–49, 133, 927; Dec. Dig. ⊂⊃20.

For other definitions, see Words and Phrases, First and Second Series, Overcharge.]

4. APPEAL AND ERROR ⊂⊃173—REVIEW—OBJECTIONS NOT MADE BELOW.

A contention not made in the court below will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079–1089, 1091–1093, 1095–1098, 1101–1120; Dec. Dig. ⊂⊃173.]

Appeal from Common Pleas Circuit Court of Colleton County; R. W. Memminger, Judge.

Action by R. H. Wichman, doing business under the trade-name of A. Wichman & Son, against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff appeals. Modified.

Padgett & Moorer, of Walterboro, for appellant. Peurifoy Bros., of Walterboro, for respondent.

WATTS, J. This was an action brought by the plaintiff against the defendant in the magistrate's court for the sum of $23.73 for an alleged overcharge of freight on a shipment of one hearse and fixtures from Sterling, Ill., to Walterboro, S. C., and for penalty fixed by statute for failure to pay claim within 40 days. The magistrate gave judgment in favor of plaintiff for full amount sued for. Defendant appealed to circuit court and the circuit judge, Memminger, sustained the appeal, granted a new trial, and remanded the case to the magistrate's court on the ground that it was error to exclude the testimony of witness R. H. Wichman as to what it would have cost plaintiff to bring property by private conveyance to Walterboro, S. C., from Charleston, S. C., as the defendant would have been entitled to the benefit of that cost in having judgment rendered against it by the magistrate, and it was remanded, with instructions to take testimony on this issue and determine the same, and to deduct this amount from amount of plaintiff's claim for overcharge in freight, and to render a judgment accordingly, and not allowing the penalty after deducing costs. From this order both plaintiff and defendant appeal.

[1] The plaintiff by three exceptions alleges error on the part of his honor in remanding the case on the grounds he did and for the purpose indicated, and in deciding, as he did, what should be deducted from plaintiff's claim, and in disallowing the penalty. The evidence in the case develops the facts that on November 9, 1912, the Rock Falls Manufacturing Company at Sterling, Ill., delivered to Chicago, Burlington & Quincy Railroad a hearse and component parts consigned to Rock Falls Manufacturing Company at Charleston, S. C., with directions to notify A. Wichman & Son, Walterboro, S. C. The shipment came in a solid car, the marks on different packages were: "Rock Falls Mfg. Co., Charleston, S. C.; notify A. Wichman & Son, Walterboro, S. C." The bill of lading with draft attached made on the plaintiff by shipper was forwarded to National Bank at Walterboro, and the plaintiff paid the draft and received the bill of lading. Plaintiff had directed that the shipment be made to them at Charleston, S. C., and at no time directed the shipper or railroad to ship to Walterboro. Instead of the hearse being delivered to the plaintiff at Charleston, where they had directed it to be shipped and as the place designated in the bill of lading, it was brought to Walterboro by the defendant without direction or consent of the plaintiff. Defendant made demand on plaintiff for $86.13, freight charges on the shipment from Sterling, Ill., to Walterboro, S. C., which was $23.73 more than proper freight charges from Sterling, Ill., to Charleston, S. C., and refused to deliver the shipment to plaintiff until full charges demanded were paid. The plaintiff offered to pay freight charges from Sterling, Ill., to Charleston, but declined to pay charges from Charleston to Walterboro. The defendant refused this offer, and in order to get the property plaintiff paid the full amount demanded under protest, and filed his claim with the defendant for the excess claimed, $23.73. This claim was filed on the day the freight was paid under protest, and was not paid in 40 days. Before plaintiff paid freight charges under protest he told defendant they could reship the hearse back to Charleston, where he had ordered it shipped in the first instance, and he would receive it there. The evidence shows that the freight came into Charleston over the southern road and was delivered by the southern road to the defendant to be transported by the defendant over its road to Walterboro. This exception should be sustained; the defendant never was rightfully in possession of the proper-

ty. The plaintiff and shipper both had directed it to be shipped to Charleston, and the shipper had consigned it to Charleston. It arrived at Charleston, its intended destination, over the southern road and the southern railroad turned it over to the defendant to be transported to Walterboro without authority or direction, either expressed or implied, from the shipper at Sterling, Ill., or the plaintiff at Walterboro, and the possession of defendant was tortious, and it follows that the plaintiff should not be required to pay the freight charges other than to Charleston, and not the excess charges from Charleston to Walterboro. This principle is established in Savannah Ry. Co. v. Talbot, 123 Ga. 378, 51 S. E. 401, 3 Ann. Cas. 1092; Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33. In 4 Ruling Case Law, § 322, we find:

"The universal and fundamental principle of the law of personal property is that no man can be divested of his property without his own consent, and that even an honest purchaser under a defective title cannot hold against a true proprietor. A carrier, therefore, acquired no right by virtue of his employment as such to hold goods delivered him by a wrongdoer, to whom they do not belong, until his charges are paid, against the claim of the owner, and so he has no lien on them for the transportation charges, irrespective of the question whether the carrier acted in good faith and was not in fault. Nor can this be said to be a harsh rule as applied to common carriers, since the carrier has the right to demand of the consignor the transportation charges in advance. Similarly it has been held that a carrier intrusted with goods cannot, by transferring them, in disregard of its instructions, to another carrier for transportation to the designated point, confer on the latter a right to freight as against the owner of the goods."

See, also, 6 Cyc. 488; Hutch. on Carriers (3d Ed.) § 177. The defendant's exceptions, eight in number, allege error:

(1) That there was no testimony to support finding of magistrate. This is overruled. Both magistrate and circuit judge concurred in their findings of fact, and there is ample testimony to sustain their finding.

[2] (2) Was the acceptance of the shipment at Walterboro and the payment of freight thereon a ratification of the act of defendant in transporting it there, although it was not the correct destination? We have found that the defendant was in wrongful possession of plaintiff's property, and in order to get possession of his property, so wrongfully detained and withheld from him, he paid an excessive freight charge, which was exacted from him by the defendant, and for which he was in no manner liable and did not owe. He paid this, not voluntarily, but under protest.

(3) Can the defendant be held liable for the mistake of its connecting carrier? This is disposed of by what has been said in sustaining plaintiff's exceptions.

[3] (4) Does section 2573, vol. 1, Code 1912, apply to the facts of this case? It does; it is an overcharge on freight.

[4] This disposes of all defendant's claim except the point is made that the filing of claim was made at Walterboro instead of Charleston. This is overruled, as this point was not made in the court below.

All of defendant's exceptions are overruled and the plaintiff's exceptions sustained, and it is the judgment of this court that the order of Judge Memminger be so modified as to make the judgment of the magistrate's court the judgment of this court. Modified.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

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(100 S. C. 115)

## SMITH v. UNION-BUFFALO MILLS CO.

(No. 9015.)

(Supreme Court of South Carolina. March 1, 1915.)

1. WITNESSES ⊂⊃240—EXAMINATION—"LEADING QUESTION."

A question, which does not suggest to the witness an answer either in the affirmative or negative, is not a "leading question."

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 837–839, 841–845; Dec. Dig. ⊂⊃240.

For other definitions, see Words and Phrases, First and Second Series, Leading Question.]

2. APPEAL AND ERROR ⊂⊃971—DISCRETION OF TRIAL COURT—LEADING QUESTION.

Allowance of leading questions rests in the discretion of the trial court, and its action will not be disturbed unless the discretion has been abused to the prejudice of the party complaining.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852–3857; Dec. Dig. ⊂⊃ 971.]

3. APPEAL AND ERROR ⊂⊃231—RULINGS ON EVIDENCE — OBJECTIONS — SPECIFICATION OF GROUNDS.

Where the record does not show any specific ground of objection urged below to the admission of evidence or any specific ground on which the court rested its ruling, the ruling is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. ⊂⊃ 231.]

4. APPEAL AND ERROR ⊂⊃882—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

A party cannot complain of the admission of evidence to prove facts shown by his subsequent cross-examination of witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591–3610; Dec. Dig. ⊂⊃ 882.]

5. APPEAL AND ERROR ⊂⊃970—TRIAL ⊂⊃62—ORDER OF PROOF—DISCRETION OF COURT.

The admission of testimony in reply rests largely in the discretion of the trial court, and the court on appeal will not interfere unless there has been an erroneous exercise of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849–3851; Dec. Dig. ⊂⊃ 970; Trial, Cent. Dig. §§ 148–150; Dec. Dig. ⊂⊃62.]

Appeal from Common Pleas Circuit Court of Union County; Ernest Moore, Judge.

Action by Pearl Smith, by her guardian ad litem, W. S. Smith, against the Union-Buffalo Mills Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. Ashby Sawyer, of Union, and Wm. Elliott, Jr., of Columbia, for appellant. Barron & Barron and Wallace & Barron, all of Union, for respondent.

WATTS, J. This action was for actual and punitive damages by plaintiff against defendant for alleged personal injuries while in the employment of the defendant. The cause came on for trial at the September term of court, 1914, for Union county before his honor, Judge Moore, and a jury. At the close of plaintiff's evidence, a motion was made by the defendant for a nonsuit both as to actual and punitive damages, as no case had been made out. His honor granted the motion as to punitive damages which were not resisted, but refused it as to the other cause of action. The jury found a verdict in favor of the plaintiff for $150. A motion for a new trial was made by the defendant and refused. Whereupon, after entry of judgment, defendant appeals, and by three exceptions alleges reversible error on the part of the circuit court in admitting over objection on the part of defendant certain testimony, and in refusing to grant a nonsuit as to the whole case, and in refusing to grant a new trial on the grounds urged.

[1, 2] As to exception 1, which complains of error as to the admission of certain evidence, we do not think it was leading, as it did not suggest an answer either in the affirmative or negative, and a great deal must necessarily be left to the wise discretion of the trial judge, and his honor stated the correct rule when he overruled the objection that the question was leading. It would not be a ground for reversal that a trial judge allowed a leading question that suggested an answer, as it is largely left in the discretion of the trial court how far he will permit a leading question, and the appellant would have to show an abuse of this discretion and that it was prejudicial.

[3] The other subdivisions complained of must be overruled, as the record shows no specific ground of objection urged before the circuit court or the specific ground upon which the court rested the ruling. Allen v. Cooley, 53 S. C. 80, 30 S. E. 721; Id., 53 S. C. 414, 31 S. E. 634; Norris v. Clinkscales, 59 S. C. 243, 37 S. E. 821; Colvin v. Oil Co., 66 S. C. 68, 44 S. E. 380.

[4, 5] In addition to this, other witnesses, in response to questions of appellant, testified in reference to the same matters. We see no incompetent evidence admitted as complained of, and the appellant cannot complain, as the record shows he brought out some facts practically on cross-examination, and his complaint as to the admission of certain testimony in reply cannot be sustained, as that is a matter largely in the discretion of the court, and we see no erroneous exercise of discretion as to exceptions 2 and 3. There was sufficient evidence to carry the case to the jury and an abundance of evidence to sustain the verdict, and these exceptions are overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

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(100 S. C. 113)

## KELLY v. COLUMBIA RY., GAS & ELECTRIC CO. (No. 9013.)

(Supreme Court of South Carolina. March 1, 1915.)

1. TRIAL ⟸194—INSTRUCTION ON FACTS.
In an action for the wrongful killing of plaintiff's intestate, whether or not the defendant operated its street car over a switch at a greater rate of speed than four miles an hour, in violation of its own rule, was an issue for the jury, so that an instruction that it was negligence per se was erroneous as an instruction on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439–441, 446–454, 456–466; Dec. Dig. ⟸194.]

2. STREET RAILROADS ⟸94—NEGLIGENCE—VIOLATION OF SPEED ORDINANCE.
A street railroad's violation of an ordinance, fixing a rate of speed over switches, is negligence per se.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 201; Dec. Dig. ⟸94.]

Appeal from Common Pleas Circuit Court of Richland County; Geo. E. Prince, Judge.

Action by Maggie E. Kelly, as administratrix of the estate of Robert L. Kelly, deceased, against the Columbia Railway, Gas & Electric Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

Elliott & Herbert, of Columbia, for appellant. Spigner, Cobb & Verner, of Columbia, for respondent.

WATTS, J. This was an action by the plaintiff against the defendant for $25,000 damages, actual and punitive, for the alleged wanton, reckless, negligent, and wrongful killing of her son, and, after issue joined, the cause was tried before his honor, Judge Prince, and a jury, at the March term of the court for Richland county, and resulted in a verdict for the plaintiff in the sum of $7,000. The defendant appeals and asks reversal upon nine exceptions.

[1] The sixth exception is:

In charging the jury that, if the defendant operated its car over a switch at a greater rate of speed than four miles an hour, it was guilty of negligence per se. The error being that such a charge was an instruction on the facts, since it took from the jury the issue of whether or not such a rate of speed over a switch was negligence, and it instructed them that a breach

of the company's rules by the servants of the company is negligence per se.

This exception must be sustained. His honor, in the settlement of the case for appeal, establishes the fact that he did so charge. In justice to his honor he was under the impression that the city ordinance of the city of Columbia prohibited the running of cars at a greater rate of speed than four miles an hour, whereas it was a rule of the company. Mr. Verner called his attention to the mistake, and no doubt his honor intended and would have corrected his mistake, but his mind evidently was diverted at this time.

[2] His honor would have been correct in his statement as to its being negligence per se had the ordinance of the city been violated. Dyson v. Railway, 83 S. C. 354, 65 S. E. 344; Lindler v. Railway, 84 S. C. 536, 66 S. E. 995; Whaley v. Ostendorff, 90 S. C. 282, 73 S. E. 186. But inasmuch as it was only a rule of the company, it was competent evidence to go to the jury as evidence of negligence and to be considered by them for what it was worth.

In the case of Stone v. Railway, 96 S. C. 228, 80 S. E. 433, it was held that a breach of rules by a servant of the company, made for his protection, would prevent a recovery under the facts disclosed in that case, and it follows that any violation of rules by representative of the master, or by master, would be competent to submit to the jury for their consideration as evidence of negligence, but it would not be negligence per se. His honor was in error in charging as he did, as complained of in this exception, and as there must be a reversal of judgment, and new trial granted, it is unnecessary to consider the other exceptions.

Judgment reversed, and new trial granted.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

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(100 S. C. 135)

## VIRGINIA-CAROLINA CHEMICAL CO. v. LANEY. (No. 9017.)

(Supreme Court of South Carolina. March 1, 1915.)

1. SALES ⇐201—TRANSFER OF TITLE—DELIVERY TO CARRIER.

Under a contract for the sale of fertilizer, providing that when it was loaded f. o. b. car consigned to a no-agent station and covered by bill of lading, it should be delivered to the buyer and release the seller from any responsibility on the shipment, a shipment f. o. b. to the buyer's no-agent station, and a mailing to him of the bill of lading, was a delivery to the buyer entitling the seller to an action for price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 529–541; Dec. Dig. ⇐201.]

2. SALES ⇐358 — ACTION FOR PRICE — INSTRUCTION.

In a seller's action for the price of goods sold to be delivered f. o. b., any difference between the carrier and the buyer was not involved, so that exclusion of evidence thereon was proper.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1049–1055; Dec. Dig. ⇐358.]

Appeal from Common Pleas Circuit Court of Chesterfield County; Frank B. Gary, Judge.

Action by the Virginia-Carolina Chemical Company against R. B. Laney. Judgment for plaintiff, and defendant appeals. Affirmed.

The fourth exception was as follows:

His honor erred, it is respectfully submitted, in excluding from the evidence rule No. 35 of the Railroad Commission of South Carolina, said rule making it the duty of the carrier, upon the arrival of a shipment at its destination, to promptly notify consignee, by mail or otherwise, of said arrival, and in case of car load shipment to notify him of the number, letters, or initials of the car, because, we submit, under the proper construction of the contract in question, the railroad, being the agent of the consignor, the acts or omissions of the railroad company are the acts or omissions of the consignor, or shipper, and it was therefore competent to introduce this rule to show under the law just what was the duty of the agent of the consignor.

G. K. Laney, of Chesterfield, and Stevenson & Prince, of Cheraw, for appellant. Barron, Moore, Barron & McKay, of Columbia, Edward McIver, of Cheraw, and Whaley & Busby, of Columbia, for respondent.

WATTS, J. This was an action by plaintiff against the defendant to recover $475.50, being the price of 30 tons of acid phosphate shipped by plaintiff to defendant under a written contract entered into between them. The cause came on for a hearing before his honor, Judge Frank B. Gary, and a jury, at the October term of the court for Chesterfield county, 1913, and after all of evidence of both plaintiff and defendant was in on plaintiff's motion, his honor directed a verdict in favor of the plaintiff for full amount sued for, and after entry of judgment defendant appeals and by four exceptions seeks reversal. The contract between the parties contains this provision:

The company agrees (a) to furnish to the customer on or before May 1st, next, from such of its factories as it may select for sale by the customer or other disposal as provided in this agreement the following specifically named amounts and kinds of fertilizers to be taken and accounted for by and charged to the customer at the prices following, payable at the dates stated below. [Here follows a list of the various brands and amounts of fertilizers, including the shipment in question in this suit.] (b) To make delivery at these prices in not less than car load lots (less than car load lots are 50 cents per ton higher and extra freight if prepaid by the company) at Laney's, S. C., sacked and tagged as required by law and shipped for consignment and delivery to customer or his duly authorized agent as he shall in due time, as hereinafter prescribed, notify and direct the

company to ship the same. On shipments ordered to river landings direct by boat, or partly by rail and partly by boat, or to a flag station, or a no-agent station on a railroad, it is agreed that when the goods are loaded f. o. b. boat, or f. o. b. cars, as the case may be, at the point of original shipment and covered by a bill of lading taken therefor that it is delivery to the customer, and that the company is thereby released from any further responsibility on said shipment. The company has the right to ship goods by any route it may select.

[1] The uncontradicted evidence shows that the plaintiff made delivery of the 30 tons of fertilizer to the Atlantic Coast Line Railway at Charleston, S. C., on March 11, 1911, billing the same to Laney's, S. C., a no-agent station, prepaying the freight charges thereon to said station and mailing bill of lading to the defendant at Laney's S. C. The fertilizer left Charleston in Atlantic Coast Line Car No. 22262, which being in bad order, the railroad transferred the contents to Chicago, Rock Island and P. car No. 52840, at Bennetts, S. C., eight miles from Charleston. On March 25, 1911, this car was left at siding at Laney's and later removed by railroad. Defendant refused to pay for fertilizer, contending that he never received the same, whereupon suit was instituted.

Exceptions 1, 2, and 3 raise and treat the same question that the court erred in directing a verdict for the plaintiff on the ground that the contract of the parties made the carrier the agent of the consignee, and that, delivery having been made to the carrier by the consignor, the consignee was liable. There is but one point in the case. The contract is plain, unambiguous, and free from doubt. The agreement was that, where goods were consigned to a no-agent station and freight prepaid, that delivery to the railroad was delivery to the customer. It is proven beyond doubt that Laney's is a no-agent station. He ordered the fertilizer shipped. The plaintiff filled his order and delivered the fertilizer to the railroad, prepaid the freight, consigned it to him at Laney's, and mailed him the bill of lading. This was a strict compliance with the contract of the parties, and his honor was correct in his interpretation of it and ruling as he did. To hold otherwise would be for the court to do away with the contract made by the parties themselves and substitute a new contract made by the court for them. These exceptions are overruled.

[2] The fourth exception is overruled as inapplicable in this suit. The defendant is not suing the railroad, and if there is any difference between them arising out of this transaction, there is nothing before this court as to it.

Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(143 Ga. 124)

## SUMTER COUNTY v. HANES, JONES & CADBURY CO. et al. (No. 177.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. EXECUTION ⟸22, 146 — LIEN — PROPERTY SUBJECT—PURCHASE BY COUNTY—EFFECT.

Where a common-law judgment was obtained against one who owned a mule and certain other personal property, and the execution issued thereon was duly entered upon the execution dockets as provided by law, if the county authorities subsequently bought the mule from the defendant in execution and used it in connection with working the county roads, this did not destroy the lien of the execution or prevent the mule from being levied upon and sold.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 133, 381–394, 558; Dec. Dig. ⟸ 22, 146.]

2. EXECUTION ⟸146—LIEN—WAIVER.

The mere fact that an attorney for the plaintiff in execution learned of the sale of the mule to the county on the day when it was delivered, and did not take any steps to enforce the execution for some time thereafter, did not affect the case.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 381–394, 558; Dec. Dig. ⟸ 146.]

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Equitable petition by Sumter County against the Hanes, Jones & Cadbury Company and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Sumter county filed its equitable petition against Hanes, Jones & Cadbury Company and the deputy sheriff of the county, seeking to enjoin the sale of a mule which had been levied on under an execution in favor of the company named against R. G. Christian, which mule was claimed by the county as its property. The case was submitted to the presiding judge on an agreed statement of facts, which showed, among other things, as follows: Hanes, Jones & Cadbury Company recovered a judgment against R. G. Christian in the city court of Americus on February 9, 1911. An execution was issued, and was entered on the execution docket of the city court of Americus and on the general execution docket of Sumter county on February 15, 1911. During the year 1912, Christian purchased two mules and certain other personal property, which he retained in his possession until October, 1913. At that time one of the mules was purchased by the county of Sumter, without actual knowledge of the existence of any lien against it. The mule was used in working the public roads of the county, and was purchased with county funds collected for road purposes. On April 8, 1914, the deputy sheriff of the county levied the execution upon the mule. Certain other facts were included in the agreed statement, tending to show that on the date of the delivery of the mule the attorney for the plaintiffs in execution heard Christian

say that he had sold the mule to the county, and learned on inquiry that this was true, but took no action until shortly before the making of the levy, when he stated in writing to the county authorities that the plaintiff's attorneys thought the mule was subject to the debt, and demanded payment for the amount of the execution. Payment was not made, and a levy was made on the mule. The presiding judge rendered judgment denying the injunction prayed for and permitting the execution to proceed. The county excepted.

R. L. Maynard, of Americus, for plaintiff in error. Ellis, Webb & Ellis, of Americus, for defendants in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. Hanes, Jones & Cadbury Company recovered judgment against one Christian in the city of Americus in 1911, and the execution based thereon was duly recorded on the execution docket of the court from which it issued and on the general execution docket of the county, thus giving notice of the lien against the property subject to levy then held by Christian or which might be acquired by him. While this execution was in force Christian purchased a mule and held it for some time. It thus became subject to the lien of the execution and to levy thereunder. Later Christian sold the mule to the county of Sumter, and it was used in working the roads of the county. It was claimed on behalf of the county that the general rule is that property of a county in use for public purposes is not subject to sale under an execution. This is a correct rule when properly applied. Curry v. Mayor and Aldermen of Savannah, 64 Ga. 290, 37 Am. Rep. 74; Neal-Millard Co. v. Trustees of Chatham Academy, 121 Ga. 208, 48 S. E. 978; Ætna Indemnity Co. v. Town of Comer, 136 Ga. 24 (2), 70 S. E. 676. But in these and similar cases efforts were made to levy on property belonging to a public corporation and used or held for public purposes, under an execution obtained against such corporation, or to foreclose a lien against like property. In one case it was held that a county could not be garnished in order to subject by that means an amount due by it for necessary public work performed by a debtor. Morgan v. Rust, 100 Ga. 346, 28 S. E. 419. Here, however, there was no effort to levy upon or enforce a lien against property to which the county had a clear and unincumbered title. When the county bought the mule, a lien had already attached to it, and the county purchased it subject to such lien. It could not destroy a lien arising by virtue of an execution against a former owner of the property by purchasing it from him. Suppose that the former owner did not have a clear title; could the county make the title good by buying the property and relying on being a political division of the state? Suppose that the former owner had given a mortgage upon the mule; could the county have destroyed the validity of this contract lien by purchasing the property from the mortgagor? To ask these questions is to answer them. If the county could not do these things, no more could it shake off a lien which has attached to the property by operation of law in the hands of a former owner, by purchasing it from him. The purchaser took the property subject to the lien, and the rule above mentioned has no application to such a situation.

[2] 2. The knowledge of an attorney for the plaintiff in execution that the mule was sold to the county, obtained after the delivery of the mule, and that he did not take any steps to enforce the execution for some little time thereafter, when he informed the county authorities that he considered the mule subject to levy and sale, and demanded, without avail, that they pay the execution, did not affect the right to have the mule levied upon and brought to sale.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(142 Ga. 71)

PARK v. MAYS et al. (No. 156.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

ACTION ON NOTE—BONA FIDE PURCHASER.

This case is controlled by the decision in Fidelity Trust Co. v. Mays, 142 Ga. 821, 83 S. E. 961.

Error from Superior Court, Butts County; Robt. T. Daniel, Judge.

Action between H. C. Park and S. H. Mays and others. From the judgment, Park brings error. Affirmed.

W. E. Watkins, of Jackson, for plaintiff in error. John R. L. Smith, of Macon, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(142 Ga. 86)

DAVIS v. HARDEN.

HARDEN v. DAVIS.

(No. 168.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. NEW TRIAL ⟸ 154 — MOTION—TIME FOR HEARING.

The case was tried at the May term of court. The next succeeding term convened on the fourth Monday in August. During the term at which the case was tried the plaintiff made a motion for new trial. The rule nisi issued by the judge was made returnable on the 23d day of September, 1913, in vacation. *Held*, the judge had power to cause the motion for new trial

to be made returnable in vacation as well as in term time, and to hear and determine the motion at the time appointed. The statutes which confer this authority (Civil Code 1910, §§ 4323, 5484) do not require that the hearing of the motion be made returnable within any specified time; nor does the statute which requires service of the motion and rule nisi upon the respondent (Civ. Code 1910, § 5475) require that he be served within any specified time before the date of the hearing. There was no error as complained of in the cross-bill of exceptions in refusing to dismiss the motion for new trial, under the facts indicated above, on the ground that the movant was in laches in not procuring an order setting the motion to be heard at an earlier date, or upon the ground that the judge was without authority to grant the rule nisi, returnable after the next succeeding term of court, or because the order failed to require service of the same before the next term of court. In this connection, see Herz v. Frank & Adler, 104 Ga. 638, 30 S. E. 797; McIntire v. Tyson, 56 Ga. 468 (2); Eady v. Atlantic Coast Line Ry., 129 Ga. 363, 58 S. E. 895; Clements v. Ledden, 132 Ga. 430, 64 S. E. 460.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 443; Dec. Dig. ⟸154.]

2. NEW TRIAL ⟸138 — MOTION—NOTICE — WAIVER.

Counsel for respondent made an entry of service upon the motion and order to show cause granted by the judge as follows: "Due and legal service of the within motion and order acknowledged, copy received, and all other and further service waived. This 4th day of September, 1913." *Held*, this was sufficient to dispense with formal service, and there was no error in refusing to dismiss the motion for new trial on the ground that the acknowledgment came too late, or because a copy of the motion which was delivered to respondent's counsel omitted to state in the caption the name of the respondent.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 280, 281; Dec. Dig. ⟸138.]

3. EXECUTORS AND ADMINISTRATORS ⟸349—ORDER TO SELL LAND—DESCRIPTION.

An order by the court of ordinary which recites that an administratrix had applied for leave to sell the land of her intestate, and which purported to grant authority to sell "the following described land of said deceased: Twelve hundred acres, more or less, in said county of Tattnall, and in the 43d and 41st districts of said county," was admissible in evidence in a collateral proceeding, over the objection that it did not sufficiently describe the land sought to be sold. Tarver v. Barber, 138 Ga. 607 (1), 75 S. E. 603, and citations.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1446, 1449–1455; Dec. Dig. ⟸349.]

4. DEEDS ⟸38—DESCRIPTION—SUFFICIENCY.

A deed purporting to be executed by Elinor Lang, as administratrix of the estate of Nathaniel Lang, contained the caption, "State of Georgia, Tattnall County," and described the land to be conveyed thus: "Said lots and tracts of land originally granted to Samuel Kitchens and Nathaniel Lang; said tracts owned by said deceased at his demise. One tract containing four hundred fifty acres, and the other containing twenty acres, adjoining the lands of Lang on all sides, situate, lying, and being in the 43d district G. M. of said county." The descriptive averments of the deed, especially those relating to the original grants to Samuel Kitchens and Nathaniel Lang, contained data from which the land intended to be conveyed can be definitely located. Under the maxim, "Certum est quod certum reddi potest," the deed was not void on the ground that it failed to sufficiently describe the land. In this connection, see Parler v. Johnson, 81 Ga. 254, 7 S. E. 317; Johnson v. McKay, 119 Ga. 196, 45 S. E. 992, 100 Am. St. Rep. 166; Atlanta & West Point R. R. Co. v. Atlanta, Birmingham & Atlantic R. R. Co., 125 Ga. 529 (2), 54 S. E. 736.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65–79; Dec. Dig. ⟸38.]

5. EVIDENCE ⟸353 — DOCUMENTARY EVIDENCE—DEEDS—DESCRIPTION.

Where, on the trial of an action of complaint for land, a deed of the character mentioned in the preceding note was tendered in evidence, and in connection therewith there was also introduced the order from the ordinary to sell, under which the sale was made, and aliunde evidence to the effect that one of the original grants designated in the deed embraced the land in controversy, it was not erroneous to admit the deed in evidence over the objections that (a) it did not sufficiently describe the land; (b) or embrace the land in controversy; (c) and was not accompanied by a sufficient order from the court of ordinary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404–1428, 1430, 1431; Dec. Dig. ⟸353.]

6. VENDOR AND PURCHASER ⟸231—PRIORITY OF DEEDS—RECORD.

Before the passage of the act of 1889 (Acts 1889, p. 106; Civ. Code 1910, § 3320), where there was a contest between two deeds whereby a person conveyed the same land to different persons, and neither deed was recorded within 12 months from the date of its execution, the older deed would prevail. Code 1882, § 2785; Martin v. Williams, 27 Ga. 406; Turner v. Tyson, 49 Ga. 165; Wadley Lumber Co. v. Lott, 130 Ga. 135 (2), 60 S. E. 836.

(a) In the matter of competition between such deeds, the rule is the same, whether both deeds be executed by the same grantor, or whether the older deed be executed by him, and the junior deed be executed by the administratrix of his estate after his death. Tucker v. Harris, 13 Ga. 1, 58 Am. Dec. 488; Rowe v. Henderson Naval Stores Co., 139 Ga. 318, 77 S. E. 17.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513–539; Dec. Dig. ⟸231.]

7. VENDOR AND PURCHASER ⟸231—PRIORITY OF DEEDS—RECORD.

In this case the plaintiff and defendant claimed under competing deeds from a common propositus; the plaintiff's deed having been executed during the life of the person through whom they claimed, and the defendant's deed having been executed by the administratrix after his death. Both deeds were executed before the act of 1889, supra, and neither was recorded within one year after the date of its execution. Under these circumstances the older deed would prevail.

(a) The fact that the defendant's deed was filed for record within a year after its execution, and actually recorded before the plaintiff's senior deed, would not entitle it to a preference; it appearing not to have been actually recorded until after the expiration of a year from its execution.

(b) It was erroneous to instruct the jury on the basis that, by virtue of its being first filed for record and recorded, the junior deed could prevail over the older deed of the plaintiff.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513–539; Dec. Dig. ⟸231.]

Error from Superior Court, Toombs County; J. B. Park, Judge.

Action between P. E. Davis and John Harden. From the judgment, both parties

bring error. Affirmed on cross-bill, and reversed on main bill.

G. W. Lankford, of Lyons, and Lankford & Moore, of Douglas, for plaintiff in error. Way & Burkhalter, of Reidsville, for defendant in error.

ATKINSON, J. Judgment on cross-bill of exceptions affirmed. Judgment on main bill of exceptions reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 110)

## LOUISVILLE & N. R. CO. et al. v. MORSE.

(No. 173.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. PARTNERSHIP ⟸258 — TORT — SURVIVING PARTNER—RIGHT OF ACTION.

Where personal property belonging to a partnership composed of two persons was destroyed by fire through the negligence of a railroad company, which consisted in a failure to properly equip its engines with suitable spark arresters and other essential equipment of locomotive steam engines, and subsequently to the commission of the tort resulting in the destruction of the property one of the partners died, the surviving partner could by suit enforce the liability of the railroad company for the tort as a surviving partner without joining in the action the personal representative of the deceased partner; it appearing that it was expressly stipulated in the articles of partnership that in case of the death of either partner the other partner should have the authority to wind up the affairs of the partnership.

(a) Whether or not without such provision in the articles of partnership the surviving partner alone could enforce the liability by action it is not necessary to consider.

(b) The court declines upon review to reverse the case of City of Atlanta v. Dooly, 74 Ga. 702.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 564–598; Dec. Dig. ⟸258.]

2. INSURANCE ⟸606 — PAYMENT — SUBROGATION—ACTION—PARTIES.

Where an insurance company had paid to the owners of the property destroyed an amount for insurance not exceeding the value of the property, and the plaintiff, the surviving partner in this case, in instituting action to recover damages against the tort-feasor in an amount equal to the insurance made the insurance company the usee in the suit, this did not furnish ground of complaint to the railway company, whether the insurance company would have been entitled to recover under the application of the doctrine of subrogation or not.

(a) Whether the case of Holcombe v. Railroad Company, 78 Ga. 776, 3 S. E. 755, is sound in all of its rulings or not, so far as its authority for the ruling allowing this suit in the name of the owner of the property destroyed for the use of the insurance company, the court thinks it is sound and declines, upon review, to reverse the ruling upon that point.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504–1511, 1514–1516; Dec. Dig. ⟸606.]

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action by J. D. Morse, survivor, for use, etc., against the Louisville & Nashville Railroad Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Howard & Slaton, of Washington, Ga., and Jos. B. & Bryan Cumming, of Augusta, for plaintiffs in error. Saml. H. Sibley, of Union Point, and C. H. & R. S. Cohen, of Augusta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 75)

## ROYAL ARCANUM v. RILEY.

## RILEY v. ROYAL ARCANUM.

(No. 160.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. INSURANCE ⟸793—MUTUAL BENEFIT INSURANCE — CONTRACT — RIGHTS OF BENEFICIARY—VESTED INTEREST.

Where a contract exists between a member of a mutual benefit society, on whose life a benefit certificate has been issued, and the beneficiary named therein, whereby it has been agreed that the beneficiary should be named in such certificate on consideration that he should pay the dues and assessments thereof, and where such contract has been fully performed on the part of the beneficiary, the beneficiary will acquire a vested equitable interest in the benefits of the certificate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1967–1972, 1980; Dec. Dig. ⟸793.]

2. INSURANCE ⟸793, 798—MUTUAL BENEFIT INSURANCE — ACTION FOR BENEFITS — DEFENSE—NOTICE OF VESTED EQUITABLE INTEREST.

If a contract of the character mentioned in the preceding note be made between the member and two of his sons on consideration that each should pay one-half of the dues and assessments, and that both should be beneficiaries, and after the issuance of the joint certificate the contract be performed by both the beneficiaries, each would be charged with notice of the equity of the other.

(a) If, after the death of the member, a suit be instituted by one of the beneficiaries against the other beneficiary and the society, for his part of the insurance, and the petition sets out and declares upon the equity as stated above, and the entry of service by the officer recites that the petition was served personally on a named agent of the society at its office in a designated city, and the society pleads to the merits of the case without raising any question as to the fact of service or its sufficiency, the society will be held to have had notice of the equity from the date of the service.

(b) In such a suit, where payment by the society to its codefendant, as sole beneficiary under a subsequent certificate procured by the member without the knowledge or consent of the plaintiff, is relied on as a defense, both defendants having notice at the time of the payment, the plaintiff's equity will be superior to any right of either of the defendants, and such payment under the circumstances will not constitute a valid defense to the action.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1967–1972, 1980, 1981, 1985; Dec. Dig. ⟸793, 798.]

3. ASSIGNMENTS OF ERROR—VERDICT.
Under the principles announced in the preceding notes, none of the assignments of error require the grant of a new trial. The evidence authorized the verdict.
4. DISPOSITION OF CAUSE.
As the judgment on the main bill of exceptions will be affirmed, the cross-bill of exceptions will be dismissed.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. L. Riley against Robert E. Riley and the Royal Arcanum. Judgment for plaintiff, the Royal Arcanum brings error, and plaintiff files cross-bill of exceptions. Affirmed, and cross-bill dismissed.

J. L. Riley instituted an action against Robt. E. Riley and Royal Arcanum in the superior court of Fulton county to recover one-half of the proceeds of an alleged insurance policy issued by Royal Arcanum, whereby that institution contracted, upon the death of E. S. Riley, to pay to the beneficiaries therein named, namely, J. L. Riley and Robt. E. Riley, $3,000. The petition was amended by striking out the first sentence in paragraph 7 and all of paragraph 10, all of which related to the want of consent upon the part of E. S. Riley and mental and physical incapacity upon his part to make a change in the beneficiaries of the alleged contract, and undue influence on the part of Robt. E. Riley over his father, and in lieu thereof making additional allegations of a contract between E. S. Riley and his two sons, Robt. E. and James L. Riley, by which a former "policy" issued to E. S. Riley by Royal Arcanum should be so changed as that each of the two sons should become beneficiaries and receive one-half of the proceeds thereof if each should pay one-half of the premiums during the life of their father, and full performance of such contract; and by alleging that payments were made by plaintiff up to the death of E. S. Riley without his having consented to a change in the beneficiaries from that agreed upon between his brother, his father, and himself, and without any knowledge that such change had been made. The petition alleged, also, that plaintiff is informed that such a change was made on the 14th day of August, 1910. When plaintiff's evidence was concluded, the court, on motion, dismissed the case as to Robt. E. Riley, but refused to dismiss it as to Royal Arcanum, and the trial between plaintiff and that defendant proceeded. The jury returned a verdict for the plaintiff. The Royal Arcanum made a motion for a new trial on the usual general grounds, which motion was amended by adding other grounds complaining of rulings upon the admissibility of evidence, of certain portions of the charge of court, and of the refusal of the judge to direct a verdict in favor of the defendant. The motion for a new trial was overruled, and movant excepted. The plaintiff filed a cross-bill of exceptions, assigning error upon exceptions pendente lite to the order dismissing the case as to Robt. E. Riley. Other facts will sufficiently appear in the opinion.

Dorsey, Brewster, Howell & Heyman, of Atlanta, for plaintiff in error. Watkins & Latimer, of Atlanta, for defendant in error.

ATKINSON, J. [1] 1. This case was before the Supreme Court on a former occasion. Riley v. Royal Arcanum, 140 Ga. 178, 78 S. E. 803. The judgment of the trial court dismissing the petition on general demurrer was reversed. The petition did not set forth a copy of the alleged policy issued by Royal Arcanum, and it was construed to be a suit involving liability upon a policy of insurance. In the course of the opinion it was said:

"The instrument sued on is alleged to be a policy of insurance; and, in the absence of allegations to the contrary, upon general demurrer, it will be considered an ordinary policy of insurance in which the beneficiaries named had a vested interest, especially in view of the fact that they had paid the premiums thereon. If it had been shown by the petition that what is called a policy of insurance was a certificate of membership in a fraternal beneficiary society, a different question would have been raised."

On the trial before the jury the evidence was such as to present such a question as that to which reference was made above as not being for decision. It appeared that Royal Arcanum was a mutual benefit society, and that the sum sought to be recovered was the proceeds of a benefit certificate issued by the society to one of its members, who was the father of plaintiff and the individual defendant. The two sons were named as beneficiaries in a certificate issued February 3, 1906. The member surrendered the certificate in August, 1910, and procured as a substitute another in which only one of the two sons was named as beneficiary. After the death of the member and after service of the suit, the society settled with the beneficiary named in the last certificate on the basis that the cobeneficiary designated with him in the former certificate had no interest. The plaintiff was the son omitted from the last certificate. It was contended by him that a contract was made between his father, his brother, and himself, the terms of which were that the two latter should pay all assessments and dues required by the society until the death of the member, and that in consideration thereof they should be the beneficiaries in the certificate; that under such agreement the certificate was issued payable to them jointly as above stated, and plaintiff and his brother proceeded to pay all assessments and dues according to the agreement; that the substitution occurred without plaintiff's knowledge or consent, and he continued thereafter to pay his half of the dues and assessments until the death of his father, which occurred in April, 1911, and by reason of such contract and its performance he acquired a vested interest as beneficiary under the former certificate, which was not divested by the substitution of the last certificate. The

evidence was uncontradicted that each of the two sons paid one-half of the assessments and dues required by the company from the issuance of the joint certificate in 1906 until the death of the member. The court admitted evidence of the alleged contract, and, in his instructions to the jury, submitted only the question as to whether there was such a contract as contended by plaintiff. The controlling question is: If there was a contract as contended by the plaintiff and it was fully performed, what interest did the plaintiff acquire, and could it be defeated merely by the fact that the member substituted the last certificate which purported to change the beneficiary? In the course of the opinion in the well-considered case of McKeon v. Ehringer, 48 Ind. App. 226, 95 N. E. 604, it is said:

"The general rule seems to be that a person who is a mere volunteer beneficiary named in the certificate issued by a mutual benefit society upon the life of one of its members acquires no vested right in the proceeds of such certificate until the death of the member occurs. Mason Mutual, etc., Society v. Burkhart, 110 Ind. 189, 10 N. E. 79 [11 N. E. 449]; Presbyterian, etc., Fund v. Allen, 106 Ind. 593, 7 N. E. 317; Bunyan v. Reed, 34 Ind. App. 295, 70 N. E. 1002; Milner et al. v. Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; Sabin v. Phinney, 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. Rep. 681. Where, however, a contract exists between the member of the mutual benefit society, on whose life a benefit certificate has been issued, and the beneficiary named therein, whereby it has been agreed that said beneficiary should be named in such certificate on consideration that he should pay the dues and assessments on such benefit certificate, or that he would render unto such member some other valuable consideration therefor, and where such contract has been fully performed and such consideration rendered on the part of the beneficiary, the courts recognize the equities arising in favor of such a beneficiary and will protect them, as against a person who has been substituted as a beneficiary, and who has no superior equities in his favor. Carter v. Carter, 35 Ind. App. 75, 72 N. E. 187; Maynard v. Vanderwerker [Sup.] 24 N. Y. Supp. 932; McGrew v. McGrew, 190 Ill. 604, 60 N. E. 861; Stronge v. Supreme Lodge of K. P., 189 N. Y. 346, 82 N. E. 433, 12 L. R. A. (N. S.) 1206, 121 Am. St. Rep. 902 [12 Ann. Cas. 941]; Jory v. Supreme Council, etc., 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; Leaf v. Leaf, 92 Ky. 166, 17 S. W. 354 [854]; Supreme Council, etc., v. Murphy, 65 N. J. Eq. 60, 55 Atl. 497."

In the opinion in the case of McGrew v. McGrew, cited above, the following language was used:

"While at law said certificate is not assignable, in equity a beneficial interest may be transferred therein, which will be protected by a court of chancery."

The principle was also applied in Supreme Council Royal Arcanum v. Tracy, 169 Ill. 123, 48 N. E. 401. The doctrine above announced is not universally recognized, but it has the sanction of the weight of authority. Savage v. Modern Woodmen of America, 84 Kan. 63, 113 Pac. 802, 33 L. R. A. (N. S.) 773 and note. See, also, Cooley's Briefs on the Law of Insurance, pp. 3764, 3765. Upon these authorities, if the plaintiff's contentions as to the existence of a contract and performance thereof be correct, he acquired a vested interest in the benefits of the certificate which equity will protect.

[2] 2. The interest being one asserted against the plaintiff's brother and also the society, between whom there was a settlement after the commencement of the suit on the basis that his brother was entitled to the entire fund, if plaintiff's interest was an equitable one, his rights against his brother and the society must be determined upon equitable principles, and his equity must be superior to any right that could be urged against it. It is declared that "he who takes with notice of an equity takes subject to that equity." Civil Code, § 4529. If there was such a contract as contended by the plaintiff, his brother, being a party thereto and participating in the payments, could not be termed a bona fide taker without notice. If there was such a contract, its existence and performance by plaintiff was alleged in the original petition which was filed April 21, 1911, and served May 1st, by serving personally a named agent of the society at its office in the city of Atlanta, before the society, on May 7th, had paid the fund over to plaintiff's brother as the sole beneficiary. The company pleaded to the merits of the case, but never questioned the fact of service or its validity. It will be deemed that the agent served was a proper agent to be served. Such filing and service of the petition would inform the society of the existence of the equity. It would be more than notice charged under Civil Code, § 4533, which deals with the doctrine of lis pendens. In this case the society cannot be said to be "taking" anything, but it is paying out funds in which it knows that the plaintiff had a vested equitable interest. Relatively to such interest, on principle, the society would stand on no better footing than if it were buying with notice of an outstanding equity in the thing bought. Under such circumstances, the equity of plaintiff would be superior to any equity or right of either of the defendants, and, in view of the evidence as to the contract and the uncontradicted evidence as to payment of dues and assessments, and notice to the defendants, there was no error on the part of the trial judge in submitting to the jury the sole question as to the existence of the contract set up by plaintiff. This case differs from that of Beckner v. Beckner, 104 Ga. 219, 30 S. E. 622, decided by five justices. In that case it was not contended that payments of dues out of property of the beneficiary were made by virtue of any contract between the member and the beneficiary that she should be such if she would pay the dues and premiums necessary to maintain the validity of the certificate. In the course of the opinion it was there stated:

"If therefore the plaintiff had alleged or admitted in her petition that the laws of the society authorized a change of the beneficiary, and had relied solely upon the contention that payment by her of the assessments created in

her a vested right which could not be divested by the action of the insured and the society without her consent, then the court would have been right in sustaining the demurrer to the petition."

This dictum was predicated on a hypothetical state of facts which the opinion proceeded to show did not appear from the allegations of the petition, and was merely obiter.

[3] 3. It is unnecessary to specifically mention the various assignments of error. It is sufficient to say that under the principles above announced none of them require a new trial. The evidence authorized the verdict.

[4] 4. As the judgment of the trial court on the main bill of exceptions is affirmed, the cross-bill of exceptions will be dismissed.

Judgment affirmed. Cross-bill dismissed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 117)

JAMES et al. v. CITY OF BLAKELY et al.
(No. 176.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. STATUTES ⟸96—SPECIAL LAWS—SCHOOLS AND SCHOOL DISTRICTS—TAXATION.

The nineteenth section of the act of December 18, 1900 (Acts 1900, p. 219), which sought to create a district lying outside of the actual corporate limits of the city of Blakely, and extending to what was termed the "school limits," and to prescribe for such territory regulations as to schools and taxation therefor, different from those established by the general school laws, was to that extent unconstitutional, as being a special act different from an existing general law on the subject, which is prohibited by the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 107; Dec. Dig. ⟸96.]

2. CONSTITUTIONAL LAW ⟸43 — ACQUIESCENCE—COLLECTION OF TAX—INJUNCTION—UNCONSTITUTIONAL ACT.

The fact that the petition showed on its face that, under the provisions of the section of the act above mentioned, an election was held in 1907 to determine the question of taxation for school purposes within the "school limits," and that the mayor and council of Blakely were preparing to levy such a tax for the year 1914, did not show an estoppel on the plaintiffs, who were citizens and taxpayers, and who filed a petition to enjoin the collection of such taxes from them.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. ⟸43.]

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action by D. W. James and others against the City of Blakely and others. Judgment for defendants, and plaintiffs bring error. Reversed.

A. H. Gray, of Blakely, for plaintiffs in error. W. G. Park and Glessner & Collins, all of Blakely, and Little, Powell, Hooper & Goldstein, of Atlanta, for defendants in error.

LUMPKIN, J. By the act of December 18, 1900 (Acts 1900, p. 219), the city of Blakely was incorporated in lieu of the town of Blakely. In the first section of the charter it was declared that "the territorial limits of the city of Blakely shall be identical with the present territorial limits of the town of Blakely, except as is otherwise specified in this act." The following sections made provisions in regard to the mayor and council, their election and qualification, the qualification of voters, the other officers of the city, the police court, and other matters appropriate to a municipal charter. All of these, until the nineteenth section was reached, dealt with the corporate limits as being the same as those of the town of Blakely, which at that time included an area one mile square. In the sixth section it was declared that "only citizens of the city of Blakely shall be eligible to be elected mayor or councilmen." In section 7, where the qualification of voters was declared, it was provided that all persons eligible to vote for members of the General Assembly, "who shall have resided in said city for six months preceding such election and who shall have paid all taxes required of them by the city of Blakely," and, in general elections for mayor and council, who may have registered as required, should be qualified voters. In these and other sections, dealing with taxation and other municipal matters, it is evident that the municipal corporation was treated as being confined within the corporate limits of one mile square. Section 19 began with the words, "There is hereby established a system of public schools for the city of Blakely." It then proceeded to make provision for a board of education, who should control such system. It declared that "the corporate limits of the city of Blakely for the purposes of this section shall include all the territory within the following bounds," describing territory in the form of a square with each side measuring 6 miles, thus containing an area of 36 square miles, while the municipal corporation proper contained 1 square mile. As to the larger territory it was provided that "jurisdiction of said city for all the purposes of this section shall extend over said territory, which said territory is referred to in this act * * * by the words 'school limits.'" It was further declared in this section that the city council should elect a board of education, which body should elect a commissioner, and that "said commissioner shall have the same jurisdiction, authority, powers and duties within said schools of Blakely as county school commissioners now have under the laws of this state, but the jurisdiction, authority, powers and duties of such commissioner may be changed by the city board of education." It was also declared that there should be paid to the commissioner of the city schools of Blakely the pro rata share of all funds for educational purposes from any source

coming to Early county, in proportion as the number of children of school age "within said school limits of Blakely shall be to the entire school population of Early county." The same section further provided that the city council of Blakely might maintain the public schools of said city by taxing all the property within "the school limits," not exceeding two-tenths of 1 per cent. ad valorem, provided two-thirds of the persons qualified to vote for that purpose should cast their ballots in favor of school tax. For this election any person who had resided in the school limits for six months, and was qualified to vote for members of the general assembly, might register and vote. By the twentieth section of the charter it was provided that the city council should have authority to establish, maintain, and enforce quarantine regulations and pass all needful ordinances in respect thereto, and that "their jurisdiction for this purpose shall extend as far as the limits known as the school limits of said city." It also declared that the city council might provide by ordinance for impounding animals running at large, and that the right to prevent them from running at large in the city might extend to the limits known as the school limits. By section 21 it was declared that any process, summons, notice, execution, or other like paper required to be served by the charter or ordinances of the city might be served and executed, and arrests might be made, by the marshal or any police officer of the city, unless otherwise provided, and at any place within the limits defined as the "school limits" of the city. By section 22 it was declared that the city council might condemn or purchase property and exercise control over the same anywhere within the territory designated as the school limits of the city, and might, by ordinance and through their officers, "regulate and control the same for any public purpose."

By the act of 1902 (Acts 1902, p. 347) the corporate limits of the city of Blakely were changed so as to comprise a square having a side two miles in length. By the act of 1903 (Acts 1903, p. 456) it was declared that the city council of Blakely should have the right to exercise the power of eminent domain, and that they might condemn or purchase property for public purposes anywhere within what were known as the "school limits" of said city, and provision was made as to certain voting places in elections.

[1] 1. A careful examination of the act incorporating the city of Blakely, and of the amendments thereto, will show that the Legislature provided for three things: (1) The incorporation of a municipality, having general powers as such, within defined limits, which at first contained only 1 square mile, and later were enlarged so as to include 4 square miles; (2) the creation of a school district embracing 36 square miles, surrounding and including the comparatively small corporate limits of the actual municipality, and extending to what were denominated "the school limits;" and (3) the conferring upon the municipal corporation of certain powers beyond its actual corporate limits and extending to the school limits. The charter itself distinctly declared that the corporate limits of the city of Blakely should be identical with those of the town of Blakely, "except as is otherwise specified in this act." The specification of greater limits was made in the nineteenth section, creating a public school system and defining the district in which it should be operated. Except as next mentioned, outside of the actual corporate limits none of the functions, powers, or responsibilities of municipal government extended save for the purpose of operating a school system in a district containing 36 times as much territory as the municipality proper. The conferring upon the municipal authorities of the right to exercise certain police powers beyond the limits of the municipality, and within certain other limits, whether specifically described in that connection or defined by reference to the "school limits," did not operate to include this entire territory in the corporate limits of the city. It simply extended the powers of the city for certain purposes beyond its limits. It is too plain to require argument that the purpose was to authorize the city of Blakely to establish and maintain public schools, not merely within its corporate limits, but within a large territory called the "school limits." And this amounted to creating a school district surrounding and including the corporate limits of the city.

It has been held in some jurisdiction that, if it violates no constitutional provision, for police purposes the Legislature may confer upon a municipal corporation certain powers which may be exercised beyond the corporate limits. Thus it has been declared that, if there is no contrary constitutional limitation, authority may be conferred to obtain property beyond the limits of the municipality, for the purpose of constructing and maintaining a system of waterworks, and that it may be policed to protect and prevent the water from becoming infected or foul; that the Legislature may authorize the extension of sewers beyond the corporate limits, so as to preserve the public health; that in connection with the power conferred on a city to license barrooms for police purposes, but not as a means of raising revenue, authority may also be conferred to require such licenses for a distance beyond the corporate limits, so as to make effectual the main purpose and prevent its evasion. See Jordan v. City of Evansville, 163 Ind. 512, 72 N. E. 544, 67 L. R. A. 613, 2 Ann. Cas. 96; Van Hook v. City of Selma, 70 Ala. 361, 45 Am. Rep. 85; 28 Cyc. 703. Without stopping to discuss the question of what police powers may be thus conferred in this state, or the question of reasonableness of ordinances passed in regard to them, the Legislature cannot extend the power of a

municipal corporation beyond its own limits, if to do so would violate a provision of the Constitution. The contention that the charter of Blakely created a municipal corporation with two limits, one called a "prime" limit, and the other called a "secondary" limit, each constituting corporate limits for different purposes, is not tenable. Nor is the argument well founded by which it is sought to analogize such legislation to the power of municipal authorities to enact ordinances making different provisions for different parts of a city, having a legitimate basis of differentiation—such as defining fire limits, requiring watchmen at railroad crossings, regulating the speed of vehicles in populous districts, and the like. Where a legislative body has such authority, they may make legitimate classifications. But this has no relevancy to the contention that there may be two corporate limits of the same municipality, one for general corporate purposes, and the other for the purposes of maintaining a school system. Nor does the conferring of the powers contained in sections 20, 21, and 22 of the charter, if valid, serve to save the conferring of another power extending over the general school district or limits, if that power cannot be constitutionally conferred.

The question, therefore, resolves itself to this: Was the nineteenth section of the charter of Blakely invalid as being an effort to create a special school district, when there was a general law providing for school districts and uniformity in regard to them, and when the Constitution of the state (article 1, § 4, par. 1, Civil Code 1910, § 6391), prohibited the enactment of a special law in a case already provided for by a general law? Or, if the section mentioned was not invalid at the time when it was enacted, was it repealed by the general school law enacted in 1905 and amended in 1906 (Acts 1905, p. 425, Acts 1906, p. 61, Civil Code 1910, § 1531, et seq.)? On this subject we think the present case is controlled by the decisions in Barber v. Alexander, 120 Ga. 30, 47 S. E. 580; Neal v. McWhorter, 122 Ga. 431, 50 S. E. 381; Sellers v. Cox, 127 Ga. 250, 56 S. E. 284; Vaughn v. Simmons, 139 Ga. 214, 76 S. E. 1004; Edalgo v. Southern Railway Co., 129 Ga. 258, 58 S. E. 846.

In Barber v. Alexander, supra (decided in 1904), it was held that an act passed in 1903, creating a special school district in Cobb county, was unconstitutional as violating the uniformity required on that subject under existing laws. In Neal v. McWhorter, supra (decided in March, 1905), an act incorporating the town of Menlo, undertook to incorporate an area about four miles square, to establish a public school system therein, and to create a board of school commissioners with power to levy taxes for school purposes on all of the property in the area described, but limited the exercise of all municipal functions to an area embraced in a circle one mile in diameter located inside the square. It was held that, in so far as the act applied to the territory within the square but outside the circle, it was unconstitutional, in that it was an indirect effort to establish a school district not within the municipal limits within the meaning of the Constitution, and was a special law enacted in a case for which provision had been made by an existing general law, which was prohibited by the Constitution of 1877. If, as we have sought to show in the present case, the large area of 36 square miles was not in any proper sense within the corporate limits of Blakely, the decision last cited is controlling.

In 1905 a general act was passed, dealing with the subject of laying out counties into school districts, and this was amended in 1906 (Acts 1905, p. 469; Acts 1906, p. 61). Since the passage of those acts it has been held that they abrogated special school districts previously established outside of municipalities, and that no such school district could be laid out in conflict with the general law; and it has been declared that merely naming a school district a municipal corporation, when in fact its only function was to operate a school, did not serve to make the establishment of such a school district constitutional. Edalgo v. Southern Railway Co., Vaughn v. Simmons, supra. Under the Constitution and these decisions, the act now under consideration must be declared unconstitutional in so far as it seeks to create a large school district or "school limits" around a comparatively small municipal corporation, with special methods of government and taxation different from those prescribed by the general law. Civil Code 1910, § 6391. The decision in Singletary v. Chipstead, 142 Ga. 208, 82 S. E. 547, turned on the bringing of two suits for the same cause of action, and it in no way conflicts with the ruling now made.

[2] 2. It was argued that the plaintiffs were estopped from instituting this proceeding. The presiding judge refused to sanction the petition or to grant an injunction on presentation of the petition. There is nothing on the face of it which shows that the plaintiffs are estopped. The mere fact that the election in regard to levying a tax for school purposes was held in 1907, and that the petition was filed to enjoin the levy of a tax in 1914, does not show an estoppel. The defendants rely on the decision in Irvin v. Gregory, 86 Ga. 605. But the allegations of the petition do not bring the case within the ruling there made. And that decision has been several times discussed on the subject of estoppel. Sellers v. Cox, 127 Ga. 246, 255, 56 S. E. 284; Jordan v. Franklin, 131 Ga. 487, 488, 62 S. E. 673; Du Pre v. Cotton, 134 Ga. 316, 321, 67 S. E. 876; Lansdell v. King, 134 Ga. 536, 537, 68 S. E. 102. Perhaps a person may so act as to estop himself from attacking the validity of a law, but an unconstitutional act cannot become a valid law by age. Un-

constitutionality is not like minority, a thing which may be outgrown in a few years. See, in this connection, Battle v. Shivers, 39 Ga. 405, 416; 1 Cooley's Constitutional Limitations (7th Ed.) 259, 260. The Constitution is the supreme law. It speaks to be obeyed.

Judgment reversed. All the Justices concur except FISH, C. J., absent.

(143 Ga. 93)

## GEORGIA RY. & ELECTRIC CO. v. CARROLL. (No. 163.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. COURTS ⟸116—RECORDS—CORRECTION.

It is the duty of the judge to make the record speak the truth. If by inadvertence the court approves his charge to the jury, and afterwards discovers a palpable clerical mistake made in its transcription, he may and should correct such mistake.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 369, 371–373; Dec. Dig. ⟸116.]

2. NEW TRIAL ⟸39—STREET RAILROADS ⟸112—INSTRUCTIONS—PRESUMPTION OF NEGLIGENCE—EVIDENCE.

After the plaintiff in a suit against an electric railway company has shown that he was injured by the running of one of the defendant's cars, a presumption arises that the defendant was negligent as charged in the plaintiff's petition. Gainesville & Dahlonega Electric Ry. Co. v. Austin, 127 Ga. 120, 56 S. E. 254; Cordray v. Savannah, etc., Ry., 117 Ga. 464, 43 S. E. 755. In such a case it is not error requiring a new trial for the court to state, in his instructions to the jury, the plaintiff's contentions respecting the defendant's negligence as alleged in the petition, though as to one of the specific acts thus alleged the defendant introduced evidence to disprove the same, and the plaintiff did not offer counter evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 57–61; Dec. Dig. ⟸39; Street Railroads, Cent. Dig. §§ 227, 228; Dec. Dig. ⟸112.]

3. ORDINARY CARE—CONTRIBUTORY NEGLIGENCE.

The instructions relative to the duty imposed by law to exercise ordinary care to avoid the consequences of another's negligence was in accord with the principle enunciated in W. & A. R. R. Co. v. Ferguson, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802, and followed in subsequent cases.

4. RAILROADS ⟸288—INTERSECTIONS—OPERATION OF TRAINS—STATUTE.

Civ. Code 1910, § 2687, providing that "all engine drivers and conductors must cause the trains which they * * * drive and conduct to come to a full stop within fifty feet of the place of crossing," where the tracks of separate and independent railroads cross each other, does not apply to an intersection by a street railroad track of a commercial railroad track. Georgia Ry. & Electric Co. v. Joiner, 120 Ga. 905, 48 S. E. 336.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 928–932; Dec. Dig. ⟸288.]

5. DAMAGES ⟸99, 216—PERSONAL INJURIES—AMOUNT RECOVERABLE—EARNING CAPACITY—INSTRUCTIONS.

The damages recoverable for permanent injuries to the person should compensate the injured one for the loss of money which he would probably earn had not the injuries occurred. R. & D. R. R. Co. v. Allison, 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43. The plaintiff alleged that his injuries were permanent, and testimony was received tending to show that a part of his foot was amputated, and that since his injury he had been promoted by his employer to a superior and more remunerative position, which he accepted, but was forced to relinquish within a few days because of his injuries. There was no error in charging: "You may take into consideration, if there is any evidence to that effect, too, a reasonable prospect of increased earnings on the part of the plaintiff." See Central of Georgia Ry. Co. v. Perkerson, 112 Ga. 923, 38 S. E. 365, 53 L. R. A. 210, and Georgia Southern Ry. Co. v. Wright, 130 Ga. 696, 61 S. E. 718.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 237–241, 548–555; Dec. Dig. ⟸99, 216.]

6. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

Assignments of error not specifically noticed are without merit. The evidence authorized the verdict, and the court did not abuse his discretion in refusing a new trial.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by W. W. Carroll against the Georgia Railway & Electric Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Colquitt & Conyers, of Atlanta, for plaintiff in error. Little, Powell, Hooper & Goldstein and Hewlett, Dennis & Whitman, all of Atlanta, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 78)

## BRANTLEY v. DAVIS et al. (No. 158.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. BOUNDARIES ⟸7 — PROCEEDINGS TO ESTABLISH—INSTRUCTIONS.

On the trial of an issue formed by the filing of a protest to the return of processioners, finding a certain land line to be the true line between certain lots of land, it was error for the court to instruct the jury: "So, in your investigations, if you should find, as a matter of fact, from the evidence, and you are to be controlled by the evidence, if you should find that the corner known and testified about as the Davis corner, then that would be, under the law, the original corner for that lot of land, whether it is the same post or not, if it was in the same place, or approximately the same place, as the original corner post, that would be the true corner of the lot of land, and then the true line between these lots would run due east and west between these two lots, whether the original line had ever been blazed out or not, that would make no difference, if that is the true corner, the true line would be a straight line running east and west from that corner. If you find that to be the true corner, then the true line would be a line running due east, with such magnetic variations as surveyors allow from that corner." The language of the charge, that "if it was in the same place, or *approximately* the same place, as the original corner post, that would be the true corner of the lot of land," etc., should not have been given.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 58–65; Dec. Dig. ⟸7.]

2. EVIDENCE ⊜317—HEARSAY EVIDENCE — ADMISSIBILITY.

On the trial of such an issue, the following testimony was objectionable, as being hearsay, and should have been excluded: "There was a line put there way back yonder by Mr. Youmans, the father of Mr. Youmans who was on the stand. I was not living in the county at that time. They said he couldn't find the original line, and ran this one. I do not know as to whether the talk about that was general or restricted. They were just talking about the line put there by Mr. Youmans. There was very little talk about it so far as I know."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174–1192; Dec. Dig. ⊜317.]

3. ADMISSION OF EVIDENCE.

The testimony objected to in the ninth and tenth grounds of the amended motion was inadmissible, and should have been excluded, on objection of the plaintiff, on the ground that it had reference to transactions occurring subsequently to the filing of the petition for processioning.

4. BOUNDARIES ⊜35 — PROCEEDINGS TO ESTABLISH—EVIDENCE.

There being no connection shown between A. P. Brantley, the plaintiff, and the Brantley Company, by which the latter could bind the former, the following testimony of a witness for the defendant should have been excluded on motion: "I know about the line claimed by Davis and Sinquefield. I cut the wood off of it, off of the Davis line, known as the Brown line, and I know I cut down to the lower line; that is about 300 or 400 yards of this house, over the field fence. At that time I was working for the Brantley Company, and cutting on the Davis lot. I am not positive, but I think I began cutting for them in January, 1902."

(a) For the same reason, the testimony, the substance of which is set out in the twelfth ground of the amended motion, should have been excluded.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 153–155, 157–159, 163, 165, 177–183; Dec. Dig. ⊜35.]

5. TRIAL ⊜193—INSTRUCTIONS—EXPRESSION OF OPINION.

The court instructed the jury as follows: "Now, if you find that prior to the time Mr. Youmans ran that line, that that was the original line dividing these two lots of land, and that this other line, known as the Davis line, was not in existence at that time, and was not the original land line, but the other was, then it would remain so until the present time, unless it was taken out of that rule by the acquiescence of the parties for more than seven years as to the Davis line being the true line, and in that case the Davis line would then be the true line." This charge was error, in that the statement that "Mr. Youmans ran that line" was an expression of opinion as to what had been proved. The court assumed that Youmans ran the original line, which is not conceded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436–438; Dec. Dig. ⊜193.]

6. TRIAL ⊜208 — INSTRUCTIONS — PLEADING AND PROOF.

Under the pleadings and the evidence, it was error to refuse the following request to charge: "If you find that the line established by the processioners is the true, original line between lots 94 and 95, then you would find in favor of the plaintiff, unless you find that the plaintiff or his predecessors in title acquiesced in the line contended for by protestant, Mr. Davis, for a period of time fixed by the law, seven years, by acts or declarations. It would be necessary for the plaintiff or his predecessors in title to have knowledge of the line claimed by Mr. Davis, and knowledge and acts or declarations by other parties than such owners of the adjoining lots could not amount to acquiescence, and bind Mr. Brantley or his predecessors in title."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477–479; Dec. Dig. ⊜203.]

7. ASSIGNMENTS OF ERROR.

There is no substantial merit in any of the other assignments of error.

Error from Superior Court, Pierce County; T. A. Parker, Judge.

Action by A. P. Brantley against J. A. Davis and others. Judgment for defendants, and plaintiff brings error. Reversed.

Memory & Summerall, of Blackshear, for plaintiff in error. Parks & Reed, of Waycross, for defendants in error.

HILL, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 97)

McGARR v. GREEN. (No. 167.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. MORTGAGES ⊜37—SECURITY DEED—EVIDENCE—ADMISSIBILITY.

The plaintiff made the defendant a deed to land and yielded possession to the grantee. About 12 years thereafter he brought suit against the defendant to recover the land, on the ground that the deed was given to secure a debt, and that the defendant contemporaneously with the execution of the deed gave him a written obligation to reconvey the land on payment of the debt. The defendant was illiterate, and the alleged agreement to reconvey purported to have been signed with his mark; and on the trial he attacked same as a forgery. As bearing on the issue of whether the transaction was a sale or a loan, both sides introduced evidence respecting the value of the land at the time of the transaction. A witness was allowed to testify in behalf of the defendant that about the date of the plaintiff's deed to the defendant the plaintiff offered to sell the land to the witness, without any proposition to have it back. Disassociated from its context, this evidence was irrelevant, as ordinarily, in a controversy between two persons, evidence as to what occurred between one of them and a third person with reference to a similar, though entirely distinct, transaction, is irrelevant. But a reference to the brief of evidence discloses that the witness was testifying about the value of the land at the time of the execution of the plaintiff's deed to the defendant, and in that connection said that the plaintiff proposed to sell the land to him for a sum of money somewhat less than he sold it to the defendant. The testimony to which objection was made was a part of that conversation, and its reception in evidence does not require a new trial.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 97–107; Dec. Dig. ⊜37.]

2. TRIAL ⊜296—INSTRUCTIONS—CURE OF ERROR.

In stating the contentions of the parties, the court inadvertently misstated the date of the deed from the plaintiff to the defendant; but, on his attention being called to the error at the conclusion of his charge, he corrected his mistake. This occurrence was not prejudicial to the plaintiff. The contentions of the parties were

fairly presented by the court in his charge to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec. Dig. ⟸ 296.]

3. TRIAL ⟸193—INSTRUCTIONS—OPINION OF JUDGE.

The court charged: "If you find in this case that [the plaintiff] agreed to convey this land to [the defendant], and pursuing that agreement he executed a fee simple deed to him and put him in possession of it, and that was the agreement and contract, the title passed out of [plaintiff] into [defendant], and [plaintiff] has not had from that date nor ever will have any further rights touching that land; and if you believe and find such to be the truth of the case, it would be your duty to find for the defendant." The criticism is that this instruction withdrew from the jury the plaintiff's contention that the deed was to secure debt and was an expression of opinion. The excerpt itself, particularly when considered in its setting in the charge, amounted to an instruction that if the jury should find that the grantee was given possession of the land, without any right of redemption or repurchase in the plaintiff, they should decide the issue with the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436–438; Dec. Dig. ⟸198.]

4. INSTRUCTIONS, VERDICT, AND DENIAL OF NEW TRIAL.

Some of the instructions were not strictly accurate, but the inaccuracies were not of such character as to be prejudicial to the plaintiff. The verdict is supported by the evidence, and the court did not abuse his discretion in refusing a new trial.

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by T. W. McGarr against James Green. Judgment for defendant, and plaintiff brings error. Affirmed.

H. R. Daniel, of Swainsboro, and Hines & Jordan, of Atlanta, for plaintiff in error. Smith & Kirkland, of Swainsboro, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 72)

## CITIZENS' ELECTRIC LIGHT & POWER CO. v. THOMPSON. (No. 157.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ⟸150—INJURIES TO SERVANT—DEFECTS—LIABILITY OF MASTER.

If, during a rainy night, an electric light company, upon being informed of a leakage of electricity diverted from its feed wires to a "supporting or guy wire," leading from the top of one of the company's poles to an anchorage in the ground near the sidewalk in a city, thus charging the guy wire with electricity and endangering the lives of persons passing along the walk, orders its lineman to remove the danger; and if, in order to do so, it is necessary for the lineman to climb the pole and cut the guy wire near the top, which he proceeds to do; and if, upon cutting the guy wire, the pole falls, owing to the fact that, though apparently sound and safe, it was rotted off just below the surface of the ground, a defect unknown to the lineman, and of which he did not have equal means with the company of knowing, and for discovery of which it was not a part of his duty to inspect—the company will be liable for the injuries to the lineman, if, knowing the rotten condition of the pole, it permitted him to climb the pole and cut the wire without warning him of the defect. Civil Code 1910, §§ 3130, 3131; Southern Bell Telephone Co. v. Covington, 139 Ga. 566, 77 S. E. 382, and citations. See, also, 2 Joyce on Electricity [2d Ed.] §§ 656–8; 1 Shearman & Redfield on Negligence [6th Ed.] § 217, p. 621, and citations; Combs v. Delaware & Atlantic Telegraph Co., 218 Pa. 440, 67 Atl. 751; Munroe v. Edison Electric Illuminating Co. of Boston, 156 Fed. 468, 84 C. C. A. 278; Ocean Steamship Co. v. Matthews, 86 Ga. 418, 12 S. E. 632.

(a) The petition, containing allegations substantially as stated above, set forth a cause of action. The objections raised by special demurrer were met by amendment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299–302, 305–307; Dec. Dig. ⟸150.]

2. INSTRUCTIONS.

The several requests to charge, in so far as appropriate and applicable to the case, were covered by the general charge.

3. GROUNDS FOR NEW TRIAL.

When the excerpts from the charge which were excepted to are considered in connection with the entire charge, none of the assignments of error based thereon, nor any of those based on rulings as to the admissibility of evidence, afford ground for a new trial.

4. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

There was evidence to support the verdict, and no error in refusing a new trial.

Error from Superior Court, Crisp County; W. F. George, Judge.

Action by Mrs. C. S. Thompson against the Citizens' Electric Light & Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. T. Hill, of Cordele, for plaintiff in error. F. G. Boatright and M. M. Eakes, both of Cordele, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 86)

## EDENFIELD v. BOYD et al. (No. 166.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. WILLS ⟸52, 163, 289, 324—ISSUE OF DEVISAVIT VEL NON—BURDEN OF PROOF—SUBMISSION OF ISSUES.

On the trial before a jury of an issue of devisavit vel non, the burden in the first instance is upon the propounder of the alleged will to make out a prima facie case by showing the factum of the will, and that at the time of its execution the testator apparently had sufficient mental capacity to make it, and in making it acted freely and voluntarily. Credille v. Credille, 123 Ga. 673, 51 S. E. 628, 107 Am. St. Rep. 157; Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1; Oxford v. Oxford, 136 Ga. 589, 71 S. E. 883. But where the only grounds of caveat were (a) "fraudulent practices upon the testator's fears, affections, and sympathies, and duress and un-

due influence on the part of the legatees;" (b) "mistake of fact as to the conduct of caveators;" (c) implied revocation of the will after it was executed; (d) the will, "if executed at all, was not attested, executed, and published as required by law"—and the evidence was all to the effect that the mind of the testator was sound and unimpaired, it was erroneous, while stating the contentions of the parties and charging the law applicable to the case, to submit an issue as to testamentary capacity of the testator on account of mental infirmity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101–110, 225, 388–402, 653–661, 767–770; Dec. Dig. ⟸52, 163, 289, 324.]

2. TRIAL ⟸256—WILLS ⟸332—ISSUE OF DEVISAVIT VEL NON—INSTRUCTION—BURDEN OF PROOF—REQUESTS.

In view of the uncontradicted evidence showing the factum of the will and that at the time of its execution the testator apparently had sufficient mental capacity to make it, and, in making it, acted freely and voluntarily, under the doctrine of the cases cited in the preceding note, in submitting the issue as to undue influence, a charge that the burden of proof was upon the caveator would have been appropriate. Where it appears, however, that the judge charged generally that, upon proof that the factum of the will was the free and voluntary act of the testator and that the formalities required by law in the execution of wills had been complied with, "that would make a prima facie case on the part of the propounder and the burden would then be shifted," if the propounder desired further elaboration or some specific instruction as to the shifting of the burden of proof, he should have made a timely written request. See, in this connection, Savannah Electric Co. v. Jackson, 132 Ga. 559, 64 S. E. 680.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628–641; Dec. Dig. ⟸256; Wills, Cent. Dig. § 785; Dec. Dig. ⟸332.]

3. TRIAL ⟸252—WILLS ⟸155—UNDUE INFLUENCE—WHAT CONSTITUTES—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

"The very nature of a will requires that it should be freely and voluntarily executed; hence anything which destroys this freedom of volition invalidates a will, such as fraudulent practices upon testator's fears, affections, or sympathies, duress, or any undue influence, whereby the will of another is substituted for the wishes of the testator." Civil Code 1910, § 3834; Franklin v. Belt, 130 Ga. 37, 60 S. E. 146, and citations.

(a) Considered separately, the facts that the testator was an old man, that he married a second time, that he disinherited some of his children, that by his will he had unequally distributed his estate among his children, that there were unfriendly feelings among the members of the family, and an estrangement between the children and their stepmother, would be insufficient to show such influence over the mind of the testator as would invalidate the will. Accordingly it was erroneous, after telling the jury that they might consider all the facts and circumstances connected with the life of the testator at the time of executing the will, and all that would throw light on the transaction, and referring to the several things above mentioned, to charge that "if, from the existence of any of these facts," the jury should determine that there was undue influence brought to bear upon the mind of the testator at the time of making the will, and it influenced him to make it, they would be authorized to find in favor of the caveators.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. ⟸252; Wills, Cent. Dig. §§ 375–381; Dec. Dig. ⟸155.]

4. TRIAL ⟸252—INSTRUCTION—UNDUE INFLUENCE—APPLICABILITY TO EVIDENCE.

Where it appears that the caveators were two daughters and certain heirs of a deceased daughter, children of the testator by a former marriage, to whom nominal sums of money were devised by the will, and that the residue of his estate was devised approximately equally between a number of other children by the first marriage and the second wife, by whom there were no children, thus showing that the will mentioned all of the members of the family of the testator, and a ground of attack upon the will by the caveators was that of undue influence over the testator, and there was no evidence that any of the children or representatives of deceased children had in any manner attempted to exercise any influence over the testator, and the only evidence relied on to show undue influence was alleged conduct and requests upon the part of the second wife, it was not strictly accurate for the court, while instructing on the subject of undue influence, to charge that "it is immaterial who might bring this mental condition upon the maker of the will."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. ⟸252.]

5. WILLS ⟸164—ISSUES OF DEVISAVIT VEL NON—EVIDENCE.

Testimony to the effect that several years before executing the will the testator received into his household two of his grandchildren, and promised to support and educate them, and "leave them plenty to pay for their living," was relevant; it appearing that a mere nominal sum was provided for them in the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403–414; Dec. Dig. ⟸164.]

6. WILLS ⟸164—ISSUES OF DEVISAVIT VEL NON—EVIDENCE.

It was competent for the propounder to show that the testator had by a deed to a tract of land made provision for one of the caveators, to whom only a nominal sum of money was left by the will. See Oxford v. Oxford, 136 Ga. 589 (1), 71 S. E. 883.

(a) The mere objection that the propounder and other legatees under the will were disputing the genuineness of the deed was insufficient to exclude the testimony of the witness by whom it was sought to prove that such provision had been made by the testator.

(b) There was no objection that the evidence was in parol, and that there was higher evidence of the facts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403–414; Dec. Dig. ⟸164.]

7. APPEAL AND ERROR ⟸728—ASSIGNMENT OF ERROR—ADMISSION OF EVIDENCE.

An assignment of error based on a ground of a motion for new trial, complaining of the admission in evidence of the testimony of a witness, which does not set forth the testimony alleged to have been erroneously admitted, is too indefinite to present any question for decision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3010–3012; Dec. Dig. ⟸728.]

8. GROUNDS FOR NEW TRIAL.

Other grounds of the motion for new trial, which complain of the charge and omissions to charge without request, are of such character as not to require elaboration. It is sufficient to say that, when considered in the light of the charge as given, none of them require the grant of a new trial.

9. SUFFICIENCY OF EVIDENCE.

As the evidence may not be the same on another trial, no ruling is made as to the sufficiency of the evidence to support the verdict.

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action between John Edenfield, Jr., and Martha Boyd and others. From the judgment, Edenfield brings error. Reversed.

Saffold & Jordan, of Swainsboro, for plaintiff in error. Williams & Bradley, of Swainsboro, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 181)

## MOSLEY v. BANK OF LINCOLNTON.

(No. 201.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

LANDLORD AND TENANT ⟸266—RENT—DISTRESS — SUBJECT-MATTER — INDEPENDENT INDEBTEDNESS—DISTRESS WARRANT.

A plea of set-off to a distress warrant, alleging against the plaintiff, in distress warrant, items of indebtedness apparently independent of the rent contract, and not alleged to be connected with it, is not allowable.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1075–1079; Dec. Dig. ⟸266.]

Error from Superior Court, Lincoln County; B. F. Walker, Judge.

Action by the Bank of Lincolnton against T. P. Mosley. Judgment for plaintiff, and defendant brings error. Affirmed.

J. M. Pitner, of Washington, Ga., for plaintiff in error. Callaway, Howard & West, of Augusta, and T. H. Remsen, of Lincolnton, for defendant in error.

EVANS, P. J. Dawson, as landlord, rented a farm, together with a mill, gin, and public ferry, to Mosley, for the year 1912. The landlord transferred in writing the rent note to the Bank of Lincolnton on January 22, 1912. The transferee foreclosed a landlord's lien, both special and general, which was levied on 25 tons of hay as the property of the tenant. The tenant made the statutory affidavit that the sum distrained for was not due. Subsequently the tenant was allowed to amend his counter affidavit by alleging:

"He admits that he did rent for the year 1912 from Lambdin Dawson a farm, ferry, mill, gin, known as the 'Lockhart Place,' in Lincoln county, Ga.; but he claims that, prior to the issuance of said distress warrant, he had fully paid off and discharged all of the rent lawfully due, by reason of the facts as follows: The said Lambdin Dawson during the year 1912 became indebted to petitioner in the sum of $550.82, as shown by bill of particulars hereto attached, marked 'Exhibit A,' and made a part of this counter affidavit. Said Dawson is indebted to petitioner as above pleaded, which defendant pleads as a credit on said rent note."

The items in the attached bill of particulars were for amounts paid certain persons and for cash to the landlord, and board for a year, and also for the loss of the use of the gin for three weeks because of failure of the landlord to repair and for damages therefor. On the trial of the case the court struck this amendment, and, upon the plaintiff introducing the rent note, directed a verdict in favor of the plaintiff. The tenant excepted, and he complains that the striking of his amendment was error, because it showed that the landlord had been paid, and that his assignee was not entitled to enforce the lien of the rent contract against him.

It is contended that after a tenant gives his landlord a negotiable promissory note for rent for a current year, and the note has been transferred by the landlord, before due, to an innocent holder for value, the assignee's lien under the statute is defeated by reason of payments made by the tenant to the landlord, and of certain repairs done on the rented premises. The Code section relied upon to support this contention reads as follows:

"Whenever any contract for rent is evidenced by writing and is transferred by written assignment before the maturity of the crops on the lands rented, the special lien in favor of landlords shall, on the maturity of the crops, arise in favor of the transferee of such rent contract in the same manner as it would have done in favor of the landlord had no transfer been made." Civil Code 1910, § 3343.

The reply to this contention of the tenant is that his pleadings do not make a case of payment, even though the statute should be construed as he contends it should be. The tenant's plea is that of set-off, and it is not averred that any item in the bill of particulars was paid in pursuance of the contract of rent. A plea of set-off admits that the rent is due, but avers that it should not be paid, because of an independent indebtedness due by the landlord to the tenant. The plea of set-off, alleging against the plaintiff, in the distress warrant, items of indebtedness entirely independent of and disconnected with the rent contract, is not allowable. Johnston v. Patterson, 86 Ga. 725, 13 S. E. 17. Moreover, the proceeding is in favor of the assignee, and certainly no cross-obligation which the tenant may have against the landlord should be asserted against the latter's assignee, unless it grew out of the rent contract sought to be enforced by distraint; and this was not alleged in the counter affidavit. There was no error in striking the amendment to the affidavit.

The amendment also contained an averment that the landlord was the owner of only a half interest in the property, and that the defendant had been compelled to pay one-half of the rent of the premises to the proper owner, the tenant's wife. This ground was not insisted upon in the brief, presumably in appreciation of the well-settled rule that the tenant cannot dispute the landlord's title.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 210)

## SIZER LUMBER CO. v. WARREN et al. (No. 214.)

(Supreme Court of Georgia. Feb. 20, 1915.)

*(Syllabus by the Court.)*

INTERLOCUTORY INJUNCTION.

Under the evidence submitted, there was no abuse of discretion in refusing to grant an interlocutory injunction.

Error from Superior Court, Wayne County; C. B. Conyers, Judge.

Action by the Sizer Lumber Company against R. E. Warren and others. Judgment for defendants, and plaintiff brings error. Affirmed.

E. C. Collins, of Reidsville, for plaintiff in error. D. M. Clark and J. H. Thomas, both of Jesup, for defendants in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 181)

## WOLFE v. WOLFE. (No. 200.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

REFUSAL OF NEW TRIAL.

No errors of law are complained of as having been committed during the trial, and, there being sufficient evidence to support the verdict, the judgment refusing a new trial is affirmed.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action between J. C. Wolfe and Clara Wolfe. From the judgment, J. C. Wolfe brings error. Affirmed.

J. M. Pitner, of Washington, Ga., for plaintiff in error. H. J. Quincey and Walter M. Rogers, both of Ocilla, and Wm. Wynne and Colley & Colley, all of Washington, Ga., for defendant in error.

BECK, J. Affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 180)

## LAMB v. EMPIRE LIFE INS. CO. (No. 199.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. EVIDENCE ⟸374—DOCUMENTS—SECONDARY EVIDENCE — TESTIMONY OF SUBSCRIBING WITNESS—NECESSITY.

Where a writing is offered in evidence, to which there is a subscribing witness, the latter must be produced in all cases, except in the five instances specified in the Civil Code 1910, § 5833, and those named in section 5832.

(a) This case does not fall within any of the exceptions enumerated in the Civil Code.

(b) Where on the trial of a suit by a beneficiary in a life insurance policy, to recover the amount named in the policy, the company defended on the ground that the reinstated policy sued upon was void by reason of certain alleged false and fraudulent representations the insured made in the application for reinstatement of the policy, which had lapsed for nonpayment of the premium when due, it was error to receive in evidence secondary evidence of the execution of the application to reinstate, without preliminary proof accounting for the subscribing witness thereto.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1583, 1584, 1587–1612; Dec. Dig. ⟸374.]

2. TRIAL ⟸139—DIRECTION OF VERDICT—EVIDENCE.

The evidence as to the representations made by the insured in order to obtain a reinstatement of the policy having been improperly admitted, it was error to direct a verdict in favor of the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. ⟸139.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by Louisa Lamb against the Empire Life Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed.

L. D. Moore, of Macon, for plaintiff in error. Hatcher & Smith, of Macon, and Little, Powell, Hooper & Goldstein, of Atlanta, for defendant in error.

HILL, J. [1] Louisa Lamb, as the beneficiary under a policy of life insurance, brought suit against the Empire Life Insurance Company to recover the amount alleged to be due under the policy. The plaintiff alleged, in effect, that the policy was in force. The defendant undertook to contest that issue, not on the fact that there had been any failure to pay premiums, but on the ground that the policy had lapsed, and that there had been fraud on the part of the insured in procuring its reinstatement. The burden, therefore, was on the defendant to make good its affirmative plea. See O'Connell v. Knights of Damon, 102 Ga. 143(2), 147, 28 S. E. 282, 66 Am. St. Rep. 159. As a foundation for proving this plea, the defendant offered in evidence an application for reinstatement, purporting to be signed by the insured, and containing certain representations which the insurer claims to have been false, and which related to a subject materially affecting the risk. This application was attested by a witness. Objection to its admission in evidence was made on the ground that the subscribing witness was not produced, or his absence accounted for. The court overruled the objection, and allowed proof to be made other than by the subscribing witness. The Civil Code declares that, where a writing attested by witnesses is offered in evidence, the subscribing witness must be produced, or his absence accounted for, except in the instances enumerated in sections 5832 and 5833, in none of which the present case falls. It was therefore error for the court to receive in evidence any testimony respecting the execution of the alleged application for reinstatement, with-

out preliminary proof accounting for the subscribing witness.

[2] 2. Inasmuch as the court erred in admitting in evidence the application for reinstatement of the policy without preliminary proof accounting for the subscribing witness thereto, and all the subsequent testimony received on the trial relative to the representations contained in the application was for that reason also erroneously admitted, it was error to direct a verdict for the defendant.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 106)

**HENDRICKS v. JACKSON et al. (No. 172.)**

**(Supreme Court of Georgia. Feb. 10, 1915.)**

*(Syllabus by the Court.)*

1. MUNICIPAL CORPORATIONS ⟸691, 697—OBSTRUCTION OF STREETS—INJUNCTION—"PUBLIC NUISANCE"—ENCROACHMENT ON ALLEY.

As originally constructed, the petition set out a cause of action. An encroachment upon a public alley of a municipality is a "public nuisance." One whose property rights will be injuriously affected by the unauthorized obstruction of a street which furnished an avenue of approach to his place of business, and which will render the same less valuable and less remunerative can maintain an action to prevent the infliction of such special injury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1492–1508; Dec. Dig. ⟸691, 697.

For other definitions, see Words and Phrases, First and Second Series, Public or Common Nuisance.]

2. MUNICIPAL CORPORATIONS ⟸697—OBSTRUCTION OF STREETS—AMENDMENT TO PETITION—RIGHT TO INJUNCTION—WAIVER.

The plaintiff's amendments to her petition and the admissions of her counsel in open court, appearing in the second division of the opinion, did not so change the petition as to deny the plaintiff the right to appropriate relief.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1502–1505; Dec. Dig. ⟸697.]

3. MUNICIPAL CORPORATIONS ⟸671—OBSTRUCTION OF STREET—MANDATORY INJUNCTION—RIGHT.

Where an abutter files an equitable petition to prevent the erection of a building, which rests upon a portion of a public alley, on the ground that she will suffer a special injury not shared in by the general public, and where, pending the suit, the building is constructed, if upon the trial the plaintiff establishes her right to enjoin the erection of the building, and its maintenance as a nuisance, the right may be enforced by appropriate order, the essential nature of which is to restrain, although in yielding obedience to the restraint the defendant incidentally may be compelled to perform some act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447–1450; Dec. Dig. ⟸671.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by Mrs. M. A. Hendricks against Max Jackson and others. Judgment for defendants, and plaintiff brings error. Reversed.

See, also, 139 Ga. 604, 77 S. E. 816.

West & Dasher, of Macon, for plaintiff in error. Ryals & Anderson, of Macon, for defendants in error.

EVANS, P. J. The plaintiff alleged that she was the owner of certain real estate in the city of Macon, abutting a public alley, known as the Park Hotel property; that the defendants are the owners of the land directly across the alley from her property, and were undertaking to erect permanent and substantial improvements on their lot, consisting of a concrete two or three story building. They had laid the foundations in such a way as that the building, when constructed, would encroach on the alley 2 feet and 9 inches for the whole length of the plaintiff's lot, and prevent the use of that portion of the alley for alley purposes. The permanent improvements encroaching on the alley will greatly injure her, for the reason that her property is located in the heart of the city, and consists of a building for hotel purposes, and the more air, light, and alley space surrounding the building the more valuable would be her property. The encroachment will injure her property for the use to which it is now put—to wit, a hotel—and for an office building or for an apartment building, for which it is eminently fitted. The injury which she would sustain from the construction of the building would not be possible of accurate computation, but would not be less than $10,000. The encroachment is without warrant or right, and constitutes a nuisance. It is being erected in violation of an ordinance of the city, set out in the petition. In paragraphs 13 to 18, inclusive, it was alleged that the defendants had, by throwing dirt from the excavations into the alley and diverting the surface water, caused her property to be damaged in a certain amount. The prayer of the petition was for judgment against the defendants for the sum of $20,000, and that they be enjoined from encroaching on the alley, and from dumping thereon any more dirt from the excavation of the defendants' premises. An interlocutory injunction was refused, and, the judgment denying such interlocutory injunction was affirmed by this court. 139 Ga. 604, 77 S. E. 816. The case came on for a hearing on its merits, when the plaintiff amended her petition by striking therefrom paragraphs 13 to 18, inclusive, and also the words "and dumping thereon any more dirt from the excavation of defendants' premises," as contained in the prayers of the petition, and by alleging that the encroachment on the alley causes special injury to her not participated in by the general public, for the reason that the alley is the approach to

her premises, and is used as such, and that she is entitled to the full width of the alley, and has an easement therein. She further amended the prayers of her petition by adding a prayer that the nuisance be abated, and for such further relief as may to the court seem meet and proper in the premises. The plaintiff's counsel announced in open court that he waived any right of the plaintiff under the petition to recover for permanent damages to her property, and elected to pursue the remedy for injunction alone, and also admitted in open court that, pending the suit, the construction of the building and the excavations had been fully completed, and the building was then occupied. Thereupon counsel for the defendants moved to dismiss the action on the ground that the injury sought to be enjoined was an injury to the value of the property, which was not irreparable in damages, and for which the plaintiff had an adequate remedy at law, and on the further ground that the plaintiff could not now pursue the remedy of injunction, and was not entitled to the injunction sought, and was not entitled to have the alleged encroachment abated as a nuisance in this proceeding. The court sustained the motion and dismissed the petition, and the plaintiff sued out a writ of error.

[1] 1. As originally constructed, the petition set out a cause of action. An encroachment upon a public alley of a municipality is a public nuisance. One whose property rights will be injuriously affected by the unauthorized obstruction of a street which furnishes an avenue of approach to his place of business, and which will render the same less valuable and less remunerative, can maintain an action to prevent the infliction of such special injury. Coker v. A., K. & N. Ry. Co., 123 Ga. 488, 51 S. E. 481; Civil Code 1910, § 4455.

[2] 2. The plaintiff's amendments and admissions did not change the nature of the action as originally alleged in the petition. The elimination of the allegations of damages alleged to have resulted from the excavation, and from the piling of dirt and rubbish in the alley pending the construction of the building, had no effect on the cause of action to prevent a partial obstruction of the alley. The waiver of the plaintiff's right to recover permanent damages to the property is perfectly consistent with her cause of action to enjoin a public nuisance which injured her property. The amendment offered and allowed contemporaneously with the admission stresses the plaintiff's contention that the encroachment on the alley will cause special injury to her not participated in by the general public. It is urged that the amendment to the prayer that the nuisance be abated, and such other relief as may be appropriate be granted, in connection with the amendments and admissions made at the trial term, converts the action into one for the abatement of a completed and existing nuisance, and that the remedy of injunction is not available. It is conceded that the statutory remedy to abate a nuisance (Civil Code 1910, §§ 5329–5339) affords a remedy in cases of existing nuisances, unless the special facts make that remedy inadequate. Broomhead v. Grant, 83 Ga. 451, 10 S. E. 116. But it will be remembered that when the plaintiff began her action the building had not been erected, and she sought to prevent its erection. Manifestly the statutory remedy to abate a nuisance applies to cases where the nuisance actually exists, and not where it is only threatened. It would be inverted logic to hold that an abutter who would suffer a special injury from the erection of a public nuisance in a public street, and files a suit to enjoin its threatened erection, loses his right to have a trial on the merits of his case, because the defendant had executed his threat by completing the nuisance before the trial term of his case. If the defendant persists in erecting the building after service of the plaintiff's suit on him, he does so at his peril. The plaintiff has a right to have the merits of his case passed upon by a jury, and neither the denial of an interlocutory injunction, nor the erection of the building pending the action, can take that right from her. The plaintiff's right of action rests upon the status at the time of the institution of her suit. The defendants' threatened wrong—if such it is found to be a trial on the merits of the case—cannot be converted into a right by the completion of the alleged wrongful act.

[3] 3. It is further contended that, inasmuch as the building is completed, and has become a permanent obstruction, the court is unable to aid the plaintiff except by a mandatory injunction, which is not permissible under the statute. The Code declares:

"An injunction can only restrain; it cannot compel a party to perform an act. It may restrain until performance." Civil Code 1910, § 5499.

A court of equity is always resourceful to find means to effectually afford relief lawfully within its power and jurisdiction. If the plaintiff establishes on the trial her right to restrain the erection of the building as asserted in her petition, and its maintenance, the court could decree under suitable penalty that the defendants should not maintain the nuisance erected pendente lite in defiance of the plaintiff's protest. While an injunction which is purely mandatory in its nature cannot be granted, the court may grant an order the essential nature of which is to restrain, although, in yielding obedience to the restraint, the defendant may incidentally be compelled to perform some act. Goodrich v. Georgia R. R. & Banking Co., 115 Ga. 340, 41 S. E. 659. The statute never was intended to enable a defendant to destroy the plaintiff's right of action by doing pendente

lite the act the commission of which the plaintiff was equitably entitled to restrain.

For the present purpose it is unnecessary to discuss the cases in which writs of error based on the refusal of interlocutory injunctions have been dismissed, on the ground that no supersedeas was granted, and the act sought to be enjoined was completed, or to determine whether later decisions of the character mentioned are in accord with the decision in Kirkland v. Mayor and Council of Macon, 62 Ga. 747 (1), and Atlanta & Florida Railroad Co. v. Blanton, 80 Ga. 563, 6 S. E. 584, with its differentiation from the case just cited. Suffice it to say that these cases deal with the refusal to grant interlocutory injunctions to preserve a status until final trial, and involve largely discretionary action, while the present case involves the right to have a final jury trial, on an equitable action, under the practice in the state, and to obtain appropriate relief, without having that right destroyed pendente lite by the wrongful conduct of the defendant in completing the erection of the nuisance.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 229)

ADAMS v. MATHEWS. (No. 224.)

(Supreme Court of Georgia. Feb. 20, 1915.)

*(Syllabus by the Court.)*

SALE OF LAND—ENFORCEMENT.

This case falls within the principles announced in Lyons v. Bass, 108 Ga. 573, 34 S. E. 721, and is controlled by the rulings therein made.

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

Action between Mrs. L. H. Adams and Mrs. C. E. Mathews. From the judgment, Mrs. Adams brings error. Affirmed.

Z. B. Rogers, of Elberton, and Cobb & Erwin, of Athens, for plaintiff in error. Geo. C. Grogan, of Elberton, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 183)

HAYES et al. v. FARMERS' BANK. (No. 202.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. EVIDENCE ⟸434 — PAROL — WRITTEN INSTRUMENT—FRAUD.

In a suit based upon a promissory note, where the defendant pleaded that he had directed the application of funds arising from the collection of certain collateral securities alleged to have been left by him in the hands of the plaintiff, it was competent for the defendant, after the introduction in evidence of a certain writing signed by him, which purported to put the title to these collateral securities in the plaintiff, to introduce evidence to show that, while he did sign this writing, he did so at a time when he was hurrying to catch a train, that he did not have time to read over the writing, but signed it upon the statement of the agent of the plaintiff that the drafts he was then handing to the defendant were the property of the bank, and that the paper presented for defendant to sign was a receipt to show where the drafts went. If in an emergency he was induced, by the statement of the plaintiff's agent, to sign the paper which contained an acknowledgment that the securities referred to belonged to the plaintiff, he will not be concluded from proving this on the idea that he cannot contradict the writing by parol evidence. If his signature to the paper was procured under the circumstances which he offered to prove, it was a fraud, and he should have been permitted to show it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005–2020; Dec. Dig. ⟸434.]

2. TRIAL ⟸29—REMARKS OF COURT—FRAUD.

It was error for the court, referring to the paper just mentioned, to say, in the presence of the jury, "Suppose he did not have time—he signed it, didn't he?"

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80–83, 508; Dec. Dig. ⟸29.]

Error from Superior Court, Franklin County; J. N. Worley, Judge, pro hac.

Action by the Farmers' Bank against J. T. Hayes. Judgment for plaintiff, and defendant brings error. Reversed.

W. R. Little, of Carnesville, and Adams & Johnson, of Royston, for plaintiff in error. Dorough & Adams, of Royston, and A. G. & Julian McCurry, of Hartwell, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 192)

WRIGHT MERCANTILE & LUMBER CO. v. ETON MERCANTILE CO. (No. 209.)

(Supreme Court of Georgia. Feb. 12, 1915.)

*(Syllabus by the Court.)*

1. ABATEMENT AND REVIVAL ⟸7—PENDING SUIT—WHAT CONSTITUTES—ATTACHMENT.

An attachment which has never been levied is not such a pending suit as may be pleaded in abatement to a subsequent action in personam.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 35–37; Dec. Dig. ⟸7.]

2. ABATEMENT AND REVIVAL ⟸15 — GROUNDS—PRIOR ATTACHMENT—FAILURE TO PAY COSTS.

The voluntary abandonment of an attachment which had never been levied, and the subsequent bringing of an action in personam, without payment of the magistrate's costs in issuing the attachment or making affidavit of inability to pay such costs, was not ground for abating the latter suit under Civil Code 1910, §§ 5625, 5626.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 111–117; Dec. Dig. ⟸15.]

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action by the Eton Mercantile Company

against the Wright Mercantile & Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. E. Mann, of Dalton, for plaintiff in error. J. J. Bates, of Spring Place, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 254)

MIDDLEBROOKS et al. v. MIDDLEBROOKS et al. (No. 233.)

(Supreme Court of Georgia. Feb. 25, 1915.)

*(Syllabus by the Court.)*

DEMURRER TO PETITION.

There was no error in sustaining the demurrer to the petition in this case.

Error from Superior Court, Fayette County; Robt. T. Daniel, Judge.

Action by Tony Middlebrooks and others against L. L. Middlebrooks and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. F. Golightly, of Atlanta, and Lester C. Dickson, of Fayetteville, for plaintiffs in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 184)

PULLIN v. McGEE et al. (No. 203.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. BILLS AND NOTES ⟸489, 511 — JOINT NOTE—PLEADING AND PROOF.

Where to a suit brought against numerous defendants upon a joint promissory note a plea of non est factum was filed by all the defendants, it was competent for the defendant upon the trial, after having introduced testimony tending to support the plea of non est factum, to introduce other testimony to the effect that, while they had agreed in writing, pending the negotiations for the purchase of a horse, to give a joint note for a certain amount, as a matter of fact, they had individually given smaller notes equaling in their aggregate the amount which had been stipulated for in the written agreement just referred to. It was competent also to show further that certain receipts referred to in the evidence as certificates of stock (which, as a matter of fact, were not certificates of stock, because there was no corporation) had been given to them by the agent of the payees in the notes; and it was competent to introduce this evidence, although the plaintiff suing upon the joint note was a transferee, claiming to be such bona fide and for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1587–1642, 1760–1770; Dec. Dig. ⟸489, 511.]

2. EVIDENCE ⟸179—BEST AND SECONDARY—PAROL—WRITTEN INSTRUMENT.

The payee in the small notes, to the execution and delivery of which the several defendants testified, being a nonresident of the state, and the notes having been delivered, according to the testimony of the defendants, to an agent of the payee, the agent himself also being a nonresident of the state, there was a presumption that the notes were out of the state; and, as the payee was not a party to the suit, the production of the notes in court could not have been compelled by a notice to produce, nor could the nonresident payee be compelled by a subpœna duces tecum to produce the notes in court; therefore it was not error to admit parol evidence as to the contents of the notes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 595–599; Dec. Dig. ⟸179.]

3. NEW TRIAL ⟸108 — GROUNDS — NEWLY DISCOVERED EVIDENCE—HANDWRITING EXPERT.

The alleged newly discovered evidence consisting of the sworn statement of a handwriting expert to the genuineness of the signatures to the note sued on was not of such a character as to require the grant of a new trial upon motion of the plaintiff after verdict against him.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. ⟸108.]

4. INSTRUCTIONS AND VERDICT APPROVED.

There was no merit in the exception to the charge, and the evidence authorized the verdict.

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Action by P. W. Pullin against E. H. McGee and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. A. Perry, of Lawrenceville, and Brown & Brown, of McDonough, for plaintiff in error. I. L. Oakes and O. A. Nix, both of Lawrenceville, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 253)

BUTTS COUNTY v. WRIGHT. (No. 232.)

(Supreme Court of Georgia. Feb. 25, 1915.)

*(Syllabus by Editorial Staff.)*

1. COUNTIES ⟸171—CLAIMS AGAINST COUNTY—CONSTITUTIONAL PROVISION.

Notes given by county officers for payment of money borrowed are unenforceable, being debts created within the prohibition of the Constitution upon the creation of debts by municipalities, save upon compliance with certain constitutional requirements.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 260; Dec. Dig. ⟸171.]

2. COUNTIES ⟸200 — CLAIMS — PRESENTMENT FOR PAYMENT—STATUTE.

Where plaintiff lent money to defendant county, taking notes of county officials therefor, which were unenforceable against the county, under Civ. Code 1910, § 411, providing that all claims against counties, unless held by minors, must be presented within one year, he could not enforce his claim as one subrogated to the rights of a legitimate warrant holder against the county, paid with his lent funds.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 315; Dec. Dig. ⟸200.]

3. COUNTIES ⟸200—CLAIMS—PRESENTMENT FOR PAYMENT—STATUTE.

Where notes, unenforceable against the county, were given by its officials to plaintiff for money lent, which was used to discharge legitimate debts due holders of county warrants, and where plaintiff sought to recover such money on

the ground that it had been used to discharge such claims, so that he stood in the position of the warrant holders, the demand on the county for payment of the notes was not a demand for payment of his legitimate claim by subrogation, so as to comply with Civ. Code 1910, § 411, requiring presentment for payment of all claims against counties within one year; the statute contemplating presentment of a legal claim within the prescribed time.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 315; Dec. Dig. ⟹200.]

4. COUNTIES ⟹222—CLAIMS—PRESENTMENT FOR PAYMENT—PETITION—SUFFICIENCY.

In an action against a county for money lent by plaintiff in return for notes invalid under the Constitution, such fund having been used to pay legitimate creditors of the county, plaintiff endeavoring to establish a valid claim by setting up that he stands in the original position of such creditors by subrogation, unless the petition alleged that such a claim was valid, and that it was presented to the county for payment, under Civ. Code 1910, § 411, so requiring, within a year after the same became payable, it was demurrable.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 355-359; Dec. Dig. ⟹222.]

Error from Superior Court, Butts County; Robt. I. Daniel, Judge.

Action by B. A. Wright, administrator, against Butts County. Judgment for plaintiff, and defendant appeals. Reversed.

W. E. Watkins, of Jackson, for plaintiff in error. Jno. R. L. Smith, of Macon, for defendant in error.

BECK, J. [1] So far as the plaintiff sets up a case based upon notes given by county officers for money borrowed, the notes being given for the future payment of the sum borrowed, it states, of course, an unenforceable contract, as the borrowing of the money and the giving of notes for future payment was a creation of a debt falling within the inhibition contained in the Constitution against the creation of debts, except upon complying with certain prerequisites stated in the Constitution itself, none of which were complied with.

[2] And in so far as it seeks to recover money from the county on the ground that, though the officers may have been guilty of illegal action in borrowing the sum from him and giving notes for future payment, nevertheless it was used for specified legitimate current expenses of a given year, and was used to pay off county warrants duly issued for legitimate claims against the county, and therefore that the plaintiff stands in the place of those to whom the warrants were issued and should be permitted to assert his claim, the plaintiff stands in the position of one who, under the provisions of section 411 of the Civil Code, is the holder of a claim against the county which must be presented for payment "within twelve months after they accrue or become payable, or the same are barred, unless held by minors or other persons laboring under disabilities, who are allowed twelve months after the removal of such disabilities," as was held in substance in the case of Butts County v. Wright, 136 Ga. 697, 71 S. E. 1046.

[3] And while an attempt is made, by amendment to the suit as it stood before that ruling, to meet that decision by alleging that the claims of the plaintiff were presented for payment within 12 months, this fails to meet the ruling there made, which held that:

"In the case at bar it did not appear that the claim had been presented in accordance with the statute; and therefore, if it would otherwise have been legal, it was barred."

Taking the pleadings most strongly against the pleader, and construing the petition in its entirety, including the amendments, it is clearly inferable that the claims which the petitioner presented for payment were notes which could not be enforced and which were illegal promises to pay in the future, and it was not the presentation of valid claims made for the purpose of having them immediately paid. For it appears that the notes, illegal in the first instance, were renewed by the giving of notes which were themselves illegal promises to pay, while, as held in the decision quoted above, "the presentation required by the statute contemplates present legal action"; and there was no allegation of presentation of a claim based on equitable ownership or assignments of warrants constituting valid claims against the county, so as to make the presentation of the claims measure up to the requirement of the statute announced in the ruling by this court when the case was here before.

[4] And, in the absence of distinct averments of the presentation of valid claims against the county within the time prescribed by the statute, the petition was demurrable, and the court erred in holding otherwise.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 254)

## T. L. SMITH CO. v. W. E. AUSTIN CO.

(No. 235.)

(Supreme Court of Georgia. Feb. 25, 1915.)

*(Syllabus by the Court.)*

1. FRAUDULENT CONVEYANCES ⟹159—TRANSFER IN FRAUD OF CREDITORS—TRUSTEE EX MALEFICIO.

A partial report of the facts of this case is to be found in the case of Austin Co. v. Smith Co., 138 Ga. 651, 75 S. E. 1048, Ann. Cas. 1913E, 1042. As will be seen by reference to that case, the plaintiff in error, the defendant in error in the present case, which had filed a cross-petition, relied for its right to recover against the plaintiff, the Smith Company, upon a statement of facts which it insisted constituted a merger between the Smith Company, a Wisconsin corporation, and a certain other corporation known as the Contractors' Supply & Equipment Company, an Illinois corporation. Upon review in this court it was held that the facts stated did not constitute a merger, and the judgment in favor of the Austin Company was reversed. At the

last hearing in the court below the defendant tendered an amendment to its cross-petition, wherein it set up that the Smith Company had entered into a certain contract with the Contractors' Supply & Equipment Company, whereby the former took over substantially all of the assets of the latter company, even to the typewriters, office furniture and fixtures, and paid, not to the Contractors' Supply & Equipment Company, but to the stockholders in that company, certain sums of money which went to two of them and to the others stock in the Smith Company. Nothing was paid to the Supply & Equipment Company. That company had a valid subsisting contract with the Austin Company, the defendant in error here, under the terms of which the former was to pay to the latter a certain percentage of all sales made in a designated territory. T. L. Smith was president of the Smith Company and also of the Contractors' Supply & Equipment Company. The contracts of the Supply & Equipment Company with the Austin Company resulted in the creation of a debt from the former to the latter because of sales which had been made by the Austin Company of machines designated as the "Smith Mixers." With that debt in existence and known to the Smith Company—necessarily known because T. L. Smith was president of the Smith Company as well as of the Contractors' Supply & Equipment Company—the assets of the latter company were taken over. *Held*, for the Smith Company, knowing of the indebtedness of the Supply Company, to take over substantially all of the assets of that company, thereby rendering the last-named company practically insolvent, was, as a matter of law, a fraud as against the creditors of the Supply Company; at least, it made the Smith Company under the circumstances a trustee ex maleficio relatively to the creditors of the Supply Company, to the extent of the value of the assets taken over by the Smith Company, thereby rendering it liable to a creditor of the Supply Company for a debt existing at the time of the transfer.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 506–509, 511, 515, 516; Dec. Dig. ⟸159.]

2. AMENDMENT TO CROSS-PETITION—DEMURRER.

The court did not err in overruling the demurrer to the amendment to the cross-petition. This was not open to the objections taken in the demurrer; that it came too late; that it stated a new cause of action; that the relief sought in the amendment could not be granted without making the Contractors' Supply & Equipment Company a party to the case; and that it was without equity to support it. The amended cross-petition stated a cause of action entitling the defendant in error here to the relief sought upon the ground of the fraud charged, which had not been adjudicated in the former decision of this court adversely to the Austin Company.

3. TRIAL ⟸169—DIRECTION OF VERDICT—EVIDENCE.

There were no material errors committed in any of the rulings complained of as to the admission of evidence, and under the issues made in the pleadings and the evidence, a verdict for the defendant in error was demanded, and the court did not err in so directing, no complaint being made, as is recited in the bill of exceptions, as to the amount of the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 381–387, 389; Dec. Dig. ⟸169.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by T. L. Smith against the W. E. Austin Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Westmoreland Bros., of Atlanta, for plaintiff in error. Chas. T. & L. C. Hopkins, of Atlanta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur except FISH, C. J., absent, and LUMPKIN, J., disqualified.

(143 Ga. 256)

## HIGH SHOALS MFG. CO. v. PRICE et al. (No. 287.)

(Supreme Court of Georgia. Feb. 25, 1915.)

*(Syllabus by the Court.)*

ILLEGAL USE OF WATER.

No errors are shown to have been committed by the court of such a character as to require the grant of a new trial; the charges excepted to are in substantial accord with the rulings made in the case of Price v. High Shoals Mfg. Co., 132 Ga. 246, 64 S. E. 87, 22 L. R. A. (N. S.) 684, and the requests to charge are either faulty in themselves, or not in accord with the rulings made in the case referred to.

Lumpkin and Atkinson, JJ., dissenting.

Error from Superior Court, Walton County; C. H. Brand, Judge.

Action between the High Shoals Manufacturing Company and J. D. Price and others. From the judgment the Manufacturing Company brings error. Affirmed.

H. G. Nowell, of Monroe, S. H. Sibley, of Union Point, and F. C. Foster, of Madison, for plaintiff in error. Cobb & Erwin and Geo. C. Thomas, all of Athens, and R. L. Cox, of Monroe, for defendants in error.

BECK, J. Judgment affirmed.

EVANS, P. J., and HILL, J., concur. FISH, C. J., absent.

LUMPKIN and ATKINSON, JJ. (dissenting). We adhere to the opinion expressed by us in Price v. High Shoals Mfg. Co., supra. For the reasons there expressed we dissent.

(143 Ga. 189)

## WILSON v. SOUTHERN RY. CO. (No. 208.)

(Supreme Court of Georgia. Feb. 12, 1915.)

*(Syllabus by the Court.)*

CARRIERS ⟸380—EXPULSION OF PASSENGER—PETITION.

In a suit for damages against a carrier of passengers for a wrongful expulsion by defendant's agent of plaintiff, who was without a ticket on defendant's cars, where the petition fails to allege that the plaintiff tendered to the defendant's ticket collector the proper fare at the train rate in lieu of a ticket when the same was demanded of him, such petition set forth no cause of action, and the court did not err in sustaining a proper demurrer thereto.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1464–1466, 1469, 1470, 1472; Dec. Dig. ⟸380.]

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Action by N. F. Wilson against the Southern Railway Company. Judgment for defendant and plaintiff brings error. Affirmed.

The suit was for an alleged wrongful expulsion of the plaintiff by the defendant's agent from its car which he had entered as a passenger for transportation to a point over defendant's line of railway. A general demurrer to the petition was sustained, and the plaintiff excepted. The petition as amended set forth, in substance, the following facts: Plaintiff purchased from defendant's ticket agent at the Terminal Station at Atlanta, Ga., a ticket to Buford, Ga., a station situated on defendant's line of railway. After presenting his ticket to the defendant's baggage agent and checking to the same place his baggage, and after having been admitted by the gatekeeper at the Terminal Station to its train, and after the train had started for his destination, when defendant's ticket collector demanded of plaintiff his ticket he found that he had misplaced or lost the same, whereupon the ticket collector demanded of him "full train fare with excess or penalty of 15 cents added," which plaintiff refused to pay. The collector thereupon threatened to eject him from the train; and, "in order to avoid further unpleasantness, wrangle, and trouble, he tendered to said collector full fare at the ticket rate from Atlanta, Ga., where petitioner boarded said train, to his destination at Buford, Ga., which amount said collector refused to accept." When his ticket was demanded of him, the plaintiff exhibited to the collector his baggage check showing that it was on the same train with him, and offered to prove by fellow passengers the truth of his statement that he had bought a ticket and that he had checked his baggage, and that they had seen him with his ticket just before entering the train. This proof the ticket collector refused to consider, and ejected the plaintiff from the car at Norcross, an intervening station.

I. L. Oakes and N. L. Hutchins, both of Lawrenceville, for plaintiff in error. J. J. & Roy M. Strickland, of Athens, and Dobbs & Wisdom and D. M. Byrd, all of Lawrenceville, for defendant in error.

LUMPKIN, J. The fact that the plaintiff bought a ticket from the defendant's ticket agent before boarding its cars shows that he recognized the necessity of having a ticket in order to be transported to the place of his destination, and that he expected a ticket to be demanded of him by the ticket collector on defendant's train. The petition shows that, when plaintiff's ticket was demanded of him, he offered the collector, in lieu thereof, a stated rate. It is not alleged that this tendered rate was the proper tariff charged passengers without tickets for transportation between Atlanta and Buford. Nor is it anywhere alleged what is the legal rate between these points, or that the amount demanded was an improper amount to be required of one without a ticket. It only appears that the plaintiff tendered a stated rate to the collector, and that the collector refused it and demanded in turn a specified rate different from that tendered by plaintiff, plus a fixed sum additional. The mere fact that the collector demanded a larger amount which in the opinion of the plaintiff was, under the circumstances, unlawful and unjust, would not relieve him from paying or offering to pay the proper fare. Indeed, not until the plaintiff showed his willingness to pay the proper fare would he be in a position to refuse to pay an alleged wrongful amount demanded of him by the collector. And the good faith of the plaintiff as a passenger could not affect the right of the defendant, where it was without fault, to demand a sum of money as train fare different in amount from that which the plaintiff thought right and just under the circumstances. The misfortune of the plaintiff cannot be allowed to prejudice the rights of an innocent defendant. In the case of Georgia Southern, etc., R. Co. v. Asmore, 88 Ga. 529, 531, 15 S. E. 13, 14 (16 L. R. A. 53), Chief Justice Bleckley, in the opinion, said:

"If his [plaintiff's] failure to have it [ticket] was due to his own neglect, or to any cause not chargeable to the company, its agents or employés, the tender of the ticket rate had no relevancy whatever to the right of the plaintiff to be carried or to shun ejection from the cars. He might as well have tendered nothing as not enough."

From what we have said in consideration of this case, we are of opinion that a passenger who fails to comply with a recognized regulation of a carrier of passengers, it matters not what may be his excuse for his neglect, cannot force such carrier, who is without fault, to take him at an amount named by him in lieu of his omission, where the amount tendered does not appear to be the proper fare charged for transportation. For it to be otherwise would be allowing one to force upon another any compromise without regard to the rights of the other. 1 Fetter, Carriers of Passengers. The demurrer was properly sustained.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 229)

IVEY et al. v. HARRIS et al. (No. 223.)

(Supreme Court of Georgia. Feb. 20, 1915.)

*(Syllabus by the Court.)*

REVIEW ON APPEAL.

No error of law is complained of, and the evidence authorized the verdict.

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

Action between B. T. Ivey and others and W. L. Harris and others. From a judgment,

the parties first mentioned bring error. Affirmed.

Hawes Cloud, of Crawfordville, and E. P. Davis, of Warrenton, for plaintiffs in error. Saml. H. Sibley, of Union Point, for defendants in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 135)

MORRIS v. DEADWYLER. (No. 204.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. GRANT OF NEW TRIAL.
There were no errors in that portion of the court's charge excepted to, requiring the grant of a new trial.

2. APPEAL AND ERROR ⊂⊃1005 — VERDICT — EVIDENCE—APPROVAL BY COURT.
While the testimony as to many of the issues involved was vague, it cannot be said that the evidence as a whole, together with the deductions which the jury could legitimately make therefrom, did not authorize the verdict; and, this having received the approval of the trial judge, the judgment refusing a new trial will not be disturbed here.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. ⊂⊃1005.]

Error from Superior Court, Banks County; C. H. Brand, Judge.

Action between W. F. Morris and Mary Deadwyler. From the judgment, Morris brings error. Affirmed.

W. A. Charters and H. H. Perry, both of Gainesville, for plaintiff in error. A. J. Griffin, of Homer, and Cobb & Erwin, of Athens, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 257)

PENDERGRASS v. DUKE.
DUKE v. PENDERGRASS.
(No. 238.)

(Supreme Court of Georgia. Feb. 25, 1915.)

*(Syllabus by the Court.)*

1. NEW TRIAL ⊂⊃11 — EXTRAORDINARY MOTION—GROUNDS.
During the first week of Jackson superior court the case of Duke against Pendergrass, the same being an equitable petition for specific performance, was tried. While the jury was out considering the case, it having been submitted to them under the instructions of the court, the court took a recess until the following Monday morning, counsel having consented that the jury might return a sealed verdict. On the following Monday morning, the judge from another circuit came on the bench to preside during the second week, and, the jury having returned a sealed verdict, the same was received and published, and the losing party, the plaintiff in error in the present case, prepared a motion for a new trial, a rule nisi, and an order setting the case down for a hearing and allowing time for the completion of the motion and a brief of the evidence. This motion and rule nisi, and the other orders that were prepared, were presented to the judge presiding the second week for his signature. He declined to sign, on the ground that he had not tried the case, being of the opinion that the motion should be presented to the judge who tried the case, and the motion was accordingly presented by counsel to that judge. He granted the order, and set the case down for a hearing at chambers. When it came on for hearing, a motion to dismiss the motion for a new trial was made by the respondent in the motion. The court rendered judgment refusing to dismiss the motion, and upon review this court reversed the judgment, overruling the motion to dismiss the motion for a new trial, holding that the judge who granted the rule nisi and the other orders referred to was without jurisdiction to entertain the motion for a new trial. Subsequently, the time for making a motion for a new trial having expired, the plaintiff in error here made an extraordinary motion for a new trial, based upon the grounds stated above and upon the grounds of the former motion for a new trial. When the extraordinary motion came on for a hearing, the judge having jurisdiction of the case overruled the motion. *Held*, the court did not err in refusing to grant a new trial upon this extraordinary motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 14-16; Dec. Dig. ⊂⊃11.]

2. NEW TRIAL ⊂⊃11 — EXTRAORDINARY MOTION—GROUNDS.
The mistake of the judge, to whom the motion made in term time was presented, as to his want of jurisdiction to entertain the motion, is not ground for the grant of a new trial upon extraordinary motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 14-16; Dec. Dig. ⊂⊃11.]

3. DECISION.
The foregoing rulings necessarily resulting in an affirmance of the judgment of the court below on a main bill of exceptions, the cross-bill of exceptions will be dismissed.

Error from Superior Court, Jackson County; J. B. Jones, Judge.

Action by Mrs. M. J. Duke against F. L. Pendergrass. Judgment for plaintiff, and defendant brings error, and plaintiff files cross-bill of exceptions. Affirmed on main bill, and cross-bill dismissed.

P. Cooley and Ray & Ray, all of Jefferson, for plaintiff in error. Jno J. & Roy M. Strickland and T. J. Shackelford, all of Athens, and J. A. B. Mahaffey, of Jefferson, for defendant in error.

PER CURIAM. Judgment affirmed on the main bill of exceptions. Cross-bill of exceptions dismissed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 159)

McNATT v. CLARKE BROS. (No. 194.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⊂⊃1051—EVIDENCE ⊂⊃178, 183—HARMLESS ERROR—CERTIFIED COPY AS EVIDENCE.
A certified copy of the record of a mortgage, which has been duly executed and recorded in the office of the clerk of the superior court, is admissible in evidence on the trial of

a case where the same is relevant, on showing that the original mortgage has been lost or destroyed.

(a) But such loss or destruction cannot be established by a certificate of the clerk that he has searched the records of his court and can find no record of the foreclosure of such mortgage.

(b) If errors were committed by the court in admitting testimony relating to the loss or destruction of the mortgage and proving its existence by parol, these are inconsequential under the facts of this case, because the plaintiff admitted that the copy attached to the certificate was a correct copy of the mortgage which he had taken, that he caused it to be foreclosed and the timber covered by it to be levied upon and sold, and that the same was purchased by him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. ⟸ 1051; Evidence, Cent. Dig. §§ 580–594, 605–637; Dec. Dig. ⟸178, 183.]

2. SALES ⟸460, 472—ALTERATION OF INSTRUMENTS—BINDING EFFECT—CONDITIONAL BILLS OF SALE.

Conditional bills of sale are required by the statute to be in writing, in order to be effective against third persons. Parol alterations of the contract are not binding on third parties, and, in a suit by a vendor against a purchaser from his vendee, it is incompetent to show that the vendor and vendee orally changed their contract of conditional sale, and that the agent of the defendant knew of such change.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1348, 1366–1376; Dec. Dig. ⟸460, 472.]

3. SALES ⟸473—CONDITIONAL SALE—PURCHASER FROM BUYER — NOTICE — INSTRUCTIONS.

A purchaser of personal property which had been previously sold under a conditional contract of sale, properly executed and recorded, wherein the title is retained in the vendor until the purchase price is paid, is bound to inquire whether the purchase price of such property has been paid; otherwise, he purchases at his peril.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1377–1390; Dec. Dig. ⟸473.]

4. CONTRACTS ⟸246 — DEPARTURE FROM TERMS—NOTICE—NECESSITY—INSTRUCTION.

Where parties to a contract, during the course of its execution, depart from its terms and receive or pay money under such departure, reasonable notice must be given to either party who has so departed from its terms of the intention of the other to rely upon the exact terms of the agreement, before the other can recover for failure to pursue the letter of the contract. Until such notice, the departure is a quasi new agreement. The charge complained of was not adjusted to the above principle.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1131–1138; Dec. Dig. ⟸246.]

Error from Superior Court, McIntosh County; W. W. Sheppard, Judge.

Action by James McNatt against Clarke Brothers. Judgment for defendant, and plaintiff brings error. Reversed.

E. J. Giles, of Lyons, and Hines & Jordan, of Atlanta, for plaintiff in error. W. L. Clay, of Savannah, for defendant in error.

HILL, J. [1] 1. This is a trover case, brought by James McNatt against Clarke Bros., for the recovery of two rafts of timber, of the alleged value of $1,673.13. The plaintiff relies on the retention of title to the timber in himself by reason of a conditional contract of sale to certain timber on lands described in the contract executed on January 22, 1913, which was duly recorded, and in which it was provided that the parties of the second part, McBride & Peterson, in order to pay the purchase price, had the right to cut, haul, and sell "to a buyer who will make the check payable to the said James McNatt, who hereby agrees to return to the said parties of the second part one-half of the proceeds of said check, in order that the said parties may defray the expenses incurred by reason of preparing the said timber for market. It is further agreed by the parties to this contract that the said James McNatt reserves the title to the aforesaid sawmill timber and control and sale thereof until the purchase price aforesaid is paid." He insists that the purchase price has not been paid, and that prior to the purchase by Clarke Bros. they had actual notice through their agents that he claimed title to the timber and that the purchase price had not been paid. The defendants contend that, after McNatt took from McBride & Peterson a contract whereby McNatt retained in himself the title to the timber in question, E. T. McBride & Co. took a mortgage on the same timber to secure an indebtedness to that firm; and that McNatt, being a member of the firm of McBride & Co., by taking a mortgage to that firm on property to which he held a retention of title by contract, had renounced his rights under such contract, for the reason that a person cannot take a mortgage on his own property. In support of this contention, they offered evidence to show that the mortgage could not be found, and also certain parol testimony as to these facts. Some of this evidence was inadmissible; for instance, that of the certificate of the clerk of court which recited that the mortgage foreclosure could not be found in his office. Daniel v. Braswell, 113 Ga. 372, 38 S. E. 829. Whatever errors may have been committed by the court in receiving testimony relating to its loss or destruction and proving the mortgage by parol are inconsequential under the facts of this case, because the plaintiff admitted that the copy attached to the certificate was a correct copy of the mortgage which he had taken, that he had caused the mortgage to be foreclosed, and the timber to be levied upon and sold, and that the same was purchased by him. The purpose of the defendants being to show that the plaintiff had subsequently relinquished his rights under the contract of sale and acquired a new and distinct title by virtue of his purchase at foreclosure sale, as to which title the rights of the defendant are claimed to be superior, they would be called upon to prove facts constituting such relinquishment in the ordinary way; but, when the party admits the facts

relied upon as being such proof, it would be unnecessary to produce testimony additional to his admission. None of the evidence relied upon by the defendants to establish such relinquishment raised the proposition that these facts amounted in law to such a renunciation or relinquishment. Some of the objections are that the method of proof was improper for the reasons assigned.

The jury returned a verdict for the defendants. The plaintiff made a motion for a new trial on numerous grounds, which was overruled and he excepted. We will not undertake to discuss each ground separately, as it would prolong this opinion unduly; but we will consider only such grounds of the motion as we think are controlling. The case has been here before. Clarke v. McNatt, 132 Ga. 610, 64 S. E. 795, 26 L. R. A. (N. S.) 585. Some, indeed most, of the questions raised by the present record were settled by the decision in the decision just cited; and the question now is largely whether the case was retried in accordance with the rulings there made. In at least one particular which we think is controlling, the trial judge misconceived the ruling there made; and this error will be pointed out later.

[2] 2. Complaint is made because the court refused to permit the plaintiff and certain witnesses, while on the stand, to testify in behalf of the plaintiff as to the conversations had with the defendants, or their agents, as to certain changes which had been made orally in the terms of the conditional bill of sale by the vendor and vendee subsequently to its execution. We will not consider these assignments further than to say that this identical question was decided when the case was formerly before this court. It was there expressly held that such a contract could not be varied by a subsequent parol agreement between the original vendor and vendee, so as to affect third parties.

[3] 3. The court instructed the jury as follows:

"The law recognizes that when a conditional bill of sale or deed to timber, or retention of title to timber or any other property, is retained in the vendor, when the paper conveying the title is of record, that carries notice of the retention of title. Now that is true, gentlemen, and Clarke Bros., or any one else, the public generally, would be bound by such notice as to the retention of title; but Clarke Bros. or no one else would be bound to take notice of the fact that the purchase money had not been paid. In other words, they are not charged with notice under that bill of sale that the purchase money for the timber conveyed in the bill of sale had not been paid."

The plaintiff in error excepts to that portion of the charge contained in the last sentence. We think the charge is open to the criticism made on it. A purchaser of property which has been sold under a conditional contract of sale, duly executed and recorded, where the title has been retained by the seller, is bound to inquire whether the purchase money has been paid or not, where he has actual notice of the retention of title by the seller. This charge is not in accordance with the decision rendered when the case was previously before this court. The whole purpose of recording an instrument where the title is retained is to put the world on notice that the purchase money is not paid; and it is therefore error to instruct the jury that a purchaser of personal property, under such circumstances, is not charged with notice, under such bill of sale, that the purchase price of the property has not been paid. Such a charge is erroneous and calculated to mislead the jury. See Clarke v. McNatt, supra. It is not a question of tracing the money and seeing that it is paid or invested in a certain manner, as in the cases cited by Judge Lumpkin in the Clarke case, supra; but it is a question of whether the purchase price for the timber has been paid at all. Surely it cannot be said, where a conditional bill of sale to timber, with power of sale, has been taken and recorded by the vendor, with a retention of title until the purchase money has been paid, that a purchaser of the timber is not chargeable with notice that the timber has not been paid for, and that he is not put upon inquiry to ascertain that fact. The court below had a misconception of the decision in the Clarke Case, supra. There it was held that where the purchase price was paid by Clarke Bros. to the vendees, McBride & Peterson, exercising a power of sale conferred by the vendor himself, it was not necessary to trace the money into the hands of the vendor who had created such power of sale.

[4] 4. The contract for the sale of the timber provided that McBride & Peterson could cut, saw, and haul the timber and have the checks given in payment made payable to McNatt, who would in turn pay half of the money to McBride & Peterson in order to defray the expenses of manufacturing the timber into lumber; but there is evidence tending to show that McNatt knew that the checks were not so made out and paid, but, on the contrary, that several of the checks were made payable to McBride & Peterson, and that these checks were accepted and indorsed by McNatt, or by McBride & Co., of which McNatt was a member, for the lumber so sold. The following charge of the court, with reference to this feature of the case, was inaccurate and calculated to mislead the jury:

"If McNatt disregarded the terms of that contract in any of his actions, why he would be bound by that disregard, and the other party would have the same right to disregard the terms of that contract, if McNatt himself did not live up to the requirements of that contract."

The rule is that were the parties to a contract, during the course of its execution, to depart from its terms and receive or pay money under such departure, reasonable notice must be given to either party who has so departed from its terms of the intention of the other party to rely upon the exact terms

of the agreement, before the other can recover for failure to pursue the letter of the contract. Until such notice, the departure is a quasi new agreement. Civil Code, § 4227; Kennesaw Guano Co. v. Miles & Co., 132 Ga. 763, 64 S. E. 1087.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 236)

WALLACE v. MATTHEWSON. (No. 227.)

(Supreme Court of Georgia. Feb. 22, 1915.)

*(Syllabus by the Court.)*

1. EXPLOSIVES ⇐8 — INJURIES TO CHILD — NEGLIGENT KEEPING—PETITION.

In an action for damages, the petition, as amended, alleged the following in substance: The defendant, being owner of a tract of land in a designated city, caused it to be subdivided, and a street to be excavated and opened to the public, so as to afford ingress and egress to a described lot. The property was advertised for sale, and the public generally was invited upon the premises for the purpose of inspection. The property was uninclosed and vacant, and used by children in the neighborhood as a playground, and had been continuously so used as long as one year without objection from the owner. Near the street, and in such position as to attract the attention of children playing on or near the premises or along the street, "the defendant, through her agents and servants, caused a box of dynamite caps to be left upon the" described lot, the same being dangerous explosives. The box was practically open, and left in such manner as to invite children to look into it and play with its contents. The defendant knew, or ought to have known by the exercise of ordinary care, that the box was so placed and would attract the attention of children who, carrying out their childish instincts, would handle and play with the contents. The plaintiff was a child about nine years of age. On account of his youth and inexperience, he did not know or understand the dangerous character of the contents of the box, and on a stated day, while playing with his playmates, went upon the property, discovered the box, and picked from it some of the caps and began to play with them, and, believing them not to be dangerous to handle, "began to hammer one" of them. While in his hand the cap exploded with great violence, causing injury, and requiring the amputation of several of his fingers. Other allegations were that the defendant was negligent in the following particulars: (a) Through her agents and employés, in leaving the box of dynamite caps upon the premises, when, through her agents and employés, she was inviting the inspection of the premises generally. (b) In not keeping the premises in a safe manner and in a condition suited for the purpose for which they were thrown open to the public. (c) In failing to securely box the dangerous explosives, and in leaving them at a place on the premises where children, by implied consent of the defendant, were accustomed to be; the defendant knowing, by the use of ordinary care, that children were likely to handle and play with the contents of the box. *Held*, that it was erroneous to dismiss the petition on general demurrer. Mills v. Central Ry. Co., 140 Ga. 181, 78 S. E. 816, Ann. Cas. 1914C, 1098; Powers v. Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154; Mattson v. Minn., etc., R. Co., 95 Minn. 477, 104 N. W. 443, 70 L. R. A. 503, and notes, 111 Am. St. Rep. 483, 5 Ann. Cas. 498, and notes; Akin v. Bradley Engineering & Machinery Co., 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586, and notes; Juntti v. Oliver Iron Mining Co., 119 Minn. 518, 138 N. W. 673, 42 L. R. A. (N. S.) 840, and notes; Sandeen v. Tschider, 205 Fed. 252, 123 C. C. A. 456; Little v. James McCord Co. (Tex. Civ. App.) 151 S. W. 835 (2).

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 4, 5; Dec. Dig. ⇐8.]

2. SPECIAL DEMURRER.

The grounds of special demurrer were not ruled upon by the trial court.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Loy Wallace, by next friend, against Mrs. A. C. H. Matthewson. Judgment for defendant, and plaintiff brings error. Reversed.

R. B. Blackburn and Colquitt & Conyers, all of Atlanta, for plaintiff in error. Robt. C. & Philip H. Alston, of Atlanta, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 237)

WALLACE v. MATTHEWSON. (No. 228.)

(Supreme Court of Georgia. Feb. 22, 1915.)

*(Syllabus by the Court.)*

LOSS OF SERVICES—INJURY TO SON.

This was an action by a father for loss of services of his son, on account of injury alleged to have been caused by negligence of the defendant. The injury was the same as that involved in the case of Wallace v. Matthewson, 84 S. E. 450. The decision in that case is controlling in this.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by R. M. Wallace against Mrs. A. C. H. Matthewson. Judgment for defendant, and plaintiff brings error. Reversed.

R. B. Blackburn and Colquitt & Conyers, all of Atlanta, for plaintiff in error. Robt. C. & Philip H. Alston, of Atlanta, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 309)

WOODS v. MAYS et al. (No. 213.)

(Supreme Court of Georgia. Feb. 20, 1915.)

*(Syllabus by the Court.)*

1. TRIAL ⇐39—INTRODUCTION OF DOCUMENTARY EVIDENCE—CERTIFICATE OF PROTEST.

When considered in connection with the evidence of the notary public who issued a certificate of protest on the paper sued on, the certificate not having been filed in court and permitted to remain there as provided in Civ. Code 1910, § 5822, it was not error to reject the certificate from evidence when offered by the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 92–98; Dec. Dig. ⇐39.]

2. REFUSAL OF INSTRUCTIONS.

The grounds of the motion for new trial which complained of the omission to charge without request, when considered in connection with the pleadings and the evidence and the charge as given, show no error requiring the grant of a new trial.

3. ACTION ON NOTE.

All other questions raised in this case are controlled by the rulings in the cases of Fidelity Trust Co. v. Mays, 142 Ga. 821, 83 S. E. 961, and Park v. Mays, 143 Ga. —, 84 S. E. 426.

Error from Superior Court, Butts County; Robt. T. Daniel, Judge.

Action between W. S. Woods and S. H. Mays and others. From the judgment, Woods brings error. Affirmed.

W. E. Watkins, of Jackson, for plaintiff in error. John R. L. Smith, of Macon, for defendants in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 205)

MANNING et al. v. SAMS. (No. 211.)

(Supreme Court of Georgia. Feb. 20, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⟸1078—ASSIGNMENT OF ERROR—ABANDONMENT.

Error was assigned upon a judgment overruling the plaintiffs' demurrer to certain portions of the defendant's answer. This assignment of error was not argued or referred to in the brief of counsel for plaintiff in error, and, under repeated rulings of this court, will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. ⟸1078.]

2. SPECIFIC PERFORMANCE ⟸114 — VENDOR AND PURCHASER ⟸79, 81—PETITION—SALE "SUBJECT TO APPROVAL OF TITLES"—CONSTRUCTION OF CONTRACT—REASONABLE TIME.

In an equitable action by the purchaser against the seller for specific performance of a contract for the sale of land, the petition declared upon the following contract: "Subject to approval of titles, W. A. Sams agrees to sell to H. S. and T. L. Manning, and they agree to buy from him [then follows a description of the property] at and for the sum of eleven thousand three hundred dollars, the same to be paid in cash when the titles are approved and made to the purchasers. The vendor agrees to transfer with said property without further consideration any unexpired insurance on said property. Said property is to be conveyed free from all liens and incumbrances. The right of possession subject to occupancy of present tenants at time the purchase money is paid and title conveyed. Signed in duplicate on this 4th day of January, 1913. W. A. Sams. H. S. Manning. T. L. Manning." It was also alleged that plaintiffs had stood ready to complete their part of the contract, and on the 10th day of June, 1913, and at various times before and after that date, had made a tender of the purchase price and requested that the defendant execute title to them in terms of the contract, that the tender was continuous, and that the defendant refused to perform his part of the contract. *Held*, that the words "subject to approval of titles," when construed in connection with the entire contract, mean that the purchaser would inquire into the title of the seller and that, if they approved his title, they would carry out the contract of sale. Middleton v. Findla, 25 Cal. 76. Under such circumstances, the sale was inchoate, but would become binding upon the seller if the purchasers should, within a reasonable time (there being no specified time appointed in the contract), approve the title. 1 Warville on Vendors (2d Ed.) § 330; 2 Warville on Vendors, § 739. See, also, Northington-Munger-Pratt Co. v. Farmers' Gin, etc., Co., 119 Ga. 851, 47 S. E. 200, 100 Am. St. Rep. 210.

(a) It cannot be said as a matter of law that the time intervening between the date of the contract and the date of the alleged tender was an unreasonable time for approval of the title.

(b) The allegations that plaintiffs tendered the purchase price and demanded a conveyance of title in terms of the contract was the equivalent of an allegation of approval of the title by the purchasers, and the petition was not subject to demurrer on the ground that it did not more specifically allege that plaintiffs approved the title.

(c) The case differs from that of Adams v. Bridges, 141 Ga. 418, 81 S. E. 208, where the contract bound the seller to sell and the vendee to buy and make payment within a specified time on condition that the titles were clear, and in which there was no tender or payment until after the time had expired.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–370, 372; Dec. Dig. ⟸114; Vendor and Purchaser, Cent. Dig. §§ 7, 8, 127–131, 136, 137; Dec. Dig. ⟸79, 81.]

Error from Superior Court, Cobb County; H. L. Patterson, Judge.

Action by H. S. Manning and others against W. A. Sams. Judgment for defendant, and plaintiffs bring error. Reversed.

Gober & Jackson, of Atlanta, for plaintiffs in error. D. W. Blair, of Marietta, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 206)

LOUISVILLE & N. R. CO. v. HUGHES. (No. 212.)

(Supreme Court of Georgia. Feb. 20, 1915.)

*(Syllabus by the Court.)*

1. TRIAL ⟸252—INSTRUCTIONS—EVIDENCE—INJURY TO LAND — NEGLIGENCE OF INDEPENDENT CONTRACTOR — LIABILITY OF EMPLOYER.

It appears from a reading of the petition in this case (which was brought for the recovery of damages for injury to lands of the plaintiff, caused by throwing rock and other débris thereon while making excavations for a roadbed and for the diversion of waters from their channel and their natural course of flowage upon the lands of the plaintiff) that the suit was based upon alleged tortious acts of the defendant and of employés and agents for whose acts of negligence the defendant was directly responsible and liable. But under the evidence which was introduced upon the trial, and to the introduction of which no objection was offered, it appeared that the alleged tortious acts from which the injuries complained of flowed were committed, in large part, by an independent contractor, as was ruled in L. & N. R. Co. v. Hughes, 134 Ga. 75, 67 S. E. 542, when this case was here before for review. In the decision in that

case, in view of the fact that the same was remanded for another hearing, this court stated all of the instances in which the employer is liable for the negligence of the contractor, as they are stated in Civ. Code 1910, § 4415, without intending to hold that all of these provisions as contained in the code section should be given in charge to the jury, regardless of the developments of the case under the evidence at the new hearing; and the trial court should not have given in charge to the jury such of the provisions of that section as were not applicable to the case under the evidence.

(a) There was no evidence to show that the work which the independent contractor was to do in the present case was wrongful in itself, or, if done in the ordinary manner, would result in a nuisance.

(b) Nor that any one of the alleged wrongful acts of the contractor was in any way the violation of a duty imposed by express contract upon the employer, or a violation of a duty imposed by a statute.

(c) Paragraph 5 of section 4415 was clearly inapplicable, under the ruling made when the case was previously before this court.

(d) However, paragraph 2 of section 4415, stating the second instance in which the employer is liable for the negligence of the contractor, was involved, as it was a matter proper to be submitted to the jury whether, as a question of fact, "according to previous knowledge and experience, the work to be done is in its nature dangerous to others, however carefully performed," and the court did not err in charging that provision of law, so that the jury might apply it to the evidence in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. ⟸252.]

2. Master and Servant ⟸315, 324—Independent Contractor — Negligence — Instructions—Nuisance—Liability of Employer.

It is provided in paragraph 6 of section 4415 of the Civil Code that "if the employer ratifies the unauthorized wrong of the independent contractor," he is liable for the negligence of the contractor. But the application of this principle should, by appropriate instructions, have been limited to the injuries caused by interference with the flowage of water, so as to cause it to pond upon the plaintiff's land, or to seep into it in such a way as to diminish its value. For if the defendant accepted the work so constructed by the independent contractor as to amount to a nuisance, the defendant became at once responsible for the existence of the nuisance, under a rule very similar to that which makes a principal responsible for unauthorized wrongs committed by his agent by ratifying them. 1 Thompson on Negligence, § 664.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1241, 1244–1253, 1255, 1256, 1265; Dec. Dig. ⟸315, 324.]

3. Master and Servant ⟸332 — Injuries to Land — Instructions — Negligence of Independent Contractor.

The court's instructions as contained in several of the excerpts from the charge complained of, as to the measure of damages, both for the casting of rocks in the process of blasting and for the diversion of water from the natural and proper channel through which it had been accustomed to flow, was open to the criticism that it allowed a recovery of damages against the defendant for alleged tortious acts in the respects referred to, which might have been the result solely of the negligence of the independent contractor, and which were not chargeable to the defendant in the present case because of any tortious act of the defendant itself, or any of its employés for whose negligence it was directly responsible, and for which the defendant was not responsible, because they fell within the category of those acts of the independent contractor for which the employer is not liable. The court, in stating the rule for the measure of damages, should have more clearly required the jury to segregate the damages for which the defendant was responsible from those with which it was not chargeable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274–1277; Dec. Dig. ⟸332.]

4. Negligence ⟸54—Persons Liable—Injuries to Land—Instructions.

Under the ruling made in this case when formerly here, the court did not err in charging as follows: "If the grantee was guilty of any tort or violation of duty after the conveyance, causing injury, it would be liable for such damages as were shown to be caused by its breach of duty or tortious conduct, but not because of its agreement with the grantor on the theory of merger." But, as pointed out in the preceding headnote, in certain portions of the charge where a specific application of this principle is made, the court did not, with sufficient clearness, instruct the jury as to distinguishing between those items of damages for which the defendant is responsible and the damages caused by the tortious acts of the independent contractor for which the employer was not chargeable.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 66, 67; Dec. Dig. ⟸54.]

5. Damages ⟸217—Trial ⟸242—Measure—Instructions—Injuries to Land.

Complaint is made of the following charge of the court: "But if you find that the plaintiff could have removed those rocks on the surface, and those under the surface did damage the land, then he would be entitled to recover whatever it would have cost to remove the rocks on the surface, if not more than the value of the land, and in addition thereto whatever damages may have accrued to the land by reason of those being under the surface, the same being the difference between the value of the land without the rocks and its value with the rocks on the land." As to the measure of damages to land claimed to have arisen from the blasting, it was error to confuse and mingle two distinct rules so as to have the damages arising from the same act to the same land measurable in part in one way and in part in another way. If there were an injury arising from blasting in the construction of a railroad's right of way by an independent contractor, and if the railroad sued was liable therefor, and there was evidence tending to show that the rock cast upon the land could be removed at a reasonable cost less than the value of the land, the first rule laid down in the excerpt from the charge just quoted might apply; that is, the measure of damages would be the reasonable cost of removal of the surface rock which fell upon the land. If there was no actual removal of the rock by the landowner, and some of the rock was imbedded in the ground and some upon the surface, so as to make a permanent injury to the freehold, the two should not be so divided as to make one measure as to the surface rocks and another measure as to those which were under the surface, but the whole should be considered in determining whether the market value of the land was diminished, and to what extent.

(a) If some part of the land was injured, not by blasting, but by the diversion of water, so as to run upon it and lessen its value, this would fall within the rule laid down in Athens Mfg. Co. v. Rucker, 80 Ga. 291, 4 S. E. 885. But in any event, if there was more than one element of damage to the land, in charging as to the measure of damages the jury should be instruct-

ed that in no event could the damages to be recovered exceed the value of the land.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 556–559; Dec. Dig. ⊂⊃217; Trial, Cent. Dig. §§ 569–576; Dec. Dig. ⊂⊃242.]

6. WATERS AND WATER COURSES ⊂⊃178 — FLOWAGE — INJURY TO LAND — PERMANENT CONDITION.

Complaint is made that the court, after instructing the jury that, if the plaintiff could have lessened the damages by draining the water off his land, he would be entitled to such amount for damages as it would have cost him to dig ditches to carry the water away, if not more than the value of the land, erred in immediately adding to such charge the following instructions: "If you find he could not have done so without going upon the lands of the defendant company, then he would not be required to do that, and would be entitled to such damage as was caused by the water standing upon his land, if any, whether it was a temporary or permanent injury, the damage being the difference between the value of the land without the water and with the water on it." While the expression of the court may not have been exact in referring to the water on it and the water off of it, yet if water be wrongfully diverted so as to cause flowage upon the land of another, although some of the overflow may have been temporary, yet the permanent condition thus created, causing permanent or recurrent overflow, would be considered, and the question whether such tort diminished the market value of the land would be determined.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 251–255; Dec. Dig. ⊂⊃178.]

7. WATERS AND WATER COURSES ⊂⊃179 — FLOWAGE—MEASURE OF DAMAGES—INSTRUCTIONS—RENT.

It was inaccurate, in charging the jury in regard to the measure of damages and the form of their verdict, to refer to permanent damages, temporary damages, and rent, as if there were three distinct subjects, and as if rent were something separate and distinct from temporary damages.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 244–250, 256–259, 263, 264; Dec. Dig. ⊂⊃179.]

8. APPEAL AND ERROR ⊂⊃301—PRESENTATION BELOW—MOTION FOR NEW TRIAL—ADMISSION OF EVIDENCE.

Complaint is made that the court erred in admitting certain documentary evidence. But this evidence is not set forth literally or in substance in the ground of the motion, nor is it attached thereto as an exhibit; and this exception falls within the rule that has many times been announced by this court, to wit, that a ground of a motion for a new trial, complaining of the admission of documentary evidence, will not be considered, unless the evidence objected to is set forth, either literally or in substance, in the motion itself, or attached thereto as an exhibit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753–1755; Dec. Dig. ⊂⊃301.]

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action by D. W. Hughes against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

John L. Tye, of Atlanta, D. W. Blair, of Marietta, and Neel & Neel, of Cartersville, for plaintiff in error. J. G. B. Erwin, Jr., of Calhoun, and Thos. W. Milner & Son, of Cartersville, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 170)

## HUTCHINSON SHOE CO. v. ELKO MERCANTILE CO. et al. (No. 197.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. EVIDENCE ⊂⊃340—ADMISSION—BANKRUPTCY—MEMBERS OF PARTNERSHIP.

On the trial of an issue in the superior court as to whether two of four defendants were members of a mercantile firm doing business under a certain firm name, it was not error to admit in evidence a certified copy of an involuntary petition in bankruptcy filed in the United States District Court and the order of the referee therein adjudicating the mercantile company bankrupts, in which petition and order of adjudication it was alleged that the firm was composed of two named members (other than those denying in the present suit that they were partners) and proof of the debt now sued on by the plaintiffs, in which their affidavit of proof alleged that the mercantile firm was composed of the two partners admitting themselves to be such.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1294–1301; Dec. Dig. ⊂⊃340.]

2. PARTNERSHIP ⊂⊃218 — INSTRUCTIONS — SALES.

Where, in such a case, the sole issue was whether two of the four defendants sued were partners of the others, relatively to the plaintiffs, it was not error for the court to instruct the jury that the question in the case was "partnership or no partnership," and whether the defendants were members of the firm sued at the time the goods were bought or were not.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 49, 426–428; Dec. Dig. ⊂⊃218.]

3. TRIAL ⊂⊃241—INSTRUCTIONS—LANGUAGE OF STATUTE.

In instructing the jury as to what constitutes a partnership relatively to third persons, it is not error to instruct them in language which substantially followed the definition contained in Civ. Code 1910, § 3158.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 562, 563; Dec. Dig. ⊂⊃241.]

4. ASSIGNMENTS OF ERROR—REFUSAL OF NEW TRIAL.

The remaining assignments of error complain of the giving of certain charges by the court to the jury, and are without merit. The court did not err in refusing a new trial.

Error from Superior Court, Houston County; H. A. Mathews, Judge.

Action by the Hutchinson Shoe Company against the Elko Mercantile Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

F. Chambers & Son, of Macon, H. E. Coates, of Hawkinsville, and Payne & Jones, of Atlanta, for plaintiff in error. John P. Ross and Wallace Miller, both of Macon, and A. C. Riley, of Ft. Valley, for defendants in error.

HILL, J. The Hutchinson Shoe Company brought suit against the Elko Mercantile

Company, alleging that it was a partnership composed of E. B. Davis, A. C. Pate, Jr., L. L. Henderson, and E. P. Kezar, and that the defendants were indebted to the plaintiffs a stated sum on two promissory notes and on an account, besides interest and attorneys' fees due on the notes, which sums the defendants refused to pay. Two of the defendants, L. L. Henderson and E. P. Kezar, separately defended on the grounds that they were not members of the partnership doing business under the name of the Elko Mercantile Company, and never had been, and that the notes sued on were never executed by them, nor by any one authorized by them; that the Elko Mercantile Company was a partnership composed of E. B. Davis, and A. C. Pate, Jr., and they, as individuals, were, on the 24th day of October, 1910, adjudicated bankrupts in the District Court of the United States for the Southern District of Georgia, on a petition filed by certain creditors of the partnership, in which petition it was alleged that the Elko Mercantile Company was a partnership composed of E. B. Davis and A. C. Pate, Jr.; that the Hutchinson Shoe Company, plaintiff in the instant case, with full knowledge of the bankruptcy proceedings, and of the fact that the Elko Mercantile Company, as a firm composed of Davis and Pate, Jr., had been adjudicated bankrupts therein, filed its proof of debt in the bankruptcy proceedings, and collected and received from the trustees of the bankrupts a dividend on its debt; that in its proof of debt so filed the plaintiff averred that it was a creditor of the Elko Mercantile Company, a partnership composed of E. B. Davis and A. C. Pate, Jr., who had been adjudicated bankrupts in the bankruptcy proceedings; and that the debt proved by the plaintiff in these proceedings is the identical debt on which suit in the instant case is predicated. Wherefore it was averred that the plaintiff was estopped from denying that the Elko Mercantile Company was a partnership composed of E. B. Davis and A. C. Pate, Jr., and was bound by its declaration on oath to the effect that the defendants Henderson and Kezar are not members of the Elko Mercantile Company, on which declaration the plaintiffs received a dividend from the estate of the bankrupt. Henderson defended on the further ground that at the time of the existence of the alleged partnership, and at the time the debt sued on is alleged to have been contracted, he was a minor, and that he never entered into any contract or partnership as alleged in the declaration, or contracted the debt sued on; and, if he ever entered into such contract, which he denies, he is not bound by it because of his minority. The jury returned a verdict in favor of the defendants. A motion for a new trial having been overruled, the plaintiff excepted.

[1] 1. On the trial of the case a certified copy of an involuntary petition in bankruptcy filed against the Elko Mercantile Company in the District Court of the United States for the Southern District of Georgia, and the order thereon of the referee adjudicating the Elko Mercantile Company bankrupts, in which petition and order of adjudication it was alleged that the firm was composed of E. B. Davis and A. C. Pate, Jr., and proof of the debt now sued on by the Hutchinson Shoe Company, in which affidavit of proof it was alleged that the firm so adjudicated bankrupts was composed of E. B. Davis and A. C. Pate, Jr., the affidavit following the petition and order of adjudication, were admitted in evidence over the objection of the plaintiff. This evidence was objected to on the ground that it was irrelevant and did not illustrate or throw any light on the case, and because the proof of claim was made for the benefit of the defendants, the dividend received going as a credit on the claim, thereby inuring to the benefit of the defendants. This evidence was not inadmissible for any of the reasons assigned. On the contrary, we think the evidence was admissible as a quasi or informal admission, though subject to explanation or rebuttal. Statements made in an affidavit by a party to a case in court are competent as such admissions, and will be received in another cause where the party against whom the admission is offered is a party. 2 Cham. Mod. L. Ev. § 1272; 2 Wig. Ev. § 1058.

[2] 2. The court charged the jury as follows:

"As I stated, gentlemen of the jury, the question in this case is partnership or no partnership. Were these defendants members of the firm at the time the goods were bought, or were they not? That is the question that you are to pass upon."

The criticism on this charge is that it restricted the inquiry by the jury too narrowly and precluded a consideration of the theory that the defendants were holding out to the world and creditors that the defendants would incorporate and do business in the corporate name, and prior to incorporation had rendered themselves liable to creditors as partners. This contention is without merit. The charge correctly and clearly stated the issue. The evidence for the defendants tended to show that they had run notices in the papers in April, before this contract was executed in July, declaring that they were not partners, and that there was no incorporation. This was the sole issue, and the trial judge clearly stated it.

[3] 3. It was not error on the trial for the court to charge the jury:

"You are familiar with what is known ordinarily as a partnership mercantile business, and it is not necessary that I should go into details as to that. It is necessary, however, that all the partners should have a common interest in the profits and losses, joint interest in the profits and losses, or a joint interest in the capital stock."

This charge is substantially in the language of Civil Code, § 3158, defining what a

partnership is, relatively to third persons, and is not subject to the criticism that it does not correctly state what constitutes a partnership as to third persons. For an elaborate discussion of what constitutes a partnership, see the opinion of Mr. Justice Lumpkin in the case of Floyd v. Kicklighter, 139 Ga. 133–135, 76 S. E. 1011.

[4] 4. The other assignments of error, complaining of certain instructions given the jury by the court, are without substantial merit, and the court did not err in refusing a new trial.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 210)

## ARIPEKA SAWMILLS v. GEORGIA SUPPLY CO. (No. 215.)

(Supreme Court of Georgia. Feb. 20, 1915.)

*(Syllabus by the Court.)*

1. EVIDENCE ⟸318—HEARSAY—LETTER.

It appearing from the record in this case that the defendant company, operating a sawmill, entered into a contract with the plaintiff for the furnishing of certain materials and labor, and for the construction and installation of a certain mechanical appliance or appliances constituting a system for the transmission of power known as the American rope drive system, which was subsequently changed to a system known as the English rope drive system, by agreement of the parties to this case, and a certain company engaged in the manufacture of the materials which went into the rope drive system referred to, which latter company also furnished skilled labor for the installation of the system, the plaintiff in the case at bar being the sales agent of the manufacturing company referred to, *held* it was error for the court to admit in evidence a letter from a salesman of the plaintiff, written to the manufacturing company, which would tend to prove that the defendant had decided to buy the rope drive system, which was actually installed upon the advice and representations of a person not connected with the manufacturing company or the plaintiff company, and that in making the purchase the defendant's agent relied upon the representations of this other person, rather than upon a warranty of the vendor. This letter was open to the objection that it was hearsay, and the defendant could not have been bound by any representations made in it.

(a) This ruling is applicable to other written communications from the salesman of the plaintiff to the manufacturing company, which were duly objected to, and the contents of which do not appear to have been disclosed to the defendant or its agent before the execution of the contract of purchase.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193–1200; Dec. Dig. ⟸318.]

2. EVIDENCE ⟸318—HEARSAY EVIDENCE—ADMISSIBILITY.

In was error to admit a letter, apparently written after the execution of the contract for the purchase of the system of power transmission, from the manufacturing company to the salesman of the plaintiff, in which the manufacturing company called attention to certain defects in the system actually ordered and the advantages of another system, the purchase of which was strongly recommended. If this letter was actually shown to the purchasing agent of the defendant before the execution of the contract of purchase, that can be made to appear upon the next trial; or, if the evidence as to whether it was exhibited to the agent of the defendant is conflicting, that can be left to the jury with appropriate instructions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193–1200; Dec. Dig. ⟸318.]

3. TRIAL ⟸191—INSTRUCTIONS—ASSUMPTION OF FACT.

Charges of the court which assumed that the contents of the letter last referred to were known to the defendant company or its agents before the execution of the contract of purchase should not have been given without also instructing the jury that the legal principles contained in the charges referred to were applicable only in case the contents of the letter last referred to were known to the defendant or its agents before entering into the contract of purchase.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420–431, 435; Dec. Dig. ⟸191.]

4. EVIDENCE ⟸271—SELF-SERVING DECLARATION—SALES.

A telegram from the manufacturing company to the defendant stating that the sender of the telegram had cautioned the defendant about certain defects in the system as installed should have been excluded on the ground that it was a mere self-serving declaration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068–1079, 1081–1104; Dec. Dig. ⟸271.]

5. SALES ⟸440—ACTION FOR PRICE—EVIDENCE—ADMISSIBILITY.

The testimony of a witness for the plaintiff that "he could have turned the grooves which he put in the wheels one-half inch deeper if he had been requested to do so, and that he could have made them a 'V' shape instead of a 'U' shape, as appeared on the template which had been furnished him by the Dodge Manufacturing Company, but no request was made of him to make any change in form or depth of the groove," should have been excluded; it not appearing that there was any duty upon the defendant or any of its agents to suggest the changes in the system as installed, or that it would have been proper for them to do so.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1261–1276; Dec. Dig. ⟸440.]

6. EVIDENCE ⟸379—DOCUMENTARY EVIDENCE—BLUE PRINTS.

A certain blueprint issued by the manufacturing company illustrating what were proper grooves in the rope drive system which was ordered by the defendant, and which was offered in evidence by the defendant, should have been admitted, as it tended to illustrate the question whether or not the system actually installed was the system contemplated in the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1656; Dec. Dig. ⟸379.]

7. SALES ⟸446—WAIVER OF DEFECTS—ACCEPTANCE—INSTRUCTION.

The court erred in charging the jury that, if they should "find the goods involved in this case, sold to the defendant, were not of the kind or quality ordered, but that, after knowledge of the fact that they were not of such quality or character, if you so find, defendant received same and retained the goods, and dealt with them as its own, such conduct will amount to an acceptance, and will be a waiver of the defects so discovered, and under such circumstances any defects so discovered could not be pleaded in abatement of the purchase price." While such a charge might be applicable in a case involving the mere sale of goods and material, where the purchaser refused to pay for the same after accepting them, it was not applicable in the present case, which, while it does to a certain extent involve the sale of goods and ma-

terials, involves the more important element of proper combination, through skilled labor, of the goods and materials into a properly constructed system for the transmission of power.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1309–1317; Dec. Dig. ⊂⊃446.]

8. ASSIGNMENTS OF ERROR.

Except as indicated in the foregoing headnotes, the assignments of error were without merit, and it is unnecessary to discuss them.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Georgia Supply Company against the Aripeka Sawmills. Judgment for plaintiff, and defendant brings error. Reversed.

Colquitt & Conyers, of Atlanta, for plaintiff in error. King, Spalding & Underwood, of Atlanta, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(142 Ga. 192)

## CAREY et al. v. CITY OF ATLANTA et al. (No. 210.)

(Supreme Court of Georgia. Feb. 12, 1915.)

*(Syllabus by the Court.)*

1. INJUNCTION ⊂⊃114 — PARTIES — BOND FOR TITLE—POSSESSION.

Where an owner of a city lot makes a contract of sale, and, upon payment of a part of the purchase money, executes a bond for title, and places the purchaser in possession, the obligor and the obligee are proper parties to a suit against the city to enjoin an illegal interference with the possession of the property. Ford v. Commercial Industrial Co., 132 Ga. 344, 63 S. E. 1120.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202–220; Dec. Dig. ⊂⊃114.]

2. INJUNCTION ⊂⊃105—PROSECUTIONS UNDER VOID ORDINANCE.

While equity will not ordinarily enjoin a criminal prosecution (Georgia Railway & Electric Co. v. Oakland City, 129 Ga. 576, 59 S. E. 296), yet, where repeated prosecutions are threatened under a void municipal ordinance, and the effect of such prosecutions would tend to injure or destroy the property of the person so prosecuted, or deprive him of the legitimate enjoyment of his property, equity will entertain a suit to inquire into the validity of the ordinance, and enjoin its enforcement (Hasbrouck v. Bondurant, 127 Ga. 220, 56 S. E. 241; Outsinger v. Atlanta, 142 Ga. 555, 83 S. E. 263).

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. ⊂⊃105.]

3. CONSTITUTIONAL LAW ⊂⊃277—DUE PROCESS—ORDINANCE—RACE—DISCRIMINATION.

Sections 1 and 2 of the ordinance of the city of Atlanta, adopted June 16, 1913, and the corresponding sections of an amendment thereto, adopted November 3, 1913, prohibiting white persons and colored persons from residing in the same block, deny the inherent right of a person to acquire, enjoy, and dispose of property, and for this reason are violative of the due process clause of the federal and state Constitutions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 762, 766, 949; Dec. Dig. ⊂⊃277.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by John Carey and others against the City of Atlanta and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Geo. Westmoreland, of Atlanta, for plaintiffs in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendants in error.

ATKINSON, J. [1, 2] 1, 2. The rulings announced in the first and second headnotes do not require elaboration.

[3] 3. The assignment of error complained of the judgment of the trial court refusing to grant an interlocutory injunction. The controlling question is as to the constitutionality of an ordinance of the city of Atlanta which provides for the segregation of residences, the design of the ordinance being to require white persons and persons of color to reside in separate blocks. It appears from the pleadings and evidence that the ordinance was adopted on June 16, 1913, and amended on November 3, 1913. On October 1, 1913, one of the plaintiffs, a colored person, purchased a lot and house from a white person, in which the latter resided. The property was located in a block occupied by white and colored persons. A white person resided on a lot adjoining the one purchased as above mentioned. On December 9, 1913, the plaintiff above mentioned contracted to sell the lot at an advanced price to the other plaintiff, and executed a bond for title. The former white owner having moved out, the obligee in the bond for title, who contemplated taking up his future residence in the house, caused the same to be temporarily rented to a colored person, and received one month's rent. When the tenant moved in, the white proprietor of the adjoining residence objected to the occupancy of the house by a colored person, and, upon notice from the chief of police that a case would be made against the tenant under the ordinance, the latter moved out, and the plaintiff was required to refund the money paid for rent. The plaintiff was also notified by the chief of police that the ordinance would be enforced against him, or any other colored person, who attempted to occupy the dwelling as a residence, upon objection being urged by the adjoining white proprietor.

The particular parts of the ordinance complained of as being unconstitutional are sections 1 and 2 of the original ordinance, and the corresponding sections of the amendment. These are alleged to be void, because they (a) deprive the plaintiffs of the use and enjoyment of their property, (b) deprive the plaintiffs of their property rights without due process of law, and (c) delegate to individuals the right to say how the plaintiffs shall use their property. By amendment to the petition it was charged that these pro-

visions of the ordinance were void as being violative of article 1, § 1, pars. 2 and 3, of the Constitution of this state (Civil Code, §§ 6358, 6359), which declare that protection to person and property is the paramount duty of government, and shall be impartial and complete; and that "no person shall be deprived of life, liberty, or property, except by due process of law." The ordinance was also charged to be violative of the Constitution of the United States, as contained in the fourteenth amendment (Civil Code, § 6700), which declares that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The ordinance in its entirety was as follows:

"An ordinance for preserving peace, preventing conflict and ill feeling between the white and colored races, and promoting the general welfare of the city, by providing for the use of separate blocks by white and colored people for residences, and for other purposes. * * *

"Section 1. That from and after the approval of this ordinance it shall be unlawful for any white person to move into or use as a residence or place of abode any house, building, or structure, or any part of a house, building, or structure situated or located on any block as hereinafter defined in section 4, on which block the house, building, or structures, in whole or in part shall be occupied or used as residences or places of abode by colored persons, otherwise than as provided in section 3 hereof. The block into which white persons are herein forbidden to move or occupy, being occupied or used by colored persons as herein set forth, shall be deemed a 'Colored Block' for the purposes of this ordinance.

"Sec. 2. That from and after the approval of this ordinance it shall be unlawful for any colored person to move into, or use as a residence or place of abode, any house, building, or structure, or any part of a house, building, or structure situated or located on any block as hereinafter defined in section 4, on which block the houses, buildings, or structures shall be occupied or used as residences or places of abode by white persons, otherwise than as provided in section 3 hereof. The block into which colored persons are herein forbidden to move or occupy, being occupied by white persons as herein set forth, shall be deemed a 'White Block' for the purposes of this ordinance.

"Sec. 3. That nothing in either of the preceding sections shall be construed or defined to prevent domestic servants from residing in the house or building wherein they are employed or upon the same lots with the houses or buildings which they serve.

"Sec. 4. That the word 'Block,' as used in this ordinance, is hereby defined to mean that portion of any street or alley together with the lots abutting on same, whether or not, and upon both sides thereof, between the two adjacent intersecting or crossing streets. In case either of said adjacent streets intersect but do not cross the street upon which the block in question may be located the lots improved or unimproved, upon the side of the last-mentioned street, to wit, the street facing the intersecting street, shall be included in the block between the two adjacent intersecting crossing streets, without reference to the street which runs to said block but does not cross same. Corner lots, improved or unimproved, shall be deemed located in the block upon the street on which they front or are intended to front when improved. In using the word 'lots' in this section it is intended to include the houses on same where such lots are improved.

"Sec. 5. That any person violating the provisions of sections 1 or 2 of this ordinance shall, on conviction in the recorder's court, be deemed guilty of an offense and be punished by a fine not exceeding one hundred dollars, or sentenced to work on the public works for not exceeding thirty days, either or both punishments to be inflicted in the discretion of the recorder, and each day's violation of the ordinance to be considered a separate offense.

"Sec. 6. That, upon the approval of this ordinance, any person desiring to build or erect, for himself or as agent for another, any building or structure to be used as residence or place of abode upon property situated in any block, as defined in section 4 hereof, and within which there are no houses, buildings, or structures used as residences, or otherwise vacant property, shall, in the application for a permit to the building inspector declare that such houses or structures for which a permit is asked are to be used as residences or places of abode for white persons or for colored persons. Upon the filing of said application the building inspector shall order the same published for two successive weeks in one of the daily newspapers of the city of Atlanta, calling particular attention to said notice, and the fact that the house, building, or structure proposed to be built or erected are to be used as residences by white people or by colored people, as the case may be; and unless within five days from the date of the last publication thereof protest be made, in writing, to the building inspector by a majority of the property owners of said lot against the use mentioned in said notice, the permit desired shall issue, if in other respects said application be in conformity with the ordinances of the city. Thereafter all houses, buildings, or structures erected for houses or residences or places of abode, and all houses, buildings, or structures in said lot erected for other purposes, but which it may be desired to use as residences or places of abode, shall be so used, either as residences or places of abode, for white persons or for colored persons, as may be determined by the permit granted in the manner hereinbefore provided. Any person or persons moving into or using as residences or places of abode any of such houses, buildings, or structures, or any part thereof, contrary to the classification as fixed in the manner herein provided, and set out in said permit, shall be guilty of an offense punished in the same manner as provided in section 5 of this ordinance. If, however, the majority of the property owners in said lot in which the proposed building or structure is to be erected and for which permit is asked, as above provided, shall protest against said house, building, or structure in the manner above provided, then in such case no permit shall issue on said application for the erection of a building or house or structure for the use set out in said application. The provisions of this section are intended to provide a method by which a block which is vacant may be improved and by which its use for either white or colored person may be determined.

"Sec. 7. That wherever after the passage of this ordinance a majority of the owners of either real or leasehold property in any block which is subject to the operation of sections 1 and 2 of this ordinance shall make application in writing to the building inspector, requesting that he declare the house in said lot to be open for occupancy thereafter by either white or colored persons, it shall be the duty of the building inspector to notify the board of police commissioners that said block is not longer subject to sec-

tions 1 and 2 of this ordinance, as the case may be. Upon the filing of said application, as above provided, with the building inspector, either white persons or colored persons moving into or using as places of abode or residences the houses and buildings in said block shall not be subject to the penalties provided for in this ordinance. Provided, however, that if at any time thereafter said block shall be occupied entirely by white persons, to wit, all the residences thereof shall be either white or colored, then said block shall thereupon immediately become subject to the provisions of the other sections of this ordinance with reference to white blocks or black blocks respectively, that is, if white persons entirely occupy said blocks, then it shall thereafter be a white block, and if colored persons entirely occupy said block, then it shall thereafter be a black block and subject to the provisions of this ordinances with reference to white and black blocks.

"Amended by Alderman Nutting: Be it ordained by the mayor and general council, that the pending ordinance in re segregation of races be amended as follows: That no provisions of the foregoing ordinance shall cause any change in the status of the races as to present occupancy or ownership, and no member of either race shall be forced to move from any present location; but that entire ordinance shall be operative as the future. That all ordinances and parts of ordinances in conflict with this ordinance be and the same are hereby repealed."

A further amendment was as follows:

"That the ordinance adopted by the general council on the 16th day of June, 1913, and approved by the Honorable J. G. Woodward, mayor, on the 17th day of June, 1913, providing for the use of separate blocks by white and colored people for residences and for other purposes be amended by adding thereto the following sections:

"Section 1. That from and after the approval of this ordinance it shall be unlawful for any colored person to move into, or use as a residence or place of abode, any house, building, or structure, or any part of a house, building, or structure situated or located except as provided in said original ordinance, which said house, building, or structure has previously been occupied by white people, and where white people are still living in houses or buildings adjoining the same, without the consent of the white people living in said adjoining house or buildings.

"Sec. 2. That from and after the approval of this ordinance it shall be unlawful for any white person to move into, or use as a residence or place of abode, any house, building, or structure, or any part of a house, building, or structure situated or located except as provided in said original ordinance, which said house, building, or structure has previously been occupied by colored people, and where colored people are still living in houses or buildings adjoining the same, without the consent of the colored people living in said adjoining houses or buildings.

"Sec. 3. The penalty for violation of the previous sections shall be as provided in section 5 of said original ordinance."

Under the operation of sections 1 and 2 of the original ordinance, and the corresponding sections of the amendment, the following result could be brought about: Assuming that in any mixed block—that is, one occupied by both white and colored persons—there are three adjacent lots owned by separate persons, each of whom resides on his lot, and that the proprietor of the middle lot be a white person, and that the proprietor on one side be a white person and the proprietor on the other be a colored person: If the middle proprietor should desire to move out and substitute a colored tenant, he could not do so if the adjacent white proprietor objected; or if he should sell to a colored person the purchaser could not move into the house to reside, or substitute another colored person to do so, if the adjoining white proprietor objected. So, also, if the middle proprietor were a colored person and should desire to move out and substitute a white person to reside in his dwelling, he could not do so if the colored adjoining proprietor objected; or, if he should sell to a white person, the purchaser could not move into the dwelling to reside, nor substitute a white tenant to do so, if the colored adjoining proprietor objected. In each of such instances an owner of property could, by mere force of the ordinance and caprice of an adjoining proprietor, without any compensation or process of law, be deprived for all time of the right to reside on his property, or to substitute a tenant or grantee to do so. The right of the owner of property to reside on it is inherent, and permanent deprivation of that right is in substance a taking of the property itself. Deprivation thereof in the manner above indicated, without any symbol of legal procedure, is opposed to the guaranty as embodied in the due process clauses of the state and federal Constitutions. Ordinances of this character are of recent origin. The first seems to have been adopted on May 19, 1911, in Baltimore, Md., and has several times been amended. Since then several other cities have adopted segregation ordinances, and the state of Virginia has enacted a statute on the subject. A person was prosecuted for violating the Baltimore ordinance. The defendant attacked the validity of the ordinance. The Supreme Court of the state of Maryland, in dealing with the case (State v. Gurry, 121 Md. 534, 88 Atl. 546, 47 L. R. A. [N. S.] 1087), discussed the constitutionality of the ordinance at length, and expressed the view that under the exercise of the police power a law of that character could be adopted, but finally decided that the ordinance was void on the ground that it was so unreasonable as to be unauthorized under the general welfare clause of the charter of the city. On this subject it was stated in the opinion that the serious objection to the provisions of the ordinance was that they wholly ignored all vested rights which existed at the time of the passage of the ordinance. This was put upon the ground that the ordinance affected the rights of an owner existing at the time of the passage of the ordinance. Relatively to them it was said:

"To deny him such rights would be a practical confiscation of his property, for his house might be of a character he would not rent to a colored person; and, if he could not use it himself, he would be deprived of not only the income from it, but of such use of it as is guaranteed to every owner of property by the Constitution and laws of the land."

While this pronouncement seems to indicate a disposition to hold the ordinance void

because the ordinance was retroactive, it at the same time recognizes that the ordinance involved jus disponendi of the owner, and that right was within the protection of the Constitution.

In North Carolina a person, in violation of a segregation ordinance, moved his family into a house to occupy it as a residence. He was tried for violating the ordinance, and found guilty. In the Supreme Court of that state it was ruled:

"Charter and statutory authority to pass ordinances for the general welfare of the city, and such regulations for the better government of the town as the commissioners may deem necessary, does not include power to forbid members of either the white or colored race to live in any block where a majority of the residents are of the other race." State v. Darnell, 166 N. C. 300, 81 S. E. 338, 51 L. R. A. (N. S.) 832.

As indicated by the note, the court was not passing on the constitutional question, but much of the reasoning employed in support of the proposition that the ordinance was not authorized under the general welfare clause of the charter of the municipality is pertinent and persuasive on the constitutional question. In the course of the opinion it was said:

"Besides, an ordinance of this kind forbids the owner of property to sell or to lease it to whomsoever he sees fit, as well as forbids those who may be desirous of buying or renting property from doing so where they can make the best bargain. Yet this right of disposing of property, the jus disponendi, has always been held one of the inalienable rights incident to the ownership of property, which no statute will be construed as having power to take away. In Bruce v. Strickland, 81 N. C. 267, it is said: 'The jus disponendi is an important element of property, and a vested right protected by the clause in the federal Constitution which declares the obligation of contracts inviolable.' The same doctrine is fully held and discussed in Hughes v. Hodges, 102 N. C. 239, 9 S. E. 437, and in the numerous citations to those two cases, which will be found in the Anno. Ed. This ordinance forbids a white man or a colored man to live in his own house if it should descend to him by inheritance, and should happen to be located on a street where a majority of the residents happen to be of such different race. There is no reason why the power of the county commissioners to provide for the public welfare should not be as broad as those of the town commissioners, and if, under such general authority, similar regulations are prescribed for the country districts, one who should buy or inherit property in a section where the opposite race is in the majority could not reside on his own property, and he could not sell it or rent it out, except to persons of such different race, since none other could reside there. Neither a white manager nor any white tenants could reside on a farm where a majority of the tenants or hands are colored. * * * There is a wide distinction between suffrage, which is not an inherent right, but which is conferred by constitutional prescription, and which is usually extended from time to time, and the inalienable right to own, acquire, and dispose of property, which is not conferred by the Constitution, but exists of natural right. There is no question that legislation can control social rights by forbidding intermarriage of the races, and in requiring Jim Crow cars, and in similar matters. It was also held in Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, that, as the state had the right to regulate or forbid the sale of liquor, that one who had devoted his property to such purpose could not object that he is forbidden longer to use it; but none of these interfere with the fundamental right of every one to acquire and dispose of property by sale."

It appears from the report of the case that, in addition to the cases specially mentioned in the foregoing excerpt, the court had before it Berea College v. Kentucky, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81; Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256; and many other cases on the subject of race regulations under the police power in matters concerning the administration of educational institutions, the operation of separate cars, and the like, in which it was held that the difference in the races afforded a basis for classification which would support in some instances ordinances, and, in others statutes, regulating the conduct of those particular businesses. In those cases the equal-protection clause of the Constitution was the one mainly discussed. In each instance the complaining person was afforded the opportunity to ride, or to attend institutions of learning, or afforded the thing of whatever nature to which in the particular case he was entitled. The most that was done was to require him as a member of a class to conform to reasonable rules in regard to the separation of the races. In none of them was he denied the right to use, control, or dispose of his property, as in this case. Property of a person, whether as a member of a class or as an individual, cannot be taken without due process of law. In the recent case of McCabe v. Atchison, etc., Ry. Co., 235 U. S. 151, 35 Sup. Ct. 69, 59 L. Ed. ——, where the court had under consideration a statute which allowed railroad companies to furnish dining cars for white people and to refuse to furnish dining cars altogether for colored persons, this language was used in reference to the contentions of the Attorney General:

"This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against; whereas, the essence of the constitutional right is that it is a personal one."

While the police power is very broad, its limits are within the Constitution. In Cutsinger v. Atlanta, 142 Ga. 555, 83 S. E. 263, the following was quoted with approval from the decision in Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636:

"The limit of the [police] power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges, and private persons, and, in so far as it imposes restraints, the police power must be exercised in subordination thereto."

In the opinion it was held:

"The Constitution of this state not only recognizes the necessary power of the courts to declare laws in violation of the state or federal

Constitution void (a power already known to exist), but expressly declares it to be their duty to hold such acts void."

The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character, it was void as being opposed to the due-process clause of the Constitution; and the judge erred in refusing to grant the injunction.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

LUMPKIN, J. (concurring specially). I concur in the result reached, but not in all that is said in the opinion of Mr. Justice ATKINSON. It seems to me that the discussion in regard to the right to use property as an incident to ownership may lead to extreme results. The right of an owner to use his property is important, but it is not so absolute that he may, at all times and under all circumstances, use it as he pleases, regardless of the public welfare, morals, or safety. The statute books contain many laws restricting the use of property by the owner of it, and prohibiting him from using it for certain purposes. Laws prohibiting the erection of wooden buildings within the fire limits of a city restrict the owner's use of his property, although he may contend that a wooden building which he desires to erect would be safe, and that he has not the means to build one of brick or stone. Laws which prevent an owner from using his property for the storage of dynamite, powder, oil, or other dangerous substances in populous communities, likewise place limitations upon the owner's right to use his property as he sees fit. The right to contract has been treated as a part of the liberty of a citizen, and yet it is subject to certain limitations for the public good. Thus usurious contracts have long been prohibited. Many other illustrations might be given in addition to those arising under laws relating to the segregation of the white and negro races in cars and schools. I cannot subscribe to the apparent idea that classification has nothing to do with such laws. Classification as to the particular use to which property is to be put, having in view its location and surroundings, may be an important element in considering laws of this character. In the leading case of Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256, Mr. Justice BROWN, delivering the opinion of the court, said:

"A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude."

Referring to the fourteenth amendment, he said:

"The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state Legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."

In Pace v. Alabama, 106 U. S. 583, 1 Sup. Ct. 637, 27 L. Ed. 207, it was held that adultery between blacks and whites could constitutionally be punished more severely than the same crime between persons of the same race, on the ground that the white and black were punished alike, without discrimination. A law prohibiting the intermarriage of the two races has been declared valid. State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42.

Suppose that an owner of property in the best residential portion of a city should claim the right to build upon his lot a large boarding house or rooming house, in which he should receive indifferently boarders of both races and sexes, producing a situation of great irritation and calculated to bring about unfortunate results. It is quite possible that the sacred right of property might be subject to regulation for the public safety (which has been declared to be the supreme law) by a reasonable pre-existing ordinance.

In Plessy v. Ferguson, supra, the law involved was one requiring railway companies carrying passengers in their coaches in the state of Louisiana to provide equal but separate accommodations for the white and colored races, by means of separate cars or by dividing the passenger coaches by a partition. Such a law necessarily interfered to some extent with the right of the owner of the property to use it as it saw fit. While this law related to railway companies, the opinion of the majority of the Supreme Court of the United States was not based on that ground. On the contrary, Mr. Justice Harlan, who dissented, referred to the fact that a railway was a quasi public highway, where all might travel. Of course, regulations based on a distinction between the two races must be reasonable and not arbitrary, and the municipal council or other body making them must have authority to do so. In the present case, the petition does not distinctly make the point that the general welfare clause in a city charter does not confer authority to adopt a segregation ordinance, or aver in terms that the ordinance under consideration was unreasonable. It does, however, charge that the ordinance delegated to in-

dividuals the right to say how the plaintiffs should use their property. I think that this ground is well taken. If the residence of the two races in close proximity was a matter requiring regulation by ordinance, the legislative body should determine the fact, and not leave it to depend upon the will of individuals, perhaps the whim of a single resident, and subject to shift from time to time according to the wishes of some of those who for the time being might reside in the block, so that sometimes the block might be classified as "white," sometimes as "black," and sometimes mixed. It provides for no method for determination of the fact by legitimate authority, save as a property owner's neighbors may wish. A similar ordinance adopted in Baltimore, which seems to have been taken as a guide in preparing the ordinance of Atlanta, was declared invalid by the Supreme Court of Maryland, although that court did not deny the right to use the distinction between the white and black races as a basis of legitimate classification.

The near approach of the end of the term, and the rush of business incident thereto, under a provision of our Constitution which requires that all cases shall be decided at the first or the second term, prevents a more thorough discussion of the subject. I agree with the majority of the court that the particular ordinance here involved is unconstitutional and void. But I think the line of reasoning adopted by them may carry them too far.

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(143 Ga. 84)

## GEORGIA PORTLAND CEMENT & SLATE CO. et al. v. JACKSON et al.

(No. 162.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. CORPORATIONS ⟸80—MISREPRESENTATIONS TO SUBSCRIBER—RECOVERY OF AMOUNT PAID —LACHES—DELAY DUE TO PROMISES.

Where an equitable petition was filed against a corporation alleged never to have been legally organized, and certain individual stockholders and officers thereof, who were also the promoters and organizers of the corporation, and as such secured cash subscriptions of stock in a large sum from the plaintiffs by falsely and fraudulently representing the corporation to be organized and ready for business, with officers, equipment, money on hand to pay for same, and railroad rights of way to the plant, when in fact it was alleged there were no assets at all, except such as were received from the plaintiffs for the stock purchased by them, and which was invested by the individual defendants in certain lands, the deeds to which expressed much larger considerations than were actually paid by defendants to the owners, and the lands contained deposits out of which a superior quality of Portland cement could be made, and where, on discovery of the alleged fraud, the plaintiffs tendered back to the officers of the corporation and the defendants their stock to be canceled and asked a refund of the money paid for the stock, which the officers of the corporation promised as soon as they could sell the lands (but which they neglected to do), and, relying on these promises, the plaintiffs waited 18 months to bring suit to trace the money paid by them for the stock into the land, and to obtain judgment for the same and have a lien established on the land, the plaintiffs were not in laches nor barred from bringing their suit on account of the lapse of time between paying for the stock and the bringing of the suit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244, 246–264, 1407, 1407½; Dec. Dig. ⟸80.]

2. FRAUD ⟸41—EQUITABLE PETITION—SUFFICIENCY.

In such a case as stated in the preceding headnote, the court did not err in overruling a demurrer filed to the petition on the ground that it set forth no cause of action.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 63; Dec. Dig. ⟸41.]

3. APPEAL AND ERROR ⟸1195—LAW OF CASE —DEMURRER.

There is no merit in any of the grounds of demurrer other than that specially dealt with in the third division of the opinion, and the judgment is affirmed, with direction that it be modified as pointed out in that part of the opinion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. ⟸1195.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Equitable petition of J. G. Jackson and others against the Georgia Portland Cement & Slate Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed, with direction.

See, also, 139 Ga. 668, 77 S. E. 1055.

J. G. Jackson and others brought their equitable petition against the Georgia Portland Cement & Slate Company and W. W. Wadsworth, H. H. Cabaniss, and W. W. Jones, and alleged substantially as follows: The corporation was chartered in the year 1908 on the petition of W. W. Wadsworth, H. H. Cabaniss, W. W. Jones, and W. P. Davis, and their associates. Since the corporation was chartered, W. P. Davis has died, and there is no administration upon his estate. The authorized capital stock of the corporation is $1,000,000, divided into 50,000 shares of preferred stock of the par value of $10 per share, and 50,000 shares of common stock of the par value of $10 per share. Shortly after the corporation was chartered, and before petitioners subscribed for and obtained any stock therein, a number of subscribers to stock undertook to organize the corporation, and named the following officers: W. W. Wadsworth, president; M. A. Pharr, first vice president; W. M. Harris, second vice president; and H. H. Cabaniss, secretary treasurer—and also named a board of directors. At the time of the organization, none of the subscribers to stock, who were present at the meeting, and who participated in the election of officers, had paid any part of their subscriptions, as far as petitioners are informed and believe. Shortly after the election of officers and directors, they employed W. W. Wadsworth and J. D. Davis as their agents to sell stock in the corporation to the pub-

lic. These agents approached petitioners for the purpose of selling stock to them, and represented that the Georgia Portland Cement & Slate Company had been organized under the laws of the state of Georgia with a capital stock of $1,000,000—$500,000 in common stock and $500,000 in preferred stock. They further represented to petitioners that the above-named officers, directors, and others were bona fide subscribers for stock and had paid for their stock, and called petitioners' attention to the personnel of the officers of the corporation. They further represented to petitioners that the corporation had purchased 370 acres of land in Polk county, on which there were inexhaustible deposits of limerock, shale, and slate; that the property had been tested by the state chemist and pronounced the finest quality of shale and limestone in the world; that the corporation had paid for the property the sum of $115,000 in cash; that W. W. Wadsworth, acting for and in behalf of the corporation, had purchased $300,000 worth of machinery that had been shipped to the corporation at Rockmart; and that the purchaser had saved the company $200,000 in the purchase of machinery. They further represented that they had secured railroad rights of way to the property, and that the machinery would be installed and the plant erected at once, as the corporation had the money on hand with which to pay for the machinery. All of these representations were false and fraudulent.

Relying upon the statements of W. W. Wadsworth and J. D. Davis as being true, petitioners subscribed for stock in the corporation in varying amounts. Petitioners were assured by these agents of the corporation that there would be no delay in the installation of the machinery represented to have been purchased, and that operations would begin without unnecessary delay, whereby a profit would be earned and dividends paid. In fact, the preferred stock contains a provision guaranteeing a 7 per cent. dividend, payable annually, redeemable in cash after July 1, 1914. Petitioners did not know of their own knowledge the conditions, but accepted as true the statements and representations of the officers and agents of the corporation, and subscribed to the preferred and common stock and paid therefor in good faith. If petitioners had known the facts as they existed at the time they subscribed and paid for their stock, they would not have purchased the same. At the time petitioners subscribed for stock in the corporation, it was represented to them, by the officers and agents of the corporation, that the officers and agents had purchased and obtained deeds from the following parties: W. W. Wadsworth, H. H. Cabaniss, T. M. Green, J. W. Williams, W. O. Jones, M. A. Pharr, W. M. Harris, W. P. Davis, and W. M. Jones—to 130 acres of land, more or less, of an alleged valuation of $250,000, notwithstanding the fact that the property had been recently conveyed to the grantors for a consideration of $3,800; deed from W. W. Wadsworth and H. H. Cabaniss to 140 acres for an alleged valuation of $250,000, notwithstanding the property had recently been conveyed to the grantors for an actual consideration of $4,500.

It is alleged that the grantors in each of the above deeds were the promoters of the corporation, and were acting for it at the time they purchased the property and conveyed it to the corporation, and that the considerations named in the deeds from them to the corporation are fictitious and fraudulent, the real purchase price of the property being $8,300; and these fictitious values were given with fraudulent intent and for the purpose of fraudulently inducing petitioners and others to subscribe for stock in the corporation. At the time petitioners subscribed for stock in the corporation, it was represented to them by its officers and agents that the lands above referred to had been fully paid for, and that $115,000 had been paid therefor. Petitioners charge that they have been informed, since the time they subscribed for the stock, that the land had not been paid for at all, but that the money they paid for the stock was used to pay for the land, and that, while the title to the lands stand in the name of the corporation, in equity it is the property of petitioners, having been purchased and paid for with their money. No machinery was ever ordered, or shipped, or installed upon the property. No right of way was ever secured, and no track laid, or any improvements made upon the property. The property is idle and brings no income whatever. Notwithstanding the fact that the corporation was pretended to have been organized in the year 1908, the officers and directors have failed and omitted to pay their subscriptions to stock, or any part thereof, and have failed and omitted to collect any substantial sums from other subscribers to stock in the corporation; petitioners having paid to the treasurer practically all the money which has been raised on subscriptions to stock. Shortly after the election of officers and directors and the subscription to and payment for stock by petitioners, the officers of the corporation practically abandoned their effort to sell stock and to equip the property and carry out the alleged purposes of the corporation. The corporation has never been legally organized for the transaction of the business for which it was incorporated, for the reason that the required 10 per cent. of the capital stock has not been paid in. The corporation has forfeited its charter on account of nonuser of its franchise. The charter of the corporation has been forfeited by willful violation of the essential conditions on which it was granted, and because the purposes and objects of the corporation have been abandoned. If the corporation is the owner of any other property of consequence

than the real estate referred to, it is not known to petitioners. The property of the corporation is idle, and there is no income therefrom, and there is no effort or purpose to carry out the purposes of the corporation, and has not been for a period of nearly four years. Petitioners desire to sever their connection with the corporation, and, in order to do so, they respectfully show that it is proper and necessary that some suitable person be appointed receiver to take charge of the property and assets of the corporation, and that the same be administered under the direction and decree of the court.

About 18 months ago petitioners discovered the falsity of the representations made to them at the time they paid for their stock in the corporation, and they made complaint to the officers of the corporation, to wit, W. W. Wadsworth and H. H. Cabaniss, and tendered their stock to the officers and demanded a return of their money paid therefor, at which time the officers assured petitioners that, if they would not take action, they would sell the property and refund them the amount they paid for the stock; and relying on these assurances, and similar ones made thereafter, and hoping to be reimbursed without litigation, they have neglected and omitted to take legal action until this time. Petitioners have lost faith in the officers of the corporation and their promises, and are thoroughly satisfied that it is not their purpose to sell the property and refund to them the amount they paid for stock in the corporation. The representations made by the officers and agents of the corporation, to induce petitioners to buy the stock, were made for the purpose of deceiving petitioners, and did deceive them into taking the stock, and the officers and directors knew that the statements and representations were false. As a part of the scheme to deceive petitioners and to defraud them into purchasing the stock, they had a small pamphlet issued setting forth the purposes and plans of the corporation, and stating the amount of capital stock, and giving a list of the officers and directors. This literature was exhibited to your petitioners before they took the stock, and is a part of the deception practiced upon petitioners in luring them into the purchase of stock.

The prayers of the petition were: That the defendants be restrained and permanently enjoined from incumbering, transferring, or hypothecating any of the assets of the corporation until this suit is finally determined. Petitioners ask for a judgment against each of the directors and officers individually, and also judgment against the corporation, in so far as the same affects the lands or the funds arising from the sale thereof, and also judgment against all the defendants named in the petition. Petitioners (who were eight in number, and whose claims aggregated a principal sum of $8,355) asked judgment for the principal sum of their claims, with 7 per cent. per annum interest thereon against all the defendants, jointly and separately. That the court adjudge and decree that the sums of money paid by petitioners and each of them, as set forth in the petition, have been invested in the lands, as set forth in the petition known as the Hays, Wilson, and Scott lands, making up a tract of about 270 acres. That the sums paid by petitioners and each of them be traced into the land, and that the exact amounts and the land in which the same were invested be fixed by the judgment and decree of the court, and that the petitioners have judgment and decree with special lien fixed upon the lands, and, in case of sale of the lands, then upon the proceeds therefrom, in order that the lands be declared subject to the judgment of each and all of the claims, and that their claims be declared to constitute a first lien upon the lands for the payment of their claims.

The defendants filed their demurrer to the petition upon the following grounds, among others: (a) Because there is no cause of action set out in the petition. (b) Because it appears that the plaintiffs have not acted promptly in this matter, thus waiving the alleged fraud charged to have been perpetrated upon them. The court overruled all grounds of the demurrer, except paragraph 11, which related to the allegations of the petition averring a forfeiture of the charter of the corporation, and the defendants excepted.

Hines & Jordan, of Atlanta, for plaintiffs in error. I. F. Mundy, of Rockmart, W. W. Mundy, of Cedartown, and J. A. Hynds, of Atlanta, for defendants in error.

HILL, J. (after stating the facts as above). [1] 1. One of the demurrers is that the plaintiffs were in laches in not bringing the suit earlier. To this we cannot agree. The petition alleges: That the plaintiffs brought suit within 18 months after they discovered the falsity of the representations made to them at the time they paid for their stock in the corporation. That, when they made this discovery, they tendered their stock to the officers of the corporation and demanded a return of their money paid therefor. That at this time the officers assured the plaintiffs that, if they would not take action, they (the officers) would sell the property and refund the plaintiffs the amount they paid for the stock, and that relying upon these assurances, and similar assurances thereafter made, and hoping to be reimbursed without litigation, the plaintiffs omitted to take legal action until the bringing of this suit. Under these circumstances, we do not think it can be said that the plaintiffs were in such laches as to bar a recovery. This is a suit to recover from the defendants the amount of money the plaintiffs subscribed for stock and paid to the defendants, and which they allege was fraudulently obtained from them. In such a case, the plaintiffs would not be

barred a recovery. This being so, we cannot hold that the plaintiffs are in laches when they bring their suit within 18 months after the discovery of the alleged fraud.

[2] 2. Is the petition in this case subject to the demurrers filed against it, or does it set forth a good cause of action? We think it is only necessary to read the allegations, as contained in the foregoing statement of facts, to arrive at the conclusion that the petition is brim full of equity. We will not repeat those allegations in detail, but it may be well to mention, in a general way, a few of the facts relied on by the plaintiffs as a basis for recovery. The individual defendants here are alleged to be the agents and promoters of the corporation, the stock of which they sold to the plaintiffs. It is alleged that they represented to the plaintiffs that they had bought and paid for 270 acres of land, of an alleged valuation of $500,000, containing limerock, slate, shale, etc., from which could be made as good cement as there is in the world, whereas the actual considerations paid for the land aggregated only $8,300, and, in the deeds made to the corporation conveying the land, false and fictitious considerations were named, aggregating $115,000. And it is alleged that the promoters—the individual defendants here—did not pay the $8,300 with their own money, but with the money of the plaintiffs derived from the sale of stock to them; that the defendants had never paid for any stock themselves. It was further alleged that the officers of the corporation represented to defendants that a right of way for a railroad leading to the property had been secured; that valuable machinery with which to manufacture the cement, estimated to be worth $300,000, had been bought and shipped, and the defendants had the money in hand to pay for it; and that the agents purchasing the machinery had saved the corporation $200,000 in the transaction. These representations on the part of the defendants are alleged to be untrue, and, on demurrer filed by the defendants themselves, they must be treated to be as alleged. If the allegations are to be thus taken, then the plaintiffs have been induced to part with their money by reason of false and fraudulent representations; and they now ask the aid of the courts to trace those funds into the lands and to recover the money back. And, in order that they may recover, they ask the aid of the court to prevent the alienation of the land until a judgment can be obtained against the defendants, and to have a decree fixing a special lien on the land to secure its payment, and, in case of sale, upon the proceeds. As already said, the allegations of the petition are to be taken as true, and, if they are true, the plaintiffs are entitled to recover on the trial, if the facts alleged are proved according to the rules of law applicable to such cases. Of course, if they are not true in fact, the plaintiffs cannot prevail on the trial of the issues made by the pleadings. But the petition is not open to the objections urged against it by the plaintiffs in error. This is not a suit by stockholders against a legal corporation, but by subscribers to stock of a corporation alleged never to have been legally organized, who aver, in effect, that they have been inveigled, by the agents and promoters of the corporation, into subscribing for stock in a bogus concern by the fraudulent representations of the individual defendants named in the petition, and asking that the plaintiffs be allowed to trace the funds furnished by them into certain lands, that they have a special lien decreed thereon, and for a judgment against the defendants named. We see no valid reason why this cannot be done. The petitioners seem to have had the law applicable before their eyes when they drew their petition, for it is drawn in substantial conformity to the decision rendered in the case of Stewart v. Rutherford, 74 Ga. 435, where it was held:

"Where the complainant did not seek any redress in the character of a stockholder or president, but sought to sever his connection entirely with it and to recover what he had been induced to put into it by fraud, it was not necessary that he should ask relief of the stockholders, who perpetrated the fraud, before applying to equity to annul the contract."

In the body of the opinion (on pages 438, 439, of 74 Ga.) Chief Justice Jackson said:

"The fraud is not a fraud of certain existing stockholders committed upon another, also already a member, nor is it a fraud by a corporation in existence upon one of its stockholders; but it antedates the existence of the corporation. It attacks the very contract which made the corporation, put into operation, and furnished the means to buy the thing to be operated upon, and the tools by which that thing, the mineral lots of land, was to be worked by the corporation to be afterwards created. One man, or a set of several men, can no more swindle and cheat another out of his money, in order to make a corporation and set it to work, than he or they could cheat and swindle him into any other contract or about any other thing. There is no such sanctity about a corporation that a natural person should be induced fraudulently, by certain other natural persons, to apply for this artificial person with them to be created by the state, and yet have no relief against those who thus cheated him, because the result of the cheating was success in creating the entity called an artificial person or a corporation. Nor does it matter one iota that the fraud made him a stockholder therein, or even the president thereof, to sweeten the pill with ambition gratified by putting him at the head of the corporation to be made. That some of the facts showing fraud in the antecedent contract transpired after the contract bore the fruit which its procurers by fraud intended, to wit, ripened into a corporation, can make no difference. If they throw light on the contract, and the conduct of those making it, and the motives leading to that conduct, it pours light upon the original transaction just as full as if it were contemporaneous or antecedent facts."

We think the petition sets forth a good cause of action.

[3] 3. As we have pointed out in the pre-

ceding division of the opinion, the plaintiffs' allegations entitle them to relief. They also prayed relief by the appointment of a receiver; but when this case was before the court on a former occasion (Georgia Portland Cement & Slate Co. v. Jackson, 139 Ga. 668, 77 S. E. 1055), it was held that, under the allegations of the petition, the plaintiffs were not entitled to the appointment of a receiver. That decision, being in the same case, is controlling on that subject. The court, therefore, erred in overruling the special demurrer to that particular prayer for relief. In affirming the case, however, direction will be given that the judgment be so modified as to sustain the sixth ground of the demurrer. The other grounds of the demurrer are without substantial merit.

Judgment affirmed, with direction. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 101)

## CITIZENS' BANK OF ADRIAN v. SOUTHERN SECURITIES & FINANCING CO. (No. 169.)

(Supreme Court of Georgia. Feb. 10, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ⟸38 — WRONGFUL DISCHARGE—RIGHT OF ACTION.

The petition set forth a cause of action for the breach of an executory contract to render service. If an agent after entering into the service of his employer is wrongfully discharged, he may bring an action immediately for any special injury which he may have sustained in consequence of the breach of contract by the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 44; Dec. Dig. ⟸38.]

2. EVIDENCE ⟸442 — REFORMATION OF INSTRUMENTS ⟸38 — ANSWER — PAROL EVIDENCE—WRITTEN CONTRACT.

The allegations of the amendment to the defendant's answer were insufficient to entitle the defendant to have its contract with the plaintiff reformed.

(a) Where parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the entire contract, and parol evidence of prior or contemporaneous representations or statements is inadmissible to add to, take from, or vary the written instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874–1897; Dec. Dig. ⟸442; Reformation of Instruments, Cent. Dig. §§ 148–150; Dec. Dig. ⟸38.]

3. MASTER AND SERVANT ⟸41 — EMPLOYMENT CONTRACT—WRONGFUL DISCHARGE—MEASURE OF DAMAGES—EVIDENCE.

The measure of damages for the breach of an executory contract to render service is the actual loss sustained by breach of the contract, and, in estimating the amount, all the facts down to the time of trial may be considered. The evidence authorized the verdict, and the court did not abuse his discretion in refusing a new trial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 50–53; Dec. Dig. ⟸41.]

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by the Southern Securities & Financing Company against the Citizens' Bank of Adrian. Judgment for plaintiff, and defendant brings error. Affirmed.

W. W. Larsen, of Dublin, for plaintiff in error. Faircloth & Claxton, of Wrightsville, for defendant in error.

EVANS, P. J. The Southern Securities & Financing Company brought a suit against the Citizens' Bank of Adrian, Ga., alleging that the bank employed the plaintiff by written contract to act as its financial agent for the term of five years from October 1, 1909, for an annual compensation of $300. The plaintiff rendered all the services therein stipulated, up to and until the 1st day of April, 1912, when the defendant wrongfully discharged the plaintiff and refused to allow it to carry out its contract, notwithstanding its offer to do so. The plaintiff had been paid for its services up to the time of the defendant's breach of the contract. The plaintiff alleged that it was entitled to recover as special damages the full amount which it would have been permitted to earn under the contract had it not been breached by the defendant, for the reason that it had already secured for the defendant its correspondents and financial connections, and had equipped itself with competent and experienced accountants for the purpose of examining the books, papers, and business of the defendant bank from time to time as requested, or when needed, and that plaintiff would be required under its contract to keep these accountants for this service until the expiration of its term of employment by the bank, to its injury and damage in the sum of $750. It was further alleged that, should it be held and determined by the court that the plaintiff can only recover damages as the years expire, they may have judgment for the sum of $150 besides interest from the 1st of October, 1912; but, should it be held and determined that the plaintiff is entitled to sue and recover as special damage the entire sum that plaintiff would be entitled to for the full term of its employment, then they pray judgment for the same. The defendant demurred to the petition, and pleaded that the suit be abated because prematurely instituted, and also filed an answer. The court overruled the demurrer to the petition, and struck the defendant's plea in abatement and certain paragraphs of the answer. The case proceeded to trial, and a verdict was rendered for the plaintiff in the sum of $850, which the court refused to set aside on motion.

[1] 1. The plaintiff's action is for breach of an executory contract. Substantially the contract is one of hiring, and the rule is well established that if an agent is wrongfully discharged from the service of his employer

he may bring an action immediately for any special injury which he may have sustained in consequence of the breach of contract by the defendant. Rogers v. Parham, 8 Ga. 190. The plaintiff alleged that it had performed its contract in providing suitable correspondents and bank connections for the defendant, and that it had provided itself with accountants for the purpose of performing its duties of inspecting the bank's affairs agreeably to the terms of the contract, and that the defendant by breaching the contract had specially endamaged it in the sum which the defendant had contracted to pay for plaintiff's services under the contract. The petition set out a cause of action. Roberts v. Crowley, 81 Ga. 429, 7 S. E. 740; Roberts v. Rigden, 81 Ga. 440, 7 S. E. 742; Equitable Loan, etc., Co. v. Knox, 131 Ga. 627, 62 S. E. 1030.

[2] 2. On the day the contract was signed, the parties made a supplemental agreement, both signing it, stipulating for an increased allowance of expenses at the end of the first year, or whenever the earnings of the bank justified same and the board of directors of the bank considered it advisable to pay the increased cost. The defendant proffered an amendment to its answer, alleging that this modification of the contract was prepared by the president of the plaintiff company, and it was agreed that the supplemental contract should contain a provision that the plaintiff should keep down any opposition to the bank at Adrian, Ga., by guaranteeing that no other banking institution should be organized in that town during the continuance of the contract, and that the plaintiff should give to the defendant bank its undivided and loyal support; that the president of the plaintiff company failed and refused to incorporate this stipulation in the contract before delivering it to the defendant, which fact was unknown to the defendant until suit was brought for breach of the contract. It was alleged that the failure of the plaintiff's president to incorporate all of the agreement in the writing constituted a fraud upon the defendant, and the contract should not be enforced until it was reformed in accordance with the actual agreement of the parties, and there was a prayer for such reformation; that, further, by reason of the plaintiff's not complying with the omitted cross-obligation, it had endamaged the defendant in the sum of $1,000, or other large amount, which it asked to recoup from the plaintiff. This amendment was properly disallowed by the court. The only allegation relied upon to constitute fraud is the omission by the president of the plaintiff company to include in the contract an obligation to stifle competition with the defendant bank in the town in which it did business. Pretermitting a discussion of the validity of such a covenant, the mere omission to include it in the contract under the circumstances alleged in the amendment does not constitute fraud. It is not charged that the defendant was deceived by any representation made by the president of the plaintiff company. The addenda to the contract was embraced in very few lines, signed by the officers of the bank, who had full opportunity to examine its contents, and who retained and kept the same, and who made no complaint that the written contract did not contain the full agreement of the parties until after it had been sued by the plaintiff. It is contended that the omitted obligation of the plaintiff could be shown by parol, upon the allegation that the written contract rested partly in parol and partly in writing. The written contract shows on its face that it was a complete agreement. Where parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the entire contract, and parol evidence of prior or contemporaneous representations or statements is inadmissible to add to, take from, or vary the written instrument. Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; Bullard v. Brewer, 118 Ga. 918, 45 S. E. 711.

[3] 3. There was evidence tending to show that the plaintiff had offered to comply with its contract and that it was wrongfully prevented from so doing by the conduct of the defendant. The measure of damage in such cases is the actual loss sustained by breach of the contract, and in estimating the amount all the facts down to the time of trial may be considered. Roberts v. Crowley, 81 Ga. 429, 7 S. E. 740. It appeared that the plaintiff had in its employment competent accountants, and that at the time of the trial a sufficient time had elapsed since the last payment for an accrual of salary in excess of the damages allowed by the jury. The verdict was authorized by the evidence. Assignments of error not specifically noticed are embraced in the foregoing rulings, which control the case.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 186)

## LOUISVILLE & N. R. CO. v. PATTERSON.
(No. 206.)

(Supreme Court of Georgia. Feb. 12, 1915.)

*(Syllabus by the Court.)*

1. INSTRUCTIONS—GROUNDS FOR NEW TRIAL.
The portions of the charge complained of do not constitute reversible error for any of the reasons assigned in the grounds of the motion for a new trial.

2. VERDICT AND DENIAL FOR NEW TRIAL APPROVED.
The evidence supported the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Fannin County; H. L. Patterson, Judge.

Action between the Louisville & Nashville Railroad Company and Lula Patterson. From a judgment, the Railroad Company brings error. Affirmed.

Wm. Butt, of Blue Ridge, D. W. Blair and Chas. H. Griffin, both of Marietta, and Tye, Peeples & Jordan, of Atlanta, for plaintiff in error. O. R. Dupree and B. L. Smith, both of Blue Ridge, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 254)

IVEY et al. v. COWART et al. (No. 234.)
(Supreme Court of Georgia. Feb. 25, 1915.)

*(Syllabus by the Court.)*

INTERLOCUTORY INJUNCTION.

There was no abuse of discretion in refusing to grant an interlocutory injunction in this case.

Error from Superior Court, Calhoun County; E. E. Cox, Judge.

Action by C. R. Ivey and others against J. S. Cowart and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

H. M. Calhoun, of Arlington, and Rambo & Wright, of Blakely, for plaintiffs in error. B. W. Fortson, of Arlington, and Pope & Bennet, of Albany, for defendants in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 186)

DORSEY v. BRYANS. (No. 207.)
(Supreme Court of Georgia. Feb. 12, 1915.)

*(Syllabus by the Court.)*

1. BILLS AND NOTES ⟸104—EXECUTION—DURESS—WHAT CONSTITUTES.

While a threat by a husband to abandon his wife unless she signs a note may in some instances amount to duress which will relieve her of liability on the note to a holder with notice, yet, where the circumstances show that the wife had no reasonable apprehension of the threat being carried into execution, the bare making of it will not be such duress as to render the note invalid.

(a) The court did not err in failing to submit the issue of duress to the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 242–247; Dec. Dig. ⟸104.]

*(Additional Syllabus by Editorial Staff.)*

2. CONTRACTS ⟸95—EXECUTION—"DURESS."

The definition of "duress" given in Civ. Code 1910, § 4116, providing that, "Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will," is sufficiently comprehensive to include any conduct which overpowers the will and coerces or restrains the performance of an act which otherwise would not have been performed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 431–440; Dec. Dig. ⟸95.

For other definitions, see Words and Phrases, First and Second Series, Duress.]

Error from Superior Court, Henry County; Robt. T. Daniel, Judge.

Action by John Bryans against Mrs. L. J. Dorsey. Judgment for plaintiff, and defendant brings error. Affirmed.

Brown & Brown and E. J. Reagan, all of McDonough, and Napier, Wright & Wood, of Atlanta, for plaintiff in error. R. O. Jackson and E. M. Smith, both of McDonough, for defendant in error.

BECK, J. The plaintiff sued the defendant on certain notes. The defendant was a married woman, and pleaded that the debt represented by the notes was that of her husband. She further pleaded that:

She "signed said notes under duress. Her said husband and plaintiff came to her house, and plaintiff insisted that defendant sign said notes as security for her said husband's debt to him. Defendant declined to do this, and protested against the purchase of the property for which her husband had become indebted to plaintiff, and for which said notes were given. Her husband threatened to leave her forever unless she signed said notes, and at the same time plaintiff was present, insisting that she sign said notes and urging and demanding that she do so. Finally, when forced against her will, and over her repeated protests by the threats of her said husband, and the insistence and urging of plaintiff, she agreed to sign said notes as security for her husband's debts."

In support of her plea she testified that her husband and the plaintiff were drinking and came to her house, and in the presence of her sister asked her to sign some notes. They represented to her that her husband had purchased the plaintiff's interest in a livery business, and requested her to sign the notes as security. The defendant said that she did not care to go security on the notes. Upon her hesitation to sign the notes her husband started off, saying if she did not sign them he was going to leave. The plaintiff also said if she did not sign the notes her husband would leave her, whereupon she agreed to sign the notes. The plaintiff produced blank forms of notes and requested her to fill in the blanks, assigning as a reason for the request that he had left his spectacles at home. Defendant filled in the blank spaces and signed the notes. The notes were given in consideration of the purchase of an interest in a livery stable business by her husband, which was run in his name, and as his business. The defendant further testified in reference to her husband's threat to leave her:

"I don't know whether I had any fears of his running away from me. He did leave me once; went to Lovejoy."

The defendant's sister testified in substantial corroboration of her. The defendant's

husband was offered as a witness in her behalf, and testified:

"I don't know that I threatened to quit Mrs. Dorsey if she didn't sign the notes; there were some words said about that. I didn't have no idea of quitting her. I never said nothing about quitting her. Mr. Bryans came there; I don't know whether I told him or not; he said I was going to quit her if she didn't sign the notes."

The plaintiff submitted evidence in opposition to the plaintiff's contention as to the circumstances under which the notes were executed. His testimony tended to show that the notes were given for the purchase price of a livery stable business, with equipment of horses, wagons, and buggies, which the defendant afterwards conducted for two years, and which she sold and received the proceeds of the sale for her own individual use. The jury returned a verdict for the plaintiff. In her motion for new trial the defendant complains that the court erred in failing to instruct the jury on the effect of duress as to the procurement of the notes.

[1, 2] Our Code declares that:

"Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will." Civil Code 1910, § 4116.

This definition is sufficiently comprehensive to include any conduct which overpowers the will and coerces or restrains the performance of an act which otherwise would not have been performed. Bond v. Kidd, 122 Ga. 812, 50 S. E. 934. It has been held that a deed executed by a married woman in consequence of her husband's threat of abandonment unless she complies may be avoided for duress. Kocourek v. Marak, 54 Tex. 201, 38 Am. Rep. 623. The argument in support of this proposition has been thus stated by Berry, J., in Tapley v. Tapley, 10 Minn. 448 (Gil. 360) 88 Am. Dec. 76:

"And, looking at the reason of things, if, as is well settled (see case cited from 5 Denio), a threat of injury to goods and other property, a threat of a battery or of illegal imprisonment, are held sufficient to constitute duress and to avoid a contract, on the ground that they take away freedom of action, and are calculated to overcome the mind of a person of ordinary firmness, when believed in, it would seem too clear for argument that equal effect ought to be given to a threat by a husband to abandon his wife and turn her out upon the world to shift for herself in the anomalous condition of a wife without a husband."

The threat by a husband of abandonment of his wife must be made under circumstances convincing to the wife that the same will be carried into execution unless she does the act commanded by her husband. If she is not convinced that her husband would abandon her in case of refusal, a bare threat of leaving her would be too trifling a circumstance to invalidate an otherwise legal transaction. In the instant case the wife practically admitted that she had no well-grounded apprehension that her husband would leave her if she refused to sign the notes, and the husband was very positive in his declaration that he had no intention of quitting her. Moreover, the wife, while testifying that the business after it was purchased was conducted in the name of her husband, admitted that she had employed the help at the stable, had supplied new horses and vehicles, and finally sold the stables and appropriated the money to her own use. Under all the circumstances, it was not erroneous for the court to omit an instruction in reference to duress occasioned by the threat of the defendant's abandonment by her husband.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 256)

SMALL v. JONES. (No. 236.)

(Supreme Court of Georgia. Feb. 25, 1915.)

*(Syllabus by the Court.)*

VERDICT AND DENIAL OF NEW TRIAL.

There was evidence to support the verdict in favor of the plaintiff. None of the grounds relied on by the movant show any error against the defendant requiring a reversal of the judgment refusing a new trial.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by J. S. Jones against W. E. Small. Judgment for plaintiff, and defendant brings error. Affirmed.

J. E. Hall and W. E. Martin, Jr., both of Macon, for plaintiff in error. Ryals & Anderson, of Macon, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 173)

MASSEE & FELTON LUMBER CO. v. GEORGIA & F. RY. (No. 198.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. INDEMNITY ⟸13—NEGLIGENCE—LIABILITY.

A railway company granted trackage facilities to a lumber company. There was a collision between an extra freight train of the railway company and a logging train of the lumber company, in which the engineer of the logging train was injured. He recovered damages of the railway company, and after payment of same the railway company brought suit against the lumber company for reimbursement. *Held* that, inasmuch as no act of negligence was charged against the lumber company, it was not liable over to the railway company for damages paid to the lumber company's engineer for injuries received in the collision.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29–85; Dec. Dig. ⟸13.]

2. INDEMNITY ⟸13 — CONTRACT GRANTING TRACKAGE PRIVILEGES—CONSTRUCTION.

A contract between a railway company and a lumber company granting trackage privileges

contained, among other provisions, the following: "The said lumber company shall hold the said railway company free and harmless from all damage or loss to all persons or property of all persons caused by the operations of said trains of said lumber company on track of the said railway company." *Held*, that this provision, as interpreted by its own words and its context, did not amount to an assumption by the lumber company of liability caused by the negligence of the railway company to persons engaged in the operation of the lumber company's trains.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29–35; Dec. Dig. ⊂⊃13.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by the Georgia & Florida Railway against the Massee & Felton Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed.

The Georgia & Florida Railway entered into a contract with the Massee & Felton Lumber Company, wherein the railway company agreed to permit the lumber company to use its main line of railroad between Bannochburn and Rays Mill, stations on the railroad, for the purpose of hauling logs over this stretch of the track. During the continuance of the contract, there was a collision between a log train of the lumber company and an extra freight train of the railway company, in which the engineer operating the engine of the lumber company was injured. The engineer instituted a suit against the railway company, alleging that, under the contract between the lumber company and the railway company, the lumber company had trackage rights to operate its log trains over the road of the railway company between certain stations. He was the engineer in charge of a log train of the lumber company, and on the morning of a day named, while running his train through a cut, on schedule time and at a normal rate of speed, i. e., 6 to 7 miles per hour, and exercising due care and caution in keeping a lookout and otherwise attending to his duties, an extra freight train of the railway company at a rate of speed from 20 to 25 miles per hour, suddenly dashed around the curve, and collided with the train operated by the plaintiff, without giving him any warning or chance to stop his train, and without stopping the train of the railway company, inflicting serious injuries upon his person. It was further alleged that permission for the lumber company's train to be at the point upon the track where the collision occurred at this particular time was furnished him from the trainmaster's office at Bannochburn by way of telegram. The railway company was alleged to have been negligent because: (a) The south-bound extra freight train of the defendant was allowed to run out of Nashville upon the schedule time of the north-bound log train operated by petitioner, instead of such train being held at Nashville to await the arrival of petitioner's train; (b) such train was running at a high rate of speed, which, in view of the fact that there was a heavy curve between Nashville and the southern limits of the trackage territory of the Massee & Felton Lumber Company, and the defendant's knowing that the lumber train was in such territory, was an act of gross negligence; (c) the defendant's engineer in approaching the curve failed to give the usual alarm by the blowing of his engine whistle. The railway company vouched the lumber company in as a party defendant. The railway company and the engineer agreed upon a settlement. This settlement was made with the consent of the Massee & Felton Lumber Company, under an agreement that the question of ultimate liability under the contract between the lumber company and the railway company should not be concluded, or the rights of either party prejudiced; that the Georgia & Florida Railway should have the right to sue the Massee & Felton Lumber Company for the recovery of the amount paid in settlement to the same extent as though judgment had been rendered against it in the case; and that, if the lumber company would have been liable to the railway company in the event a verdict had been rendered, it would be liable to the same extent, and no more, under the terms of the settlement. After the payment by the railway company to the engineer of the amount agreed upon in the settlement, the railway company instituted its action against the lumber company, alleging the foregoing facts, and attaching a copy of their agreement to the petition. This contract contained, among others, the following provisions:

"The lumber company is to furnish its own cars, engines, equipment, and employés necessary for hauling its logs and empties, at its own expense and that all of said trains operated by the lumber company are to be run only at such times, and under such rules and regulations, as may be from time to time prescribed by the railway company and its duly constituted authorities, copies of such rules and regulations to be furnished to the lumber company. * * * The said lumber company shall see that its engineers and conductors engaged in operating trains over the line of said railway company have good time-keeping watches, which they shall compare with the time given the conductors and engineers running regular trains on said railroad at and when called upon. The agent at Bannochburn shall furnish daily to the engineers and conductors of the lumber company the time which they shall keep by such watches. Lumber company's engineers and conductors shall keep off the time of all regular and signal trains as laid down on said time cards. The lumber company will see that their conductors and engineers are supplied with time cards in effect, and the said engineers and conductors shall carry out the instructions of the officials of said railway company as to the running of special or extra trains that are not shown upon their regular time cards; and that they will strictly observe all other orders that the officials of said railway company shall issue from time to time affecting that portion of the

cannot show that he is entitled to recover land from the possession of the defendant by showing that the latter has conveyed to a third person any interest which she may have had.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16–29; Dec. Dig. ⊂⊃9.]

4. ABATEMENT AND REVIVAL ⊂⊃84—WAIVER OF PLEA—TRIAL ON MERITS.

To an action seeking to recover land, the defendant at the first term filed a plea in abatement, setting up that the same plaintiff had previously brought an action against the defendant to recover the land, and had dismissed it and instituted a second action without paying the cost of the former suit. The defendant also pleaded to the merits of the action. When the case was called for trial, a jury was stricken, and, without reading the petition, counsel for the plaintiff stated to them the contentions and case for the plaintiff which he expected to prove. Counsel for the defendant then stated to the court that the plea in abatement was of file and had to be first disposed of, and also stated to the court and jury the contentions of the defendant on the merits. *Held*, that while the general rule is that if a defendant, who has filed a plea in abatement, goes into the trial of the case upon its merits, without insisting upon such plea, he thereby waives it, the rule was not applicable to the state of facts above set out; and it was error, on motion of the plaintiff, to strike the plea in abatement on the ground that it had been waived.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 155, 176, 507–510; Dec. Dig. ⊂⊃84.]

5. SCOPE OF REVIEW—DECISION.

The ruling above made so infected the entire trial on the merits as to render it illegal. Accordingly, the errors complained of in the grounds of the motion for a new trial will not be specifically passed upon; but the judgment will be reversed without adjudicating their merits, and the case will be remanded in order that it may be retried under the rulings above made.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by J. W. Waters, administrator, against M. L. Durrence. Judgment for plaintiff, and defendant brings error. Reversed, with directions.

H. H. Elders, of Reidsville, and Hines & Jordan, of Atlanta, for plaintiff in error. Way & Burkhalter, of Reidsville, for defendant in error.

PER CURIAM. Judgment reversed, with directions. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 237)

## SEABOARD AIR LINE RY. v. BLACKWELL. (No. 229.)

(Supreme Court of Georgia. Feb. 23, 1915.)

*(Syllabus by the Court.)*

COMMERCE ⊂⊃58—INTERSTATE COMMERCE—BLOW-POST LAW—VALIDITY.

The provision of Civil Code 1910, § 2675, which requires the engineer of a locomotive to check the speed thereof on approaching a public road crossing, so as to stop in time should any person or thing be crossing the railroad track on said road, is not unconstitutional as applied to a railway train while engaged in interstate commerce, under the conditions set forth in paragraph 23 of the defendant's answer, on the ground that, as thus applied, the statute is a regulation of interstate commerce and repugnant to the provisions of the Constitution of the United States that "the Congress shall have power to regulate commerce with foreign nations and among the several states." The statute is an exercise of the police power of the state, though to some extent it may indirectly affect interstate transportation.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 77–86, 100; Dec. Dig. ⊂⊃58.]

**Certified Questions from Court of Appeals.**

**Action by Elizabeth Blackwell against the Seaboard Air Line Railway. Defendant's motion for new trial being overruled, it sued out a bill of exceptions to the Court of Appeals, which propounds certain questions to the Supreme Court. Questions answered in opinion.**

Elizabeth Blackwell brought suit against the Seaboard Air Line Railway for an alleged homicide by the defendant of her minor son, who, while traveling along a public road, came to a crossing on its line, which was about two miles east of the city of Elberton, where defendant's track crossed such public road, and, while crossing over the track in a buggy, was struck and killed by the engine of the defendant. An act of negligence alleged in the petition was the failure on the part of the defendant to comply with the provisions of the statute of this state commonly known as the "blow-post law." Paragraph 23 of the defendant's plea was:

"And for further plea and answer in this behalf this defendant says that in paragraph twelve (12) of said petition it is alleged as an act of negligence that the engineer in charge of the engine which is alleged to have caused the injury complained of failed to blow the whistle of the engine at a blow post 400 yards south of the crossing where the homicide is alleged to have occurred, and failed to keep blowing said whistle until the train arrived at the crossing; and in paragraph thirteen (13) of said petition it is alleged that the employés of the defendant in charge of the engine which is alleged to have brought about the injury complained of failed to check the speed of the train at the blow post 400 yards south of the crossing, and failed to keep checking the same until it reached the crossing, so as to stop in time should any person or thing be crossing said track on said road, and such failure on the part of the employés on said train is alleged in said paragraph to be negligence. In other parts of said petition it is inferentially charged that a failure on the part of the employés in charge of the train to comply with what is known as the blow-post law in force in this state was negligence on the part of this defendant; and it is sought in said petition, and especially the paragraphs above referred to, to charge this defendant, as a matter of law, in failing to have its employés comply with the provisions of said blow-post law. This defendant denies that the failure to comply with said blow-post law was negligence on its part relatively to the transaction in question. This defendant alleges that the law above referred to as the blow-post law is that set forth in sections 2675, 2676, and 2677 of the Code of this state adopted in 1910, and is in the following language:

"'Sec. 2675. A Post to be Erected. There

must be fixed on the line of said roads, and at the distance of four hundred yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road.

" 'Sec. 2676. Neglecting to Erect Such Posts. Should any company fail or neglect to put up said posts, the superintendent thereof shall be guilty of a misdemeanor.

" 'Sec. 2677. Failing to Blow Whistle. If any engineer neglects to blow said whistle as required, and to check the speed as required, he is guilty of a misdemeanor: Provided, that within the corporate limits of the cities, towns, and villages of this state, the several railroad companies shall not be required to blow the whistle of their locomotives on approaching crossings or public roads in said corporate limits, but in lieu thereof the engineer of said locomotive shall be required to signal the approach of their trains to such crossings and public roads in said corporate limits, by tolling the bell of said locomotive; and on failure to do so, the penalties of this section shall apply to such offense.'

"This defendant avers that the train of defendant which is referred to in the petition, as appears from the allegations of said petition, was a train which ran from Atlanta, in the state of Georgia, to Abbeville, in the state of South Carolina, and said train was used as an instrumentality of this defendant in carrying on its business as an interstate carrier of passengers and freights between the points named, and in said train were carried passengers from the state of Georgia to the state of South Carolina and other states, and baggage from points in the state of Georgia to points in the state of South Carolina and other states, and upon said train also the Southern Express Company, under a contract with this defendant, carried articles of freight between Atlanta and other points in the state of Georgia to Abbeville and other points in the state of South Carolina, and other points in other states, and upon said train were also carried the mails of the United States, and the train in question was actually engaged in commerce between the several states, and especially between the state of Georgia and the state of South Carolina. This defendant avers that the line of this defendant over which said train was operated ran from the city of Atlanta, in the state of Georgia, to and over the Savannah river, which is the boundary line between the state of Georgia and the state of South Carolina, and thence to the city of Abbeville, in the state of South Carolina, and thence to other points in the states of North Carolina and Virginia. This defendant alleges that between the city of Atlanta, in the state of Georgia, and the Savannah river, where the same is the boundary line of the state of Georgia, there are one hundred and twenty-four (124) points where the line of this defendant crosses public roads of the different counties of this state, established pursuant to law, and all of such crossings are at grade. This defendant alleges that the distance from the city of Atlanta to the line of the state at the Savannah river traversed by the line of railway of this defendant is one hundred and twenty-three (123) miles. This defendant alleges that, according to the provisions of said blow-post law above set forth, it is required of the engineer in charge of railway trains to begin to check the train at a point 400 yards from each road crossing and to continue to check during the time that said 400 yards is being traversed, and have the engine under such control at the crossing that if any person or thing shall be upon the crossing it shall be in the power of the engineer to stop the train before it passes the crossing. This defendant avers that in order to comply with said law it will be necessary for the engineer in charge of the train to so slacken the speed of the train that there would be practically a full stop of the train at each of the road crossings over which the line of railway was constructed. This defendant avers that the time that would be required to so check and slacken the speed of the train, and then, after the crossing was passed, to increase the speed to the rate at which the train was running, would depend upon various conditions that might or might not exist at the time and at the crossings, such as the weight of the train, the state of the weather as affecting the condition of the rail, and the per cent. of the grade. This defendant avers that to comply with said law relatively to a train composed of an engine and three cars, consisting of a mail car and two coaches or similar cars, the time consumed in checking and slackening speed and increasing speed after the crossing was passed would not be less than three (3) minutes, and that, if the train was composed of a larger number of cars, the time consumed would be greater. This defendant avers that this allegation as to the time consumed in complying with such law at each crossing is based upon ordinary conditions; that is, where there is no grade, or the percentage of grade is low, where the conditions of the weather are such as not to affect the track, and all conditions are usual and ordinary. This defendant avers that, where the grade is heavy or great, and the track is affected by the weather, the time consumed would be greater. This defendant avers that, a train composed of an engine and freight cars being ordinarily a longer train than a passenger train, the time consumed in complying with said law at each crossing with the average freight train would be not less than five minutes. This defendant avers that the train referred to in the petition which is alleged to have caused the injury complained of was a train composed of an engine, a mail car, and two coaches—that is to say, a train composed of an engine and three ordinary coaches—and this defendant avers that if the provisions of the blow-post law above set forth had been complied with on the day in question, from the time that said train left Atlanta, in the state of Georgia, until it reached the Savannah river, the boundary line of the state, that at least three minutes would have been consumed at each crossing in complying with said blow-post law, and that the time consumed in compliance with said law on the day in question between the city of Atlanta and the Savannah river would have been more than six hours. This defendant alleges that, according to the adopted schedule of said train, the time consumed in running from the city of Atlanta to the Savannah river was four hours and thirty minutes; and this schedule was operated by giving a signal from the whistle of the engine on the approach to each crossing, but not checking and slackening speed in approaching the crossing; and that, if said law had been complied with, the time consumed in operating the train from the city of Atlanta to the Savannah river would have been more than ten hours and a half. This defendant further avers that the maximum rate of speed for freight trains upon the line of this defendant is twenty miles an hour, and that, if the law was complied with in the operation of freight trains between the city of Atlanta and the Savannah river, the time consumed in complying with said law at the public road crossing would be ten hours or more, and the time consumed in operating a freight train between the city of Atlanta and the Savannah river would be more than sixteen hours. This defendant further alleges that the 124 public road crossings above referred to are the usual and ordinary grade crossings, and there is nothing in the conditions surrounding which makes any one of them peculiarly dangerous, other than such danger as may result from the crossing of

a public road by a railroad track at grade. This defendant further alleges that between the city of Atlanta and the Savannah river the line of railway of this defendant crosses the tracks of two other railroads, and that under the laws of this state, wherever one railroad track crosses another, the engineer in charge of the train is required to bring his train to a full stop fifty feet from the crossing, and that the time consumed in such crossings would increase the time required to operate the trains between the points above referred to. This defendant alleges that the blow-post law above referred to, in so far as it requires the engineer in charge of trains to begin to check his train at a point 400 yards from the crossing and to keep checking until the crossing is reached, and have his train under such control that the same can be stopped if there should be any person or thing upon said track at said crossing, is, as applied to the train in question, which is alleged to have brought about the injury complained of, a regulation of interstate commerce and an unreasonable regulation of such commerce, and is in violation of paragraph 3, section 8, article 1, of the Constitution of the United States, which declares, 'The Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes,' which confers upon Congress the exclusive power to regulate the commerce among the several states; and said blow-post law is, as applied to the train in question, null and void. Wherefore this defendant says that each and every allegation of said petition which charges this defendant with negligence in failing to comply with said law, and especially paragraphs 12 and 13 of said petition, set forth no act which would in law amount to negligence; and this defendant alleges that it is not guilty of any negligence under the facts so alleged, and is not liable to plaintiff on account of its failure to comply with the provisions of said blow-post law; and all of this said defendant is ready to verify."

To this special plea the plaintiff filed a written demurrer, and a motion to strike the same, upon the ground that it set forth no legal defense against the cause of action set out in the plaintiff's petition. The trial court sustained the demurrer and struck the special plea above referred to, "except so much as reads as follows: 'The defendant denied that the failure to comply with said blow-post law was negligence on its part relatively to the transaction in question.'" The defendant excepted pendente lite, assigning error upon this ruling. The case proceeded to trial, and resulted in a verdict in favor of the plaintiff. The defendant's motion for a new trial having been overruled, it sued out a bill of exceptions to the Court of Appeals, assigning error upon the refusal to grant a new trial, and upon the exceptions pendente lite. The Court of Appeals propounded the following question to this court:

"Is the provision of the Civil Code, § 2675, which requires the engineer of a locomotive to check the speed thereof on approaching a public road crossing, so as to stop in time should any person or thing be crossing the railroad track on said road, unconstitutional so far as applied to a railway train while engaged in interstate commerce, under the conditions set forth in paragraph 23 of the defendant's answer, for the reason that, as thus applied, the statute is a regulation of interstate commerce and repugnant to the provision of the Constitution of the United States that 'The Congress shall have power to regulate commerce with foreign nations and among the several states?'" (In incorporated towns or cities the bell of the engine is required to be rung in approaching public crossings, in lieu of the blowing of the whistle.)

Z. B. Rogers and H. J. Brewer, both of Elberton, and F. C. Shackelford and Cobb & Erwin, all of Athens, for plaintiff in error. Pulliam Proffitt, of Elberton, for defendant in error.

LUMPKIN, J. It is well established by decisions of the Supreme Court of the United States that the right to regulate interstate commerce is exclusively vested in Congress, and that the states cannot pass any laws directly regulating such commerce, but that the states may, in the exercise of their police power, pass laws in the interest of public safety which do not interfere directly with the operation of interstate commerce; that the constitutionality of a state statute regulating the operation of railroad trains depends upon its effect on interstate commerce; and that, in the absence of congressional regulation on the subject, a state may make reasonable regulations as to the manner in which trains shall approach, and give notice of their approach to, dangerous crossings, so long as they are not a direct burden upon interstate commerce. Southern Ry. Co. v. King, 217 U. S. 524, 30 Sup. Ct. 594, 54 L. Ed. 868. No exact rule can be formulated by which to determine in advance what enactments along this line by states are valid and what are invalid. In Southern Ry. Co. v. Atlanta Sand Co., 135 Ga. 35, 46, 68 S. E. 807, 812, it was said:

"As the Supreme Court of the United States have mentioned reasonableness as a guide in determining the extent to which a state law may affect interstate shipments without being invalid, and as reasonableness or unreasonableness is a matter for which no absolute standard can be prescribed, but a thing sometimes appears reasonable to one mind, yet unreasonable to another, and even the same person may change his view as to what is reasonable with age, experience, and reflection, the determination of questions like that now before us involves no small difficulty."

We will cite only a few of the many cases in which state laws have been held valid, though to some extent affecting interstate commerce.

In Louisville & Nashville R. Co. v. Kentucky, 161 U. S. 677, 702, 16 Sup. Ct. 714, 724, 40 L. Ed. 849, Mr. Justice Brown said:

"It has never been supposed that the dominant power of Congress over interstate commerce took from the states the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render

desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."

In that case a state statute of Kentucky prohibiting a railroad or other common carrier from consolidating or pooling its earnings with a parallel or competing line, and prohibiting certain other leases and combinations, was held valid.

In Hennington v. State, 90 Ga. 396, 17 S. E. 1009, a statute of this state which made it a misdemeanor to run a freight train on Sunday was upheld, and this was affirmed in Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166, Seale v. State, 126 Ga. 644, 55 S. E. 472. In Atlantic Coast Line Railroad Co. v. State, 135 Ga. 545, 69 S. E. 725, 32 L. R. A. (N. S.) 20, a law of this state which required railroads to use headlights of a certain character was upheld, and this was affirmed in 234 U. S. 280, 34 Sup. Ct. 829, 58 L. Ed. 1312. In Lake Shore, etc., Ry. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702, a state law requiring three regular passenger trains to stop each way daily at every village containing over 3,000 inhabitants was upheld. In Erb v. Morasch, 177 U. S. 584, 20 Sup. Ct. 819, 44 L. Ed. 897, it was held that a regulation by the city of the speed at which railroad trains might run within its limits was valid, although applicable to interstate trains, at least until Congress had acted on the subject. We forbear undertaking to map out "the twilight zone" in which state authorities may act until Congress has acted on the subject. See, also, Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; Southern Railway v. Melton, 133 Ga. 277, 298, 65 S. E. 665, and cit.; Southern Railway Co. v. Atlanta Sand, etc., Co., supra.

In Southern Railway Co. v. Grizzle, 131 Ga. 287, 62 S. E. 177, it was declared that the section of the state Code now under consideration was not, with respect to a railroad company doing an interstate business, invalid as being a regulation of interstate commerce, but was a police regulation designed to secure public safety, and valid as such.

In Central Railroad Co. v. Hall, 109 Ga. 367, 34 S. E. 605, the actual ruling was that where the crossing was one-half mile from the depot from which the train started, the law applied. In the opinion Chief Justice Simmons expressed some views as to the hardship or effect upon rapid transit which might arise from the law. What he said on this subject was an obiter dictum. He practically conceded the propriety of such a law before the days of rapid transit, as an exercise of the police power for the preservation of the public safety. It can hardly be claimed that rapid transit is more important than human life. It must also be borne in mind that, while the commerce of the country calls for rapid transit, the local development and increase in population also create a greater necessity for public highways and for means for protecting the safety of those who use them.

In Southern Railway Co. v. King, supra, it was held that one who would strike down a statute as unconstitutional must show that it affects him injuriously and actually deprives him of a constitutional right. Mr. Justice Day said (217 U. S. 536, 537, 30 Sup. Ct. 594, 597 [54 L. Ed. 868]):

"They [referring to the averments of the plea] do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful operation. For aught that appears as allegations of fact in this answer, the crossing at which this injury happened may have been so located and of such dangerous character as to make the slackening of trains at that point necessary to the safety of those using the public highway, and a statute making such requirement only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained."

If the state Legislature may regulate the speed of trains in approaching dangerous crossings and the signals to be given in so doing, necessarily it must be allowed some judgment in determining when such regulations should be made. It requires no argument to prove that grade crossings are dangerous, especially in populous communities. In urging that, if the number of these crossings increase, the police power of the state terminates, there is danger of taking the anomalous position that, as the danger to the public increases the state loses its authority to protect its citizens therefrom. Take, for instance, a populous city. The streets may cross the railroad at frequent intervals, and many people may pass over them. Surely this would rather furnish a reason for holding that the state has the power to protect the public in such places of danger than that its effort to do so would be invalid because it might require a railroad train coming from another state to slacken its speed at those places. In the present case the railroad company alleges that between Atlanta and the Savannah river (a distance of 123 miles) there are 124 grade crossings. It is hardly within the range of possibility that they are distributed equally along the line. On the contrary, it may fairly be assumed that many of these crossings are in populous sections—at stations or in towns or cities along the route. It is not alleged how many of them are in the country or in sparsely settled districts. So that it may be that the very situation hypothetically stated above may actually

exist in this case, and the railroad company may be complaining because at a place in a populous section there are frequent crossings, and that it ought not to be required by the state law to regard the safety of the public at such places, because of the very increase of danger at them. It does not appear that the operation or speed of trains in stretches of country sparsely settled and with few crossings is seriously affected, or that the trains may not run for long distances without stoppage, or that slowing down from a high speed in populous places may not serve for several crossings, if such allegations would make a difference. Surely it could not be held that a railroad company has the right to run at an unrestricted speed and without giving proper signals through towns, villages, or densely populated communities because there may be frequent grade crossings at such places. Furthermore, crossings may be situated between two neighboring communities, or they may be at places of danger where to prohibit the state from restricting the speed and requiring the giving of signals would be to license rashness.

The public have a right to use the public highways. Railroads have no inherent right to pass over them, except by virtue of a franchise from the state. The state has the right, in the exercise of its police power, to pass laws to preserve the public safety. Laws must be general in their character, and cannot well single out and specify one public crossing and omit another, if the condition is such as to make a police regulation for safety proper. The mere fact that on a particular day or series of days a great number of people may not pass over a particular crossing is not conclusive that it is not a place requiring protection to the public. On other days there may be reasons why a great number of people would pass over the same crossing. Who shall determine when the state shall exercise the unquestionable police power for the safety of the lives of its citizens? Shall it be the Legislature who represents the sovereignty of the state in making laws, or shall every law thus enacted be subject to the opinion of a jury? How far shall the legislative discretion in determining whether a particular protective law should be enacted be nullified, where it undoubtedly has some basis, and the entire matter be relegated as a mere question of fact to a jury in each case, with the possibility of differences in their findings? Shall the law which requires the erection of blow posts, the giving of signals, and the regulation of speed, for the protection of the public at the crossing of public highways at grade over railroads, be entirely in the air, and applicable to one public crossing and not to another, or to the same crossing at some times and not at others, according as a jury may find in regard to it? Under our system issues of fact are for the jury; and, if the validity of this law in each case becomes a question of fact, then it will be impossible to tell in advance what is the law applicable to crossings of public highways and railroads. Or shall it be determined by the opinion of a court in each case, with a like resulting uncertainty?

In the present case it is alleged in general terms that the 124 public road crossings over the defendant's line of road in this state are the usual and ordinary grade crossings, and that there is nothing in the conditions surrounding them which makes any one of them peculiarly dangerous other than such danger as is incident to the crossing of a public highway and the railroad track at grade. We do not think that this is sufficient to show that the law is invalid. Applying the well-recognized rule that allegations are to be construed most strongly against the pleader, this does not negative the fact that all of these crossings are dangerous. It, in effect, concedes that they are all dangerous as grade crossings, but merely alleges in general terms that there is nothing to make any one of them peculiarly dangerous other than this fact. Nothing more is stated as to the particular crossing where the injury occurred, except that it is within about two miles of a city.

In Civil Code, 1910, § 2585, par. 5, which forms a part of the general law on the subject of incorporation of railroad companies and their powers, it is declared that:

"Whenever the track of any such road shall touch, intersect, or cross any road, highway, or street, it may be carried over or under, or cross at grade level or otherwise, as may be found most expedient for the public good."

This section was taken from the act of 1892, but a similar provision existed under the act of 1881. While the defendant company may be a foreign corporation, it must operate in Georgia by virtue of a Georgia franchise; and while the charter under which it, or some subordinate company under the franchise of which it may operate, may not have been granted under the general incorporation law, yet that law indicates a public policy by which railroad companies may avoid danger and delays at grade crossings by means of crossings above or below grade. The Code section now under consideration does not apply where the crossing is not at grade. Barton v. Southern Railway Co., 132 Ga. 841, 64 S. E. 1079, 22 L. R. A. (N. S.) 915, 16 Ann. Cas. 1232. It is quite probable that in many instances grade crossings could be obviated altogether. Has a railroad company the constitutional right to disregard laws for obviating delays and dangers, and nevertheless to declare that the Legislature cannot enact a law of the character now under consideration for the protection of the public where grade crossings exist, and when, in the legislative opinion, there is reasonable ground for such an enactment?

If the rule is that one who seeks to overthrow a police regulation enacted by a state

for public safety must make out a clear case in order to accomplish that purpose, it seems to us that the railroad in this case has failed to do so. Congress has not undertaken to pass any law covering the subject involved in the Code section now being considered. It is therefore not a case of a conflict of a state law and an act of Congress within the power of the latter to pass; but it is a question whether the legislative power of this state has been so arbitrarily used that it shall be declared that the power conferred by the Constitution of the United States upon Congress to regulate commerce among the several states shall ex proprio vigore strike down the hands of the state when they stretch out to protect the public from danger.

The police regulation of speed and signals at highway crossings over a railroad in the state is not a matter which is inherently and exclusively one for congressional control; otherwise the decisions upholding some of these state regulations could not have been made. Congress has not assumed control over the subject. The law under consideration does not undertake directly to deal with interstate commerce. Whatever effect such law may have on interstate commerce is only incidental and indirect. It does not prohibit interstate commerce or in terms refer to it. It does not directly impose any burden on it. It merely provides for public safety at railroad crossings where the Legislature have determined that such provision was necessary; and if it causes trains to move somewhat more slowly at such places, as a means of safety to the public, how can it be declared that such law is invalid?

We recognize the ruling made in Southern Ry. Co. v. King, supra, and by no means intend to disregard what was there decided. But, if what we have said above is well founded, the ruling here made does not conflict with what is held in that case. When a state statute is on trial for its life, some presumption in its favor should be indulged, and it should not be declared void except in a clear case. We do not think that such a case has been made here as requires a declaration that the section of the state Code which is attacked is invalid relatively to the railroad company.

If we should declare this police law of the state unconstitutional or invalid, should it be held void in toto as to all railroads and all crossings within the state over which interstate trains or commerce may pass, without regard to the number of such crossings over the different railroads, and their situations, or dangerous character, or should the law be declared invalid only as to the Seaboard Air Line Railway, leaving it to stand as to all other railroads, at least until further consideration, and, if it should be declared invalid as to the Seaboard Air Line Railway, should it be so declared as to all crossings of public highways over that road, whether in populous districts, or in towns or cities, or not, or only as the particular crossing where the injury complained of in this case occurred? Moreover, the danger to the public is as great from an interstate train as from an intrastate train. If we should hold, relatively to interstate trains, that this law is invalid, or invalid as to certain railroads, or as to certain crossings, should we still hold that, relatively to intrastate trains and those carrying only intrastate commerce, the provision is legitimate and valid to safeguard the public? In other words, is it a good law for some railroads, some trains, and some crossings, and an invalid law as to other railroads and other trains and other crossings, though the purpose of the law in all cases is to provide for the safety of the public? It must be remembered that railroads are in the nature of public highways, and that other public roads are also public highways, and that the traveling public have the right to use these public highways which traverse the country, though they may cross the lines of railroads.

Of course, the facts well pleaded must be taken as true on demurrer, whether, in fact, they are correct or not. And we have so considered them in the preceding discussion. Mere conclusions are not admitted by a demurrer.

All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 229)

PEPPERS v. CAUTHEN et al. (No. 225.)
(Supreme Court of Georgia. Feb. 20, 1915.)

*(Syllabus by the Court.)*

1. CREDITORS' SUIT ⊂⊃39—EQUITABLE PETITION BY CREDITORS—PREMATURITY—BANKRUPTCY.

An equitable petition was filed by creditors of a bankrupt holding notes containing a waiver of exemption, whereby they sought to have a receiver appointed and to subject the exemption to such debts. The petition alleged that the bankrupt had applied for and had set apart to him an exemption. By amendment a copy of an order of the referee in bankruptcy deciding certain issues raised by objections which had been filed to the valuation placed upon the property so set apart as exempt was added as an exhibit. This showed that the order of the referee was dated after the filing of the original petition. *Held*, that this was not sufficient to show that the equitable petition was prematurely filed, so as to require a dismissal thereof on motion in the nature of a general demurrer.

(a) No motion for a new trial was made, and the assignments of error which were made cannot bring before this court the correctness of the verdict as to issues of fact.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 154–164; Dec. Dig. ⊂⊃39.]

2. CREDITORS' SUIT ⊂⊃59—ATTORNEY'S FEES—RIGHT TO ALLOWANCE.

Where certain creditors holding notes containing waivers of exemption filed an equitable petition setting out that it was prosecuted on behalf of themselves and other creditors similarly situated for the purpose of subjecting an exemption set apart to the bankrupt,

and the exemption was taken possession of by a receiver of the state court and reduced to money, if other creditors also holding waiver notes intervened and procured a part of the fund to be paid to them, as between creditors so obtaining the benefit of the fund, a fee might be allowed therefrom for the attorneys of the creditors filing the petition and bringing such fund into court, before it would be distributed. But, if the fund in court was more than sufficient to pay the indebtedness and legitimate cost and charges, the excess which would be going to the bankrupt after payment of such notes, costs, and expenses, should not be reduced by the payment of attorneys' fees for bringing the fund into court. Direction is given that the decree be so modified as to conform to this ruling.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 218–221; Dec. Dig. ⟹59.]

3. Costs ⟹13—Allowance — Equitable Action.

There was no error in ordering that there be paid from the fund the cost of the receivership, including the court cost proper, the reasonable expenses incurred by the receiver in keeping the personal property, the cost of making a sale of the property, and a reasonable fee for his services.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 21, 25; Dec. Dig. ⟹13.]

4. Exemptions ⟹128—Waiver—Validity.

Under the exception as here made, the decree was not erroneous on the ground that the state Constitution declares that a debtor shall have the power to waive or renounce in writing all the benefit of the exemption except as to wearing apparel and not exceeding $300 worth of household and kitchen furniture and provisions to be selected by himself and wife, if any.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 157; Dec. Dig. ⟹128.]

5. Appeal and Error ⟹724—Assignments of Error—Sufficiency.

Some of the assignments of error in the bill of exceptions depend upon a consideration of the evidence, and some of them are too vague to raise proper questions for consideration by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997–3001, 3022; Dec. Dig. ⟹724.]

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

Equitable petition by R. L. Cauthen and others against J. G. Peppers. Judgment for plaintiffs, and defendant brings error. Affirmed, with direction.

Cauthen and two McLanahans, for themselves and other creditors who might come in and be made parties, filed their equitable petition against J. G. Peppers, alleging in substance as follows: In November, 1912, Peppers was adjudicated a bankrupt and a trustee was appointed. The bankrupt applied and had set apart to him out of his estate certain personal and real property as an exemption. Prior to bankruptcy, the bankrupt gave to the plaintiffs certain promissory notes containing waivers of homestead or exemption. The notes have not been reduced to judgment or proved in bankruptcy. Peppers has no property except his exemption and he is insolvent. In order to preserve the exempted property and prevent it from going into the hands of the bankrupt, it is necessary that a receiver should be appointed to take charge of and hold it. The plaintiffs cannot bring an action at law to take charge of and hold the exempted property until they can get a judgment in rem against it. They pray that a receiver be appointed and directed to apply to the court of bankruptcy for the possession of the exempted property, and to hold it subject to the order of the superior court; that the bankrupt be enjoined from receiving the exempted property from the trustee; that the trustee be enjoined from delivering it or its proceeds to the bankrupt or to any one for him; and that the plaintiffs have judgment in rem against the property for the amount of their claims, or, if the property should be sold and reduced to cash by order of the court, that their judgments be paid out of the proceeds thereof. This petition was filed on February 7, 1913. On September 8th thereafter, the plaintiffs amended the petition by attaching to it a copy of the finding of the referee in bankruptcy in regard to the setting apart an exemption in personal and real property to the bankrupt. The copy of the referee's order recited that certain issues formed by objections to the trustee's report as to exempted property of the bankrupt came on to be heard before the referee on February 8th. He found that the value of certain described personalty set apart by the trustee was $374.50; and that the balance of the exemption of $1,600, amounting to $1,225.50, be taken out of the 115 acres of land, of which $61\frac{11}{40}$ acres were of the value of $1,225.50. It was further recited that a receiver had been appointed by the superior court under an equitable petition filed therein, and it was ordered that the trustee deliver to the receiver the exempted property. It did not appear in this order when the trustee in bankruptcy set apart the property as exempt. The defendant filed a motion to dismiss the petition as amended on three grounds: (1) The petition showed on its face that the exemption sought to be subjected was set apart on February 18, 1913, and that this proceeding in rem against the property was filed on February 7, 1913, thereby showing that the superior court was without jurisdiction and that the suit was prematurely brought; (2) that, at the time when the original proceeding was filed, there was no property in existence upon which a judgment or decree of the superior court could operate, the exemption not having been set aside and the specific articles thereof ascertained; (3) that, at the time when the proceeding was filed, the superior court was without jurisdiction of any of the property of the defendant, all of it being in the exclusive jurisdiction of the United States District Court until the exemption applied for was determined by that court. This motion was overruled,

and the defendant excepted pendente lite and assigned error on the ruling. The First National Bank of Elberton intervened, alleging that it held two notes of the bankrupt containing waivers of homestead and exemption. The case was submitted to a jury on special issues of fact, and upon their finding the court entered a decree giving judgments in favor of the plaintiffs against the property set apart as an exemption in certain specified amounts, directing that the property be sold and that from the proceeds the court costs and the expenses of keeping the property and of sale, be paid; that the receiver pay to himself a fee of $25, and the plaintiffs' attorneys as a fee for bringing the fund into court $300; that the balance be applied to the payment of the judgments in favor of plaintiffs equally; and that, if any balance then remained, it be paid to the bankrupt as his exemption. No motion for a new trial was made, but exception was taken directly to the decree.

J. T. Sisk, of Elberton, for plaintiff in error. Thos. J. Brown, Geo. C. Grogan, and Z. B. Rogers, all of Elberton, for defendants in error.

LUMPKIN, J. [1] 1. The motion to dismiss the petition was in the nature of a demurrer, on the ground that it showed on its face that the exemption had not been set aside when the petition was filed. This does not appear on the face of the petition. On the contrary, the original petition (which was filed on February 7, 1913) alleged that the bankrupt had applied for and had set apart to him an exemption. The amendment attached a copy of the order of the referee in bankruptcy deciding certain issues raised by objections which had been filed to the valuation placed upon the property set apart to the bankrupt as an exemption by the trustee. The order of the referee was dated February 18, 1913, but it did not appear on what date the trustee in bankruptcy set apart the property as an exemption to the bankrupt. It cannot be said therefore that the petition showed on its face that the trustee in bankruptcy had not set apart the property before the petition was filed. Whatever may have been developed by the evidence, no motion was made for a new trial, and the propriety of the finding of the jury is not properly before us. It has been held that, where property has been set apart as exempt by the trustee in bankruptcy and before his report has been confirmed by the referee, an equitable petition may be filed. Arnwine v. Beaver, 134 Ga. 377, 67 S. E. 937. What has been said above renders it unnecessary to discuss the ruling made in Coffey v. Mitchell, 139 Ga. 430, 77 S. E. 561, further than to say that it was there stated that no relief was sought against the bankrupt defendant other than a special judgment fixing a lien on the property which he was seeking to have set apart as an exemption in bankruptcy; and that it was not decided that no case could arise where equitable relief might not be invoked prior to the formal setting apart of the exemption. It has been held that after the property has been set apart by the trustee, but before the time for filing exceptions has elapsed, he may transfer it. Taylor Co. v. Williams, 139 Ga. 581 (77 S. E. 386). If no equitable petition could in any case or under any circumstances be filed without alleging that the exemption had been set apart, the result might sometimes be a race between a creditor holding a note containing a waiver of exemption, who must wait until the actual setting apart of such exemption before applying to a court of equity, and an insolvent bankrupt endeavoring to sell or divest himself of the exemption immediately upon the setting apart by the trustee. If, as has been said, after an exemption is set apart, in theory of the law, it is treated as always having been in the bankrupt and never administered by the court of bankruptcy, when a bankrupt proceeds for the purpose of having property segregated and thus set apart to him, it would seem that this very fact might furnish a ground for the creditor to proceed before it is too late, with proper allegations as to necessity therefor. Of course, he could not finally subject property until it was set apart, and any right to have the property taken possession of by a receiver might be dependent upon its being set apart and upon the result of exceptions to the trustee's action. But we are not called on to rule whether this necessarily requires a creditor having a note containing a waiver to wait, under all circumstances, until the entire transaction is or may be over; nor do we make any ruling on this subject.

[2] 2. Exception was taken to the inclusion in the decree of attorney's fees for bringing the fund into court while the waiver of homestead was only operative as to the amount of the debt. The theory on which attorney's fees for bringing a fund into court is allowed is that if the diligence of one creditor secures a fund for a common benefit, and, if others share therein, any expense of securing it should not fall on the diligent creditor alone; that those who participate in the fund should contribute their share to the common expense, so that the fund going to the different creditors may be first taxed with the proper amount of attorney's fees before its distribution. But this does not authorize creditors to be paid in full and also to require the debtor to pay attorney's fees for bringing the fund into court. What is here said refers to the award of a fee from the fund for bringing it into court, and not to the contract fees which may be contained in the notes. Direction is given that the decree be so modified that if the fund is sufficient to pay the waiver notes in full, together with such costs and expenses as have been

decreed against the fund, attorney's fees for bringing such fund into court shall not be taxed as against such excess, but that such fee may be awarded from the fund which would be going to the creditors participating in the distribution.

[3] 3. It is contended that the decree was erroneous in directing the costs of the receivership to be paid from the fund, on the ground that the waiver only covered the debt. The notes sought to be enforced contained a promise to pay a stated amount with interest and "with all cost of collection," and waived all homestead or exemption rights as against the notes and any renewal thereof. The waiver clearly included such costs, and there was no error in directing that they be paid from the fund. The court has a discretion in awarding costs in an equitable action. Civil Code, 1910, § 5423.

[4] 4. It was contended that a part of the property included in the exemption and against which the decree was rendered was household and kitchen furniture and wearing apparel, and that, under the law, the right to an exemption in such property cannot be waived. The Constitution declares that a debtor shall have the power to waive or renounce in writing the right to the benefit to the exemption except as to wearing apparel and not exceeding $300 worth of household and kitchen furniture and provisions to be selected by himself and wife, if any. Civil Code 1910, § 6584. Under the ruling in Miller v. Almon, 123 Ga. 104, 50 S. E. 998, in order for this exemption of $300 to be effectual as against a waiver, it must have been set apart. It does not appear that in the court below the point was raised that the debtor and his wife selected household and kitchen furniture not exceeding $300 in value and claimed it as an exemption in spite of the waiver. So far as appears from this bill of exceptions, the point is made for the first time by assigning error in the decree. We do not think this furnishes ground for reversal.

[5] 5. Another ground of exception to the decree complains that it was erroneous for that:

"Under the evidence submitted under paragraphs of the amended plea, said contract of conditional sale which was evidenced by the bond for title signed by and the notes sued on by R. L. Cauthen, J. J. McLanahan, and G. H. McLanahan, was rescinded by the acts therein set forth."

This seems to be a complaint more appropriate to a motion for a new trial than to an exception to a decree. Moreover, the statement, "under the evidence submitted under paragraphs of the amended plea," is so indefinite as to which paragraphs of the plea are referred to and what evidence is intended that it is a very loose and uncertain form of exception to a decree.

A similar criticism may be made as to other exceptions, and in so far as they raise points for determination they are without merit.

Judgment affirmed, with direction. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 164)

## WARD v. MILLER et al. (No. 195.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. INSANE PERSONS ⟸100, 101—JUDGMENT—EXECUTION—SALE—VALIDITY.

A judgment obtained against an insane person is not void; and where an execution based on such judgment is levied on land belonging to such defendant in fi. fa., and the land sold at sheriff's sale, a purchaser at such sale would be protected.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 179–185; Dec. Dig. ⟸100, 101.]

2. EXECUTION ⟸258—VALIDITY—CONFORMITY WITH JUDGMENT.

An execution should follow the judgment; but a misstatement in an execution as to the date of the judgment, if the execution so describes and identifies the judgment as to make certain the legal authority of the court which caused it to be issued, this is sufficient to authorize the sheriff to levy on and sell the land of the defendant in fi. fa., and in a collateral proceeding will uphold a sale made under the execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 736–739, 789; Dec. Dig. ⟸258.]

3. EXECUTION ⟸99, 275—COPY IN LIEU OF LOST ORIGINAL—"ALIAS FI. FA."—SALE—RIGHTS OF PURCHASER.

Where an execution issued from the superior court has been lost, and by appropriate order the judge of the superior court establishes what is designated as a "copy" of the lost original in substantial conformity to the requirements of section 5321 of the Civil Code of 1910, such copy is substantially an "alias fi. fa.," as contemplated by the statute, and can as such be legally levied on land belonging to the defendant.

(a) A purchaser at sheriff's sale under such fi. fa. would be protected.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 16, 148, 195–202, 345, 607, 791–796; Dec. Dig. ⟸99, 275.]

4. DENIAL OF NEW TRIAL.

The court did not err in refusing a new trial.

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Action by S. K. Ward, administrator, against F. C. Miller, administrator, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

S. K. Ward, as administrator, brought suit against W. C. Price and F. C. Miller, as administrator upon the estate of E. P. Miller, and alleged: The defendants were in possession of a certain tract of land containing 484 acres in Liberty county, and refused to yield possession. The plaintiff, as administrator of the estate of Charles Tutty, claims title to the lands, being seised thereof in fee. In the years 1906 and 1907 W. C. Price and E. P. Miller cut cross-ties and pine wood from and upon the land, the cross-ties being of the value of $300, and the pine wood

of the value of $100, and have converted the same to their use without the consent of the plaintiff. An abstract of title to the land was attached as an exhibit. A judgment was prayed against Price and Miller, as administrator, for possession of the premises, and for the sum of $400 as the value of the crossties and pine wood. Price filed an answer to the petition, admitting that he was in possession of the land, but averring that for lack of information he was unable either to admit or deny that the property was conveyed by William Tutty to Charles Tutty on September 9, 1891. He denied that the plaintiff had any right or title to the land and was seised thereof in fee. He admitted that he had never surrendered possession of the lands to the administrator, but denied any demand on him to do so, and denied that plaintiff has any right to make such demand. Miller, as administrator, denied generally all the material allegations of the petition.

During the trial the plaintiff offered the following amendments to his petition:

(1) "That said defendants are claiming title to said premises under and by virtue of a sheriff's deed, dated January 3, 1905, made by A. B. Brewer, sheriff of Liberty county, Ga., to W. C. Price and E. P. Miller, covering the premises described in the petition, which deed is based upon and made under and by virtue of the execution therein referred to in favor of C. J. McDonald against Charles Tutty for $132.35, principal, and interest, $17.50, and interest on said principal sum from May 17, 1900, and costs, issuing out of superior court, Liberty county, Ga., said execution having been issued on May 20, 1900. Said execution purports to be based upon a judgment in favor of C. J. McDonald against Charles Tutty, rendered for said amounts, in Liberty superior court on May 23, 1900, in complaint for land, and no other judgment was rendered at said term in favor of C. J. McDonald against Charles Tutty, except the one dated May 23, 1900, aforesaid. Plaintiff shows to the court that said sheriff's deed and the execution upon which it is based are illegal, null, and void, for that said execution was issued on May 20, 1900, according to its date, while said judgment upon which it purports to be based is dated and was rendered on May 23, 1900. Said execution was prematurely issued."

(2) "That defendants claim title to said premises under and by virtue of a sheriff's deed dated January 3, 1905, made by A. B. Brewer, sheriff of Liberty county, Ga., to W. C. Price and E. P. Miller, covering the premises described in the petition; said deed being based upon an execution in favor of C. J. McDonald against Charles Tutty, issuing out of Liberty superior court, May term, 1900. That said deed and execution have been introduced in evidence by defendants. Said deed and execution are illegal, null, and void, for that on the date of the rendition of said judgment on May 23, 1900, the defendant in fi. fa., Charles Tutty, who was then defendant in complaint for land suit, which resulted in the rendition of said judgment, was an insane person, and was incapable of making a valid contract, and did not know the consequences of his deeds and acts, owing to his mental derangement, and that said mental condition lasted until the time of his death on October 30, 1904, and commenced before the May term, 1900, of Liberty superior court, all of which was known to the said W. C. Price at the time he purchased with E. P. Miller the premises involved in this case on January 3, 1905."

These amendments were disallowed by the court, to which rulings the plaintiff excepted pendente lite. The court directed a verdict in favor of the defendants. A motion for a new trial was made by the plaintiff, which was overruled, and he excepted.

P. W. Meldrim and Edwin A. Cohen, both of Savannah, for plaintiff in error. Oliver & Oliver and N. J. Norman, all of Savannah, for defendants in error.

HILL, J. (after stating the facts as above). [1] 1. The second and third grounds of the amended motion for a new trial will be considered along with the exceptions pendente lite to the disallowance of the amendments offered to the petition (which are set forth in the statement of facts), inasmuch as the refusal to allow the witness to testify, as complained of in these grounds, depends on whether the amendments to the petition should have been allowed. The amendments referred to are predicated upon the theory that the judgment obtained against Tutty was void, because, as alleged, he was insane at the time it was obtained against him, and that consequently the sale of his property under the judgment was likewise void, and the defendants obtained no title to the land in controversy at the sheriff's sale under an execution based on such judgment. This is not an open question in this state. This court decided, as early as the case of Foster v. Jones, 23 Ga. 168, that a judgment against a lunatic is not void, and that a purchaser at sheriff's sale under such judgment would be protected. See, also, Luhrs v. Hancock, 181 U. S. 567, 574, 21 Sup. Ct. 726, 45 L. Ed. 1005. This being so, the court did not err in disallowing the amendment to the petition which alleged that the execution and deed introduced in evidence by the defendants were void because the defendant in fi. fa. was insane at the time the judgment was obtained against him, nor in rejecting evidence in support of the amendments on the ground of irrelevancy.

[2] 2. Error is assigned because the court refused to permit the plaintiff to prove by the records of the court that the judgment which was the foundation of the execution levied on the land, and under which the land was sold and purchased by the defendant, was the only judgment rendered in favor of C. J. McDonald against Charles Tutty at the May term, 1900, of Liberty superior court, and refused to permit the plaintiff to prove that the May term, 1900, of the superior court of Liberty county did not convene until May 21, 1900, and that the court was not in session on May 17, 1900, the date on which the copy execution sets out the judgment was rendered; the copy execution being dated May 20, 1900. That the execution shows that it was issued a few days before the judgment was obtained is an irregularity, which could be cured by amendment. It is true

that the execution should follow the judgment; but a misstatement in the execution as to the date of the judgment, if the execution so describes and identifies the judgment as to make certain the legal authority of the court which caused the execution to be issued, does not render the judgment void, and it is sufficient to authorize the sheriff to levy on and sell the land of the defendant in execution, and, in a collateral proceeding, a sale made under such levy will be upheld. Sprott v. Reid, 3 G. Greene (Iowa) 489, 56 Am. Dec. 549, and cases cited.

[3] 3. Complaint is made because the court admitted in evidence, over objection, what is declared to be a "copy" execution instead of an "alias" fi. fa., as provided by law. Indorsed on the "copy" or "alias" fi. fa. was the following order of the court:

"It appearing that the original of the within copy fi. fa. is lost, and that the within is a substantial copy of said lost original, ordered, that the within copy be, and the same is hereby, established in lieu of the lost original. This Nov. 25, 1904.

"Paul E. Seabrook, Judge S. C. A. J. C."

The land in controversy was levied on and sold under this execution. Section 5321 of the Civil Code is as follows:

"When any execution which shall have been regularly issued from the superior courts of this state shall be lost or destroyed, the judge of the court from which the same issued may at any time, either in open court or vacation, upon proper application being made and the facts proved by the affidavit of the applicant, his agent, or his attorney, or by any other satisfactory proof, grant an order for the issuance of an alias execution in lieu of the lost original execution."

If the execution was issued in compliance with the provisions of this section (and from its recitals it seems to have been), then the execution established is in all essentials an "alias," although it may have been designated a "copy." Such a fi. fa. can be levied by the sheriff on the land of the defendant in fi. fa., and the purchaser at such sale would be protected in so far as a sale under such fi. fa. would make it a legal sale. We think the judge's order was a substantial compliance with the above-quoted section of the Civil Code. Rushin v. Shields, 11 Ga. 636, 56 Am. Dec. 436; Water Lot Co. v. Bank of Brunswick, 53 Ga. 30; Milner v. Akin, 58 Ga. 555; Torrent v. Sulter, 67 Ga. 32-34.

[4] 4. The court did not err in refusing a new trial.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(16 Ga. App. 12)

## HENRY v. GEORGIA & F. RY. (No. 5623.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

TRIAL ⊂⊃139—NONSUIT—EVIDENCE.

The evidence adduced in behalf of the plaintiff was sufficient to support legitimate deductions and inferences from which the jury might have been authorized to find in favor of the plaintiff, and the court therefore erred in awarding a nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ⊂⊃139.]

Error from City Court of Douglas; John C. McDonald, Judge.

Action by Alfonso Henry against the Georgia & Florida Railway. Judgment for defendant, and plaintiff brings error. Reversed.

Chastain & Henson, of Douglas, and W. W. Bennett, of Baxley, for plaintiff in error. McDonald & Willingham and F. W. Dart, all of Douglas, and Wm. H. Barrett, of Augusta, for defendant in error.

WADE, J. Judgment reversed.

BROYLES, J., not presiding.

(16 Ga. App. 33)

## CITIZENS' NAT. BANK v. DASHER. (No. 5580.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. GARNISHMENT ⊂⊃142, 146—GARNISHEE—ANSWER—PAYMENT TO DEFENDANT.

The court did not err in striking the amendment to the garnishee's answer as to the payment of the fund in its hands to the defendant; the amendment showing that the payment was made after service of the summons of garnishment and by direction of the justice of the peace who issued the summons of garnishment, when the summons required the garnishee to answer to the city court of Macon, and the law required that the bond be filed with the clerk of that court and the security be approved by him. Nor did the court err in refusing to consider an amendment alleging that the garnishee believed and was advised that it should make answer as to Joseph M. Napier & Co. only, and filed its answer with reference to Joseph M. Napier & Co. only, since the summons of garnishment required the garnishee to answer as to "Joseph M. Napier, trading under the name and style of Joseph M. Napier & Co." A garnishee is not clothed with any discretion to be exercised by him in making an answer, and is required to answer in the terms of the summons and as to the defendant or defendants named therein. The amendment offered was especially immaterial, because in the original answer the garnishee had admitted that more than $1,200 belonging to Joseph M. Napier & Co. came into its hands between the time of the service of the summons and the date of its answer.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 267, 274; Dec. Dig. ⊂⊃142, 146.]

2. BANKRUPTCY ⊂⊃195—LIEN OF CREDITOR—GARNISHMENT.

A garnishing creditor has an inchoate lien upon any property, money, or effects of his debtor which may be caught in the hands of a garnishee, which arises upon the service of the summons of garnishment. Civ. Code 1910, § 5273. And although, under the provisions of section 67f of the Bankruptcy Act (Act Cong. July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1913, § 9651]), judgments or other liens obtained against an insolvent person at any time within four months prior to the time of the filing of a petition in bankruptcy against

him are null and void in case he is adjudged bankrupt, "where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the [federal] statute, which is plainly confined to judgments creating liens. If this were not so, the date of the acquisition of a lien * * * would be entirely immaterial." Metcalf Bros. Co. v. Barker, 187 U. S. 165–174, 23 Sup. Ct. 67, 71 (47 L. Ed. 122). See, also, National Surety Co. v. Medlock, 2 Ga. App. 665, 58 S. E. 1131, and Albany Ry. Co. v. Dunlap Hardware Co., 8 Ga. App. 171, 68 S. E. 868. For this reason the trial judge did not err in refusing to consider the garnishee's amendment, in which it was alleged that the defendant had been adjudged bankrupt, where it appeared that the adjudication was more than four months after the service of the summons of garnishment. Furthermore, the court's ruling upon this point was not error of which the garnishee could complain, and the trustee had no interest in the subject-matter, because it was admitted that the defendant's money in the hands of the garnishee had been paid to the defendant before the petition in bankruptcy was filed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 296–305; Dec. Dig. ⊂⊃195.]

Error from City Court of Macon; Robert Hodges, Judge.

Action between the Citizens' National Bank and A. L. Dasher. From the judgment, the Bank brings error. Affirmed.

Hatcher & Smith, of Macon, for plaintiff in error. A. L. Dasher, Jr., of Macon, for defendant in error.

RUSSELL, C. J. Judgment affirmed

BROYLES, J., not presiding.

(16 Ga. App. 28)

PARK v. DANIEL et al. (No. 5478.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

BILLS AND NOTES ⊂⊃525—BONA FIDE PURCHASER—ACQUISITION AFTER MATURITY.

There was circumstantial evidence which authorized the inference that the plaintiff acquired title to the note subsequently to its maturity, and that for that reason he was not a bona fide purchaser. The charge of the court was a full, fair, and able presentation of the law applicable to the case, and, when considered as a whole, was not subject to any of the exceptions presented in the motion for a new trial. For that reason, the verdict approved by the trial judge will not be disturbed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832–1839; Dec. Dig. ⊂⊃525.]

Error from City Court of Jefferson; G. A. Johns, Judge.

Action between H. C. Park and M. A. Daniel and others. From the judgment, Park brings error. Affirmed.

A. C. Brown, of Jefferson, and Jno. J. & R. M. Strickland, of Athens, for plaintiff in error. G. C. Thomas, T. J. Shackelford, and W. M. Smith, all of Athens, and P. Cooley, of Jefferson, for defendants in error.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

(16 Ga. App. 14)

HEYMAN et al. v. DECATUR STREET BANK. (Nos. 5685, 5981.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⊂⊃369—DISMISSAL—GROUNDS—FAILURE TO PAY COSTS.

The failure of the plaintiff in error to pay the costs in the lower court is not a good ground for the dismissal of the writ of error in the reviewing court. The clerk in the trial court has his remedy under section 5996 of Civil Code 1910. See In re Contempt by Four Clerks, 111 Ga. 89 (6), 36 S. E. 237.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1998; Dec. Dig. ⊂⊃369.]

2. APPEAL AND ERROR ⊂⊃632—BILL OF EXCEPTIONS—SERVICE—DISMISSAL.

The fact that the bill of exceptions was filed before being served upon the defendant in error is not a good ground for dismissal, provided the service was in time. Civ. Code 1910, § 6179. Paragraph "g" of section 42 of the act creating the municipal court of Atlanta (Acts 1913, p. 169) does not conflict with this Code section.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2771; Dec. Dig. ⊂⊃632.]

3. GROUNDS FOR DISMISSAL.

The other ground for dismissal is without merit; there being no conflict, on the face of the record as to the date of the overruling of the motion for a new trial.

4. PARTNERSHIP ⊂⊃204—PROCESS ⊂⊃61—SERVICE—VALIDITY—JURISDICTION OF SUBJECT-MATTER.

Where a partnership composed of two persons residing in Fulton county, whose place of business is in the city of Atlanta, is sued, in the municipal court of Atlanta, as an indorser for value on promissory notes, and where service has been made on the partner residing in Atlanta, the court has jurisdiction of the subject-matter; and personal service by the marshal of the court, or his deputy, upon the other partner, whose legal residence is without the corporate limits of the city, is good and valid, if made in any part of the county.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 376–381; Dec. Dig. ⊂⊃204; Process, Cent. Dig. § 69; Dec. Dig. ⊂⊃61.]

5. PARTNERSHIP ⊂⊃213—PLEADING—AMENDMENT.

Where promissory notes are made payable to a firm, and indorsed by the firm, and sold to a third person, and a suit is brought in a justice's court, or in the municipal court of Atlanta, against the individual members of the firm, it is not error to allow an amendment which sets forth the fact that the firm is a partnership composed of the members individually sued. Act of 1913, supra (Acts 1913, p. 164, § 37, par. "c"); St. Cecilia's Academy v. Hardin, 78 Ga. 39, 3 S. E. 305; Smith v. Columbia Jewelry Co., 114 Ga. 698, 40 S. E.

735; Adas Yeshurun Society v. Fish, 117 Ga. 345, 43 S. E. 715; Perkins v. Shewmake, 119 Ga. 617, 46 S. E. 832.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 408, 409; Dec. Dig. ⟸213.]

6. PARTNERSHIP ⟸200 — ACTION—PARTIES—AMENDMENT TO PLEADING.

After the amendment referred to in the fifth headnote above, is allowed, the mere fact that the firm itself, as a firm, is not specifically made a party to the suit is immaterial, when the process, with copies of the notes sued on, served upon the individual members of the firm, clearly shows that the suit is against the firm, as well as against the individual members thereof. Under the liberal rules of pleading and practice in justices' courts, and in the municipal court of Atlanta, this was sufficient. The summons set forth a good cause of action. Civ. Code 1910, § 5572; Southern Ry. Co. v. Collins, 118 Ga. 414, 45 S. E. 306; Ferry v. Mattox, 2 Ga. App. 104, 58 S. E. 291; Atlantic Coast Line R. Co. v. Lane & Autry, 9 Ga. App. 525, 71 S. E. 918; Higdon v. Williamson, 10 Ga. App. 377, 73 S. E. 528; Fine v. Southern Express Co., 10 Ga. App. 163, 73 S. E. 35; Gillett v. Walter, 74 Ga. 291.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 369–371; Dec. Dig. ⟸200.]

7 EVIDENCE ⟸374 — DOCUMENTARY EVIDENCE—PROOF OF EXECUTION.

There was no error in admitting in evidence the notes sued on, although their execution was not proved by the attesting witness, when the defendants had filed no plea of non est factum. Civ. Code 1910, §§ 4295, 4299; Neal v. Gray, 124 Ga. 510 (4), 52 S. E. 622; Gray v. Oglesby, 9 Ga. App. 356, 71 S. E. 605.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1583, 1584, 1587–1612; Dec. Dig. ⟸374.]

8. PROCESS ⟸45—SECOND OR ORIGINAL SUMMONS—VACATION OF ORDER.

There was no error in the order of the chief judge of the municipal court of Atlanta, vacating the trial judge's order that another copy of the summons of the suit be issued, directed to the sheriff of Fulton county, and that the same be served upon O. L. Heyman, and proper entry and return made; there being no provision of law for the issuing of a second original summons of a suit in the county in which the first original summons was issued.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 42–45; Dec. Dig. ⟸45.]

9. APPEAL AND ERROR ⟸1078—ASSIGNMENTS OF ERROR—ABANDONMENT.

The other assignments of error are without merit, and, not being specifically referred to in the brief of counsel for the plaintiff in error, are deemed abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. ⟸1078.]

10. APPEAL AND ERROR ⟸11—RIGHT PENDING CERTIORARI.

While a writ of error on a direct bill of exceptions is pending in this court, the plaintiff in error cannot also bring his case here by certiorari via the superior court; and the judge of the superior court did not err in dismissing the certiorari, it having been prematurely brought. Archie v. State, 99 Ga. 23, 25 S. E. 612; Crosson v. State, 124 Ga. 652, 52 S. E. 880; Walker v. State, 8 Ga. App. 214, 68 S. E. 873.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 39–46; Dec. Dig. ⟸11.]

11. JUDGMENT AND DENIAL OF NEW TRIAL APPROVED.

The evidence demanded the judgment, and the appellate division of the lower court did not err in overruling the motion for a new trial.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Decatur Street Bank against O. L. Heyman and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Morris Macks and M. Herzberg, both of Atlanta, for plaintiffs in error. Lovick G. Fortson and Green, Tilson & McKinney, all of Atlanta, for defendant in error.

BROYLES, J. [4] We think it necessary to discuss only the fourth headnote, in regard to the service upon the nonresident partner. This was the point most strongly urged in the brief of counsel for the plaintiff in error. Section 4675 of the Civil Code provides that:

"Suits against makers and indorsers, and against co-obligors or joint makers, may be located in the district where the principal debtor or one of the co-obligors or joint makers can be sued, and the other parties, who may reside in a different district from such in the same county, may be joined in the suit on the same terms such persons residing in different counties may be sued in the superior courts, but by the process used in justices' courts; and in such cases the constable of the district where the suit is located may serve such process in *any part of the county.*" (Italics ours.)

Section 4719 of the Civil Code provides that:

"In case where suit is brought against joint obligors or joint promisors, or other joint debtors, * * * in all these and like cases, the constable of the district in which suit is brought may serve all processes on all the parties, and do all other legal acts required of him in the progress of such suit, *in any district of the county.*" (Italics ours.)

So it seems clear that if this suit had been brought in a justice's court (providing, of course, the amount had been within its jurisdiction), and if the service had been made on O. L. Heyman by the constable of that court, the service would have been valid, if made in any district in the county. This is practically admitted in the brief of counsel for plaintiff in error, but it is insisted that the marshal of the municipal court of Atlanta has no such authority, and that the office of constable in the city of Atlanta was abolished when the municipal court of Atlanta was created, and that the marshal of that court did not fall heir to the rights and powers of the constable. We cannot agree with the learned counsel in this view of the law, for the act creating the municipal court of Atlanta, approved August 20, 1913 (Acts 1913, p. 145), expressly and directly provided that the marshal of the court, and his lawful deputies, should have all the rights, powers, and authority possessed by

a constable of a justice's court in this state. In section 24 of the act above mentioned (Acts 1913, p. 157) it is provided that:

"The duties, powers, rights, authority and liabilities of said marshal, and each of said deputies, shall be the same as those prescribed for constables elected or appointed, and serving in justice courts of this state."

And in section 26 of the same act it is provided that:

"The municipal court of Atlanta shall have all the jurisdiction as to subject-matter which, at the time of the adoption of said constitutional amendment, was exercised by the justices' courts and the justices of the peace under the Constitution and laws of this state."

So, in our opinion, the service made by the deputy marshal of the municipal court of Atlanta upon O. L. Heyman, the nonresident partner, was a good and valid service, and the lower court did not err in so holding.

Judgment affirmed.

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(16 Ga. App. 22)

## FITE v. STATE. (No. 5735.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸668—STATEMENT OF ACCUSED—RESTRICTIONS.

"The privilege accorded a defendant in a criminal trial in this state of making a statement to the jury is an anomaly. The contents of the statement are not to be restricted or governed by the rules controlling the admissibility of evidence. 'In all criminal trials the prisoner shall have the right to make to the court and jury just such statement in the case as *he may deem proper* in his defense.' Pen. Code 1910, § 1036. Though the court may prevent repetition of the same statements, or debar the statement of circumstances wholly disconnected *in fact* with the fact upon which the defendant bases his defense, the statement of the defendant is not to be curtailed, either by rulings or interruptions, merely because the facts stated by the defendant, and which constitute a part of his narrative, * * * may, under the rules of evidence, be irrelevant and do not present *in law* a valid defense." Richardson v. State, 3 Ga. App. 313, 59 S. E. 916.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1584–1590; Dec. Dig. ⟸668.]

2. CRIMINAL LAW ⟸668—INSTRUCTIONS—STATEMENT OF ACCUSED.

In view of the foregoing ruling, as well as for the reason that it is the exclusive prerogative of the jury to give to the statement of one accused of crime such force as they may think right to give it, even according it "preference to the sworn testimony in the case," if the jury thinks right to do so, the court erred in charging the jury that a specified fact brought out by the defendant's statement was not a proper thing for them to consider in making up their verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1584–1590; Dec. Dig. ⟸668.]

3. CRIMINAL LAW ⟸785, 824—INSTRUCTIONS—IMPEACHMENT OF WITNESSES.

In the absence of an appropriate and timely request, the trial court is not required to charge upon the subject of the impeachment of witnesses; but when the court has fully and correctly instructed the jury that they are the exclusive judges to determine whether any witness has been impeached, how the witnesses may be impeached by proof of contradictory statements, and that the jury is not bound to find that a witness is impeached, though a thousand might testify to his bad character, and yet they may feel authorized to find that a witness is impeached though only one or two may so testify, the court should also charge that, if the jury find that a witness is successfully impeached, they should disregard his testimony altogether, unless it be corroborated by evidence of good character or by the circumstances of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776–1781, 1889–1894, 1996–2004; Dec. Dig. ⟸785, 824.]

4. CRIMINAL LAW ⟸681, 782—DEMONSTRATIVE EVIDENCE — FOUNDATION — INSTRUCTIONS.

Evidence as to the conduct of dogs in following tracks should not be admitted until after a preliminary investigation, in which it is established that one or more of the dogs in question were of a stock characterized by acuteness of scent and power of discrimination, and had been trained or tested in the exercise of these qualities in the tracking of human beings, and were in the charge of one accustomed to use them. It must also appear that the dogs so trained and tested were laid on a trail, whether visible or not, concerning which testimony has been admitted, and upon a track which the circumstances indicate to have been made by the accused. When these preliminary tests have been made, the fact of tracking by a bloodhound may be permitted to go to the jury as one of the circumstances which may tend to connect the defendant with the crime with which he is charged. Should the preliminary investigation disclose either that the dog was not of proper stock or untrained, or not in the charge of a person familiar with such dogs, or was not placed upon a trail connected at least by circumstances with the defendant, the trial court should exclude the entire testimony as to the conduct of the dogs. When such a foundation as that referred to above has been laid, and evidence showing the conduct of the dogs has been received, the jury should be charged in substance that before they can consider the conduct of the dogs they must find that the dogs were accurate, certain, and reliable in following the trail of human footsteps, and that if they find this, then the evidence of the conduct of the dogs and its result may be considered, together with all the other evidence in the case, as a circumstance in determining the guilt or innocence of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1161, 1612, 1847, 1849, 1851, 1852, 1877, 1878, 1880–1882, 1906, 1907, 1909–1911, 1960, 1966, 1967; Dec. Dig. ⟸681, 782.]

5. CRIMINAL LAW ⟸338—DEMONSTRATIVE EVIDENCE—ATTEMPT TO DISCREDIT.

It was not error to repel evidence to the effect that counsel for the accused in order to establish the unreliability of the dogs in question, offered to pay one of the witnesses a certain sum to make or repeat a test of the dogs.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. ⟸338.]

6. DENIAL OF NEW TRIAL.

Except as pointed out above, in the first, second, third, and fourth paragraphs, the trial was apparently free from error. For the reasons there stated, the court erred in overruling the defendant's motion for a new trial.

Error from Superior Court, Cobb County; H. L. Patterson, Judge.

B. A. Fite was convicted of crime, and brings error. Reversed.

Fred Morris, N. A. Morris, and Geo. D. Anderson, all of Marietta, for plaintiff in error. Herbert Clay, Sol. Gen., of Marietta, for the State.

RUSSELL, C. J. Judgment reversed.

BROYLES, J., not presiding.

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(16 Ga. App. 35)

GLEATON v. COTHRAN. (No. 5586.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

COURTS ⇐122—AMOUNT INVOLVED—PLEADING—AMENDMENT.

A suit for an amount so small that the court is without jurisdiction to entertain the original petition cannot be amended by an additional distinct allegation of indebtedness on the part of the defendant, which, added to the original indebtedness, will produce such an amount as would have been within the jurisdiction of the court if both amounts had originally been alleged in the petition. Consequently, there was no error in dismissing the petition.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413, 427; Dec. Dig. ⇐122.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. S. Gleaton against B. C. Cothran. Judgment for defendant, and plaintiff brings error. Affirmed.

C. B. Reynolds, of Atlanta, for plaintiff in error. Candler, Thomson & Hirsch, of Atlanta, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

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(16 Ga. App. 30)

WALLACE v. STATE. (No. 5570.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

CRIMINAL LAW ⇐1092—APPEAL—BILL OF EXCEPTIONS — DATE — PRESUMPTION — DISMISSAL.

The date of the judge's certificate to a bill of exceptions will be presumed to be the date on which it was tendered to him, where it does not affirmatively appear, from the bill of exceptions or from his certificate, that it was tendered on a different date. To give the Court of Appeals jurisdiction in a criminal case, the bill of exceptions must be tendered within 20 days from the rendition of the judgment complained of; and where the date on which it was tendered does not affirmatively appear, and the recital therein that it was tendered "within the time provided by law" is qualified by the additional words, "and within 30 days of the entry of judgment overruling said motion for a new trial" (the judgment complained of), and the certificate of the judge is dated 28 days after the rendition of the judgment, the jurisdiction of this court to entertain the writ of error is not affirmatively established.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834–2861, 2919; Dec. Dig. ⇐1092.]

Error from City Court of Carrollton; James Beall, Judge.

Will Wallace was convicted of violating the prohibition law, and brings error. Writ of error dismissed.

Smith & Smith, of Carrollton, for plaintiff in error. C. E. Roop, Sol., of Carrollton, for the State.

RUSSELL, C. J. The plaintiff in error was convicted upon an accusation charging a violation of the prohibition law, and made a motion for a new trial. The motion for new trial was overruled on January 24, 1914, and thereafter a bill of exceptions was presented. This bill of exceptions was certified by the judge (as appears by the date of his certificate) on February 21, 1914. A motion was made to dismiss the bill of exceptions upon the ground that it was not tendered and signed within 20 days from January 24, 1914, as required by the provisions of section 6153 of the Civil Code; and this motion must be sustained. Counsel for the plaintiff in error, in support of their contention that the bill of exceptions should not be dismissed, rely upon the decisions in Moore v. Kelly & Jones Co., 109 Ga. 798, 35 S. E. 168, and in Taliaferro v. Smiley, 112 Ga. 62, 37 S. E. 106, and contend that there is nothing in the record to show that the delay of the judge in signing the bill of exceptions was caused by the plaintiff in error or his counsel.

If there were anything in the record to indicate that this bill of exceptions was in fact tendered to the trial judge within 20 days, and that any definite period of time elapsed between the time when the bill of exceptions was presented to the judge and the 21st day of February, when he signed the certificate, we would decline to dismiss the writ of error. Where a bill of exceptions in a criminal case affirmatively recites that it is tendered within 20 days from the rendition of the decision of which complaint is made, and the trial judge in terms of the statute certifies that it is true, this court, in accordance with the principle announced in the case of Taliaferro v. State, supra, will assume that it was tendered in time. However, in the present bill of exceptions, while it is stated that the bill of exceptions is tendered "within the time provided by law," it is stated, in immediate connection therewith, that the bill of exceptions was tendered within 30 days of the entry of the judgment of which complaint was made, and consequently it is not apparent that there was any delay between the tender of the bill of exceptions and the judge's certificate thereto; on the contrary, it is rather evident that there was no delay. The recital of the bill of exceptions upon this point is as follows:

"And now within the time provided by law, and within 30 days of the entry of judgment overruling the said motion for a new trial, comes the defendant and tenders this his bill of exceptions and prays," etc.

The requirements as to the time within which bills of exception must be tendered, served, and sent up are imperative, for upon compliance with these requirements depends this court's jurisdiction to consider the writ of error, and the motion to dismiss in the present case raises the same question as that presented to the Supreme Court in American Mortgage Co. v. Walker, 115 Ga. 738, 42 S. E. 59, in which it was held that it must affirmatively appear that the bill of exceptions was tendered within the time prescribed by law, and in which Presiding Justice Lumpkin held that this all-important jurisdictional fact is not a legitimate subject of bare presumption, and that when it is not made to affirmatively appear, either from the bill of exceptions or from the transcript of the record, the writ of error must be dismissed. Numerous decisions of the Supreme Court on this point were cited and construed by Chief Justice Simmons in Evans v. State, 112 Ga. 763, 38 S. E. 78.

Under the provisions of section 6153 of the Civil Code and section 1102 of the Penal Code, criminal cases must be brought up by fast bills of exceptions, such as formerly applied peculiarly to applications for injunction, and for discharge in bail trover, and to judgments granting or refusing alimony, mandamus, or other extraordinary remedies, and "the bill of exceptions shall be tendered and signed within 20 days from the rendition of the decision." It has been so frequently held by the Supreme Court that, unless the bill of exceptions is tendered within the time, the reviewing court is without jurisdiction to entertain a writ of error in such a case, that it seems unnecessary to cite authority to this effect; but, in addition to the cases already referred to, see Harris v. State, 117 Ga. 13, 43 S. E. 419; Crawford v. Goodwin, 128 Ga. 134, 57 S. E. 240; Sweat v. Georgia Naval Stores Co., 129 Ga. 571, 59 S. E. 273; and Curtis v. Mansfield, 132 Ga. 444, 64 S. E. 327. It is, of course, well settled that reference may be had either to the bill of exceptions, the certificate of the judge, or the transcript of the record, in determining whether or not a bill of exceptions has been tendered within the time prescribed by law. Bonds v. Berdett, 113 Ga. 114, 38 S. E. 304, citing Cloudis v. Bank of Tennessee, 6 Ga. 481; Russell v. March, 6 Ga. 491; Justices v. Barrington, 6 Ga. 579; Newton v. Burtz, 44 Ga. 599; Dismuke v. Trammell, 64 Ga. 429; Gregory v. Daniel, 93 Ga. 795, 20 S. E. 656; and Evans v. State, 112 Ga. 763, 38 S. E. 78. But if, after such reference, it does not affirmatively appear that the bill of exceptions was tendered in time, it is equally well settled that the court is without jurisdiction, and the writ of error must be dismissed.

If this had been a case not governed by the law as to "fast" writs of error, the tendering of the bill of exceptions would have been in time, but, since it is a criminal case, it is covered by the provisions of section 6153, which prescribes that the bill of exceptions shall be tendered "within 20 days from the rendition" of the judgment upon which error is assigned, irrespective of whether the term of court has expired; and for this reason this court has held that in such cases assignments of error which must be presented as special exceptions must either be preserved by exceptions pendente lite, or be presented in a bill of exceptions certified within 20 days from the ruling of which complaint is made. Wheeler v. State, 4 Ga. App. 325 (6), 61 S. E. 409.

Writ of error dismissed.

BROYLES, J., not presiding.

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(16 Ga. App. 12)

## McREE v. QUITMAN OIL CO. et al.

(No. 5683.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. CORPORATIONS ⇐30—JOINT ADVENTURES ⇐1 — "PROMOTER" — "COADVENTURER" — "VENTURE."

A "coadventurer" is one who takes part with others in an adventure or in a venture. A "venture" is "an undertaking attended with risk, especially one aiming at making money; business speculation." New Standard Dictionary. A "promoter" may be either a person who assists (by securing or furnishing capital or otherwise) in starting or forwarding a financial, industrial, or commercial enterprise, as a joint-stock company, or the like, or one who makes this his business. Id. "The persons who, for themselves or others, take the preliminary steps to the organization of a corporation are called promoters." 1 Thompson on Corporations, § 81.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97–100; Dec. Dig. ⇐30; Joint Adventures, Cent. Dig. § 1; Dec. Dig. ⇐1.

For other definitions, see Words and Phrases, First and Second Series, Promoter.]

2. CORPORATIONS ⇐30—PARTNERSHIP ⇐42 —COADVENTURERS — "PROMOTERS" — LIABILITY.

"Until a corporation is legally organized, the coadventurers will be liable as partners for all debts contracted on behalf of the aggregate body, with their consent, either express or implied." 10 Cyc. 657. "The promoters of a corporation are each individually liable for debts created in behalf of a proposed corporation, unless these debts are paid by the corporation after its organization." Meinhard v. Bedingfield, 4 Ga. App. 176 (3), 61 S. E. 34. "Prior to the formal and complete organization of a corporation, the organizers of it may make provisional contracts in behalf of the corporation, which may become binding on the corporation after it begins business; but in the meantime, and until the corporation is legally organized, the promoters are liable as partners." Rosenheim Shoe Co. v. Horne, 10 Ga. App. 582 (3), 73 S. E. 953. Though one who was not a member when a debt was contracted cannot be held liable on that particular debt. 1 Cook on Corporations, 235. Those organizing corporations and subscribing for its stock are referred to in

Meinhard v. Bedingfield, and in Rosenheim Shoe Co. v. Horne, supra, as "promoters."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97–100; Dec. Dig. ⊂⊃30; Partnership, Cent. Dig. § 57; Dec. Dig. ⊂⊃42.]

3. CORPORATIONS ⊂⊃28—PARTNERSHIP ⊂⊃41—"DE FACTO CORPORATION"—LIABILITY OF STOCKHOLDERS.

A "corporation is a 'de facto corporation' where there is a law authorizing such a corporation and where the company has made an effort to organize under the law and is transacting business in a corporate name. * * * Where a supposed corporation is doing business as a de facto corporation, the stockholders cannot be held liable as partners, although there have been irregularities, omissions, or mistakes in incorporating or organizing the company." 1 Cook on Corporations, § 234. See, also, 2 Cook on Corporations, § 424.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 26, 70; Dec. Dig. ⊂⊃28; Partnership, Cent. Dig. §§ 56, 58, 59, 74; Dec. Dig. ⊂⊃41.

For other definitions, see Words and Phrases, First and Second Series, De Facto Corporation.]

4. CORPORATIONS ⊂⊃30—LIABILITY OF PROMOTERS—SUFFICIENCY OF EVIDENCE.

Two coadventurers in a proposed corporation were sued as partners for the debts thereof (the others having been discharged in bankruptcy), and it appeared, from the undisputed evidence, that both were present and participated with the other promoters in originally effecting a partial organization for the purpose of conducting a specified business at a certain place; that it was then and there agreed by all present that a charter should be obtained, and both defendants subscribed for shares in the company, for which one thereafter paid in full and the other in part; that no charter was in fact ever applied for or obtained, and the company never became a de jure or de facto corporation, and this fact was manifestly known to both; that it was understood and agreed at the original meeting, when both defendants were present, that machinery to carry on the proposed business should be promptly purchased, and such machinery was afterwards installed with the knowledge of both parties sued as partners, and the business was actually conducted, under the intended corporate name agreed upon, for a period of two years from the date of the first agreement to organize and incorporate, with the knowledge of both of the subscribers sued as partners. It further appeared that Dr. Clower, one of these defendants, lived in the town where the business was operated, and knew how and by whom the same was conducted, and that no charter had ever been obtained for its incorporation, knew of the proposal to purchase the particular machinery on account of which the suit was brought, and himself thereafter participated in negotiations looking to the purchase of additional machinery needed, and gave written authority to another to represent him in connection with the business, at any meeting held by those interested, during an extended absence on his part, and indorsed a note given in the name of the company in behalf of another creditor. It further appeared, with reference to the Quitman Oil Company, that within a few weeks after the meeting, when the agreement to organize and incorporate was made, this defendant responded to a request to pay one-third of its subscription for stock, and afterwards paid $200 by check payable to R. D. Edmondson, the person who, according to some testimony, acted as secretary and treasurer of the proposed corporation (the Morven Gin Company), but was never afterwards called on to pay the remaining $400, and never in fact paid this balance or sought to ascertain if the charter had been granted, though its manager resided in the same county where the application for a charter would necessarily have been advertised; that, soon after the payment of the $200, the Quitman Oil Company purchased a large amount of machinery necessary for the proposed business, for and in behalf of the proposed corporation. *Held*, that under these facts a finding in favor of the defendant was not authorized, and the verdict was therefore contrary to law, as both defendants were in legal effect "promoters" and "coadventurers."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97–100; Dec. Dig. ⊂⊃30.]

Error from City Court of Quitman; Wm. H. Long, Judge.

Action by W. S. McRee against the Quitman Oil Company and others. Judgment for defendants, and plaintiff brings error. Reversed, and rehearing denied.

Branch & Snow, of Quitman, and Whitaker & Dukes, of Valdosta, for plaintiff in error. Bennet & Harrell, of Quitman, for defendants in error.

WADE, J. Judgment reversed.

BROYLES, J., not presiding.

On Motion for Rehearing.

A motion for rehearing was filed by the Quitman Oil Company on the sole ground that the court must have overlooked the fact disclosed by the evidence that this defendant was a corporation, and therefore incapable of entering into partnership relations, and that anything done by it through its manager which might have had the legal effect of rendering an individual liable as a partner, on account of debts incurred by the promoters of the Morven Gin Company, who neglected to take any of the necessary steps towards the incorporation of that proposed company, would be ultra vires and not binding on the Quitman Oil Company.

The question raised by the motion for rehearing, however, was not raised by the defendant's plea, and was nowhere presented in the record for determination, and was not even referred to in the briefs for the defendants in error, and this court therefore was not required to decide it.

Rehearing denied.

(16 Ga. App. 9)

DUNN v. STATE. (No. 5504.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. HOMICIDE ⊂⊃169—SELF-DEFENSE—EVIDENCE.

Where a homicide is admitted and the accused seeks to justify upon the ground that he was actuated by the fears of a reasonable man, the conduct and condition of the deceased in his presence shortly before the fatal encounter, and the consequent influence of this conduct or condition upon the mind of the accused, is relevant as being illustrative not only of the reason-

ableness of his fears, but also as indicating the quo animo of the deceased, although the previous difficulty may have been between the deceased and a third person. Such evidence, if properly considered by the jury as a part of the res gestæ, may be material both in the consideration of what apprehensions might reasonably arise in the mind of the defendant, and in enabling the jury to determine who was probably the aggressor at the time of the homicide, especially where the evidence is strongly conflicting upon these points.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 341–350; Dec. Dig. ⟸169.]

2. Criminal Law ⟸338—Evidence—Admissibility.

Generally it is immaterial whether a witness has frequently or infrequently testified as such; and, in the absence of any explanation as to the necessity for such proof in the case on trial, the court did not err in excluding evidence to the effect that the witness was testifying in a court of law for the first time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. ⟸338.]

3. Criminal Law ⟸377, 378—Homicide ⟸180—Character of Defendant—Proof—Rebuttal.

In a criminal prosecution, evidence of the general good character of the accused is limited to the particular trait involved in the nature of the charge, and evidence on the part of the state, in rebuttal of such proof of good character, must likewise depend upon the nature of the crime alleged, and be confined to those traits of character naturally involved in the commission of the particular offense. Upon cross-examination of a witness who had testified that the character of the defendant for peaceableness was good, it was error to permit the witness to testify, over objection, that he had personal knowledge that the accused had been drunk upon occasions prior to the time of the alleged homicide, or that he habitually used intoxicants. The fact that one accused of crime was under the influence of an intoxicant at the time of the alleged offense might illustrate his quo animo in making the assault, and for that purpose would be relevant; but his general character for drunkenness or sobriety is not germane to the question raised as to the peaceableness of his disposition generally.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836, 837, 840, 842; Dec. Dig. ⟸377, 378; Homicide, Cent. Dig. § 381; Dec. Dig. ⟸180.]

4. Criminal Law ⟸686, 1153—Reopening Cause—Discretion—Appeal.

Reopening a cause for the introduction of additional evidence, after the evidence has closed, is a matter addressed solely to the discretion of the trial judge, and this discretion will not be controlled unless manifestly abused. The record does not disclose that in the present case the discretion of the trial judge was abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1619, 1620, 1625, 1626, 3061–3066; Dec. Dig. ⟸686, 1153.]

5. Homicide ⟸295—Instructions—Provocation.

The charge of the court on that part of section 65 of the Penal Code, relating to provocation by words, threats, and menaces, to which exception was taken, was erroneous, under the ruling in this case when here before. Dunn v. State, 13 Ga. App. 682, 79 S. E. 764. The charge as given was appropriate to evidence for the prosecution which might have authorized a verdict finding the accused guilty of voluntary manslaughter, but since the defendant relied upon the defense that he acted upon the fears of a reasonable man as justification for the homicide, which he admitted, it was error so to instruct the jury, without instructing them in connection therewith to the effect that while words, threats, and menaces will not mitigate the offense, and while even the heat of passion supposed to be irresistible presents no excuse for homicide, nevertheless words or menaces may justify a killing if the circumstances be such as to arouse the fears of a reasonable man that a felony is about to be committed upon him. This error was aggravated by the instruction that "the other equivalent circumstances" referred to in the Code section do not include words, threats, or menaces. See, in this connection, citations in Manson v. State, 14 Ga. App. 837, 839–840, 82 S. E. 763.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 606–609; Dec. Dig. ⟸295.]

6. Homicide ⟸300 — Instructions — Defenses.

Sections 70 and 73 of the Penal Code should not be given in charge to the jury in connection with each other and as if applicable to a single defense, and without pointing out the wholly different application of each. In cases where the defense of the accused rests only upon the contention that the homicide was committed under the fears of a reasonable man, the principle relative to urgent and pressing danger, embodied in section 73, should not be given in charge.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616–620, 622–630; Dec. Dig. ⟸300.]

7. Evidence of Good Character—Instructions.

The requested instructions relating to the legal effect of evidence of good character were substantially embodied in the charge of the court.

8. Criminal Law ⟸789 — Instructions — Reasonable Doubt.

In a criminal prosecution the state carries the burden of establishing every fact necessary to prove the material allegations of the indictment, and for that reason an appropriate and timely written request to the effect that, if the jury have a reasonable doubt as to the existence of any fact necessary to make out the case as charged in the indictment, it is their duty to give the benefit of the doubt to the defendant and acquit him, should not be refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1851, 1880, 1904–1922, 1960, 1967; Dec. Dig. ⟸789.]

9. Criminal Law ⟸830—Requested Instruction—Statement of Accused.

Where the court, in a criminal case, gives in charge to the jury the substance of the Code section relative to the right of the accused to make a statement to the court and jury, and the weight to be attached thereto by law (Pen. Code 1910, § 1036), it is not error to refuse to amplify this instruction by further instructing the jury that it is as much their duty to consider the defendant's statement as it is to consider the sworn testimony, and that if the statement of the defendant raises a reasonable doubt of the defendant's guilt it is their duty to acquit; the instruction requested not being in its entirety a correct statement of the law. O'Dowd v. Newnham, 13 Ga. App. 220 (10), 80 S. E. 36.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. ⟸830.]

10. Homicide ⟸300 — Instructions — Defense—Fears of Reasonable Man.

In a proper case for instructions to the jury upon the law applicable to the justification afforded by the fact that a killing alleged to be felonious was committed under the fears of a reasonable man, they should be charged to the

effect that it is not incumbent upon the defendant to show that the killing was actually necessary, but that it would be sufficient if the accused at the time of the killing believed, and had good reason to believe, that the killing was necessary, and further that, if they have a reasonable doubt as to whether he believed the killing was actually necessary, it would be their duty to find the defendant not guilty; but in these respects the instructions given by the trial judge were not subject to the exceptions presented.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616–620, 622–630; Dec. Dig. ⟸300.]

Error from Superior Court, Fannin County; H. L. Patterson, Judge.

Waldo Dunn was convicted of crime, and brings error. Reversed.

B. L. Smith and Thos. A. Brown, both of Blue Ridge, and N. A. Morris and Geo. D. Anderson, both of Marietta, for plaintiff in error. Herbert Clay, Sol. Gen., of Marietta, for the State.

RUSSELL, C. J. Judgment reversed.

BROYLES, J., not presiding.

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(16 Ga. App. 39)

DANIEL v. BURSON. (No. 5653.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. CONTRACTS ⟸338 — RESCISSION — PLEA — MOTION TO STRIKE.

The defendant's plea contained sufficient material averments as to a rescission of the contract sued on, and the court erred in sustaining an oral motion to strike it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1691, 1692, 1695, 1698–1705; Dec. Dig. ⟸338.]

2. SALES ⟸267—ACTION FOR PRICE—FAILURE OF CONSIDERATION—WAIVER OF WARRANTIES.

In view of the waiver of warranties, both express and implied, as embodied in the contract, the plea of failure of consideration was not available, and could properly have been stricken had a timely and appropriate special demurrer been filed thereto, or had the motion to strike been confined solely to that portion of the plea alleging failure of consideration.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 760, 761; Dec. Dig. ⟸267.]

Error from City Court of Jefferson; G. A. Johns, Judge.

Action by J. F. Daniel against J. I. Burson. Judgment for plaintiff, and defendant brings error. Reversed.

Ray & Ray, of Jefferson, for plaintiff in error.

RUSSELL, C. J. Burson sued Daniel on a note for the purchase price of a sorrel mare. The note contains the following clause: "Said property is sold without any warranty, express or implied." The defendant filed a plea denying any indebtedness on the note, and alleged both a failure of consideration and a mutual rescission of the contract sued on. The court, upon oral motion of counsel for the plaintiff, struck the plea and directed a verdict for the plaintiff. To this the defendant excepts.

[1] 1. We are of the opinion that the court erred in striking the plea and in directing the verdict for the plaintiff. After setting out certain defects in the animal purchased, the plea contained an averment as follows:

"He [defendant] did not discover same until he carried the said mare home, and just as soon as he discovered the defect in said mare he at once carried her back to Guy Thurmond [who was alleged to be the agent of the plaintiff] and J. I. Burson, and then and at that time they agreed to take the said mare back and deliver to this defendant his note, and give him the money he had paid them, but asked this defendant to keep the mare until spring following, as they were crowded with horses and mules and wanted the defendant to winter the said mare. This defendant insisted that they comply with their trade, as said mare was guaranteed to him, and insisted that he have his note, which at that time they promised to deliver to him in the spring after the note was given, and at their request this defendant carried this mare described in the note sued on and demanded his note, and the same was refused."

This part of the plea, though possibly not couched in the exact language that it should be, is to our minds a sufficient plea of rescission, and entitled the defendant to the right to have a jury pass upon the merits thereof. The parties to the contract, if they saw fit, had a right to rescind the contract of sale (Civil Code, § 4304); and, if they did so, then the rescission is a conclusive answer to any effort on the part of the plaintiff to collect the note. This case differs but very little from the case of Steen v. Harris, 81 Ga. 681, 8 S. E. 206. In that case the seller retained possession of certain notes given for the purchase money of a piano, and the purchaser retained possession of the piano. The piano was levied upon under an attachment sued out by a creditor of the purchaser of the piano and while the piano was constructively at least in the purchaser's possession. The sellers, while still retaining the notes, filed a claim to the piano. The Supreme Court said:

"The rescission of the sale would have been a conclusive answer to any effort on the part of Steen & Marshall or of Baldwin & Company [the original holders of the note and transferrors to Steen & Marshall] to collect the amount of the notes or to enforce them against Gardner [the purchaser]. So that the case at the time of the levy was simply this: Gardner had possession of the piano, holding it for Steen & Marshall; they had possession of the notes, holding them for him."

So it is in this case, if the contention of Daniel is correct; he had possession of the mare, after the rescission, holding her for Burson, and Burson had possession of Daniel's note, holding it for Daniel.

[2] 2. Mixed and mingled in the same paragraph with the plea of rescission set out in the preceding paragraph and in the succeeding paragraph is an apparent attempt on the

part of the defendant to plead failure of consideration due to a breach of express warranties alleged to have been made by the plaintiff to the defendant at the time of the sale. Such portions of the plea as attempted to set up such matter as a defense would have been subject to special demurrer, and any evidence in support of such a plea as a defense would be inadmissible. The note is one for the purchase money of "one sorrel mare, weight about 900 pounds." The note stipulates that "said property is sold without any warranty, express or implied." It is too well settled in Georgia to admit of discussion that parol evidence will not be admitted to vary the terms of a written contract (Civil Code, § 4268), and this court has in several cases similar to that at bar held that failure of consideration was not permissible as a defense to notes for purchase money where all warranties were waived. Branch v. James, 4 Ga. App. 90, 60 S. E. 1027; Jones v. Riley Co., 14 Ga. App. 84 (3), 80 S. E. 341. See, also, McNeel v. Smith, 106 Ga. 215, 32 S. E. 119; Pryor v. Ludden, 134 Ga. 288, 67 S. E. 654, 28 L. R. A. (N. S.) 267; Watson v. Smith, 15 Ga. App. ——, 82 S. E. 633.

Any evidence tending to show that the mare was worthless or of a value unconscionably disproportioned to the amount stipulated in the note, while not admissible to establish a failure of consideration dependent upon a breach of warranty which the defendant had waived, may be considered by a jury as a circumstance corroborative of the defendant's contention that there was a rescission.

Judgment reversed.

BROYLES, J., not presiding.

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(16 Ga. App. 49)

## KIRBO v. SOUTHERN RY. CO. (No. 5724.)

(Court of Appeals of Georgia. Feb. 24, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ⟸203, 204—INJURY TO RAILROAD EMPLOYÉ — ASSUMPTION OF RISK—APPLICATION OF DOCTRINE—FEDERAL EMPLOYERS' LIABILITY ACT.

Section 4 of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. 66, c. 149 [U. S. Comp. St. 1913, § 8660]), provides that in any action brought against a common carrier under that act to recover for injuries to one of its servants, such employé shall not be held to have assumed the risks of his employment in any case where the violation by the carrier of any statute enacted (by Congress) for the safety of employés contributed to the injury. This section limits the abrogation of the doctrine of assumed risk in such cases to instances in which the violation of an express statutory duty of the carrier is charged; and in an action under the statute, for injury to a railroad employé resulting solely from negligence of the railroad company in constructing its tracks too close together, the doctrine of assumed risk is applicable. Seaboard A. L. Ry. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 639, 640, 58 L. Ed. 1062.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538–546; Dec. Dig. ⟸ 203, 204.]

2. MASTER AND SERVANT ⟸204—INJURY TO RAILROAD EMPLOYÉ—ASSUMPTION OF RISK—MAINTENANCE OF LIGHTING SYSTEM.

When a railroad company maintains an electric lighting system in its freight yards in order to supply light necessary for the switching of cars, and to enable its employés engaged in that business to move about at night near and between dangerous tracks in greater safety, and injury results to an employé because of defects therein arising from the negligence of the railroad company, whereby the usual necessary amount of light is not supplied to him at the point in the yards where the injury occurred, he cannot, under the provisions of section 4 of the federal Employers' Liability Act, supra, be held not to have assumed the risk arising from the failure of the railroad company to properly maintain its lighting system. Seaboard A. L. Ry. Co. v. Horton, supra.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544–546; Dec. Dig. ⟸ 204.]

3. MASTER AND SERVANT ⟸288—INJURY TO RAILROAD EMPLOYÉ—ASSUMPTION OF RISK—QUESTION FOR JURY.

Whether, after discovering the insufficiency of light, the employé assumed the extra risk thereby resulting, by undertaking to perform his duties as a switchman near and around dangerous tracks, notwithstanding the imperfect light, would be a question of fact for determination by a jury, depending in part upon how long this insufficiency existed immediately prior to the injury, and upon when the discovery was or could have been made by the plaintiff, and also upon his location at the time the light failed, and whether, under the exigencies of the situation, it was then possible for him to remove himself from the danger zone to a place of safety, or whether the employé was necessarily so engrossed in the efficient and proper discharge of his duties as to render him oblivious to a partial failure of the light.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068–1088; Dec. Dig. ⟸ 288.]

4. DISMISSAL OF PETITION.

The court therefore erred in sustaining a general demurrer and dismissing the plaintiff's petition.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by A. L. Kirbo against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Atkinson & Born, of Atlanta, for plaintiff in error. McDaniel & Black, of Atlanta, for defendant in error.

WADE, J. Judgment reversed.

BROYLES, J., not presiding.

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(16 Ga. App. 19)

## NEW WARE FURNITURE CO. v. REYNOLDS. (No. 5700.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. TRIAL ⟸139, 171, 206 — DIRECTION OF VERDICT—SUBMISSION OF ISSUES.

The various assignments of error based on the refusal of the court to direct a verdict or to give to the jury instructions amounting in effect to the direction of a verdict are without merit. "It is never error to refuse to direct a

effect that it is not incumbent upon the defendant to show that the killing was actually necessary, but that it would be sufficient if the accused at the time of the killing believed, and had good reason to believe, that the killing was necessary, and further that, if they have a reasonable doubt as to whether he believed the killing was actually necessary, it would be their duty to find the defendant not guilty; but in these respects the instructions given by the trial judge were not subject to the exceptions presented.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616–620, 622–630; Dec. Dig. ⟸300.]

Error from Superior Court, Fannin County; H. L. Patterson, Judge.

Waldo Dunn was convicted of crime, and brings error. Reversed.

B. L. Smith and Thos. A. Brown, both of Blue Ridge, and N. A. Morris and Geo. D. Anderson, both of Marietta, for plaintiff in error. Herbert Clay, Sol. Gen., of Marietta, for the State.

RUSSELL, C. J. Judgment reversed.

BROYLES, J., not presiding.

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(16 Ga. App. 39)

DANIEL v. BURSON. (No. 5653.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. CONTRACTS ⟸338 — RESCISSION — PLEA — MOTION TO STRIKE.

The defendant's plea contained sufficient material averments as to a rescission of the contract sued on, and the court erred in sustaining an oral motion to strike it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1691, 1692, 1695, 1698–1705; Dec. Dig. ⟸338.]

2. SALES ⟸267—ACTION FOR PRICE—FAILURE OF CONSIDERATION—WAIVER OF WARRANTIES.

In view of the waiver of warranties, both express and implied, as embodied in the contract, the plea of failure of consideration was not available, and could properly have been stricken had a timely and appropriate special demurrer been filed thereto, or had the motion to strike been confined solely to that portion of the plea alleging failure of consideration.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 760, 761; Dec. Dig. ⟸267.]

Error from City Court of Jefferson; G. A. Johns, Judge.

Action by J. F. Daniel against J. I. Burson. Judgment for plaintiff, and defendant brings error. Reversed.

Ray & Ray, of Jefferson, for plaintiff in error.

RUSSELL, C. J. Burson sued Daniel on a note for the purchase price of a sorrel mare. The note contains the following clause: "Said property is sold without any warranty, express or implied." The defendant filed a plea denying any indebtedness on the note, and alleged both a failure of consideration and a mutual rescission of the contract sued on. The court, upon oral motion of counsel for the plaintiff, struck the plea and directed a verdict for the plaintiff. To this the defendant excepts.

[1] 1. We are of the opinion that the court erred in striking the plea and in directing the verdict for the plaintiff. After setting out certain defects in the animal purchased, the plea contained an averment as follows:

"He [defendant] did not discover same until he carried the said mare home, and just as soon as he discovered the defect in said mare he at once carried her back to Guy Thurmond [who was alleged to be the agent of the plaintiff] and J. I. Burson, and then and at that time they agreed to take the said mare back and deliver to this defendant his note, and give him the money he had paid them, but asked this defendant to keep the mare until spring following, as they were crowded with horses and mules and wanted the defendant to winter the said mare. This defendant insisted that they comply with their trade, as said mare was guaranteed to him, and insisted that he have his note, which at that time they promised to deliver to him in the spring after the note was given, and at their request this defendant carried this mare described in the note sued on and demanded his note, and the same was refused."

This part of the plea, though possibly not couched in the exact language that it should be, is to our minds a sufficient plea of rescission, and entitled the defendant to the right to have a jury pass upon the merits thereof. The parties to the contract, if they saw fit, had a right to rescind the contract of sale (Civil Code, § 4304); and, if they did so, then the rescission is a conclusive answer to any effort on the part of the plaintiff to collect the note. This case differs but very little from the case of Steen v. Harris, 81 Ga. 681, 8 S. E. 206. In that case the seller retained possession of certain notes given for the purchase money of a piano, and the purchaser retained possession of the piano. The piano was levied upon under an attachment sued out by a creditor of the purchaser of the piano and while the piano was constructively at least in the purchaser's possession. The sellers, while still retaining the notes, filed a claim to the piano. The Supreme Court said:

"The rescission of the sale would have been a conclusive answer to any effort on the part of Steen & Marshall or of Baldwin & Company [the original holders of the note and transferrors to Steen & Marshall] to collect the amount of the notes or to enforce them against Gardner [the purchaser]. So that the case at the time of the levy was simply this: Gardner had possession of the piano, holding it for Steen & Marshall; they had possession of the notes, holding them for him."

So it is in this case, if the contention of Daniel is correct; he had possession of the mare, after the rescission, holding her for Burson, and Burson had possession of Daniel's note, holding it for Daniel.

[2] 2. Mixed and mingled in the same paragraph with the plea of rescission set out in the preceding paragraph and in the succeeding paragraph is an apparent attempt on the

part of the defendant to plead failure of consideration due to a breach of express warranties alleged to have been made by the plaintiff to the defendant at the time of the sale. Such portions of the plea as attempted to set up such matter as a defense would have been subject to special demurrer, and any evidence in support of such a plea as a defense would be inadmissible. The note is one for the purchase money of "one sorrel mare, weight about 900 pounds." The note stipulates that "said property is sold without any warranty, express or implied." It is too well settled in Georgia to admit of discussion that parol evidence will not be admitted to vary the terms of a written contract (Civil Code, § 4268), and this court has in several cases similar to that at bar held that failure of consideration was not permissible as a defense to notes for purchase money where all warranties were waived. Branch v. James, 4 Ga. App. 90, 60 S. E. 1027; Jones v. Riley Co., 14 Ga. App. 84 (3), 80 S. E. 341. See, also, McNeel v. Smith, 106 Ga. 215, 32 S. E. 119; Pryor v. Ludden, 134 Ga. 288, 67 S. E. 654, 28 L. R. A. (N. S.) 267; Watson v. Smith, 15 Ga. App. ——, 82 S. E. 633.

Any evidence tending to show that the mare was worthless or of a value unconscionably disproportioned to the amount stipulated in the note, while not admissible to establish a failure of consideration dependent upon a breach of warranty which the defendant had waived, may be considered by a jury as a circumstance corroborative of the defendant's contention that there was a rescission.

Judgment reversed.

BROYLES, J., not presiding.

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(16 Ga. App. 49)

## KIRBO v. SOUTHERN RY. CO. (No. 5724.)

(Court of Appeals of Georgia. Feb. 24, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ⟸203, 204—INJURY TO RAILROAD EMPLOYÉ — ASSUMPTION OF RISK—APPLICATION OF DOCTRINE—FEDERAL EMPLOYERS' LIABILITY ACT.

Section 4 of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. 66, c. 149 [U. S. Comp. St. 1913, § 8660]), provides that in any action brought against a common carrier under that act to recover for injuries to one of its servants, such employé shall not be held to have assumed the risks of his employment in any case where the violation by the carrier of any statute enacted (by Congress) for the safety of employés contributed to the injury. This section limits the abrogation of the doctrine of assumed risk in such cases to instances in which the violation of an express statutory duty of the carrier is charged; and in an action under the statute, for injury to a railroad employé resulting solely from negligence of the railroad company in constructing its tracks too close together, the doctrine of assumed risk is applicable. Seaboard A. L. Ry. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 639, 640, 58 L. Ed. 1062.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538–546; Dec. Dig. ⟸ 203, 204.]

2. MASTER AND SERVANT ⟸204—INJURY TO RAILROAD EMPLOYÉ—ASSUMPTION OF RISK —MAINTENANCE OF LIGHTING SYSTEM.

When a railroad company maintains an electric lighting system in its freight yards in order to supply light necessary for the switching of cars, and to enable its employés engaged in that business to move about at night near and between dangerous tracks in greater safety, and injury results to an employé because of defects therein arising from the negligence of the railroad company, whereby the usual necessary amount of light is not supplied to him at the point in the yards where the injury occurred, he cannot, under the provisions of section 4 of the federal Employers' Liability Act, supra, be held not to have assumed the risk arising from the failure of the railroad company to properly maintain its lighting system. Seaboard A. L. Ry. Co. v. Horton, supra.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544–546; Dec. Dig. ⟸ 204.]

3. MASTER AND SERVANT ⟸288—INJURY TO RAILROAD EMPLOYÉ—ASSUMPTION OF RISK —QUESTION FOR JURY.

Whether, after discovering the insufficiency of light, the employé assumed the extra risk thereby resulting, by undertaking to perform his duties as a switchman near and around dangerous tracks, notwithstanding the imperfect light, would be a question of fact for determination by a jury, depending in part upon how long this insufficiency existed immediately prior to the injury, and upon when the discovery was or could have been made by the plaintiff, and also upon his location at the time the light failed, and whether, under the exigencies of the situation, it was then possible for him to remove himself from the danger zone to a place of safety, or whether the employé was necessarily so engrossed in the efficient and proper discharge of his duties as to render him oblivious to a partial failure of the light.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068–1088; Dec. Dig. ⟸ 288.]

4. DISMISSAL OF PETITION.

The court therefore erred in sustaining a general demurrer and dismissing the plaintiff's petition.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by A. L. Kirbo against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Atkinson & Born, of Atlanta, for plaintiff in error. McDaniel & Black, of Atlanta, for defendant in error.

WADE, J. Judgment reversed.

BROYLES, J., not presiding.

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(16 Ga. App. 19)

## NEW WARE FURNITURE CO. v. REYNOLDS. (No. 5700.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. TRIAL ⟸139, 171, 206 — DIRECTION OF VERDICT—SUBMISSION OF ISSUES.

The various assignments of error based on the refusal of the court to direct a verdict or to give to the jury instructions amounting in effect to the direction of a verdict are without merit. "It is never error to refuse to direct a

verdict" (Scott v. Valdosta, Moultrie & Western R. Co., 13 Ga. App. 65, 78 S. E. 784), even though in the interest of time and economy it may be desirable that a verdict, unquestionably demanded by the evidence, should be directed by the court. McMillan v. First National Bank of Valdosta, 13 Ga. App. 23, 78 S. E. 734.

(a) A trial judge "is not required, even though so requested, to state to the jury that an issuable fact is true, or has been sufficiently proved, even though it be undisputed in the evidence. The better practice is to allow the jury to determine the question whether any issuable fact proved by either party is uncontradicted or undisputed." Scott v. Valdosta, Moultrie & Western R. Co., supra.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365, 396, 500; Dec. Dig. ⇐139, 171, 206.]

2. WITNESSES ⇐144—COMPETENCY—TRANSACTIONS WITH PERSON SINCE DECEASED.

"Where any suit is instituted or defended by a corporation, the opposite party shall not be admitted to testify in his own behalf to transactions or communications solely with a deceased or insane officer or agent of the corporation." Civ. Code 1910, § 5858 (3). Besides the deceased agent of the corporation, there must be some other person present, related in some way to the corporation, before the opposite party will be competent to testify to transactions or communications had with such agent. The mere presence of a stranger, who was in no wise concerned or interested for the corporation in regard to the matter concerning which the transactions or communications were had with the deceased agent of the corporation, would not make the evidence of the survivor admissible in reference to such transactions or communications. Augusta Naval Stores Company v. Forlaw, 133 Ga. 138, 149, 65 S. E. 370; Register v. Aultman & Taylor Co., 106 Ga. 331, 332, 32 S. E. 116; Merchants' National Bank of Savannah v. Demere, 92 Ga. 735, 740 (4), 19 S. E. 38; American Harrow Co. v. Dolvin, 119 Ga. 186, 45 S. E. 983.

(a) Testimony from the defendant as to transactions and communications had by him solely with W. R. Ware, since deceased, an agent for the New Ware Furniture Company, in which Ware pointed out, as such agent, what particular lumber had been conveyed by the plaintiff to the defendant, was incompetent, notwithstanding the fact that other witnesses, unconnected with the said corporation, likewise heard the statements of the agent, and may themselves be competent to prove the same conversation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 625–643; Dec. Dig. ⇐144.]

3. EVIDENCE ⇐178, 441 — SECONDARY EVIDENCE—LOST INSTRUMENT.

Where a contract reduced to writing and properly executed is thereafter lost or destroyed, it is competent to prove by parol testimony what were the substantial terms and provisions thereof; but proof as to the antecedent negotiations or representations, leading up to the execution of the written contract, is inadmissible to contradict or vary its terms or provisions as established by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580–594, 1719, 1723–1763, 1765–1845, 2030–2047; Dec. Dig. ⇐178, 441.]

4. PRINCIPAL AND AGENT ⇐115—AGENT OF CORPORATION — REPRESENTATIONS — BINDING EFFECT—SALES.

Where the agent of a corporation is directly interested by agreement with a third person in prospective profits to result from the purchase by the third person of personal property from his principal, representations made by him to the purchaser as to the quantity, quality, or location of the property cannot have a binding effect against the interest of the corporation.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 339–343; Dec. Dig. ⇐115.]

5. ASSIGNMENTS OF ERROR.

Specific reference to various assignments of error not covered by the foregoing rulings is unnecessary, since the same points will doubtless not arise on a new trial of the case.

Error from City Court of Floyd County; J. H. Reece, Judge.

Action by the New Ware Furniture Company against H. T. Reynolds. Judgment for defendant, and plaintiff brings error. Reversed.

Lipscomb & Willingham and Nathan Harris, all of Rome, for plaintiff in error. Maddox & Doyal and Dean & Dean, all of Rome, for defendant in error.

WADE, J. Judgment reversed.

BROYLES, J., not presiding.

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(16 Ga. App. 33)

## MERCER v. PLANTERS' RICE MILL CO.

(No. 5634.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

BROKERS ⇐54—COMMISSION—RIGHT.

There was no error in sustaining the demurrer, for it does not appear from the petition that the efforts of the real estate agent in securing the option resulted in procuring a purchaser ready, able, and willing to buy the real estate of the defendant.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75–81; Dec. Dig. ⇐54.]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by G. A. Mercer against the Planters' Rice Mill Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Osborne & Lawrence and Edmund H. Abrahams, all of Savannah, for plaintiff in error. Geo. W. Owens, E. S. Elliott, and T. P. Ravenel, all of Savannah, for defendant in error.

WADE, J. Judgment affirmed.

BROYLES, J., not presiding.

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(16 Ga. App. 35)

## SPERRY v. PLANTERS' RICE MILL CO.

(No. 5633.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

PETITION—DEMURRER.

There was no error in sustaining the demurrers, for the reason that the petition failed to show that the purported purchaser ever offered to buy and pay for the real estate which had been the subject-matter of negotiation.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by M. L. Sperry against the Planters' Rice Mill Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Osborne & Lawrence and Edmund H. Abrahams, all of Savannah, for plaintiff in error. Geo. W. Owens, E. S. Elliott, and T. P. Ravenel, all of Savannah, for defendant in error.

WADE, J. Judgment affirmed.

BROYLES, J., not presiding.

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(16 Ga. App. 17)

## AMERICUS GAS & ELECTRIC CO. v. COLEMAN. (No. 5688.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⟸1001 — VERDICT — PLEADING AND PROOF.

A verdict may be upheld when based upon evidence supporting allegations in a petition which are sufficiently definite (under the reasonable and liberal construction favored by the courts) to clearly put the opposite party on notice as to the cause of action relied upon.

(a) Measured in this way, the petition not only charged negligence on the part of the defendant in permitting certain electric wires to become exposed by loss of their insulating covering, and thereby extremely dangerous, but also charged negligence on account of the faulty construction of the electric light system at the point where the injury occurred.

(b) All assignments of error based on instructions from the court relative to the duty of the defendant as to the proper erection and maintenance of its electric light system, and likewise assignments of error on account of the refusal to give certain instructions to the jury restricting the right of recovery solely to negligence in permitting certain wires conveying a dangerous electric current to become denuded of their insulating covering, are therefore without merit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928–3934; Dec. Dig. ⟸1001.]

2. TRIAL ⟸252—INSTRUCTIONS—EVIDENCE—PETITION.

Where a paragraph in a petition alleges gross carelessness and wanton and willful disregard of life and property because of certain specific facts therein stated, and there is no evidence whatever introduced which tends to sustain such allegations, it is error on the part of the court to read to the jury that portion of the plaintiff's petition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. ⟸252.]

3. ELECTRICITY ⟸14 — DUTY TO FURNISH SAFEGUARDS—EXTENT.

The following charge was error: "They are bound to provide such safeguards against danger as are best known and most extensively used, and all necessary protection must be afforded to avoid casualties which may be reasonably expected." The duty rested upon the defendant to use such safeguards against danger, in the construction and maintenance of its wires, poles, etc., as were prudent, usual, and customary, but the burden did not rest upon the defendant to employ the safeguards "best known and most extensively used." The defendant was bound to ordinary care and diligence, and was required to so construct its lighting system that persons proceeding along the streets and highways, according to the usual modes of travel, would not be liable to incur danger from currents of electricity by contact therewith.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. ⟸14.]

4. MARRIAGE ⟸40, 54—AGE OF CONSENT—RATIFICATION—PROOF.

"Our statute fixes the age of consent to marry in the female at 14 years; and, while the ceremonial marriage performed between the female who has not reached this age and the man competent to contract marriage may be said to be void, yet the female, after reaching the consentable age, may affirm the marriage, and it is thereafter binding, and no new marriage is required." Luke v. Hill, 137 Ga. 159, 161, 73 S. E. 345, 346 (38 L. R. A. [N. S.] 559); Crapps v. Smith, 9 Ga. App. 400, 71 S. E. 501. Civil Code 1910, § 2931, provides that a person of the male sex must be at least 17 years of age to contract a marriage. If, however, such a contract be entered into by a boy less than 17 years old, but after he reaches "the consentable age" he affirms the marriage, and there is cohabitation between the parties, the marriage will thereafter be valid and binding. Smith v. Smith, 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362.

(a) Where a plaintiff sues on account of the homicide of her alleged husband, and proof is made that the ceremony of marriage was performed between herself and the deceased when the latter was less than 17 years of age, it must further appear that after the alleged husband reached the age of 17 years he nevertheless ratified and confirmed the marriage by continuing to cohabit with his wife as such, in order to warrant a recovery in behalf of the alleged widow. See, in this connection, Murchison v. Green, 128 Ga. 339, 57 S. E. 709, 11 L. R. A. (N. S.) 702.

(b) The evidence of the plaintiff in this case establishes the fact that a ceremonial marriage had been performed between herself and the deceased when the latter was less than 17 years of age, and there was no evidence whatever to show cohabitation between the parties after the deceased reached the age of 17 years, or to show that they lived together and were generally known or reputed in the community of their residence to be man and wife.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 58–69, 79, 93–103, 105, 106, 109; Dec. Dig. ⟸40, 54.]

Error from City Court of Americus; W. M. Harper, Judge.

Action by Mary Coleman against the Americus Gas & Electric Company. Judgment for plaintiff, and defendant brings error. Reversed.

Battle & Hollis, of Columbus, and W. A. Dodson, of Americus, for plaintiff in error. J. A. Hixon and W. P. Wallis, both of Americus, for defendant in error.

WADE, J. Judgment reversed.

BROYLES, J., not presiding.

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(16 Ga. App. 34)

## WILLIAMS v. STATE. (No. 5582.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. FALSE PRETENSES ⟸45—ACCUSATION—VARIANCE—DOCUMENTARY EVIDENCE.

The court erred in admitting in evidence, over the defendant's objection, a purchase-money note executed by the defendant, in which title to "one black horse mule about six years old, weighing about 1,000 pounds, and known as the Hill mule," was retained in S. S. Brewer & Settle. The defendant was accused of fraudulently obtaining credit, by falsely and fraudulently representing to the prosecutor that he (the defendant) was the owner of a certain bay horse mule named Jim, about six years old, weighing about 900 or 1,000 pounds, and that there was no incumbrance on the said mule, which he thereupon mortgaged to the prosecutor. Even if parol evidence were admissible for the purpose of showing that the bay mule named Jim and the black mule known as the Hill mule were identical, an allegation that the bay mule named Jim was held by S. S. Brewer & Settle under a certain bill of sale could not be established by the introduction of a bill of sale of a black mule. The error in the admission of this irrelevant testimony, over timely objection to its irrelevancy, must be presumed to have been prejudicial to the accused; and upon this ground alone, in the state of the record, a new trial should have been granted.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. ⟸45.]

2. INDICTMENT AND INFORMATION ⟸159—AMENDMENT—EFFECT.

The court properly allowed the accusation to be amended, and the amendment relates back to the time of filing the original accusation. The remaining assignments of error do not appear to be meritorious.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 505–514; Dec. Dig. ⟸159.]

Error from City Court of Elberton; Geo. C. Grogan, Judge.

Lewis Williams was convicted of fraudulently obtaining credit, and brings error. Reversed.

Z. B. Rogers, of Elberton, for plaintiff in error. Boozer Payne, of Elberton, for the State.

RUSSELL, C. J. Judgment reversed.

BROYLES, J., not presiding.

(16 Ga. App. 11)

## GRUBBS et al. v. COMANCHE TRIBE NO. 6, I. O. R. M. (No. 5552.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. BENEFICIAL ASSOCIATIONS ⟸13, 18—CONSTRUCTION OF BY-LAWS—"IN ARREARS FOR DUES."

Where the by-laws of a fraternal beneficiary society provide that a member who has been in arrears for dues for three months shall not be entitled to sick benefits until after the expiration of four weeks subsequent to his placing himself in good standing by the payment of dues, and the provision in regard to the payment of funeral benefits excludes the beneficiaries from participation only in the event that the member is "in arrears for dues" at the time of his death, a member, after having been in arrears for dues for three months, would not be entitled to sick benefits until the expiration of four weeks after the time of his restoration to good standing by payment of dues, but, in case of his death at any time after his restoration to good standing, his beneficiaries would be entitled to funeral benefits. A member is not "in arrears for dues," within the meaning of a by-law as to funeral benefits, when his dues have been so far paid that, according to the by-laws, he is in good standing. In the present case the member died on August 14, 1913. At the time of his death his dues were paid to July 1, 1913, by a payment made on July 24, 1913. A by-law of the fraternal society contains a provision that: "A member shall be considered in good standing and entitled to benefits, if he is not indebted to his tribe for dues, fines, or assessments in a sum equal to three moons [months] dues." Consequently the deceased member was not, at the time of his death, in arrears so far as to deprive his beneficiaries of funeral benefits, though he himself, under the provisions of another by-law, could not have drawn sick benefits until after four weeks from July 24, 1913.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. §§ 22–26, 41–50; Dec. Dig. ⟸13, 18.]

2. BENEFICIAL ASSOCIATIONS ⟸20—REMEDIES OF BENEFICIARIES—RESORT TO COURTS.

As a general rule, a member of a beneficial fraternal association must exhaust all the remedies provided by the society before resorting to the civil courts, but this restriction does not apply to his beneficiaries after his death, unless the by-laws contain a mandatory requirement to that effect. A provision in the by-laws of a fraternal benefit association by which a member, in order to obtain an adjudication as to his right to sick benefits, is permitted to appeal to a designated tribunal of the association, has no application to the right of the beneficiaries of a deceased member to pursue their appropriate remedy to collect funeral benefits in the civil courts.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. §§ 51–56; Dec. Dig. ⟸20.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Mrs. A. J. Grubbs, and others against the Comanche Tribe No. 6, I. O. R. M. Judgment for defendant, and plaintiffs bring error. Reversed.

Edgar Latham, of Atlanta, for plaintiffs in error. Mayson & Johnson, of Atlanta, for defendant in error.

RUSSELL, C. J. Judgment reversed.

BROYLES, J., not presiding.

(16 Ga. App. 43)

## FLOYD & LEE et al. v. BOYD. (No. 5765.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⟸1078—ASSIGNMENTS OF ERROR—ABANDONMENT—BRIEF.

Assignments of error not referred to in the brief of counsel for the plaintiff in error must be treated as having been abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. ⟸1078.]

2. JUDGMENT ⟸665—PARTNERSHIP ⟸63—ACTION AGAINST—DISMISSAL—RES JUDICATA.

The dismissal of an action against a partnership is no bar to an action against a partnership of the same name, not comprising the same individuals. In contemplation of law, a partnership, regardless of the firm name, is an entity prima facie distinct from any other partnership or person; and this rule is not affected by the fact that some of the individuals composing the partnership may be members of another firm, engaged in the same or a similar business. The trial judge therefore did not err in sustaining a general demurrer to the plea of res judicata, filed in behalf of the partnership styled "Floyd & Lee," and alleged to be composed of J. B. Floyd and D. C. Lee; the plea being based upon a judgment dismissing a prior suit against Floyd & Lee, a partnership alleged to be composed of J. R. Floyd and B. C. Lee.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1177–1179; Dec. Dig. ⟸665; Partnership, Cent. Dig. § 93; Dec. Dig. ⟸63.]

3. JUDGMENT ⟸665—RES JUDICATA—PLEA.

A judgment cannot be the basis of a plea of res judicata in an action in which the parties are not the same as in the case in which the judgment was rendered, although the cause of action be the same in both cases.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1177–1179; Dec. Dig. ⟸665.]

4. LIMITATION OF ACTIONS ⟸130—DISMISSAL AND NONSUIT—"RENEWAL"—EFFECT AS BAR.

It is immaterial that the action was brought in six months from the plaintiff's dismissal of a prior suit against a partnership of the same style but not composed of the same persons. A plaintiff's dismissal of an action will not prevent him from proceeding upon the same cause of action in a suit against a different defendant; and in such a case the second petition is not a "renewal" of the action, within the provisions of section 4381 of the Civil Code of 1910, as to renewal of dismissed or nonsuited actions within six months.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 539, 545, 553–566; Dec. Dig. ⟸130.

For other definitions, see Words and Phrases, First and Second Series, Renewal.]

5. BROKERS ⟸48—COMMISSION—SUFFICIENCY OF EVIDENCE.

"The fact that property is placed in the hands of a broker to sell does not prevent the owner from selling, unless otherwise agreed. The broker's commissions are earned when, during the agency, he finds a purchaser ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner." Civil Code 1910, § 3587.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 65; Dec. Dig. ⟸48.]

6. APPEAL AND ERROR ⟸1151—EXCESSIVE VERDICT—DISPOSITION OF CAUSE—DIRECTION.

The evidence did not authorize a verdict for so large an amount as that awarded the plaintiff by the jury, but there is evidence in the record which authorized a verdict for the plaintiff; and therefore this court will exercise its discretionary power of terminating litigation, by directing that the verdict be reduced to an amount definitely fixed by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498–4506; Dec. Dig. ⟸1151.]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by A. E. Boyd, administratrix, against Floyd & Lee and others. Judgment for plaintiff, and defendants bring error. Affirmed, with directions.

Theodore Titus, of Thomasville, for plaintiffs in error. Fondren Mitchell, of Thomasville, for defendant in error.

RUSSELL, C. J. This suit was brought by Boyd against Floyd & Lee, alleged to be a partnership composed of J. R. Floyd and D. C. Lee. The suit is to recover commissions alleged to have been earned by Boyd as a real estate dealer, by his services as an agent in producing a purchaser for a certain tract of land and certain timber rights. The jury returned a verdict for the plaintiff, and exceptions were taken to the judgment overruling the defendant's motion for a new trial. The death of Boyd, the defendant in error, having been suggested of record, his temporary administratrix was in this court substituted in his stead as defendant in error.

[1] 1. The general grounds of the motion for a new trial were amended by two assignments of error. The first of these relates to an alleged error of the court in refusing a request for certain instructions to the jury, and the second assigns error upon an instruction given. While the points raised in these assignments of error are raised in the discussion of the evidence, there is no specific reference, direct or remote, in the brief of the learned counsel for plaintiff in error, and, under a well-settled rule, they must be treated as having been abandoned.

[2] 2. We shall deal first with the exceptions pendente lite, which are presented in the bill of exceptions. It appears from the record that the petition in this case was filed November 22, 1913, and that the December term, 1913, was the appearance term. At that term, as appears from the bill of exceptions, the defendants, Floyd & Lee, as copartners, and J. R. Floyd in his individual capacity, before pleading to the merits or demurring, filed a special plea in bar, in which it was alleged that the pending suit involved the identical cause of action as that set forth in a former suit between the same parties which was dismissed by the court, and that the judgment dismissing the action was an adjudication against the plaintiff's right to recover commissions on account of the sale of the land. The plea further set forth that the judgment dismissing the former suit was entered on April 3, 1913, and the pending suit, not having been filed within six months, was barred. The plea in bar was overruled, the court holding that as the firm of Floyd & Lee in the former action was alleged to be constituted of J. R. Floyd and B. C. Lee, and in the present action the defendant firm was alleged to be composed of J. B. Floyd and D. C. Lee, the suits were

not against the same parties. The only evidence offered in support of the plea in bar was the plea of no partnership, filed by Floyd in the former action, together with the record of the judgment in that case. There was no evidence that the names B. C. Lee and D. C. Lee were used as to the same person, nor anything to indicate more than what might be inferred from Floyd's plea of no partnership in the first case, to wit, that B. C. Lee perhaps had no actual existence. In the first suit B. C. Lee was not served, and D. C. Lee was not served in the second case. But in the second suit Floyd interposed no plea denying his partnership with D. C. Lee. To sustain the plea of res judicata, it was necessary for the defendants to show, not only that the same cause of action was involved in both cases, but that the parties in both cases were the same. Civil Code, §§ 4335, 4336. If the defendants had shown that B. C. Lee was but another name by which D. C. Lee was known, or vice versa, the plea of res judicata might have been sustained; but, since the court had nothing before it except the record of the previous suit, it could not have correctly held that a partnership composed of J. R. Floyd and B. C. Lee was the same legal entity as a partnership composed of J. B. Floyd and D. C. Lee, although the name and style of each firm was Floyd & Lee. To have so held would be to declare that any firm known as Smith & Jones would be liable for all the undertakings of any other firm of Smith & Jones which might thereafter form a partnership. The burden of establishing the res judicata was upon the defendants, and they failed to establish that the defendant partnership in both cases was the same. So far as is disclosed by the record, it affirmatively appeared in this case that the two partnerships were composed of different individuals; and the fact that Floyd may have been a member of both partnerships was immaterial, for it is possible for one person to be at once a member in as many partnerships as he has the means to join.

[3] 3. It is, of course, well settled that the plea of res judicata extends not only to what was actually pleaded in the cause, but to what could have been pleaded, and if as a matter of fact it could have been shown that the names B. C. Lee and D. C. Lee were names of one and the same person, and that there was not and never had been but one partnership in which the defendant Floyd was associated with this Lee, known both as B. C. and D. C., the dismissal of the prior suit upon a general demurrer would have been fatal to any renewal of the action. However, that is not the case.

[4] 4. Much of the argument of counsel is directed to the inquiry whether the second suit was filed within six months after the dismissal of the first action. So far as the voluntary dismissal of the plaintiff's prior suit for commissions upon the sale of the timber is concerned, the suit was filed within six months, and would have been in time even if it had been a renewal of the same action; for the plaintiff voluntarily dismissed the prior action on June 13, 1913, and the suit now before us was filed November 22, 1913. Thus only five months and three days had elapsed. However, we are of the opinion that the provisions of section 4381 of the Civil Code have no application whatever in this case; for the reason, already pointed out, that the parties involved in the two suits are not the same. Section 4381 relates solely to renewed cases. It refers to the same action brought over, and for an action to be the same, so that the term "renewal" will apply, it is not alone necessary that the cause of action be the same, but there must also be an exact identity of the parties. However, the provisions of section 4381 are not applicable even as to renewed cases, unless, due to the dismissal, the bar of the statute of limitations has attached or may attach, and it is to relieve this bar that the allowance of six months' time in which to renew the suit is given. Hackney v. Asbury, 124 Ga. 678 (1), 52 S. E. 886.

[5] 5. The strongest contention of the plaintiff in error is based upon evidence that Boyd did not procure a purchaser ready, willing, and able to purchase Floyd & Lee's property, and who actually offered to buy it on the terms stipulated by them. Floyd testified that he merely told Boyd that Floyd & Lee would pay him 5 per cent. commission upon a sale of the land at $35 per acre and the sawmill timber, amounting to 328 acres, at $15 per acre; that Boyd did not have the exclusive agency or the exclusive right to sell; that there was no agreement as to the terms of the sale; and that he (Floyd) himself sold the land and the timber. Boyd testified, as Floyd had done, that there was no special agreement as to the terms of the sale under his agency. He testified that his authority was limited, so far as the price was concerned, to $35 per acre for the land, and $15 per acre for the right to cut timber, upon which he was to receive 5 per cent. commission. The land and the timber might be sold separately or together, the commission in either case being the same agreed per cent. Floyd testified that he agreed to give the commission of 5 per cent. on the sale of the land at $35 per acre, but he positively asserted that he expressly refused to pay a commission on the sale of the timber. This raised a square conflict between Boyd and Floyd as to the allowance of the commission on the sale of the timber, though they were agreed as to the agency for the sale of the land. It is uncontradicted in the record that Boyd did not himself consummate the trade, but that after the purchaser, Ansley, had been approached by Boyd in regard to the purchase of the land and the timber, he (Ansley) took the matter up with Floyd, with the

result that he purchased the timber at the stipulated price of $15 per acre, but obtained the land at $30 per acre instead of at $35, to which sum Boyd's agency was confined. Ansley testified that Boyd called his attention to the land and the timber, carried him to see the property, and proposed to sell it to him at $35 per acre for the land and $15 per acre for the timber, and that he at once agreed to buy the body of timber at $15 per acre, but declined to pay $35 per acre for the land or to consider that proposition. It thus appears that Boyd did not procure a purchaser for Floyd & Lee's Land, but, under the testimony of Ansley, he did secure a purchaser for the timber upon the 328 acres of woodland. It was within the right and power of the jury to prefer the testimony of Ansley to that of Boyd on the one hand, or to that of Floyd on the other; and so the only question is whether a verdict for the plaintiff is authorized by the evidence in the record. It is, of course, well settled that, where there is no express provision to the contrary, the appointment of a real estate agent to sell property does not deprive the owner of the right of selling the property himself without liability to account to the real estate agent for the commission. Civil Code, § 3587; Doonan v. Ives, 73 Ga. 295; Humphries v. Smith, 5 Ga. App. 340, 63 S. E. 248; Moore v. May, 10 Ga. App. 198, 73 S. E. 29.

A real estate agent may earn commissions even when a sale is not actually consummated, but he must procure a purchaser who is ready, willing, and able to buy upon the terms proposed by the seller, or else he is not entitled to a commission. If there be evidence of bad faith on the part of the seller, shown by his withdrawing the property from the hands of the real estate agent and selling it at a lower price, merely to avoid the payment of commissions, the real estate dealer may recover his commissions. But where there is no evidence of fraud, or of an intention arbitrarily to deprive the agent of his commission, the mere fact that the owner of the property himself exercises his right to sell it is not evidence of fraud. We conclude that the evidence of Ansley would have authorized a verdict for the plaintiff, and, since the jury found for the plaintiff, the evidence must be given the construction most favorable to him, and, in this view of the case, Ansley's testimony that he was willing, and expressed his willingness, to buy the timberland, contributed to the sale of the property, and entitled the agent to his commission upon the sale of the timber, even though the plaintiff was not entitled to recover upon the sale of the land because he did not procure a purchaser for it at $35 per acre, which was the only price at which he was permitted to sell. No objection can be made to the plaintiff himself selling the property; for, unless an exception is stated, the general rule permits the principal to dispose of his own property, provided only that, if the sale be made to one secured as a purchaser by the agent the owner and principal will be liable for the commissions.

[6] 6. The jury were authorized to find a verdict in favor of the defendant, but they found for the plaintiff. In the state of the record, a verdict would have been authorized for the commissions upon the sale of the timber, while it is not authorized upon the sale of the land. Hence the verdict is larger than is authorized by the evidence; and for that reason we direct that the verdict be reduced from $373.50 to $246.

Judgment affirmed, with direction.

BROYLES, J., not presiding.

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(16 Ga. App. 20)

## HAYS v. STATE. (No. 5716.)

(Court of Appeals of Georgia. Feb. 13, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸594 — CONTINUANCE — ABSENCE OF WITNESSES.

The court did not err in refusing to continue the case upon the showing that the absent witness was in the state of Tennessee, and therefore not subject to the processes of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. ⟸594.]

2. CRIMINAL LAW ⟸589 — CONTINUANCE — GROUNDS—JURY.

The fact that members of a jury, who had been previously impaneled to try the accused upon the same indictment (the hearing, however, resulting in a mistrial), commingled for two days with the jurors in attendance upon the court, and from whom the jury to try the case were to be selected, afforded no ground for a continuance, especially since it was not made to appear to the court that the probable jurors knew how the previous jury stood, nor that any of the jury, who had previously heard the evidence and agreed to a mistrial, had approached any jurors or attempted to influence them, or even had discussed the case with any of them. Any prejudice or bias resting upon the mind of any juror, due to his association or communication with any member of the previous jury, could properly have been ascertained from his answers upon the voir dire, or, if this were insufficient, by putting the jurors severally upon the court as a trior.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1315, 1319; Dec. Dig. ⟸589.]

3. COURTS ⟸76—CRIMINAL LAW ⟸1129—ASSIGNMENT OF ERROR — ADJOURNMENT — JURY.

Where the act does not designate the length of a term of a superior court, the judge may adjourn the court from week to week, and require the attendance of the same panel of jurors during the adjourned session. Cribb v. State, 118 Ga. 316 (6), 45 S. E. 396. For this reason, since it did not appear from the defendant's challenge to the array, based upon the ground that only 30 jurors were drawn whether the challenge referred to the original drawing of jurors for the March term of Chattooga superior court or to a drawing of tales jurors by the court during the term, the assignment of error is not sufficiently specific to present anything for the consideration of a reviewing court. In the absence of proof to the contrary, it is to be pre-

sumed that the judge of the superior court originally drew 36 names of persons to serve as petit jurors at the March term of the superior court, in accordance with section 856 of the Penal Code of 1910, and that the names of the 30 jurors to which the assignment of error refers were those of talesmen drawn by the court, in its discretion, for any probable emergency requiring the presence of jurors in addition to those composing the regular panels.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 250–254; Dec. Dig. ⊂⊃76; Criminal Law, Cent. Dig. §§ 2954–2964; Dec. Dig. ⊂⊃1129.]

4. WITNESSES ⊂⊃309 — RECEPTION OF EVIDENCE — WITNESS' CLAIM OF PRIVILEGE — STRIKING OUT EVIDENCE.

When a witness, offered for the purpose of proving that a female, who is alleged to have been seduced, was not virtuous prior to the alleged seduction, declined to answer certain pertinent questions, on the ground that so doing would incriminate himself, the whole of his testimony upon the subject should have been ruled out. Pinkard v. State, 30 Ga. 757; Young v. State, 65 Ga. 527; McElhannon v. State, 99 Ga. 672 (2), 681, 26 S. E. 501.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1069–1071; Dec. Dig. ⊂⊃309.]

5. CRIMINAL LAW ⊂⊃448, 465, 741—WITNESSES—COMPETENCY—EVIDENCE—OPINION.

The opinion of a witness is admissible in evidence in the discretion of the court when the facts and circumstances are not capable of being clearly detailed and described; the weight and probative value of the opinion being for determination by the jury and dependent upon the nature of the fact to which the opinion relates. A witness may testify to the use of persuasion by another, although not able to state the possibly undescribable means constituting the persuasion. Glover v. State, 82 S. E. 602, 603 (5).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035–1039, 1041–1043, 1045, 1048–1051, 1057, 1138, 1221, 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. ⊂⊃448, 465, 741.]

6. CRIMINAL LAW ⊂⊃1129—WITNESSES ⊂⊃246—INTERROGATION OF WITNESSES—ASSIGNMENT OF ERROR—SUFFICIENCY.

While judicial interrogation is not generally to be commended, a trial judge has the right to propound questions to a witness for the purpose of eliciting the truth and in the interest of justice, provided that, in the exercise of this right, he neither intimates nor expresses any opinion upon the testimony nor in any other way prejudices the rights of either of the parties. In the present case the assignment of error that the asking of the questions "emphasized the importance of the evidence adduced, and showed clearly to the jury the trend of the court's mind in reasking the questions," is incomplete, in that it does not appear from the assignment of error itself what the answers were to the questions alleged to have been previously asked, nor is the statement that the asking of the questions showed the trend of the court's mind a sufficient or definite allegation that the mind of the court favored the prosecution rather than the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954–2964; Dec. Dig. ⊂⊃1129; Witnesses, Cent. Dig. §§ 852–857; Dec. Dig. ⊂⊃246.]

7. SEDUCTION ⊂⊃32—"VIRTUOUS FEMALE."

The instruction of the court to which exceptions are taken is not subject to the objection that it is confusing, and fails clearly to state the law of seduction. It did not take away from the jury the right to determine, from the evidence, whether or not the female alleged to have been seduced was in fact seduced, nor deprive the jury of considering all the pertinent facts. Under the law in Georgia, a woman is a virtuous female if her body be pure; and, if she has never had sexual intercourse with another, he who first has sexual intercourse with her may be guilty of seduction, though both her mind and heart be impure, and though "other parties might have taken liberties with her, such as hugging and kissing."

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 54½–55½; Dec. Dig. ⊂⊃32.

For other definitions, see Words and Phrases, First and Second Series, Virtuous.]

8. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and there was no error in refusing to grant the motion for a new trial.

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Will Hays was convicted of crime, and brings error. Affirmed.

See, also, 83 S. E. 502.

Wesley Shropshire, of Summerville, for plaintiff in error. W. B. Shaw, of La Fayette, and W. H. Ennis, Sol. Gen., of Rome, for the State.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

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(16 Ga. App. 50)

WATTERS v. WRIGHT. (No. 5603.)

(Court of Appeals of Georgia. Feb. 24, 1915.)

*(Syllabus by the Court.)*

1. ADMISSION OF EVIDENCE.

While some illegal evidence may have been admitted, no substantial error, that could materially prejudice the legal rights of the defendant, was committed by the court in the admission thereof.

2. VENDOR AND PURCHASER ⊂⊃315—ACTION FOR PURCHASE PRICE—DIRECTION OF VERDICT—SUBSCRIPTION—PAYMENT OF JUDGMENT.

It is contended that the court erred in directing a verdict for the full amount sued for, when it had not been affirmatively shown that the railroad had been completed from Rome to Gore, Ga., and that it was shown that the plaintiff, Mrs. Wright, had not paid the full amount of the judgment against her husband, Seaborn Wright. In our opinion, the evidence and the pleadings were sufficient for the judge or jury to legitimately infer that the railroad had been completed according to the subscription contract. We also think that the evidence conclusively showed that the plaintiff had paid the full amount of the judgment against her husband. The fact that Seaborn Wright gave, or loaned, to his wife, $309.94 worth of wood, which she used in paying the judgment against him, is immaterial; the undisputed evidence being that the subscription had been made for the benefit of her property, and that she had paid the full amount of the judgment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 928–931; Dec. Dig. ⊂⊃315.]

3. RULINGS ON FORMER APPEAL—DIRECTION OF VERDICT.

The rulings of this court, when this case was here on a former writ of error (Wright v. Watters, 12 Ga. App. 308, 77 S. E. 106), were that the $1,000 subscription to procure the building of the railroad was part of the pur-

chase money of the land sold to the defendant Watters by the plaintiff; that it was immaterial whether the consideration was paid wholly in money, or partly in money or other things of value; that it was immaterial whether this subscription was made by the plaintiff herself or by Seaborn Wright, her husband; that the subscription, though made by Seaborn Wright, was really the subscription of his wife, and was afterwards ratified by her; that the subscription was originally made for the benefit of her property (the very land which was bought by Watters); that the defendant's compliance with his undertaking to pay this $1,000, as a part of the consideration of the deed which gave him possession of the land, is necessary to effect his complete discharge from liability for the purchase price of the land; and that the petition in this case set forth a good cause of action. Under the above rulings, and as all the material allegations were substantially proved as laid, and the verdict was demanded by the legal evidence admitted, the court did not err in directing the same in favor of the plaintiff.

Russell, C. J., dissenting.

Error from City Court of Floyd; J. H. Reece, Judge.

Action by A. E. Wright against A. W. Watters. Judgment for plaintiff, and defendant brings error. Affirmed.

Maddox & Doyal, of Rome, for plaintiff in error. Barry Wright and Nathan Harris, both of Rome, for defendant in error.

BROYLES, J. Judgment affirmed.

RUSSELL, C. J., dissents.

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(16 Ga. App. 41)

## KENNEDY v. BUTLER, STEVENS & CO.

(No. 5714.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. WITNESSES ⟸150, 164 — COMPETENCY — TRANSACTIONS WITH PERSON SINCE DECEASED.

"Where any suit is instituted or defended by a person insane at time of trial, or by an indorsee, assignee, transferee, or by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the insane or deceased person, as to transactions or communications with such insane or deceased person." Civil Code, § 5858 (1).

(a) It appears that this suit was defended by Butler, Stevens & Co., who acquired both possession and title through a transfer from one Purvis, now deceased, and therefore testimony from the plaintiff, Kennedy, against the interest of the defendants, as to his transactions and communications with Purvis, or as to the nonexistence of such transactions and communications, would be incompetent. Turner v. Woodward, 136 Ga. 275, 71 S. E. 418; Hendricks v. Allen, 128 Ga. 181 (2), 57 S. E. 224.

(b) So, also, proof of the execution of a letter purporting to be signed by the deceased transferror, containing admissions prejudicial to the interest of his transferees, could not be made by the plaintiff; nor could testimony from the plaintiff be admitted to the effect that this letter and certain accounts of sales of cotton, which likewise tended to establish facts prejudicial to the interest of the transferees of Purvis, were delivered to the plaintiff by Purvis.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 560, 653–657, 683–686, 688–695; Dec. Dig. ⟸150, 164.]

2. WITNESSES ⟸140 — COMPETENCY—PARTY IN INTEREST—TRANSACTIONS WITH PERSON SINCE DECEASED.

"Where a person not a party, but a person interested in the result of the suit, is offered as a witness, he shall not be competent to testify, if as a party to the cause he would for any cause be incompetent." Civil Code, § 5858 (4).

(a) Taylor was not pecuniarily interested in the result of the trover suit brought by his landlord Kennedy, since he was a cropper, and the title and right of possession of the two bales of cotton, included in the suit, which were grown by him, was vested by law in his landlord; and therefore he was not incompetent to prove transactions and communications, or the absence thereof, between himself and the deceased, Purvis.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 598–618; Dec. Dig. ⟸140.]

3. SUFFICIENCY OF EVIDENCE—NONSUIT.

Considering all the testimony admitted by the court, together with that improperly eliminated by the court's ruling upon the testimony of Taylor, the evidence as a whole, nevertheless, did not authorize the plaintiff to recover; and it therefore was not error to award a nonsuit.

Error from City Court of Savannah; Davis Freeman, Judge.

Trover by J. D. Kennedy against Butler, Stevens & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

Oliver & Oliver, of Savannah, for plaintiff in error. Adams & Adams, of Savannah, for defendant in error.

WADE, J. Kennedy brought trover against Butler, Stevens & Co., to recover two bales of cotton grown by him and two bales grown by Taylor as his cropper, to which he claimed legal title as landlord (Civil Code, § 3705), but in which Taylor had an interest. The extent of Taylor's interest is not definitely disclosed, as the amount of his indebtedness to his landlord to be first paid therefrom does not appear. Purvis, now deceased, acquired possession of the four bales of cotton and shipped them in his own name and for his own benefit and credit to the defendants. The plaintiff sought to prove by his own testimony transactions and communications between himself and Purvis, tending to show that he had never sold his two individual bales of the cotton to Purvis or authorized him to use them for his own benefit, and also to show statements made by Purvis to identify a letter and "account sales" for the four bales of cotton as having been signed by and coming from Purvis, all of which would have been against the interest of the transferees of the deceased. The plaintiff further sought to prove by Taylor, his cropper, who had an interest in the proceeds to be derived from two of the bales of cotton sued for, that Taylor had likewise never

sold these two bales to Purvis or agreed for him to ship or market them, and show transactions and communications, and the absence of transactions and communications between Purvis and himself in reference to this cotton.

Judgment affirmed.

BROYLES, J., not presiding.

(75 W. Va. 598)

LEWIS v. BLANKENSHIP. (No. 2689.)

(Supreme Court of Appeals of West Virginia. Feb. 16, 1915.)

*(Syllabus by the Court.)*

1. AFFIDAVITS ⟸12—VERIFICATION — SUFFICIENCY—OFFICE JUDGMENT.

An affidavit filed with a declaration, pursuant to and in compliance with section 46, c. 125, Code 1913 (sec. 4800), bearing the caption: "State of West Virginia, Monroe County, to wit: In the Circuit Court Thereof: G. H. Lewis, Plaintiff, v. J. B. Blankenship, Defendant"—signed, "G. H. Lewis, Plaintiff," and concluding with the words: "Taken, sworn to and subscribed to before me this 14th day of September, 1912. C. H. Doss, Justice of the Peace, Sweet Springs District"—sufficiently shows the venue of the authentication thereof.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 46-57; Dec. Dig. ⟸12.]

2. APPEAL AND ERROR ⟸280—EXCEPTIONS—WAIVER.

Where, in assumpsit on an account, plaintiff has filed with his declaration the affidavit prescribed by section 46, c. 125, Code 1913 (sec. 4800), he may, after the overruling of his objection to the filing of any plea unaccompanied by the counter affidavit by that section made an essential prerequisite therefor, and of his motion to strike such plea from the file, duly excepted to, join issue and proceed to trial thereon, without waiving the benefit of the exception saved to him upon the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1646, 1648, 1649; Dec. Dig. ⟸280.]

Error to Circuit Court, Monroe County.

Action by G. H. Lewis against J. B. Blankenship. Judgment for plaintiff, and defendant brings error. Affirmed.

John L. Rowan, of Union, and Sanders & Crockett, of Bluefield, for plaintiff in error. T. N. Read, of Hinton, and Geo. W. Layman, of New Castle, Va., for defendant in error.

LYNCH, J. With his declaration in assumpsit, based on an account, requiring an executed writ of inquiry before judgment, G. H. Lewis filed at rules the affidavit in form and effect as provided by section 46, c. 125, Code. Without filing a counter affidavit, likewise required by the same section, Blankenship tendered, and the trial court over objection permitted him to file, the plea of the general issue, and overruled plaintiff's motion to strike the plea from the file, to which rulings plaintiff excepted, and the parties went to trial, resulting in a verdict and judgment for defendant. On plaintiff's motion a new trial was awarded, and defendant excepted, and, upon filing the counter affidavit, re-entered the same plea. The case is now here on writ of error to the order granting the new trial.

[1] Was there any error in the ruling on such motion? The statute cited expressly provides that where, in an action for recovery of money arising out of contract, plaintiff has filed with his declaration an affidavit, in form and substance as therein prescribed, and an order is entered at rules for an inquiry of damages, "no plea shall be filed in the case, either at rules or in court, unless defendant shall file therewith the affidavit hereinbefore required to set aside an office judgment in which no order for an inquiry has been made." The language of the section, it will be observed, is imperative, and forbids the filing of any plea, except upon compliance with its provisions, or unless, as held in some cases, such compliance is waived by plaintiff; the provision being for his benefit.

For defendant two objections are urged against plaintiff's affidavit: One that neither it nor the jurat discloses the venue or locus of the verification; one that by his participation in the trial, without specifically directing attention to defendant's failure to file the requisite counter affidavit, plaintiff waived strict compliance with the statutory provisions now relied on by him. The affidavit is as follows:

"State of West Virginia, Monroe County, to wit:
"In the Circuit Court Thereof.
"G. H. Lewis, Plaintiff, v. J. B. Blankenship, Defendant.
"In Assumpsit.

"G. H. Lewis, the plaintiff named in the foregoing action, being duly sworn, says that there is, as he verily believes, due and unpaid from the said defendant to the said plaintiff, upon the demands stated in the declaration in said case, including principal and interest to this date, after deducting all payments, credits, and setsoff made by the said defendant, and to which the said defendant is in any wise entitled, the sum of $2,076.82. G. H. Lewis, Plaintiff.

"Taken, sworn to and subscribed to before me this 14th day of September, 1912. C. H. Doss, Justice of the Peace, Sweet Springs District."

In form, the affidavit is the same as the one held sufficient in Quesenbury v. Association, 44 W. Va. 513, 30 S. E. 73, except that there the caption, "State of West Virginia, County of Summers," followed, while here the caption precedes, the style of the cause, and except the jurat shows the verification was taken in Summers county. The difference, however, we deem wholly immaterial. If the affidavit in any way indicates with reasonable certainty the jurisdiction of the officer, it is sufficient, though wanting that formality generally found in good pleading showing venue. Kesler v. Lapham, 46 W. Va. 293, 33 S. E. 289. "If made in good faith, and reasonably sufficient, an affidavit should be held good." 1 Enc. Pl. & Pr. 320

When read as a whole, it may, with pru-

priety, be said the affidavit, challenged by defendant, shows both the style of the action in which it was filed, and the county in which it was verified, and not, as defendant contends, only the style of the action. If the caption states the county, the presumption is that the officer signing the jurat was authorized to act and did act in the county so stated. 2 Am. & Eng. Enc. Law & Prac. 666; Bensimer v. Fell, 35 W. Va. 15, 31, 12 S. E. 1078, 79 Am. St. Rep. 774; Dyer v. Flint, 21 Ill. 80, 74 Am. Dec. 73; In re Keller (D. C.) 36 Fed. 684.

In the Dyer Case, an affidavit for an attachment was held sufficient, because on its face it appeared to have been made in the county where the suit was brought, although the jurat was signed by a person as notary public without stating for what county he acted. And in the Keller Case the caption was, "State of Wisconsin, Municipal Court, City and County of Milwaukee"; the verification was by "Julius Meizelwich, Clerk of Municipal Court"; and the affidavit was held sufficient. The venue of an affidavit to prove service of a notice is sufficiently shown, where it is indorsed on the back of the notice, which is properly entitled. Persinger v. Jubb, 52 Mich. 304, 17 N. W. 851. And Irving v. Brownell, 11 Ill. 402, and Graham v. Anderson, 42 Ill. 514, 42 Am. Dec. 89, hold that:

"If the affidavit be taken within the county where the court is sitting, judicial notice will be taken of the fact that the officer taking it is a justice of that county." 17 Am. & Eng. Enc. Law (2d Ed.) 913.

See Carpenter v. Dexter, 8 Wall. 513, 19 L. Ed. 426.

[2] The affidavit being, in our opinion, sufficient in form and substance, did plaintiff, by joining in the trial on the plea filed, waive the statutory requirement as to a counter affidavit by defendant? Had plaintiff not objected to the filing of the plea when tendered, or moved promptly to strike it out if filed without his knowledge, he would be deemed to have waived compliance with the statute. Williamson v. Nigh, 58 W. Va. 629, 53 S. E. 124. There it is stated that, as the section cited is for plaintiff's benefit, it may be, and is deemed to have been, waived by plaintiff, where, without such objection or motion, he joins issue and proceeds to try the case upon the plea tendered and filed, in the absence of such affidavit.

But, in argument, the suggestion is made that, as plaintiff did not specifically state the grounds of his objection to the plea or of his motion to strike it out, he cannot urge them here. So far as we are enabled to determine from the record itself, no grounds were assigned. But plaintiff did expressly object to the filing of the plea, and promptly moved to strike it from the record of the case, and excepted to the ruling of the court upon the objection and motion, in the order made and acted on. What more could he reasonably be required to do to preserve the legal provision for his benefit? Virtually, he was forced into trial in disregard of that requirement. He did all that was reasonably necessary to save to himself the benefit of a violated statutory enactment made in his behalf, unless it was to decline to join issue upon a plea filed, not only without compliance with the legal requirement, but in violation of its express mandate. He had twice invoked, in vain, aid of the statute. His objection and motion were a challenge, not alone of the sufficiency in the form of the plea, but of the right to plead at all, and asserted the right to have the record of the case restored to its condition prior to entry of the order filing the plea tendered. Having exhausted the essential legal procedure in vindication of his right to the benefit of the provision, plaintiff, we think, did not waive the right and benefit so accruing to him.

Again, if defendant did not, as he contends, have any knowledge of the existence of plaintiff's affidavit, or of the objection interposed to the filing of the plea, of which ignorance there is nothing in the record or elsewhere informing us, except his claim in oral argument, he cannot now take advantage of such lack of knowledge. As the affidavit was filed at rules with the declaration, and the objection and motion of plaintiff were made in open court, defendant must be deemed to have had knowledge of their existence. Of whatever occurred in the action affecting him, he is presumed to have knowledge.

Nor do we know, or have we any means of ascertaining, whether plaintiff stated to court or counsel the grounds of his objection or motion. The record shows only that he objected to the filing of the plea and that he moved to strike it out after it was filed. He may have done more than so appears. But what does appear seems ample to save to him the benefit of the imperative command of the statute on which he relies.

Defendant in error has caused to be certified to us a judgment in his favor, resulting from a second trial had after the verdict in the first was set aside and before the writ of error now being considered was granted by this court. What effect must be given to that judgment, we do not, and properly cannot, now decide, but leave it to the disposition of the trial court, subject to review here for errors committed, if any, upon the application of the suitor who may deem himself prejudiced thereby.

Being of opinion that the award of a new trial was clearly right, we affirm the judgment to which the writ was directed.

(75 W. Va. 687)

KELLEY v. ÆTNA INS. CO. (No. 2756.)

(Supreme Court of Appeals of West Virginia. Feb. 16, 1915.)

*(Syllabus by the Court.)*

1. INSURANCE ⟸646—FIRE POLICY—CANCELLATION—BURDEN OF PROOF.

In an action on a policy of fire insurance, if the defense be that within the five days after notice to the assured of defendant's purpose to cancel the policy and calling for its surrender, the policy was in fact surrendered, and with assured's consent and agreement cancelled, the burden of proof of establishing such defense rests upon defendant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645–1668; Dec. Dig. ⟸646.]

2. INSURANCE ⟸665—FIRE POLICY—CANCELLATION—SUFFICIENCY OF EVIDENCE.

A case in which such burden was fully borne by the defendant, justifying reversal of the judgment on the adverse verdict of the jury in favor of plaintiff.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707–1728; Dec. Dig. ⟸665.]

3. NEW TRIAL ⟸72—VERDICT—WEIGHT OF EVIDENCE.

Where in such case the decided weight and preponderance of the evidence, not depending solely on conflicting oral evidence, but supported by documentary proof, and uncontroverted facts, greatly preponderates in favor of defendant, such adverse verdict should be set aside and a new trial awarded.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146–148; Dec. Dig. ⟸72.]

4. INSURANCE ⟸243 — CANCELLATION — NOTICE—WAIVER—CONSIDERATION.

When in such case it clearly appears by the preponderance of the evidence that the assured at the time he surrendered his policy for cancellation had knowledge of his right to five days notice, but within that time surrendered the policy and consented and agreed to its cancellation, and takes credit for the unearned premium as of the day of such surrender and cancellation, such waiver of his right is supported by sufficient consideration, and he cannot thereafter assert any rights under the policy, or recover thereon for a loss occurring within the five days.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 531–533; Dec. Dig. ⟸243.]

5. APPEAL AND ERROR ⟸1048—HARMLESS ERROR—LIMITING CROSS-EXAMINATION.

Error, if any, in denying proper cross-examination, will not be regarded here, when it appears, as in this case, that such error was fully cured by proper cross-examination of the witness permitted on his subsequent recall.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4145, 4151, 4158–4160; Dec. Dig. ⟸1048.]

Error to Circuit Court, Mercer County.

Action by M. H. Kelley against the Ætna Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

Sexton & Roberts, of Bluefield, for plaintiff in error. Sanders & Crockett, of Bluefield, for defendant in error.

MILLER, J. Action on a policy of fire insurance. Judgment for plaintiff on the verdict for one thousand dollars, the full amount of the policy. This writ of error is prosecuted by defendant company.

The defenses interposed were non-assumpsit, and a special plea that at the time of the fire the policy sued on was not in force, that prior thereto plaintiff had surrendered the policy to defendant for cancellation, and that the same had been duly cancelled at the time of its delivery for that purpose.

The declaration, in the brief form prescribed by the statute, alleged, parenthetically, that the original policy of insurance, a copy whereof purported to be filed with the declaration, was in the possession of defendant, and which had been obtained by it wrongfully, and the production thereof would be demanded on the trial.

On demand by defendant, plaintiff filed a bill of particulars, alleging that the Flat Top Insurance Agency, defendant's agent, wrote plaintiff that it had been ordered to cancel said policy, and requested plaintiff to return the same for that purpose; that plaintiff went to see said agent, concerning the cancellation thereof, and with the view of having other insurance written, taking with him the said policy, and that while in the office of said agent, defendant, through its said agent, obtained possession of said policy, and refused to return it to plaintiff, although demanded by him to do so; that said policy was not surrendered to said agent, nor to any other person, and that the notice required for cancellation thereof had not been given, and that at the time of the fire destroying the property insured said policy was in full force and effect.

On the issues thus presented the facts proven were: That the policy, the Standard form of New York, was issued February 4, 1913, for one year from February 3, 1913, at noon, to February 3, 1914, at noon, for one thousand dollars, covering insured's one-half interest in a three story frame, metal roof building, situated at Glatto, Mercer County, West Virginia, and known as "Ashworth Hotel." Other insurance permitted not exceeding three fourths of the actual cash value of the property. That the premium, $54.60, had not been paid by the assured but charged to plaintiff by defendant's agents, but that before the fire, these agents had paid the premium to defendant, less their commissions. That on May 24, 1913, the Flat Top Insurance Agency wrote plaintiff that defendant company had ordered cancellation of said policy, and requesting its return to them in the enclosed stamped envelope, and saying that they would remit the amount of the unearned premium due; also notifying him with regrets, that they would be unable to replace the insurance in any of the other companies represented by them; that this letter was received by plaintiff, either on Sunday, May 25, or Monday, May 26, 1913. That on May

27, 1913, in response to said letter, plaintiff took the policy and the letter to the office of the Flat Top Insurance Agency, handed both to Mr. Payne, the bookkeeper and cashier, Mr. Bradshaw, the secretary and treasurer, being also present, when the earned and unearned premium on the policy were calculated as of May 26, 1913, at noon, the earned premium amounting to $16.75, and that after crediting plaintiff thereon with $10.05, standing to his credit on the books of the agency, for the return premium on another policy, plaintiff paid the balance of the earned premium, $6.70, and took a receipt therefor, as being in full of his account.

That on May 28, 1913, following this transaction, plaintiff made application to another agency for a like amount of insurance on the same property, but not having the necessary data, made an appointment with the agent to meet him at his place of business in Bluefield, at an hour stipulated, and at which hour the agent called, but not finding plaintiff in, failed to get the data, and the policy was never issued to take the place of the cancelled policy.

The fire destroying the property occurred on the night of May 28, 1913. At that time plaintiff held a policy in the Svea Fire & Life Insurance Company for $500.00, and in his proof of loss to that company, verified by his affidavit, plaintiff stated that the total amount of insurance covering the property "was $500.00 and not more." It is shown also that on the morning of May 29, 1913, after the fire, plaintiff went to the office of the agency to which he had the day before applied for the new insurance and inquired of the agent, whether he had issued any insurance on his property, and stating that the property had burned the night before, and being told by the agent that not having been able to get the data from him the day before, when he called as agreed, he had not written any insurance on the property; that on the same day, either before or after seeing this agent, plaintiff was at the office of the Flat Top Insurance Agency, and gave information to Bradshaw of that agency of his loss the night before, but Bradshaw says he then made no claim or pretense that the cancelled policy was still in force, and though plaintiff was subsequently recalled, he did not contradict Bradshaw or pretend to have then asserted a claim of loss against defendant company on account of said policy. He does say that he inquired of Bradshaw and Payne on that occasion if the Ætna policy had been cancelled and was told by them that it had been. And he says that he then went to the other agency to see if they had written a policy.

The foregoing are the uncontroverted facts in the case. The only material facts which can be said to be in controversy are as to who were present and what was said between Kelley, the assured, and Bradshaw and Payne, the agents for defendant company, on the afternoon of May 27, 1913, at the offices of the Flat Top Insurance Agency, when Kelley went there and turned in the policy sued on, with the letter of notification of May 24, 1913. Kelley swears that Bradshaw was not in when he entered the office, nor until after he had handed the policy and letter to Payne, and had talked to Payne about paying the premium. Bradshaw and Payne swear that both were present during the entire transaction, and heard and participated in all that was said on that occasion. Being asked on cross-examination why he had taken his policy to the Flat Top Insurance Agency on May 27, 1913, he answered:

"I owed the premium on the policy, and I thought that it was on that account that they wanted the policy, and I went down to pay the premium."

When recalled after Bradshaw and Payne, and others, had testified, Kelley swore in chief that when he received the letter of May 24, 1913, from defendant's agents he "went to pay the premium, as I thought, on the policy that I had, and they just took the policy and started to figure on it"; and "I thought I was going to pay the premium on the policy when I went in there"; and they gave him the "receipt which has been introduced in evidence in this case, for $6.70." He also swears that when he first went in Bradshaw was not there, but Payne was, and that he had conversation with Payne before Bradshaw came in; that Payne and some lady were in there, lady not named or produced; that before Bradshaw came in he was there and went to the window "and placed my policy and my pocket book on the window there * * * and I told them I wanted to pay that, and Mr. Payne took the policy and placed it on the desk, and I asked him— He said then that— I saw where he was going to keep the policy—went to figuring on the interest—something on the insurance. I saw he was going to keep the policy, and I told him to give it back to me, and he refused, saying that the company was going to take it up, and Mr. Bradshaw didn't come in till— Then I told him—asked him if Mr. McGuire and Perdue had a policy on that building, and he went back and said they had five hundred dollars on it, and then I asked him why they couldn't protect me the same as they did McGuire and Perdue. Then Mr. Bradshaw came in about that time and said if they had a loss at that time they would be held responsible for it, as a special agent told him three months before that time to take that policy up." He says he does not remember anything else said by Bradshaw after he came in; that he did not then or at any time agree to the cancellation of the policy, and requested them right then and there to return the policy. Asked on cross-examination, why, after receiving the letter of cancellation, if he only went to pay the premium on the policy, he took the policy with him, he said he knew the amount was

on the policy. Asked if he didn't suppose they had a record of that amount, he answered:

"They may have. Q. You could look at the policy, and see what the amount was, couldn't you? A. Yes, sir, they could either give me that or give me another policy. * * * Q. How much did you owe on that policy, Mr. Kelley? A. I don't remember the amount now. Q. You know it was more than $6.70, don't you? A. Yes, sir. Q. Why did you simply pay $6.70? A. Well, I had to pay them whatever they said. They handed me the receipts—they took the policy and handed me the receipt. Q. Didn't they explain to you that was the earned premium on that policy up to that time? A. Yes; they had the policy then; they wouldn't return it. Q. It was explained to you that that was the amount of the earned premium due on that policy up to that date? A. Yes, sir. Q. And you paid it? A. Yes, sir. Q. And left the policy there? A. Yes, sir. Q. Why did you pay that premium—that $6.70—if you didn't want to agree to the cancellation? A. I had to do it to be square with the company. Q. You never said anything to them about the five days, did you? A. No, sir. Q. You didn't ask for five days to get other insurance? A. No, sir."

And a little further on in his cross-examination he testified:

"Q. If you were opposing the cancellation of that policy on May 27, why did you agree to pay them the earned premium up to that time and take a receipt for it? A. I couldn't do anything else only pay them what they asked. Q. They explained to you that they couldn't do anything else except cancel the policy—that the company had demanded it? A. Yes, sir. Q. And cancelled it when you delivered it to them? No answer."

Both Bradshaw and Payne swear positively that Kelley presented the policy for cancellation, that the amount of the earned premium was figured, the balance paid, the policy surrendered and cancelled, without any objection from Kelley, and that he made no objection whatever to cancellation, and made no demand for the return of the policy. Payne swears that when Kelley came in on May 27, he presented the policy together with the letter and said:

"Here is that policy, you wanted me to bring in; and I took the letter and read it to see what was to be done with it. That was the first I knew of the policy having to be brought in; and just about that time Mr. Bradshaw stepped up and took up the conversation with Mr. Kelley."

Asked what he did with the policy at that time, he answered:

"I cancelled it. Figured the earned premium on the policy, and there was a credit of another policy that had been previously cancelled—unearned premium on it—that was to Mr. Kelley's credit on his account; and the difference between the credit on that policy and the earned premium on the Ætna policy was something like six or seven dollars, which Mr. Kelley paid me, and I gave him a receipt for that. That squared his account and cancelled the policy at that time."

[1] On these pleadings and issues thereon, and proof presented, can the judgment prevail against the errors assigned and relied on for reversal? The facts of the issuance of the policy and the loss of the property being shown, and not controverted, the first proposition relied on to support the judgment is that the evidence does not support the defense that the policy was by agreement of the parties, and for a sufficient consideration, cancelled, so as to deprive the assured of the benefit of the five days prescribed by the policy. It is conceded that under the terms of the policy and without such consent and agreement the policy could not have been cancelled within the period of five days from such notice. But it is insisted that the proofs in support of the plea, show beyond the shadow of doubt, and by its overwhelming weight, that the policy was surrendered by the assured and with his consent and agreement cancelled within the five days. This is evidenced not only by the oral evidence of defendant's witnesses, but by the documentary proof admitted supporting the same, and opposed to which there is nothing but the improbable and unsupported oral evidence of plaintiff. Wherefore, the policy was not in force at the time of the fire.

[2, 3] It is undoubtedly the law, applicable to the five days' provision of the Standard form of policy sued on in this case, that without the consent or agreement of the assured, waiving his rights thereunder, the premium being paid, or credit given therefor, the policy cannot within that period be cancelled so as to deprive the assured of the benefit thereof, and that when such cancellation and surrender is relied on as a defense, the burden of establishing the consent and agreement rests on the insurer. Cooley's Briefs on the Law of Ins., 2811, 2812, 2820, 2821. But we think the defendant has fully borne the burden of proof in this case. The things done by the insured respecting such surrender and cancellation, the money paid for earned premium, the receipt taken, his surrender of the policy, plaintiff's sworn proofs of loss, presented to the other company, and his other acts and conduct, are wholly inconsistent with his oral evidence attempting to negative the fact of surrender, and his consent and agreement to cancellation. This documentary evidence fully supports defendant's witnesses on the most material facts, and the verdict cannot be allowed to stand on the theory of conflicting oral evidence. We think the decided weight and preponderance of the evidence, not depending on the conflicting oral evidence, but backed by the documentary and uncontroverted facts, greatly preponderates in favor of defendant, supporting its plea, and that the verdict is contrary to the law and the evidence, calling for the application of the rules enunciated in Coalmer v. Barrett, 61 W. Va. 237, 56 S. E. 385, point 4 of the syllabus; Sims v. Carpenter, Frazier & Co., 68 W. Va. 223, 69 S. E. 794, points 2 and 3 of the syllabus; and Chapman v. Liverpool Salt & Coal Co., 57 W. Va. 395, 50 S. E. 601, Syl. 1.

[4] Another proposition advanced in support of the judgment is that plaintiff is not

shown to have had knowledge of the five days' provision of his policy, and cannot be held to have waived an unknown right, by surrender and cancellation of his policy, and without consideration therefor. He certainly knew the defendant had right of cancellation, and that under the terms of the policy he had right of immediate surrender and cancellation. At the time of plaintiff's surrender of the policy he had a credit on the books of the agency for an unearned premium, for which he took credit on the premium earned on the policy surrendered. He recognized the mutual rights of the parties when after receiving notice he took the policy to the agents and delivered it to them. Pursuant to that notice, or inspired by it, he went to the office of the agency bearing the policy for some purpose. Why did he deliver the policy, if he simply went to pay premium? He did not pay the premium, but only the earned premium up to noon of the day before. He says he demanded the policy back; for what purpose? Was it that he might have the benefit of the remainder of the five days? If so, then he must have had knowledge of the terms of the policy, else he would have made no such demand. How can he plead ignorance of its terms? Neither defendant nor its agents would have undertaken to cancel the policy within the five days if he had not voluntarily surrendered it, and taken credit for the full amount of the unearned premium up to the date of surrender. That was sufficient consideration for his voluntary surrender of the policy before the end of the five days' limitation. The terms of the policy told him of his rights, and of the rights of the defendant. He almost immediately sought other insurance, and but for his negligence he would no doubt have been fully protected, at the time of his loss, by other insurance. While the policy denied defendant the right to cancel within the five days, it as fully gave right to plaintiff to surrender it for cancellation within the five days and obtain the benefit of the unearned premium. That he did surrender it and paid the premium only up to the date of surrender, or the day before, is proven beyond doubt. He made no tender of more premium, and has not done so, so far as the record shows, up to this time. That the insured may so waive his right to the five days needs no citation of authority. It is in the terms of the policy. And when he does so the insurer need not stop to inquire whether he knows that by the terms of the policy he has other rights. 3 Cooley's Briefs on the Law of Insurance, 2807. For the proposition contended for counsel for plaintiff cite and rely on Wicks v. Scottish Union & National Ins. Co., 107 Wis. 606, 83 N. W. 781; Bard v. Fireman's Ins. Co., 108 Me. 506, 81 Atl. 870; Rosen v. German Alliance Ins. Co., 106 Me. 229, 76 Atl. 688; Clark v. Insurance Co. of North America, 189 Me. 26, 85 Atl. 1008, 35 L. R. A. 276. The Wisconsin case is not applicable, for in that case there was nothing in the notice of the insurance company, nor anything done by the insured showing or tending to show an intention or agreement to surrender the policy within the five days. Here there is positive and undeniable evidence of that fact. In that case the court says:

"The trouble with the argument here is that there is no proof of any such agreement, and no proof of any facts from which such an agreement is properly inferable."

In Bard v. Fireman's Ins. Co., there is positive evidence of the insured's refusal to surrender the policy, and denial of defendant's right to cancel, and of fraudulent conduct on the part of the agent in obtaining the policy. In Rosen v. German Alliance Ins. Co., the policy had never been delivered to the plaintiff. Plaintiff had no information as to its terms, except the false statements of the agent, and by whom he was misled to consent to cancellation on the promise of the agent to put him into another company. The insured had no knowledge of his rights under the policy. The court said in that case:

"It must be further conceded that the parties had a right to cancel the policy at once by mutual agreement; that is, that the plaintiffs had a right to waive this provision if they saw fit to do so, but on this point the burden of proof is on the defendant."

In that case the court well said the burden had not been borne by the defendant. In the case at bar we have concluded the burden of the defendant has been fully sustained. See Miller v. Fireman's Ins. Co., 54 W. Va. 344, 46 S. E. 181. That cancellation may be effected by mutual consent without regard to the terms of the policy seems to be fully established by the authorities. Besides the authorities cited, see, also, 2 Clement on Fire Insurance (1905) 409, Rule 15, and cases cited.

[6] Another point of error urged is that the court below denied defendant proper cross-examination of plaintiff's witnesses. It is replied that these errors, if errors they be, are not pointed out specifically and were not made the ground of the motion for a new trial, and cannot be considered on this writ of error, and besides were cured by subsequent cross-examination of the witness when recalled. If error there was, which would be available here, we think it was substantially cured by the cross-examination on recall of the witness, and that no prejudicial error was committed in the rulings of the court on the evidence.

Lastly, it is complained that "Court's Instruction" to the jury was prejudicial to defendant. Said instruction is as follows:

"The Court instructs the jury that the plaintiff, Kelley, had five days from the time he received notice on the 25th day of May, 1913, in which to return the policy under the terms of the policy introduced in evidence in this case, and that the policy would have been in force for five days from the date of receiving the notice; but if the jury believe from the

evidence that the plaintiff Kelley delivered said policy to the Flat Top Insurance Agency on the 27th day of May 1913, and agreed for the same to be canceled, then they will find for the defendant; but if the jury believe from the evidence that the said Kelley, when he delivered the policy to said company, did not return the policy for cancellation, but for the purpose of paying the premium, then they will find for the plaintiff."

The criticism is, that in undertaking in the last clause to state the converse of the proposition stated in the first, the court has given undue prominence to the theory of the plaintiff, that he did not return the policy for cancellation, but for the purpose only of paying the premium. Counsel say that no matter what plaintiff's original purpose in returning the policy may have been, if after he returned it he agreed, as stated in the first clause of the instruction, and the policy was cancelled, plaintiff could not recover; that he would be bound by his waiver and agreement. If the instruction is fairly susceptible of the inconsistency between the two propositions stated, and with defendant's instructions numbered 1 and 2, given, and which seem to state correctly defendant's theory of the case, it probably should not have been given in that form. We are inclined to think that the jury might have been misled by it, but that when read in connection with defendant's instructions, it is doubtful whether they were in fact misled thereby as counsel for defendant suggest. On another trial of the case we think it would be well to modify the instruction if given, so as to avoid the danger of misleading the jury.

For the errors found therein, as noted, the judgment below will be reversed, and the defendant awarded a new trial.

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(75 W. Va. 608)

## MORRISON v. APPALACHIAN POWER CO.

(Supreme Court of Appeals of West Virginia. Feb. 16, 1915.)

*(Syllabus by the Court.)*

1. ELECTRICITY ⇐⇒19—PERSONAL INJURIES—OWNERSHIP OF WIRES—SUFFICIENCY OF EVIDENCE.

Ownership of an electric light and power wire, supplying current to a pumping station situate outside of the corporate limits of a town, and used in supplying water to the inhabitants thereof, is reasonably to be inferred from proof of ownership of the power plant and electric lighting system within the town, and from proof that all the wires are supplied with electricity from the same power plant.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ⇐⇒19.]

2. ELECTRICITY ⇐⇒16—INJURIES TO TRAVELER—LIABILITY—HIGHWAYS—OWNERSHIP OF WIRES.

An electric company is liable to a traveler on the highway for an injury received by coming in contact with a broken telephone wire, not owned or controlled by it, but which it has suffered to become charged with a dangerous current of electricity from its own wire by falling across it in the highway, and so remaining for an unreasonable length of time.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. ⇐⇒16.]

3. ELECTRICITY ⇐⇒14—NEGLIGENCE ⇐⇒4—CARE REQUIRED—"REASONABLE CARE."

Reasonable care and negligence are relative terms, and the degree of care required in a given case must be commensurate with the dangers to be avoided. In handling so dangerous an agency as electricity a high degree of care is not unreasonable.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. ⇐⇒14; Negligence, Cent. Dig. § 6; Dec. Dig. ⇐⇒4.

For other definitions, see Words and Phrases, First and Second Series, Reasonable Care.]

Error to Circuit Court, Mercer County.

Action by William Morrison against the Appalachian Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bernard McClaugherty and French & Easley, all of Bluefield, for plaintiff in error. Greever & Gillespie, of Tazewell, and Sanders & Crockett, of Bluefield, for defendant in error.

WILLIAMS, J. Plaintiff was driving a team of horses along a narrow public road, walking beside his team, and, seeing a broken telephone wire lying across the ditch and extending into the road, and fearing it would become entangled in his wagon wheels, stooped to pick it up and throw it out of the road, and was severely shocked and burned. It happened to be highly charged with electricity. He sued and recovered a judgment for $3,000 against defendant, and it brings error.

[1] The principal error relied on is the refusal of the court to set aside the verdict, on the ground that it is not supported by the evidence. The telephone wire, harmless in itself, was charged by being in contact with an electric light and power wire, strung beneath it on the same poles, and across which it had fallen. Two telephone wires, and a signal wire connecting with the town's water tank to indicate the quantity of water therein, ran to the pump station, a mile and a half from the town of Pocahontas. These wires are admitted to be the property of the Pocahontas Light & Water Company, a subsidiary of the Pocahontas Consolidated Collieries Company. The electric light wire extended from the power plant in the town of Pocahontas to the pump station, furnishing light and power thereto, and was formerly owned and controlled by the Pocahontas Light & Water Company. But about a year previous to the accident, defendant purchased from said last-named company its electric power plant and wires in the town of Pocahontas. Plaintiff contends that it also purchased and took control of the electric light wire running to the pump station, and defendant contends that it is not proven by the evidence

that it did. Defendant's liability depends upon the proper determination of that controverted question of fact. If it did not own and control the electric light and power wire, of course it owed no duty to keep it in a safe condition, and is not liable. It is not seriously contended that negligence on the part of the owner of the wire is not shown, nor that the jury were not justified, by the evidence, in exonerating plaintiff from contributory negligence; neither is it claimed that the verdict is excessive. The chief contention of defendant's counsel is that there is not sufficient evidence to prove defendant's ownership and control of the wire. But, after carefully reading and considering the record in connection with the carefully prepared briefs and oral argument of counsel on both sides of the case, we are satisfied that there was sufficient evidence on the question of ownership to justify the jury in answering affirmatively the special interrogatory as to whether or not defendant owned it at the time plaintiff was injured. Defendant's contract of purchase from the Pocahontas Light & Water Company was in writing, and was not in evidence. Counsel for defendant insists that its purchase was confined to the wires strung within the corporate limits of the town of Pocahontas, and did not include the wire running to the pump station. There is no positive testimony by any of defendant's witnesses that it did not own and control the wire. It relies upon the weakness of plaintiff's evidence to prove that it did own it. Suppose the written contract of purchase had been produced, and that it appeared not to mention specially the wire running to the pump station as a part of the plant and lighting system included in the contract, would not the reasonable presumption be, if it was not excepted, that it was included within the general terms of description of the property sold? We are inclined to think so. It is hardly reasonable that defendant would have purchased the power plant and all electric light wires fed thereby, except the one extending out of town to the pump station, without some special reason therefor and some agreement respecting the supply of electricity intended to be carried by it. It is the general custom with electric light companies to erect and maintain the wires by which they supply light to their customers, and in the present case defendant continued to supply current from the power plant to the pump station just as it had been supplied before the purchase. There is no evidence that the pump station was supplied with electric current under a contract or arrangement differing from that prevailing with defendant's other customers. It is highly probable that some special agreement would have been made if the water company was to be supplied with electricity to be delivered to it at the generating plant, and then to be carried on its own wire to the place where needed. While direct evidence of a material fact is always desirable, it is not always possible to obtain it, and in such cases it is proper to resort to natural and reasonable presumptions based on the general observation and experiences of men as the best evidence. Underhill on Evidence, § 225. The application of that doctrine to the present case is certainly in the interest of justice, because it was extremely difficult for plaintiff to prove defendant's ownership by direct evidence, and very easy for defendant to prove that it did not own it, if that was the fact. The injury to plaintiff occurred on May 1, 1912. Defendant purchased the electric light plant in April, 1911. Mr. Walters, a witness for plaintiff, says the line ran through his place; that he was cutting some timber along the electric line, and made application to Kell Maxey, an employé of the defendant, in April, 1912, to take down the wires so he could fell the trees without breaking them, and the wires, including the electric light wire, were taken down according to his request. Mr. Bunn, superintendent of construction for the defendant company, was examined as a witness on behalf of plaintiff, and he said he did not think his company operated the line. But he admits that electricity was furnished to the line from the power plant that furnished light to citizens in the town of Pocahontas. He was asked if the defendant was not operating the line at the time of the accident, and answered:

"Well, the line was in service. Q. In whose service? A. Well, it was in service supplying the electric power down to the pump station; but I don't think the Appalachian Power Company had charge of it or control over it."

It is also proven that, some time after the accident, men employed by the Appalachian Power Company took down the electric wire in question and erected another line connecting with defendant's main line at a point near to the pump station, over which electricity was delivered thereto. In the absence of any explanation of why this was done, it is fair to presume that it was because defendant owned and controlled the line, and it was more convenient and less expensive to deliver by the shorter line. Presumably it had such ownership and control from the time it purchased the power plant; there being no evidence that it had any control over the line, or right to remove it, other than it acquired by its original purchase, nor is there any evidence that it acted for the Pocahontas Light & Water Company in removing the line and substituting therefor a new one. The evidence is sufficient to prove prima facie ownership and control of the wire by the defendant, and cast upon it the burden of disproving it. The court, therefore, properly refused to set aside the verdict, on the ground that it was not supported by the evidence.

The refusal of the court to give defendant's instructions Nos. 1, 5, 7, 8, 10, and 11 is complained of. No. 1 is a peremptory instruction to find for defendant, and, of course, was properly refused, in view of what

we have already said. The court gave its instructions Nos. 2, 3, 4, 6, 9, and 12, which fairly presented its theory of defense. We have carefully read and considered all the instructions which were refused, and do not think any error was committed in refusing them. As we have concluded to affirm the judgment, it will serve no useful purpose to discuss seriatim the rejected instructions. Some of them were refused because they were covered by others, given at the request of defendant, and others were properly refused for want of evidence to support them.

[2, 3] Having the ownership and control of such a dangerous agency as electric transmission wires, defendant was bound to exercise a degree of care commensurate with the danger likely to be produced by its negligence. It was bound to a high degree of care to see that the current was not permitted to escape from the wire in such way, and by such means, as to injure persons in lawful use of the public highway. Thomas v. Electric Co., 54 W. Va. 395, 46 S. E. 217; Thornburg v. City & Elm Grove R. R. Co., 65 W. Va. 379, 64 S. E. 358. "Reasonable care" and "negligence" are relative terms and depend upon the circumstances and exigencies of the particular case. The greater the danger to others from failure to exercise care, the greater is the degree of care required. Van Winkle v. American Steam Boiler Co., 52 N. J. Law, 240, 19 Atl. 472; Armbright v. Zion, 108 Iowa, 338, 79 N. W. 72; Schutte et al. v. United Electric Co., 68 N. J. Law, 435, 53 Atl. 204.

Although the defendant did not own or control the broken telephone wire, an agency directly contributing to plaintiff's injury, still, having control of the electric wire that transmitted the dangerous current of electricity that caused the broken telephone wire, otherwise harmless, to become very dangerous, it was liable, if it negligently suffered the danger to continue for an unreasonable time. Western Union Telegraph Co. v. Nelson, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464, and New York & N. J. Tel. Co. v. Bennett, 62 N. J. Law, 742, 42 Atl. 759. There is evidence tending to prove that the broken telephone wire had been seen in the road, in the same condition, for a number of days prior to the accident. The jury could therefore properly infer that defendant was negligent in failing to discover and remove the danger.

The judgment is affirmed.

(75 W. Va. 632)

## STATE v. DE BERRY. (No. 2612.)

(Supreme Court of Appeals of West Virginia. Feb. 16, 1915.)

*(Syllabus by the Court.)*

1. INDICTMENT AND INFORMATION ⊂⊃191—OFFENSES INCLUDED IN CHARGE.

An indictment for larceny may under section 19, chapter 145, serial section 5210, Code 1913, be supported by evidence showing embezzlement by defendant of the property alleged to have been stolen, and that the agency or service relied on related to but the single transaction of entrusting the property embezzled to defendant.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 265, 604–621; Dec. Dig. ⊂⊃191.]

2. LARCENY ⊂⊃40—VARIANCE—PROOF OF POSSESSION.

On the trial of one charged with the larceny or embezzlement of goods proof of actual or constructive possession of the goods by the one alleged in the indictment to be the owner thereof is sufficient.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102–126, 160; Dec. Dig. ⊂⊃40.]

3. LARCENY ⊂⊃71—INSTRUCTIONS—ELEMENTS OF OFFENSE.

If on the trial of one charged with larceny or embezzlement of goods, the jury are instructed to find a certain way, all elements necessary to constitute the offense must be included therein, and particularly the element of intent to steal or embezzle such goods.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 191–194; Dec. Dig. ⊂⊃71.]

4. LARCENY ⊂⊃3—ELEMENTS OF OFFENSE—INTENT.

Other instructions given and refused considered and disposed of on familiar rules and principles.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 3–10; Dec. Dig. ⊂⊃3.]

*(Additional Syllabus by Editorial Staff.)*

5. TROVER AND CONVERSION ⊂⊃1——"CONVERSION."

"Conversion" is an unauthorized assumption and exercise of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's right (citing Words and Phrases, First and Second Series, Conversion).

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 1, 2; Dec. Dig. ⊂⊃1.]

Error to Circuit Court, Cabell County.

P. J. De Berry was convicted of larceny, and brings error. Reversed, and new trial awarded.

Jean F. Smith and Doolittle, Copen & Davis, all of Huntington, for plaintiff in error. A. A. Lilly, Atty. Gen., and John B. Morrison and J. E. Brown, Asst. Attys. Gen., for the State.

MILLER, J. The indictment on which defendant was found guilty, and by the judgment complained of adjudged to serve a term of two years imprisonment in the penitentiary, charges him with unlawfully and feloniously stealing, taking and carrying away, three rugs, of the value of thirty dollars, the goods, chattels and property of one B. B. Burns, against the peace and dignity of the State.

[1] Our statute, section 19, chapter 145, serial section 5210, Code 1913, among other things, declares it to be larceny, for any agent, servant, etc., of any person to embezzle or fraudulently convert to his own use any effects or property of any other person which shall have come into his possession by

virtue of his place or employment. In State v. Fraley, 71 W. Va. 100, 76 S. E. 134, 42 L. R. A. (N. S.) 498, we decided that an offense under this statute is sufficiently established by evidence showing that the agency or service related to but the single transaction of entrusting the property embezzled to defendant. And an indictment for larceny is supported by proof of the embezzlement of the property alleged to have been stolen. State v. McClung, 35 W. Va. 280, 13 S. E. 654; Pitsnogle v. Com., 91 Va. 808, 22 S. E. 351, 50 Am. St. Rep. 867; Shinn v. Com., 32 Grat. (Va.) 899.

To convict, the State relied on the evidence of Burns, to the effect that De Berry, a colored man, and a professional rug and carpet cleaner in the City of Huntington, had applied to him, the secretary and treasurer of certain corporations, for the job of cleaning some rugs in the offices of said companies, then in his charge, and that Burns had agreed with De Berry that he should get one of the rugs after 5 o'clock, P. M., of the same day, and clean and return it before office hours the next morning, and if his work should prove satisfactory he was then to get the other rugs and clean and return them, all for the price of three dollars. The State also showed by Burns and other witnesses, that about 5 o'clock that evening defendant got all three rugs from the offices of these companies, and with the assistance of the elevator boy took them down on the elevator to the ground floor, and out on the sidewalk at the entrance of the office building, where he left them, to go to a nearby stable kept by Womeldorff to get a transfer to haul them to his place of business, and where he also lived; that afterwards, the same evening, defendant offered to sell the rugs first to Womeldorff, then to a saloon keeper, and also to a druggist in the vicinity of the building where he had the rugs, but that neither of the offers was accepted, and the rugs were not sold, and that when arrested, defendant told the police officer where he had gotten the rugs and for what purpose, and that he was taking them home to clean them, and to return them to the owner the next morning as he had agreed.

Defendant in his own behalf swore that his agreement with Burns was to take all three rugs at the same time, and clean and return them the next morning for the one stipulated price of three dollars; and that after removing the rugs to the sidewalk, not being able to get a transfer he returned to the rugs on the sidewalk, and afterwards carried them one by one to Womeldorff's stable, and later in the evening returned to the stable and got one of the rugs on his shoulder and started up the alley towards his home or place of business, when he was immediately arrested by a policeman, to whom Womeldorff had given information of his suspicions that something was wrong with defendant's action, and was taken to police headquarters adjoining or near Womeldorff's stable, where the rugs were also taken, and left until they were claimed by Burns the following morning.

The evidence of the State and of De Berry shows conclusively that De Berry was quite drunk, so much so that he was scarcely able to walk straight, and De Berry swears that his proposals to sell the rugs were in jest, to use his own language, that he was "just kidding," and acting as a man in his condition was likely to act; that if he had wanted to steal the rugs he had plenty of opportunities to do so, and would not have gone about the police station to accomplish his object; that he had no intention of selling the rugs, would not have sold them if his proposals had been accepted, but intended to perform his contract, and take the rugs back to the offices where he got them the next morning. This is substantially all the evidence in the case.

[2] The first point of error is that the allegata and probata do not agree, the allegation of the indictment being that the rugs alleged to have been stolen were the property of B. B. Burns, and the proof that they belonged to the two corporations, of which Burns was secretary and treasurer. But the proof is that at the time of the alleged offense the actual or constructive possession of the property was in Burns alleged to be the owner thereof. This is sufficient. Wherefore no variance. State v. Chambers, 22 W. Va. 779, 46 Am. Rep, 550; State v. Heaton, 23 W. Va. 773.

[3] The next point is that the court below erred in giving State's instructions numbers 1 and 4, the only instructions given at the instance of the State. Number 1, was predicated on the theory that Burns had given De Berry right to move only one of the rugs; number 4, based on defendant's evidence, that he had been given the right to remove all three rugs. The first told the jury that if defendant moved the three rugs and took and carried them away, and tried to sell them, they should find him guilty, and if of the value of more than twenty dollars, guilty of grand larceny. The fourth told the jury that if De Berry was entrusted with the rugs to clean them and for that purpose alone, and tried to sell them and exercised acts of ownership over them, though he did not sell them, he was guilty of embezzlement, and they should so find.

We think each of these instructions is bad, and that they call for reversal, as they both omit the very important element of intent to steal or embezzle, and therefore ignore the theory of defendant covered by his testimony, that his proposals to sell were in jest and without any intent whatever of wrongfully or unlawfully selling the rugs. In State v. Moyer, 58 W. Va. 146, 52 S. E. 30, 6 Ann. Cas. 344, this court held, point two of the syllabus, among other things, that in embezzlement it is necessary to show that the

conversion of the property was with intent to deprive the owner thereof. In 3 Brickwood's Sackett on Instructions, section 4591, it is said:

"Embezzlement is the fraudulently removing and secreting of money or personal property with which the party has been intrusted, for the purpose of applying it to his own use."

In section 4592, of the same work, it is said that, if the jury is instructed to find a certain way all elements must be included. And the author refers to an instruction disposed of in Higbee v. State, 74 Neb. 331, 104 N. W. 748, which was there condemned because it omitted to cover the element of intent. Under the authorities we think the instructions under consideration are clearly bad and should have been rejected as not fully covering the law governing the case.

[5] Besides these objections to State's instructions, it is very doubtful whether if otherwise good, they are justified by the evidence. To be guilty of embezzlement, one must "convert" to his own use the money or goods entrusted to his care. The statute uses the word "convert." What will amount to such conversion? It will be noted that the time for defendant to return the rugs had not expired. They were not to be delivered until the next morning. That was his contract. He proposed to sell the rugs, but had not done so. He had stored them in Womeldorff's stable, and this is the only evidence in any way tending to show conversion, or intent to deprive the owner of his property. See Penny v. State, 88 Ala. 105, 7 South. 50. Many definitions of conversion are found in the books. 2 Words and Phrases, 1562 et seq.; 1 Words and Phrases (2d Series) 1030 et seq. The most comprehensive of these definitions, and perhaps the most accurate, is found in 1 Bouvier's Law Dict. (Rawle's 3d Revision) 668, and in Black's Law Dict. (2d Ed.) 267, as follows:

"An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's right."

Does the evidence bring defendant's acts clearly within this definition of conversion? We do not think it does. But the evidence may be different on another trial and we ought not conclude the State perhaps by any further comment on the sufficiency of the evidence.

[4] Error is also assigned in the refusal of the court to give defendant's instructions numbered 1, 2, 4, 5, and 6. We have examined these instructions and are of opinion that they are bad and were properly rejected. With respect to the first and second, it was not necessary that defendant should have intended at the time of taking the rugs to deprive the owner of them, but if after obtaining them he conceived the purpose and intent to unlawfully appropriate them to his own use, and did convert them within the meaning of our statute, the crime was complete, although he may not have succeeded in getting away with the goods. With respect to instruction number 4, it is not necessary in cases of embezzlement that defendant should have been guilty of trespass in removing personal property in the first instance, if after obtaining possession thereof lawfully he conceived the intent and purpose to deprive the owner thereof, and effected a conversion of the goods, his crime was complete. With respect to instructions numbers 5 and 6, they did not properly state the law relating to proof of ownership, already referred to, and were properly rejected.

For the errors noted we are of opinion to reverse the judgment, and to award defendant a new trial.

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(75 W. Va. 648)

## STATE v. KOCH. (No. 2740.)

(Supreme Court of Appeals of West Virginia. Feb. 16, 1915.)

*(Syllabus by the Court.)*

1. INCEST ⟸13—EVIDENCE—PARENTAGE OF CHILD.

Where on the trial of one indicted for incest with his daughter, the State relies on and attempts to prove by her the birth and parentage of her child, and to impute the same to defendant, as inculpating facts or circumstances tending to show guilt, the evidence is material and relevant, and is properly admitted to the jury.

[Ed. Note.—For other cases, see Incest, Cent. Dig. § 11; Dec. Dig. ⟸13.]

2. WITNESSES ⟸268, 379—CROSS-EXAMINATION—IMPEACHMENT—FOUNDATION.

Where on such trial the daughter, as prosecutrix, is permitted to give in evidence to the jury the fact of the birth of her child and to impute its parentage to her father, she is subject to cross-examination thereon, and it is error to deny defendant the right to such cross-examination, and the foundation being laid therefor she is liable also to be impeached by showing that she has made contradictory statements in relation thereto on other occasions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959, 1209, 1220-1222, 1247-1256; Dec. Dig. ⟸268, 379.]

3. CRIMINAL LAW ⟸785, 789—INSTRUCTIONS—WITNESSES—CREDIBILITY.

Instructions to the jury given and refused, and presenting no new or novel propositions, considered and disposed of on the several assignments of error relating thereto, upon the principles enunciated in points one and two of this syllabus, and on other familiar legal rules and principles.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776-1781, 1846-1849, 1851, 1880, 1889-1894, 1904-1922, 1960, 1967; Dec. Dig. ⟸785, 789.]

Error to Circuit Court, Jackson County.

A. E. Koch was convicted of incest, and brings error. Reversed, and new trial awarded.

Stone & Wolfe, of Ripley, for plaintiff in error. A. A. Lilly, Atty. Gen., and John B. Morrison and J. E. Brown, Asst. Attys. Gen., for the State.

MILLER, J. Defendant was indicted, and, on the uncorroborated evidence of the prosecuting witness, a married daughter, convicted of incestuous sexual intercourse with her, and by the judgment complained of was sentenced to serve a term of two years imprisonment in the state penitentiary.

The first point of error, in logical sequence, relied on for reversal, is that the court below, over defendant's objection, permitted the State to prove by the prosecutrix that about two months before her marriage, which occurred May 27, 1911, she became pregnant, and that the defendant, her father, was the father of her child; and that after allowing this evidence to go to the jury the court had erred in other particulars in relation thereto, namely, first, in denying defendant's motion to strike out witness' testimony relating to the paternity of the child; second, in denying defendant the right to cross-examine her in relation thereto, and particularly whether prior to her marriage and about the time of her conception witness had not had sexual intercourse with her husband; and, third, and as a foundation for contradiction, whether she had not stated to the justice before whom and at the time she sued out the warrant against defendant that about two months before her marriage she had had sexual intercourse with her husband; fourth, in refusing to permit defendant to prove by said justice such contradictory statement by the prosecutrix.

These latter points are for the most part dependents upon the question involved in the first point, namely, whether the parentage of the child, as evidencing one of the alleged incestuous intercourses proven by the prosecutrix, was material and relevant evidence? If it was, as the court below seems to have concluded, first, by admitting the evidence over objection, and second, by refusing to strike it out, it follows as a matter of course that the witness was subject to cross-examination on that question, and to be impeached as proposed by defendant. If not material and relevant the court erred in admitting the evidence, and also in denying the motion of defendant to strike it out.

[1] The main question then, is, was the paternity of the child a fact material and relevant to the issue? When such fact does not involve the question of the guilt or innocence of the accused we do not think it is material, for the accused may be proven guilty regardless of the question of the paternity of the child born to the woman. Kidwell v. State, 63 Ind. 384; Mathis v. Com. (Ky.) 13 S. W. 360. But where the State relies on, and, as in this case, attempts to prove the parentage and birth of the child and to impute the same to defendant, and as inculpating facts and circumstances tending to show guilt, we think the evidence then becomes material and relevant and is properly admitted. If the child was conceived out of wedlock, as the witness swore, its birth, seven months after marriage, was evidence of illicit intercourse with some one, and if, as she swore, that intercourse was with her father, he was guilty of the crime of incest charged. True, she testified to other acts of intercourse with defendant before and after her marriage, and if her evidence was worthy of belief, he could have been found guilty, independently of the evidence respecting the particular offense, resulting in pregnancy, and birth of her child. But for ought we know, the jury may have disbelieved her as to the other acts, or were unduly influenced by the one imputing the child to him, and thereby prejudicing him. So we think the court did not err in admitting the evidence of the paternity and birth of the child. It was material and relevant for the purposes indicated. Swisher v. Malone, 31 W. Va. 442, 447, 7 S. E. 439; Harris v. State, 64 Tex. Cr. R. 594, 144 S. W. 232; State v. Hurd, 101 Iowa, 391, 70 N. W. 613; Kilpatrick v. State, 39 Tex. Cr. R. 10, 44 S. W. 830; Bowen v. Reed, 103 Mass. 46; Ronan v. Dugan, 126 Mass. 176; Eddy v. Gray, 4 Allen (Mass.) 435; Sabins v. Jones, 119 Mass. 167.

True some of these cases are bastardy cases, not cases of incest; but when the fact of parentage is offered as evidence of incestuous acts, it becomes material, and the witness giving the evidence is subject to cross-examination and to be impeached thereon. Generally the cross-examination may be coextensive with the material evidence given in chief, and should only be limited thereby. State v. Hatfield, 48 W. Va. 561, 37 S. E. 626; State v. Carr, 65 W. Va. 81, 63 S. E. 766.

[2] On the question of laying the foundation for impeaching the prosecutrix, we think it was competent for defendant on cross-examination to ask her whether at the time of swearing out the warrant against her father she had not stated to the justice that about two months before her marriage she had had sexual intercourse with Alexander who afterwards became her husband. If she admitted this fact such admission would certainly have weakened her evidence given in chief; if she denied it, the evidence of the justice that she had made such statement to him, would have contradicted her. So we think the rulings of the court both in denying the cross-examination, and in rejecting the evidence of the justice, as proposed by defendant, were erroneous and prejudicial to defendant. The law is well settled that a witness may be impeached by proving that on another occasion he made statements inconsistent with or contradicting his statements on the trial, if those statements be material. State v. Goodwin, 32 W. Va. 177, 9 S. E. 85. And though collateral, if made in chief, the rule is that the witness may be cross-examined and impeached thereon.

Forde v. Com., 16 Grat. (Va.) 547; 2 Wigmore on Evidence, sections 1020–1023.

[3] Defendant also points out alleged errors in the giving and refusing of instructions. First, it is complained that State's instruction number 1, on the subject of reasonable doubt, is erroneous in its concluding sentence that such doubt "must be *serious* and substantial in order to warrant acquittal." An instruction in the same form and using the objectionable word "serious" was approved in State v. Staley, 45 W. Va. 797, 32 S. E. 198. We see no error in this instruction.

State's instruction number 2, is complained of. It advises the jury, that relationship of the witnesses to defendant, their interest in the result of the case, their temper, feelings, bias, if any, their demeanor on the stand, their intelligence, &c., are proper considerations in determining the weight and credibility to be given their testimony. The criticism is not that the instruction is not good in law, but that it was liable to mislead the jury, and discredit the witnesses for defendant. But it is not limited to defendant's witnesses, it clearly includes the witness for the State, related to defendant as daughter. It is not a binding instruction, and we find no error in it, or in its application to the case.

State's instruction number 5, complained of, also on reasonable doubt, was approved in State v. Bickle, 53 W. Va. 599, 45 S. E. 917, and we find no error therein.

State's instruction number 6, telling the jury, on the issues made by the evidence, that the paternity of the child of the prosecutrix, was an immaterial fact, is erroneous, and should have been rejected. The State by introducing the fact, and, by reference to time, place and circumstance, imputing the paternity of the child to defendant, and as among the inculpating facts and circumstances, made the fact a material issue on the trial, and it should not have been ruled out by an instruction to the jury.

There was no reversible error in rejecting defendant's instruction number 4. It was sufficiently covered by his instruction number 10, given. Defendant's instruction number 6, we think was erroneously rejected. As the question of the paternity of the child of prosecutrix was made an issue by the evidence of the State, as we have decided, defendant was entitled to have the jury told, as proposed by the instruction, that on the question of paternity, they should consider any evidence in the case showing or tending to show the absence of likeness to defendant.

We think defendant was also entitled to his instruction number 9, rejected. The first part, telling the jury, in substance, that to justify conviction the inculpating facts must be inconsistent with the innocence of the accused, and incapable of explanation in any reasonable hypothesis than that of guilt, was given; but the court rejected the rest of the instruction which would have told the jury that in considering the supposed inculpating facts, testified to by the State's only witness, they should take into consideration the motives which may have induced her to make the complaint against her father and the influence to the same end which may have been exercised over her by her husband, in connection with the several demands previously made by them upon defendant for money and at the time of making the charges against him, and that if upon consideration of these facts and of all the other facts and circumstances shown in evidence they should entertain reasonable doubt as to the guilt of defendant, it would be their duty to find him not guilty. We think defendant was entitled to the whole of this instruction. State's instruction number 8, did not cover fully the subject. It simply told the jury that if on the evidence they believed defendant guilty beyond reasonable doubt, they should so find, although they might further believe the prosecutrix and her husband at the time of accusing defendant of the offense, had demanded large sums of money from him. The motives of witnesses are always proper to be considered by the jury in weighing their evidence. The instruction was not bad as one singling out and giving undue prominence to uncontrolling facts and circumstances in the case. Bice v. Wheeling Electrical Co., 62 W. Va. 685, 692, 693, 59 S. E. 626.

As the judgment will have to be reversed for the errors already pointed out, it becomes unnecessary, if not improper, to consider on the motion for a new trial, the weight and sufficiency of the evidence to sustain the verdict. For the errors pointed out, the judgment will be reversed and a new trial will be awarded defendant.

(168 N. C. 371)

## BORDEN BRICK & TILE CO. v. PULLEY et al.

### Appeal of KING LUMBER CO.

(No. 146.)

(Supreme Court of North Carolina. March 10, 1915.)

1. MECHANICS' LIENS ⟸61 — STATUTES — CONSTRUCTION.

Under Revisal 1905, §§ 2019–2021, giving liens to materialmen supplying materials for the erection of a building, requiring notice to the owner contracting for the building before settlement with the contractor, etc., only a materialman, furnishing materials for a building to some one having a contract relation to the work, acquires a lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 77, 78; Dec. Dig. ⟸61.]

2. MECHANICS' LIENS ⟸97 — STATUTES — CONSTRUCTION.

A lien arising under Revisal 1905, §§ 2019–2021, arises by substituting the claimant to the rights of the contractor, enforceable against any sums which may be due from the owner at the time of notice, or which are subsequently earned under the contract, and one having a lien may enforce it, regardless of the state of the account between the contractor and the subcontractor contracting with the lien claimant.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 129; Dec. Dig. ⟸97.]

3. MECHANICS' LIENS ⟸305 — STATUTES — CONSTRUCTION.

Where a lien claimant under Revisal 1905, §§ 2019–2021, has obtained the sum due from the owner to the contractor, the contractor, not guilty of any breach of duty, is not personally liable.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 636; Dec. Dig. ⟸305.]

Appeal from Superior Court, Wayne County; Connor, Judge.

Action by the Borden Brick & Tile Company against L. O. Pulley and others. From a judgment for plaintiff, defendant King Lumber Company appeals. Modified and affirmed.

Civil action to enforce materialman's lien. On the hearing it was made to appear that, in 1912, the defendant Y. M. C. A., contracted with the King Lumber Company to build them a hall or home in the city of Raleigh, at the contract price of $44,767.48, and that, in July, 1913, the said lumber company sublet the contract for the brick, stone, and cement work to L. O. Pulley, for the sum of $12,700, to be paid 85 per cent. of the value of material and labor in any one month, to be paid by the 15th of the following month and the remainder on final completion and inspection of the work. The contract of Pulley, as stated, obligated said Pulley to furnish labor and material to do all masonry of every description, including plain and reinforced concrete work and brick work, except that the cut stone was to be furnished by the King Lumber Company. That the plaintiff, under contract with L. O. Pulley, supplied him with brick, which were used in said building, to the amount of $3,353, and on the 31st of January, 1913, there was a balance due on said account of $1,898, which the defendant Pulley failed to pay, and plaintiff thereupon served notice in proper form on the defendant the Y. M. C. A. and on the King Lumber Company, claiming a lien on said building for the amount due for said material pursuant to the statute. That at the time of the said notice, given and received, there was due from the Y. M. C. A., the owner of the building, to the King Lumber Company, the sum of $1,898, which sum, having been attached by the plaintiff in this cause, has been paid into the court, subject to the judgment to be entered herein, and at the time of said notice the balance due and to become due on the contract from the King Lumber Company to L. O. Pulley was $1,669.87. That after the notice served upon contractor the King Lumber Company paid L. O. Pulley the sum of $1,401.32, leaving a balance still due and owing from the King Lumber Company to said Pulley of $268.55. There was evidence offered on the part of the King Lumber Company to the effect that, at the time it received the notice from plaintiff, in January, 1913, it had paid to L. O. Pulley all that was then due him under the contract for brickwork, and that the $1,401.32 was for money subsequently earned by said Pulley under the contract, and was for concrete and cement work done under said contract, after the receipt of said notice.

It was contended for plaintiff that, on the facts in evidence, the said L. O. Pulley acted as agent of the principal contractor in making these purchases, rendering such contractor directly liable for the whole amount; and, if not, that, if Pulley was subcontractor, the entire amount could be collected under the statutes applicable to and controlling the subject—both positions being controverted by the King Lumber Company.

The jury rendered the following verdict;

"(1) Was L. O. Pulley, at the time of the institution of this action, and is he now, a non resident of North Carolina? Answer: Yes.

"(2) In what sum, if any, is L. O. Pulley indebted to plaintiff? Answer: $1,898.00, and interest from January 3, 1913.

"(3) Was defendant L. O. Pulley subcontractor or agent of defendant King Lumber Company? Answer: Subcontractor.

"(4) In what sum, if any, was King Lumber Company indebted to L. O. Pulley under contract on January 3, 1913? Answer: $1,669.87.

"(5) Did defendant King Lumber Company pay any sum to defendant Pulley under its contract with him after plaintiff notified King Lumber Company of its claim for material furnished to L. O. Pulley? Answer: Yes.

"(6) In what sum, if any, is King Lumber Company indebted to plaintiff for material furnished to defendant Pulley? Answer: $1,669.87, and interest from January 3, 1913."

Judgment on verdict for plaintiff against L. O. Pulley for $1,898, and, among other things, applying the $1,898 due the contractor from Y. M. C. A. to the judgment recovered against L. O. Pulley, and judgment against the King Lumber Company for $1,669.87, to

be applied in discharge of the judgment against L. O Pulley and of the lien against the Y. M. C. A. building. Defendant the King Lumber Company excepted and appealed, assigning for error, chiefly, the refusal to nonsuit plaintiff on motion made in apt time; second, for certain specified errors in the judgment as rendered.

Dortch & Barham, of Goldsboro, for appellant. Langston, Allen & Taylor, of Goldsboro, and Pace & Boushall, of Raleigh, for appellee.

HOKE, J. The statutes of this state, notably Revisal, §§ 2019, 2020, and 2021, provide for a lien on the property in favor of subcontractors, laborers, and materialmen supplying material for the erection, repair, or alteration of a building, when they come within certain conditions and give the notices contemplated and required by the law, and enforceable to an amount not to exceed the sum due from the owner at the time of notice given. Section 2019 gives the lien to all subcontractors and laborers who are employed to furnish, or who do furnish, material for the building, etc. Section 2020 provides that any subcontractor, laborer, or materialman, who claims a lien as provided in the preceding section, may give notice to the owner or lessee of the real estate, who makes the contract for the building or improvement at any time before settlement with the contractor, and if the said owner or lessee shall refuse or neglect to retain out of the amount due the contractor under the contract as much as shall be due or claimed by the subcontractor, laborer, or materialman, the latter may proceed to enforce his lien, and, after notice given, no payment to the contractor shall be a credit on or discharge of the lien herein provided. In section 2021 a contractor for building, altering, or repairing of a building, etc., is required to furnish the owner or his agent, before receiving any part of the contract price, an itemized statement of the amount owing to any laborer, mechanic, or artisan, employed by such contractor, architect, or other person, or to any person for material furnished, and, on delivery of such itemized statement, it becomes the duty of the owner to retain a sufficient amount to satisfy these claims. And it is further provided that, if the contractor fails to comply with this requirement, any laborer, mechanic, artisan, or person furnishing materials may furnish to such owner or his agents an itemized statement of the amount due to such laborer, mechanic, or artisan employed by such contractor, etc. And the section provides, further, that *any person* may furnish to such owner or his agents an itemized statement of the amount due him for materials furnished for such purposes, and, on delivery of such notice to such owner or his agent, the person giving the same shall be entitled to all the liens and benefits conferred by this section, or by any other law of this state, in as full and ample a manner as though the statement had been furnished by the contractor, architect, or other person.

[1, 2] From a careful perusal of the statute, it will appear that it is not every claimant whose material has been used in a building that is entitled to a lien, but, unless he is a laborer or mechanic, supplying material, and who is given a lien by the express provision of section 2019, a material or lumber man in the strict sense of the term, who claims a lien under the provisions of sections 2020 and 2021, will only be entitled thereto when he supplies material for the building to some one having contract relation to the work. And, where such lien arises under the provisions of the statute, it does so by substituting the claimant to the rights of the contractor, enforceable as stated, against any and all sums which may be due from the owner at the time of notice given or which are subsequently earned under the terms and stipulations of the contract. In well-considered cases it is said to amount to an assignment pro tanto of the amount due or to become due from the owner to the principal contractor, and this, regardless of the state of the account between the principal contractor and the subcontractor, who may be the debtor of the claimant.

We are not aware that the question has been heretofore directly presented in this state, but the position is in accord with authoritative cases in other jurisdictions construing statutes of similar import, and of our own decisions, in so far as they now bear upon the subject, and is justified and required by the clear and imperative language of the statute conferring on any person, who has furnished material for the purposes of the building and who gives a notice containing an itemized statement of his claim to the owner or his agent, all the liens and benefits conferred by this section or any other law of the state, in as full and ample a manner as though the statement had been furnished by the contractor or architect. Mfg. Co. v. Andrews, 165 N. C. 285, 81 S. E. 418, 51 L. R. A. 866; Wood v. Railroad, 131 N. C. 48, 42 S. E. 462; Clark v. Edwards, 119 N. C. 115, 25 S. E. 794; Lumber Co. v. Hotel Co., 109 N. C. 658, 14 S. E. 35; Pinkston v. Young, 104 N. C. 102, 10 S. E. 133; Heard v. Holmes, 113 Ga. 159, 38 S. E. 393; Mack, Adm'x v. Colleran, 136 N. Y. 617, 32 N. E. 604; Van Clief v. Van Vechten, 130 N. Y. 571, 29 N. E. 1017; Vogel v. Luitwieler, 52 Hun, 190, 5 N. Y. Supp. 154; Bassett v. Mills, 89 Tex. 162, 34 S. W. 93; 27 Cyc. pp. 91, 96, 97, 99.

Speaking to the question in Vogel's Case, 52 Hun, at page 190, 5 N. Y. Supp. 157, Barker, P. J., delivering the opinion, said:

"The respondent makes the further point that it does not appear that the contractor is in-

debted to the subcontractor, Poppet, for the work and labor and material furnished in painting the house, and for that reason the appellant did not establish a valid lien on the premises. We cannot assume that Poppet has been paid, and, until the contrary appears, it may be presumed that he has not been, as a liability once created is supposed to continue until it is shown that it has been discharged. But if it appeared that Poppet had been paid for the work and labor which he performed, the right of the appellant to place a lien upon the premises as a security for his debt was not thereby extinguished; for the right was secured to him by statute, and its validity is not made to depend upon the question whether his vendee had been paid by the party with whom the latter contracted to do the work and labor. Such a construction placed upon the statute would contravene and defeat its express objects and purposes, and, so far as it was intended as a protection for materialmen and laborers, it would enable the contractor and the subcontractor, by concert of action, to deprive them of the benefits of the statute."

It is urged for the appellant that, at the time he received notice of plaintiff's claim, there was nothing then due from him to his codefendant Pulley, and that the $1,401.32 paid by him after receiving notice was for work done by Pulley after that date, and that no liability should attach by reason of such payments. Having held that plaintiff's lien, if otherwise valid, could be enforced, regardless of the state of the account between the contractor and the subcontractor, the position may not avail to prevent the application of the sum due from the owner, and, if it were otherwise, the money earned by Pulley was earned under the stipulations of the contract between the two, and, even if plaintiff's lien had to be worked out through the amount due to Pulley, the authorities hold that the notice to the contractor would amount to an assignment pro tanto of all sums due to Pulley at the time of notice or subsequently earned by him under the contract. Budd v. Trustees of Camden School, 51 N. J. Law, 36, 16 Atl. 194; Mayer v. Mutchler, 50 N. J. Law, 162, 13 Atl. 620; Anderson v. Huff, 49 N. J. Eq. 349, 23 Atl. 654.

[3] While we approve the judgment, in so far as it applies the balance due from the owner to the contractor in satisfaction of plaintiff's claim, we find nothing in the record to warrant or sustain a personal recovery for the $1,669.87 against the King Lumber Company. The statute gives the lien against the property, enforceable to the extent of the amount due from the owner to the contractor. This the plaintiff has obtained, and, the jury having rejected the position that Pulley bought as agent of the lumber company, unless it were established that the company has been guilty of some breach of duty, under the statute, working to plaintiff's prejudice, there is nothing to bring the company under pecuniary liability.

The personal recovery against the King Lumber Company, therefore, must be set aside, and, so modified, the judgment is affirmed.

Modified and affirmed.

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(169 N. C. 288)

## STATE v. KENNEDY. (No. 161.)

(Supreme Court of North Carolina. March 10, 1915.)

1. HOMICIDE ⟸309 — MANSLAUGHTER — INSTRUCTIONS—EVIDENCE.

Where defendant testified on a prosecution for murder that deceased approached him saying that his dog bit him, which defendant denied, whereupon deceased called him a liar, and hit and kicked him, and came at him with a knife, and that defendant backed up to a fence and broke off a paling with which he struck deceased, breaking his skull, after having been twice cut, an instruction on manslaughter was demanded.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652–655; Dec. Dig. ⟸309.]

2. HOMICIDE ⟸120—SELF-DEFENSE.

One who is acting in self-defense may continue the assault, if reasonably necessary to put himself beyond danger, and to the extent that the circumstances as they reasonably appeared will justify him for that purpose.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 175; Dec. Dig. ⟸120.]

3. HOMICIDE ⟸52 — PROVOCATION — EXISTENCE OF MALICE.

Though provocation exists for a homicide, it may be shown by evidence that defendant did not slay in consequence of it, but on malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 76, 77; Dec. Dig. ⟸52.]

4. HOMICIDE ⟸39—PROVOCATION—GRADE OF CRIME.

In every case of killing on sudden quarrel, the grade of the crime depends on the character of the provocation. If the provocation is great, it will be manslaughter; but, if slight and the killing is done with a degree of violence out of proportion to the provocation, it will be murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 59–61; Dec. Dig. ⟸39.]

5. HOMICIDE ⟸44, 45 — PROVOCATION — WORDS.

Words are not a sufficient provocation, but blows are a sufficient provocation to lessen a homicide into manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 68, 69; Dec. Dig. ⟸44, 45.]

6. HOMICIDE ⟸39 — MANSLAUGHTER — PASSION.

Passion which in law rebuts the imputation of malice, and reduces the crime to manslaughter, need not be so overpowering as for the time to shut out all knowledge and wholly destroy volition.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 59–61; Dec. Dig. ⟸39.]

7. HOMICIDE ⟸42—"LEGAL PROVOCATION."

The definition that, whenever force is used on the person of another under circumstances amounting to an indictable offense, such force is "legal provocation," is not intended to imply that an act must be indictable before it can become a legal provocation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 65, 66; Dec. Dig. ⟸42.

For other definitions, see Words and Phrases, Legal Provocation.]

which all the authorities hold sufficient to extenuate; for, if it amount to a breach of the peace, and offer an indignity to the person receiving it, it is generally conceded that it will extenuate the homicide to manslaughter, although a deadly weapon be used.

[5] Accordingly, it is laid down by Hawkins:

"If one man, upon angry words, shall make an assault upon another, either by pulling him by the nose or filliping him upon the forehead, and he that is so assaulted draw his sword and immediately run the other through, that is but manslaughter."

The same passage is quoted with approbation by Kelyng, 135; and I take the sound principle to be that if any assault made with violence or circumstances of indignity upon a man's person be resented immediately by the death of the aggressor, and he who is assaulted act in the heat of blood and upon that provocation, it will be but manslaughter. When therefore a court is called upon to pronounce the general rule, it should be that:

"Words are not a sufficient provocation, but blows are a sufficient provocation to lessen the crime into manslaughter." Taylor's Case, 5 Bur. Rep. 2796.

Some cases, however, have been attended with peculiar circumstances, showing the necessity of a more critical and precise limitation of the rule. In those exceptional cases, Stedman's Case, East's Cr. Law, 234, and Rex, 1 Strange, 499, where it was held to be murder, there were circumstances indicating deadly revenge or diabolical fury or evidence of protracted and unrelenting cruelty, and they are not really exceptions to the general rule, but come within the principle of the rule itself. And Chief Justice Taylor says regarding them:

"But if in Stedman's Case he had instantly, upon receiving the box on the ear, stabbed the woman, and the officer in the other case had stabbed Mr. Luttrell upon receiving the blow with the cane, the cases must have been pronounced to be manslaughter."

It is all based upon the notion that if, when one is assaulted, he instantly thereupon, before time has elapsed for reason to assume its sway, in the transport of passion thus excited, and without previous malice, returns the blow with a deadly weapon and kills his assailant, it will be manslaughter. State v. Hill, 20 N. C. at page 629, 34 Am. Dec. 396. As was said in that case by Judge Gaston, this it not because the law supposes that this passion made him unconscious of what he was about to do, and stripped the act of killing of an intent to commit it, but because it presumes that passion disturbed the sway of reason, and made him regardless of her admonitions. It does not look upon him as temporarily deprived of intellect, and therefore not an accountable agent; but as one in whom the exercise of judgment is impeded by the violence of excitement and accountable therefore as an infirm human being.

[6] We nowhere find that the passion which in law rebuts the imputation of malice must be so overpowering as for the time to shut out knowledge and destroy volition. All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which during the furor brevis renders a man deaf to the voice of reason, so that, although the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity. We are not speaking here of those assaults which, being of a deadly character, permit of different conduct on the part of the assailed, and which the law will view with greater leniency.

[7] It was held in State v. Hale, 9 N. C. 582, State v. Caesar, 31 N. C. 391, and State v. Miller, 112 N. C. 878, 17 S. E. 167, that:

"Whenever force is used upon the person of another, under circumstances amounting to an indictable offense, such force is a legal provocation."

It does not necessarily excuse or justify a killing, as that will depend upon the character of the force used, and the surrounding circumstances; but it may extenuate by reducing the crime to a lower grade than murder. The above definition of a "legal provocation" is not intended to imply that an act must be indictable before it can become a legal provocation (State v. Will, 18 N. C. 121), for it is not thus restricted in its application, as will appear from that decision.

In this case, if the facts are as stated by the prisoner in his testimony, and by those witnesses who corroborated him, he was assaulted by the deceased with a knife and was cut, and the deceased continued to press upon him while he was backing away, and not until he thought he was in danger of life or limb did he use the plank which he had jerked from the fence. This was calculated to arouse his passion and to dethrone his reason and to rebut the malice which otherwise would have made the killing a murder, and he was entitled to have this phase of the evidence submitted to the jury, with proper instructions. It does not prevent a conviction for murder, for the jury may find that is not true, but that he acted from malice, which the law implies from use of a deadly weapon, or even with deliberation and premeditation. The views we have expressed are strongly supported, we think, by State v. Curry, State v. Miller, and the other cases above cited, and also by the following: State v. Floyd, 51 N. C. 392; State v. Ellick, 60 N. C. 450, 86 Am. Dec. 442; State v. Massage, 65 N. C. 480; State v. Harman, 78 N. C. 515; State v. Kennedy, 91 N. C. 572; State v. Exum, 138 N. C. 599, 50 S. E. 283; State v. Baldwin, 152 N. C. 822, 68 S. E. 148; State v. Yates, 155 N. C. 450, 71 S. E. 317. In Baldwin's Case, Justice Hoke said:

"Manslaughter is the unlawful killing of another without malice, and, under given conditions, this crime may be established, though the killing has been both unlawful and intentional.

Thus, if two men fight upon a sudden quarrel and on equal terms, at least at the outset, and in the progress of the fight one kills the other—kills in the anger naturally aroused by the combat—this ordinarily will be but manslaughter. In such case, though the killing may have been both unlawful and intentional, the passion, if aroused by provocation which the law deems adequate, is said to displace malice and is regarded as a mitigating circumstance reducing the degree of the crime."

Upon a careful review of the case, our conclusion is that the court erred in excluding from the consideration of the jury the view which was presented as to manslaughter. There are other serious questions raised by the exceptions, but they may not be again presented, and therefore require no consideration now.

New trial.

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(168 N. C. 382)

## HARRISON v. ATLANTIC COAST LINE R. CO. (No. 116.)

(Supreme Court of North Carolina. March 10, 1915.)

1. PLEADING ⟸211—DEMURRER ORE TENUS.
The objection that no cause of action is averred under the laws of another state where the alleged injury occurred, cannot be raised by demurrer ore tenus.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 472, 481; Dec. Dig. ⟸211.]

2. NEGLIGENCE ⟸103½ — WHAT LAW GOVERNS—QUESTIONS FOR JURY.
In an action for death, caused in another state, a contention that there was not sufficient evidence for the jury that intestate was killed by defendant's train must be determined by the rules of evidence of this state.
[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 170; Dec. Dig. ⟸103½.]

3. DEATH ⟸8—ACTION — WHAT LAW GOVERNS.
It being alleged in the complaint that intestate was killed in Virginia, and the law of that state being pleaded in bar of recovery, the measure of duty defendant owed to the intestate and the liability of defendant for negligence is to be determined according to the laws of Virginia.
[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 12, 36, 52, 121, 133; Dec. Dig. ⟸8.]

4. TRIAL ⟸136—QUESTIONS FOR JURY—CONFLICTING EVIDENCE—OPINION EVIDENCE.
Where there is a conflict of the opinions of witnesses as to the laws of another state, it is for the jury.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323-327; Dec. Dig. ⟸136.]

5. TRIAL ⟸136—QUESTIONS FOR JURY—LAW OR FACT—LAWS OF OTHER STATES.
While the law of another state pleaded in bar of recovery usually raises a fact for the jury, where the statutes of another state and the decisions of its highest court are in evidence, and constitutes the only evidence, it is for the court and not the jury to interpret them.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323-327; Dec. Dig. ⟸136.]

6. RAILROADS ⟸396—INJURY TO PERSON ON TRACK—CARE TO BE USED.
The Virginia law differs from that of North Carolina in that, under the Virginia law, no duty was owing to a trespasser on a railroad track to anticipate and watch out for him upon the track; its sole duty being not to wilfully injure him after his helpless condition and peril was discovered.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1341-1343, 1357; Dec. Dig. ⟸396.]

7. RAILROADS ⟸359—INJURY TO PERSON ON TRACK—CARE TO BE USED — BURDEN OF PROOF.
The burden of proof is on the plaintiff, suing under the laws of Virginia for the death of a person killed in that state, to establish that the engineer of the train which killed such person did actually see him in a helpless condition on the track.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1238, 1239; Dec. Dig. ⟸359.]

Appeal from Superior Court, Northampton County; Bond, Judge.

Action by L. A. Harrison against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. New trial.

This is a civil action, tried upon these issues:

1. Was C. H. Harrison killed by the negligent running of the defendant's engine, as alleged in the complaint? Answer: Yes.
2. Was there contributory negligence on his part? Answer: Yes.
3. After said C. H. Harrison put himself in peril, might the killing have been avoided by the exercise of proper care and prudence on the part of the defendant company's engineer? Answer: Yes.
4. What damage, if any, is plaintiff entitled to recover of defendant? Answer: $1,000.

W. A. Townes, of Wilmington, F. S. Spruill, of Rocky Mount, and Mason, Worrell & Long, of Jackson, for appellant. Peebles & Harris and Gay & Midyette, all of Jackson, for appellee.

BROWN, J. The complaint alleges that plaintiff's intestate was killed by the negligence of defendant's engineer on the trestle crossing Fountain creek in the state of Virginia; that the intestate was in a helpless condition on the track crossing the said creek; that a north-bound train was approaching, and the engineer failed to keep a proper lookout, so that the engine ran against or over the intestate and killed him. The defendant denied that its train struck or killed Harrison, and set up that the injury, if it occurred, was in the state of Virginia, and to be governed by the law of Virginia, and that if plaintiff's intestate was struck and killed, it was the result of his contributory negligence in trespassing upon the track of the defendant.

[1] 1. It is contended that under the laws of Virginia the complaint fails to state a cause of action in that it fails to allege that the engineer actually discovered the intestate's condition and could have prevented the injury by the exercise of due care. The complaint alleges a cause of action under the law of North Carolina, and the point that no cause of action is averred under the laws

of Virginia cannot be raised by demurrer ore tenus. The law of Virginia is properly pleaded in the answer, and an issue is raised to be determined as issues of fact are determined under the practice of our courts.

[2] 2. For a similar reason, the contention that under the rulings of the courts of Virginia there is no sufficient evidence that the intestate was struck and killed by the train cannot be sustained. This fact must be determined by the rules of evidence obtaining in this state, and under our decisions there are circumstances in evidence which justified the court in submitting that disputed fact to the jury. Henderson v. Railroad, 159 N. C. 581, 75 S. E. 1092; Kyles v. Railroad, 147 N. C. 394, 61 S. E. 278.

[3] 3. It being alleged in the complaint that the intestate was killed in the state of Virginia, and the law of that state being pleaded in bar of a recovery, it is well settled that the measure of duty the defendant owed to the intestate and the liability of the defendant for negligence must be determined according to the law of that state. Hancock v. Telegraph Co., 142 N. C. 163, 55 S. E. 82; Harrill v. Railroad, 132 N. C. 656, 44 S. E. 109.

[4, 5] When the law of another state is pleaded in bar of recovery, an issue of fact is raised to be determined generally by the jury. It is usual to prove the law of another state by introducing witnesses learned in the laws of that state, or their depositions. Where there is a conflict of opinion of such witnesses, it is for the jury to determine the matter as to whom they believe. But on this trial no witnesses as to the law of Virginia were introduced. By consent the decisions and opinions of the Court of Appeals, the court of last resort in the state of Virginia, were introduced in evidence and read to the court and jury. No other evidence as to the law of Virginia was introduced by either party. When the statute law of another state is material to the decision of a controversy and the statute is in evidence, it is for the court and not the jury to construe it. So when the decisions and opinions of the highest court of another state are in evidence, and constitute the only evidence, as in this case, of the law of another state, it is for the court and not the jury to interpret them. Upon the same principle, where a deed or written contract is admitted in evidence, it is for the court and not the jury to construe and expound its meaning. It is manifest from the form of the third issue and the charge of the court that the measure of duty the defendant owed the intestate and its liability for negligence was determined according to the law of this state, and not according to the law of Virginia, as expounded by its highest court.

The defendant excepted to several parts of the charge, the substance of which was that it was the duty of the engineer to keep a vigilant lookout ahead, and if he could by the exercise of reasonable care have seen the intestate in time to have stopped his train, it was negligence if he failed to do so. That is a fair statement of our law, but it is not the law of Virginia, according to all the admitted evidence in this case. That evidence consisted of the following decisions of the Virginia Court of Appeals: Seaboard R. R. Co. v. Joyner, Adm'r, 92 Va. 354, 23 S. E. 773; Tucker's Adm'r v. Norfolk & Western Ry. Co., 92 Va. 549, 24 S. E. 229; N. & W. Ry. Co. v. Wood, 99 Va. 156, 37 S. E. 846; Southern Ry. v. Back, 103 Va. 778, 50 S. E. 257; C. & O. Ry. Co. v. Farrow's Adm'r, 106 Va. 137, 55 S. E. 569, 10 Ann. Cas. 12; Hortenstein v. Va.-Caro. Ry. Co., 102 Va. 914, 47 S. E. 996; Southern Ry. v. Bailey, 110 Va. 833, 67 S. E. 365, 27 L. R. A. (N. S.) 379.

[6, 7] These decisions appear to be uniform and clear. They all establish the fact that the Virginia law differs from that of North Carolina in that no duty was owing to (Harrison) a trespasser to anticipate and watch out for him upon the track, and its sole duty was not to willfully injure him after his helpless condition and peril was discovered, and the burden of proof is on the plaintiff to establish that the engineer *did actually see him* in a helpless condition. We quote from some of them: N. & W. v. Wood, 99 Va. 156, 37 S. E. 846, above quoted, holds:

"Ordinarily the only duty a railroad company owes a trespasser on its premises is to do him no intentional or willful injury. It does not owe him the duty of caution and vigilance until it has such notice, or such reason to believe that he may be in danger, as would necessarily put a prudent man on the alert."

In C. & O. v. Farrow's Adm'r, 106 Va. 137, 55 S. E. 569, 10 Ann. Cas. 12, the court held:

"A railroad company is not required to anticipate and make provision for trespassers upon its tracks, but after it has discovered a trespasser upon its tracks, it must exercise reasonable care to avoid doing him an injury, and if his danger be obvious and imminent, it must use all the means which are available for his protection which are consistent with its higher duties to others. Seaboard R. R. Co. v. Joyner, 92 Va. 354, 23 S. E. 773."

The sixth syllabus of this case is as follows:

"When a licensee on a railroad track was killed by a moving car, the doctrine of the last clear chance had no application, it appearing that defendant's servant on the train did not see deceased, being engaged in the performance of a necessary duty which he could not neglect."

According to the law of Virginia, as expounded by its Court of Appeals, the intestate was a trespasser and wrongfully on the defendant's trestle. The defendant's engineer did not owe him the duty to keep a lookout for him. When the engineer has actual notice that a trespasser is on the track and in danger, he then owes the duty of protection as far as possible consistent with his higher duty to passengers. Tucker's Adm'r v. Norfolk & W. Ry. Co., 92 Va. 549, 24 S. E. 229; S. & R. R. v. Joyner, 92 Va. 354, 23 S. E. 773. His honor therefore erred in charging the jury. The third issue is misleading to the

jury, as the case is governed by the Virginia law and not ours, and it should be framed accordingly.

New trial.

(168 N. C. 391)

## RICHMOND CEDAR WORKS v. JOHN L. ROPER LUMBER CO. (No. 9.)

(Supreme Court of North Carolina. March 10, 1915.)

1. DEEDS ⟸129 — ESTATES CREATED — LIFE ESTATE—ABSENCE OF WORDS OF INHERITANCE.

A deed executed before 1879, which did not use the word "heirs" in connection with the name of the grantee, conveyed only a life estate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 351, 360–365, 416–430, 434, 435; Dec. Dig. ⟸129.]

2. REFORMATION OF INSTRUMENTS ⟸45 — MISTAKE.

Equity will not correct a deed on the ground of mutual mistake, except upon clear and convincing evidence, especially when the parties to the deed are dead.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157–193; Dec. Dig. ⟸45.]

3. EQUITY ⟸64—MAXIMS.

Equity aids the diligent, and not one who delays for an unreasonable time, without explanation or excuse, to seek relief, especially where the evidence also shows acquiescence in the assertion of a hostile claim.

[Ed. Note.—For other cases, see Equity, Dec. Dig. ⟸64.]

4. REFORMATION OF INSTRUMENTS ⟸45—MISTAKE—DEED—OMISSION OF WORDS OF INHERITANCE.

Where a deed conveyed all the grantor's right, title, and interest in a tract of swamp land to the grantee, without words of inheritance, and further recited that the land was purchased from the commissioner for a certain estate 25 years before, but no deed had been made to the grantor, and the grantor conveyed all the title that was vested in him and in his heirs, and warranted against them, and no other persons, the conveyance of the title of the heirs is not sufficient to show that the words of inheritance in connection with the grantee were omitted by mistake so as to authorize reformation of the deed, especially where the deed was not part of plaintiff's chain of title, but the reformation was sought only to furnish a color of title to support an adverse possession for seven years against the holder of the legal title.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157–193; Dec. Dig. ⟸45.]

5. ADVERSE POSSESSION ⟸71—COLOR OF TITLE—REFORMATION OF DEED.

Where a deed which on its face conveyed no title to one in possession of the land is subsequently reformed to correct a mistake therein, and thus becomes color of title, the reformation does not relate back so as to make the possession prior thereto possession under color of title; since the mere equity to have the deed reformed is not color of title to support an adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415–429; Dec. Dig. ⟸71.]

Appeal from Superior Court, Gates County; Long, Judge.

Action by the Richmond Cedar Works against the John L. Roper Lumber Company. Judgment for the defendant on nonsuit, and plaintiff appeals. Judgment affirmed by divided court without opinion, and petition to rehear dismissed.

This is a petition to rehear an appeal disposed of at the last term without an opinion, the court being equally divided, Associate Justice BROWN not sitting. The action is to determine the title to land and to recover damages for trespass thereon.

The plaintiff introduced a grant from the state to John Fontaine, of date July 10, 1788, for the purpose of showing title out of the state. The next deed offered by the plaintiff was one from Joseph Allyn to George T. Wallace, of date March 16, 1857, which reads as follows:

"This deed made this the sixteenth day of March, in the year eighteen hundred and fifty-seven, between Jos. T. Allyn, grantor, to George T. Wallace, for the consideration of two hundred dollars paid by the said Wallace, and the said Allyn doth give, bargain, and sell to the said Wallace all of his right, title, and interest in and to a juniper swamp, called the Fountain Swamp, situate, lying, and being in the county of Gates, in the state of North Carolina, and described as follows: [Here follows description.]

"One-third of the above tract of land was sold to the late George Douglas more than twenty years since, and the said Douglas' portion was divided off by writing signed by the parties, and his third part is not included in this sale. The said tract of land was purchased of the commissioners of the estate of the late T. Proctor in June, 1832, and no deed had been made to the grantor. And the said Allyn conveys all right and title that is vested in him and his heirs and warrants against them and no other person. Witness my hand and seal.

"Jos. T. Allyn. [Seal.]"

The plaintiff then offered a deed from George T. Wallace to the Richmond Cedar Works, Limited, dated April 8, 1885, and a deed from the Richmond Cedar Works, Limited, to the plaintiff, dated July 2, 1891.

The plaintiff alleged in its complaint that the word "heirs," in connection with the name of the grantee, was omitted from the deed of Allyn to Wallace by mutual mistake, but it offered no evidence in support of this allegation except the deed itself. The plaintiff offered evidence tending to locate the land described in the Fontaine grant, and evidence tending to show that the land described in the deed from Allyn to Wallace and the deed from Wallace to Richmond Cedar Works, Limited, and the deed from Richmond Cedar Works, Limited, to Richmond Cedar Works lay within the bounds of said grant and locating the land described in said deed. The plaintiff offered evidence tending to show that the land in controversy was swamp land and in a swamp of more than 2,000 acres.

There was evidence tending to show that Geo. T. Wallace, the grantee in the deed from Allyn to Wallace, had been in adverse possession of the land in controversy con-

tinuously for more than 7 years prior to 1884, but neither plaintiff nor those under whom it claims have had any possession since 1884.

The defendant introduced a number of deeds, beginning with deed from the heirs of Jno. Fontaine and deeds to those under whom it claims from them to itself, and introduced parol evidence tending to locate these deeds as covering the locus in quo, and also evidence of continuous adverse possession in itself of the land in controversy for more than 20 years prior to 1904.

At the close of all the evidence the defendant moved for judgment of nonsuit. The motion was allowed, and the plaintiff excepted and appealed.

Winston & Biggs, of Raleigh, for appellant. Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellee.

ALLEN, J. [1] The deed from Allyn to Wallace, under which the plaintiff claims, conveyed only a life estate, as it was made before 1879, and the word "heirs" is nowhere used in connection with the name of the grantee (Cullens v. Cullens, 161 N. C. 346, 77 S. E. 228); and, as the grantee therein is dead, there is a failure of title in the plaintiff, unless the deed is reformed and converted into a fee.

[2] The jurisdiction of a court of equity to reform and correct a deed upon the ground of mutual mistake is well established, but it is a jurisdiction which should be cautiously exercised and should be denied, except in clear cases, particularly when the parties to the deed are dead, and the evidence relating to the transaction has been lost by lapse of time.

The duty devolving upon the court and the degree of proof required are well and accurately stated in Ely v. Early, 94 N. C. 1, which has been frequently approved, where the court says:

"That the court may, in the exercise of its equitable jurisdiction, correct a mistake in a deed, or other written instrument, such as that alleged in the complaint, is not controverted; but it will do so only where the mistake is made to appear by clear, strong, and convincing proof. The court must be satisfied from the evidence, beyond reasonable question, of the alleged mistake. By the solemn agreement of the parties to it, the deed at once, upon its execution, becomes high and strong evidence of the truth of what is expressed in it as between the parties to it. One of its chief purposes is to make such evidence, and it ought not to be changed or modified except upon the clearest proof of mistake. * * * It must stand until by a weight of proof greater than itself, a court of equity, in the exercise of a very high and delicate jurisdiction, shall correct it. The court always acts in such cases with great caution and upon the clearest proof, and in Wilson v. Land Co., 77 N. C. 452, Mr. Justice Bynum, having reference to a deed, said: 'The whole sense of the parties is presumed to be comprised in such an instrument, and it is against the policy of the law to allow parol evidence to add to or vary it, as a general rule. But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, relief will be withheld upon the ground that the written paper must be treated as the full and correct expression of the intent, until the contrary is established.' The same doctrine is laid down in Story's Eq. Jur. pars. 153, 157; Pomeroy Eq. Jur., par. 859; Rowley v. Flannelly, 30 N. J. Eq. 612; Burger v. Dankle, 100 Pa. 113; Brawdy v. Brawdy, 7 Pa. 157."

[3] Diligence is also a duty imposed upon the party seeking relief, the maxim of equity being, "Vigilantibus non dormientibus equitas subveniunt," and of this maxim Mr. Bisbahm, in his treatise on Equity (section 39), says:

"It is designed to provoke diligence, to punish laches, and to discourage the assertion of stale claims. By virtue of this maxim such claims are rejected in equity, independently of any statute of limitations. * * * This defense is peculiar to chancery courts, which in such cases act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights."

In Simmons v. Railroad, 159 U. S. 278, 16 Sup. Ct. 1, 40 L. Ed. 150, the court says:

"It has always been a principle of equity to discourage stale demands; laches are often a defense wholly independent of the statute of limitations."

And the same principle was declared in Capehart v. Mhoon, 58 N. C. 180, and in Clements v. Insurance Co., 155 N. C. 61, 70 S. E. 1076.

In the application of the maxim equitable relief was denied in Tate v. Conner, 17 N. C. 225, after the lapse of 34 years, in Lewis v. Coxe, 39 N. C. 199, after 40 years, and in Ditmore v. Rexford, 165 N. C. 621, 81 S. E. 994, after 57 years; the reason being, as stated in the Lewis Case, that the court cannot be sure; it sees the transaction clearly "through the dim obscurity of so long an interval."

We speak of a delay for an unreasonable time, unexplained and without excuse, and the evidence also shows the element of acquiescence in the assertion of a hostile and adverse claim—the possession of the defendant for 20 years.

[4] Another consideration which weighs against the equitable relief prayed for is that the plaintiff is asking a court of equity to reform a deed to enable it to set up an adverse possession under color against a defendant, who has the true title by mesne conveyances connecting itself with the grant upon which the plaintiff has to rely to show title out of the state.

Let us then examine the deed in the light of the authorities, and in connection with the circumstances that have transpired since its execution. The strongest position in behalf of the plaintiff is that the grantor, Allyn, undertakes to convey not only his own interest in the land, but also the interest of his heirs; the argument being that, if he had not had an estate of inheritance, and had not intended to convey it, the word "heirs" would not have been used. This view is entitled to

consideration, but by the use of the word it also appears that he knew its meaning and effect, and an examination of the whole deed indicates caution and circumspection. The grantor is careful in wording the deed so that it shall convey not the land, but his interest in it, and his warranty is restricted to himself and his heirs. The reason for this is apparent upon the face of the deed, as the deed itself shows that he had no title at the time of its execution, because, while he says he bought the land in 1832, he also states that he had never received a deed, although 25 years had elapsed, and he could not well have acquired title by possession if the locus in quo is correctly described in the petition as a juniper swamp, not fit for cultivation, and not inhabitable by man, a part of the Great Dismal Swamp, a fit abode for bears and other wild beasts.

Instead of the deed affording clear indication of an intention to convey a fee, it shows upon its face that the grantor did not have a fee, and manifests a purpose to cut down the estate conveyed as far as possible, and a purpose to minimize liability in the event of a claim against him.

It also appears that the deed was made 58 years ago; that the plaintiff has held the deed under which it claims more than 24 years; that neither the plaintiff nor any one under whom it claims has ever had possession of the land except that prior to 1884 George T. Wallace held possession for 7 years; and that during all this time there has been no effort to assert the claim that the deed of 1857 was intended to convey a fee simple, although the evidence introduced by the defendant shows that it has been in possession for about 20 years since 1884.

Giving full effect to the whole deed, and considering the attendant circumstances, we are of opinion that the relief prayed for by the plaintiff should be denied.

[5] If, however, the deed should be reformed and converted into a fee, the plaintiff would still be without title, as, upon the facts in this record, the decree of reformation would not relate back so as to enable the plaintiff to claim that the 7 years' adverse possession of Wallace was under the deed as reformed.

Color of title and adverse possession ripening it into a true title must go hand in hand, and, when Wallace was holding adversely, it was under a paper purporting to convey a life estate, and not a fee, and, if he was entitled to reform the deed, it was a mere right in equity, and not an estate.

In the case of Henley v. Wilson, 77 N. C. 218, the plaintiff claimed under a deed from one Stone to one McClennahan, for life, and contended upon the trial that it appeared from the deed that it was intended to convey a fee simple, and that this vested in him an equitable estate in fee upon which he could recover, and the court, dealing with this contention, says:

"The plaintiff's counsel, on the argument, took the ground that he could maintain the action as equitable owner in possession under the provisions of C. C. P. § 55. That provision does not apply; for the plaintiff has no equitable estate as a purchaser in possession, or other cestui que trust, but has only a right in equity to have Stone converted into a trustee and decreed to execute a deed in fee simple; and the fact that Stone, pending the action, executed the very deed that he would have been required to execute, does not vary the case; for the deed took effect only from the time of its delivery, and Stone had no power to make it relate back to the time of the execution of the deed to McClennahan. Indeed, a court of equity has no such power, and could only have required Stone to do what he has done—namely, execute a deed in conformity to the intention of the parties."

It will be noted that the plaintiff is not asking to reform a deed which is a link in a chain of title, nor does the principle apply applicable to the re-execution of lost deeds, as illustrated by Hodges v. Spicer, 79 N. C. 223, and Phifer v. Barnhart, 88 N. C. 333.

The petition to rehear will be dismissed, and the judgment of the superior court affirmed.

Petition dismissed.

(168 N. C. 344)

## JOHN L. ROPER LUMBER CO. v. RICHMOND CEDAR WORKS et al.

(No. 21.)

(Supreme Court of North Carolina. March 10, 1915.)

1. ADVERSE POSSESSION ⟸101 — CONSTRUCTIVE POSSESSION—SEPARATE TRACTS.

Generally, where title is claimed by adverse possession as to two separate pieces of land against the same claimant, an adverse holding of each must be made out by circumstances relating to possession of each respectively, and possession of one will not extend constructively to the other.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 575–589; Dec. Dig. ⟸101.]

2. ADVERSE POSSESSION ⟸52 — WAIVER OR ABANDONMENT — PURCHASE OF OUTSTANDING TITLE.

One in possession of land under color of title may purchase an outstanding title without thereby breaking the adverse nature of his holding under the first title, though the period for perfecting title under the first holding had not expired.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 259, 262–265; Dec. Dig. ⟸52.]

3. ADVERSE POSSESSION ⟸52 — WAIVER OR ABANDONMENT — PURCHASE OF OUTSTANDING TITLE.

Where plaintiff held adversely for 6½ years under color of title constituted by a deed from a stranger, he did not abandon or relinquish such holding or the right to complete title thereunder by the purchase of an outstanding interest which was contended to be the interest of a tenant in common of defendants, where there was no intention by plaintiff to abandon the color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 259, 262–265; Dec. Dig. ⟸52.]

Appeal from Superior Court, Camden County; Whedbee, Judge.

Action by the John L. Roper Lumber Company against the Richmond Cedar Works and another. From a judgment for plaintiff, defendant named appeals. No error.

This is an action to recover damages for a trespass on the plaintiff's land, known as the lots numbered 2 and 3 in the New Lebanon division, which was made in the year 1819. The trespass consisted in cutting roads on the land for the purpose of carting over it; the defendant justifying under a clause contained in the partition decree, reciting that it would be convenient in carting to the Cross Canal for one proprietor to have the free privilege of using the share of other proprietors for that purpose. Plaintiff asked for a restraining order to stop the trespass, which was at first granted, but afterwards vacated, and plaintiff appealed to this court, when the order was reversed, and the injunction directed to be continued to the hearing. 158 N. C. 161, 73 S. E. 902. Defendant at first admitted the title of plaintiff to lots 2 and 3, and set up the right to cross them; afterwards, by amendment, admitted plaintiff's title to lot No. 2, and formally denied the title to lot No. 3, and finally, by amendment, denied plaintiff's title to both lots, which defendant alleges was due to the unexpected decision of this court in Weston v. Roper Lumber Co., involving the title to lots 1 and 4 in said division, as to the estoppel of a judicial partition between tenants in common. 162 N. C. 165, 77 S. E. 430. The other litigation between them concerned the title to lot 12 of said division, which was finally decided by this court in favor of the plaintiff, so that plaintiff has recovered lots 1 and 4, which bound the land in controversy on the east and west, lot 12, which bounds it on the north, the Cross Canal being its southern boundary. The jury, in this case, returned the following verdict:

"(1) Is the plaintiff, John L. Roper Lumber Company, the owner and entitled to the possession of the land described in the complaint, as alleged? Answer: Yes; the whole thereof.

"(2) If so, have defendants entered and trespassed thereon, as alleged? Answer: Yes.

"(3) If so, what damage has plaintiff sustained thereby? Answer: $75.00."

The decision of this matter turns chiefly on the plaintiff's adverse possession of lots 2 and 3. Judgment was entered upon the verdict, and defendant appealed.

Ward & Thompson, of Elizabeth City, and Winston & Biggs, of Raleigh, for appellant. Small, MacLean, Bragaw & Rodman, of Washington, N. C., and J. Kenyon Wilson, of Elizabeth City, for appellee.

WALKER, J. (after stating the facts as above). [1] The defendant contends, as to both tracts, that plaintiff has had no such adverse possession as ripened his title under color, as the two tracts, designated as lots 2 and 3 in the New Lebanon division, were held by plaintiff and claimed by two separate deeds, and were, in fact and in law, to be taken and considered as two separate and distinct tracts of land, which would therefore require an adverse possession of each tract during the full period of limitation. It may be admitted, generally, that where the bar of the statute is pleaded, or the benefit thereof is relied on in any way, as to two separate pieces of land against the same claimant, an adverse holding of each must be made out for the requisite time by circumstances relating to the possession of each piece respectively, and mere possession of the one will not be extended so as constructively to include the other. A discussion of the question is not called for, as we are satisfied that there was an actual adverse possession of each tract under color for a sufficient length of time to ripen the title into a perfect one. The defendant's objection was not to the character of the possession, as not being adverse, but to the application of the doctrine of constructive possession to a case where there are two or more separate tracts of land, when it should be restricted to cases where there is only one tract involved. 1 Cyc. 1128. There was no error, therefore, as to lot No. 2.

The other question presented as to lot No. 3 is whether the plaintiff waived or abandoned all right to claim any benefit from its adverse possession of 6½ years under the deed of Harrison E. Weston to it, dated 1st day of June, 1878, as color of title, by afterwards, December 19, 1884, taking a deed from H. E. Weston, John R. White, and others. Defendants contend that, at the time the last deed was made, they were tenants in common with H. E. Weston and the other persons named therein, but it may well be doubted if they have offered evidence sufficient in law to establish the fact under the rule laid down in Byrd v. Express Co., 139 N. C. 273, 51 S. E. 851, or whether they have connected themselves with the title of Samuel Weston, the first.

[2] As tested by the clear weight of authority and the rule of reason, the general doctrine is that a person in adverse possession of land under color may purchase an outstanding title to the same land, without thereby preventing his possession from being longer adverse or breaking its continuity, and this is so, although the period fixed by the statute for perfecting his title, under color, had not then expired. The subject is so fully and lucidly treated by Circuit Judge William H. Taft, in Elder v. McCaskey, 70 Fed. (Circuit Court of Appeals) 529, especially at page 547, 17 C. C. A. 251, at page 269, that we could not do better than to reproduce what has there been said, and especially as the facts of that case are so clearly analogous to those now under consideration, the outstanding title being that of a tenant in common:

"There remains to consider the contention of claimants, sustained by the court below, that, whether the possession of defendants was at any time adverse to the claimants, the disseisin was subsequently purged by recognition and acquiescence of defendants in claimants' title, so that avowed cotenancy ensued before the statute had run. This contention is chiefly rested on the purchase and acceptance by the defendants of deeds conveying to them outstanding interests of certain of the heirs of the brothers and sisters of William Barr, Sr., whose title was of the same character as that of claimants. It is well settled by binding authority that a vendee is not estopped to deny the title of his vendor. Robertson v. Pickrell, 109 U. S. 608, 614, 615, 3 Sup. Ct. 407 [27 L. Ed. 1049]; Watkins v. Holman, 16 Pet. 25, 54 [10 L. Ed. 873]; Willison v. Watkins, 3 Pet. 43 [7 L. Ed. 596]; Blight's Lessee v. Rochester, 7 Wheat. 535 [5 L. Ed. 516]. And the necessary conclusion from this is drawn, in the last-named case, that the person in possession of property under a claim of complete ownership has the right to fortify his title by the purchase of any real or pretended titles, without thereby holding possession in subordination to them. This is further supported by the decisions of many other courts to the same effect. Warren v. Bowdran, 156 Mass. 280 [31 N. E. 300]; Gardner v. Greene, 5 R. I. 104; Chapin v. Hunt, 40 Mich. 595; Mather v. Walsh, 107 Mo. 121, 131 [17 S. W. 755]; Giles v. Pratt, 2 Hill (S. C.) 439, 442; Osterhout v. Shoemaker, 3 Hill [N. Y.] 513, 518; Tobey v. Secor, 60 Wis. 310, 312 [19 N. W. 99]. The following are cases where the possessor and defendant purchased outstanding titles of tenants in common with the plaintiffs in ejectment, and yet was held not to have thereby acknowledged the validity of the plaintiff's title: Fox v. Widgery, 4 Me. [Greenl.] 214; Jackson v. Smith, 13 Johns. [N. Y.] 406, 413; Northrop v. Wright, 7 Hill [N. Y.] 477, 489, 496; Bryan v. Atwater, 5 Day, 181 [5 Am. Dec. 136]; Cannon v. Stockmon, 36 Cal. 539 [95 Am. Dec. 205]; Winterburn v. Chambers, 91 Cal. 183 [27 Pac. 658]; Cook v. Clinton, 64 Mich. 309, 313 [31 N. W. 317, 8 Am. St. Rep. 816]. And the same rule prevails in Ohio."

We need not assent to all that is said in that case, as to the relation of vendor and vendee with respect to any estoppel of the latter to deny or dispute the title of the former, and we cite the case only for the purpose of showing that the vendee's adverse possession is not affected by his purchase, and not as binding us to an approval of all the reasons advanced in support of the conclusion, as that is not necessary to a decision of this matter or to the value of the case as an authority. Mr. Freeman, in his work on Cotenancy and Partition (section 106) says:

"A person in possession of land may protect himself from litigation by purchasing any outstanding claim against his property. By so purchasing he does not necessarily admit the superiority of the title bought, nor change his possession, which was before adverse, into a possession subordinate to the newly acquired title. Therefore one who is in possession of real estate does not become a tenant in common thereof by merely accepting a deed therefor from the owner of an undivided interest therein."

The party who accepts a deed in fee from a grantor having no title or a less estate than he conveys performs no act expressly designed to influence, and which influences, the conduct of the latter to his injury, nor does he make any admission which, in good conscience and honest dealing, he should be forbidden to gainsay. The grantee is the one exposed to injury, and when necessary for his protection, he may show the truth and dispute the title of his grantor, as a party is only concluded against showing the truth or asserting a legal right, when the result would be a wrong, through his means, to some third person. There is no such relation ordinarily existing between the grantee in fee and his grantor, as will raise even an implied obligation, on the part of the former, against a denial of the title and estate of the latter. Although a tenant cannot question the right of his landlord, a grantee in fee, as he stands on a different footing in the law, may hold adversely to the grantor, and there can be no good reason why he should not be at liberty to deny that the grantor had any title. There is no estoppel where the occupant is not under an obligation, express or implied, that he will at some time or in some event surrender the possession, but the grantee in fee is under no such duty. He does not receive the possession under any contract, express or implied, that he will even give it up, but takes the land to hold for himself and to dispose of at his pleasure. He owes no faith or allegiance to his grantor, and he does him no wrong when he treats him as an utter stranger to the title, and, finally, it results from these considerations, and perhaps others of equal cogency, that his possession is really adverse to his grantor, as has often been held by the courts. The above principles are supported by the following cases: Sparrow v. Kingman, 1 N. Y. (1 Comstock) 242; Osterhout v. Shoemaker, 3 Hill (N. Y.) 518. The disseisin, therefore, was not purged by taking the deed, nothing else appearing. A disseisor in possession has an interest in the land which he may transfer with the possession to a third person or which on his death will pass to his heir, and the mere taking of a deed from another, against whom he is holding adversely, does not, of itself, constitute a relinquishment of this right. City of St. Paul v. C., M. & St. P. Railway Co., 45 Minn. 387, 48 N. W. 17.

In Coakley v. Perry, 3 Ohio St. 344, one Nathan Perry had purchased the land, received a conveyance, and was in possession. Subsequently he took a deed, with covenant of warranty, from Job Doan, to whom one-fourth interest in a tax title had descended from his father, and with reference to these facts the court said:

"It would be the grossest absurdity to conclude that Nathan Perry, by taking the conveyance from Job Doan for a trifling consideration, contemplated, instead of continuing seised of the whole premises, as he claimed to have been before, that he became seised of only an undivided part, in common with the other heirs of Job Doan's ancestor. It would seem to be just and reasonable that a person in the bona fide possession of land under a claim of title

should be allowed to buy in any title, real or pretended, with a view to quiet the enjoyment of his possessions, and that the purchase of an adversary title, if it does not strengthen, should certainly not have the effect to impair, the title of the owner. It is not the policy of the law to deter persons from buying their peace and compel them to submit to the expense and vexation of lawsuits, for fear of having their titles tainted by defects which they would gladly remedy by purchase, where it can be done with safety."

Judge Taft further says, in Elder v. McClasky, supra, 70 Fed. at page 548, 17 C. C. A. at page 270:

"Whether the acceptance of a deed ot an outstanding interest by one in possession shall affect his adverse possession depends on all the circumstances surrounding it. Generally, if his possession began under a claim of title in fee the purchase of another title is not to be regarded as a change of his attitude. His purchase may strengthen his title, but it is usually not permitted to impair it. Cases may perhaps be conceived where the acceptance of a deed of an interest in property by one in possession would be equivalent to an express avowal of subordination to the title of others in privity with the grantors, but it would be exceptional. The cases relied upon by the court below to establish a different doctrine do not seem to us to do so."

He then proceeds to distinguish the cases, which it was contended held to the contrary, and demonstrates that they were based upon exceptional circumstances which showed that the grantee in the deed intended to abandon his prior possession, and to claim under his newly acquired title, which, of course, would take them out of the rule. It is said in 1 Cyc. p. 1016:

"With the exception of at least one decision in which it has been broadly ruled that the purchase of an outstanding title or interest by the adverse claimant interrupts the continuity of his possession, it seems to be very generally conceded that an adverse occupant may purchase an outstanding title without thereby interrupting the continuity of his possession. A party, it is said, may very well deny the validity of an adverse claim of title, and yet choose to buy his peace at a smaller price than be at great expense and annoyance in litigating it."

It may be admitted that, under some special circumstances, the purchase of an outstanding interest will have the effect of divesting the possession of its hostile character, but no such circumstances are to be found in this case. A party is not bound to admit, and does not necessarily admit, title in another, because he prefers to get rid of that other's claim by purchasing it. He has a right to quiet his possession and protect himself from litigation in any lawful mode that appears to him most advantageous or desirable. To hold otherwise would compel him to litigate adverse claims, or, by buying one, forego any right to claim the benefit of the statute of limitations as to all others. The acts and declarations of the possessor may, doubtless, be given in evidence with a view of showing the character of his claim, but whether the possession is adverse or not is a question for the jury to determine upon all the evidence. Cannon v. Stockmon, 36 Cal. 539, 95 Am. Dec. 205. If a party is in possession continuously for 7 years, all the time claiming ownership exclusive of any other right, and under color, he is entitled to the benefit of the statute of limitations, no matter how many outstanding adverse claims he may purchase to secure his peace and remove any cloud or suspicion from his title, unless he has, in some way, estopped or precluded himself from relying on that statute, and the question for the jury to determine on such claim is whether, upon all the evidence, he appears to have been continuously in possession during the time prescribed, claiming title adversely and exclusive of any other right. Cannon v. Stockmon, supra. This is not the case of a grantee of one tenant in common, who is in possession under a deed for the whole, and not for the particular tenant's interest, which requires a holding for 20 years to bar the cotenant; the making of the deed and the possession by the grantee claiming thereunder not being sufficient, under our ruling, to constitute such a disseisen of the cotenant as to bar his right if the possession is continued for 7 years. Page v. Branch, 97 N. C. 97, 1 S. E. 625, 2 Am. St. Rep. 281; Breden v. McLaurin, 98 N. C. 307, 4 S. E. 136; Ferguson v. Wright, 113 N. C. 537, 18 S. E. 691; Roscoe v. Roper Lumber Co., 124 N. C. 42, 32 S. E. 389; Bullin v. Hancock, 138 N. C. 198, 50 S. E. 621; Whitaker v. Jenkins, 138 N. C. 476, 51 S. E. 104; Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682. And these cases show, as also does Caldwell v. Neely, 81 N. C. 114, that 20 years of possession is essential to bar cotenants, and the fact of holding and claiming under a deed for the whole from one of them will make no difference. Boggan v. Somers, 152 N. C. 390, 67 S. E. 965. And the same doctrine was stated very recently in a case between the same parties as those arrayed against each other in this record (Lumber Co. v. Cedar Works, 165 N. C. 83, 80 S. E. 982), where we said:

"We are aware that this court has held that a deed by one tenant of the entire estate held in common is not sufficient to sever the unity of possession by which they are bound together, and does not constitute color of title, as the grantee of one tenant takes only his share and 'steps into his shoes.' In such case, 20 years of adverse possession, under a claim of sole ownership, is required to bar the entry of the other tenants, under the presumption of an ouster from the beginning raised thereby. Cloud v. Webb, 14 N. C. 317; Hicks v. Bullock, 96 N. C. 164 [1 S. E. 629]; Breden v. McLaurin, 98 N. C. 307 [4 S. E. 136]; Bullin v. Hancock, 138 N. C. 198 [50 S. E. 621]; and Dobbins v. Dobbins, 141 N. C. 210 [53 S. E. 870, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682], where the other cases are collected. We are not inadvertent to the fact that this state stands alone in the recognition of this principle, the others holding the contrary, that such a deed is good color of title (1 Cyc. 1078, and notes); but it has too long been the settled doctrine of this court to be disturbed at this late day, as it might seriously impair vested rights to do so. It should not, though, be carried beyond the ne-

cessities of the particular class of cases to which it has been applied, but confined strictly within its proper limits; otherwise we may destroy titles by a too close attention to technical considerations growing out of this particular relation of tenants in common, and more so, we think, than is required to preserve their rights. This view has, within recent years, been thoroughly sanctioned by the court."

Judge Gaston said, in Cloud v. Webb, 15 N. C. 290, 25 Am. Dec. 711 (second appeal):

"A sole possession by the bargainee of a part under a deed in severalty for that part might, and probably would, amount to a demonstration plain that such possession was a several holding under that deed, was tantamount to an ouster of that part, and therefore adverse to Mrs. Cloud's claim of a right to the possession thereof."

[3] It will be seen by these references, within what narrow limits the doctrine as to the effect of a possession held under the deed of one of the cotenants is confined, and as to whether such a deed, followed by possession taken by the grantee, will constitute a disseisin of the other tenants. But here the plaintiff held under a deed made by a stranger and adversely to all others, for 6½ years, and we find no evidence that he intended to relinquish the advantage he had gained by such holding and substitute for it a one-half undivided interest in the land of doubtful validity, but the contrary appears to have been the motive and purpose, as the subsequent purchase was clearly intended merely to clear up the title, or to get rid of adverse claims to it, however unfounded they may have been, so that it would be exempt from future attack. It was not supposed by any of the parties to the transaction that plaintiff was buying an interest in common with defendants, but all the circumstances tend to show that it continued to rely upon the adverse possession to ripen its title under the color. The case is therefore not like that of one when an outsider receives a deed from one of the tenants for the entire and undivided estate in the land held in common, and has no other source of title. Plaintiff holds the deed of a stranger to a several interest, and not one held in common, and has the right to perfect his title under it, although he may have purchased another claim and taken a conveyance from those asserting it, to safeguard the title, which was maturing by his continued possession under color.

The prayers of the defendants required the court to instruct the jury, as matter of law, that the taking of the second deed prevented plaintiff from claiming any benefit by its adverse possession under the Harrison E. Weston deed of 1878, and there was no error in refusing them. The court properly left the question of adverse possession to the jury, with appropriate instructions. The reference to plaintiff's possession in 1871 and 1872 was harmless, being merely the statement of a contention. The court immediately afterwards correctly instructed the jury as to adverse possession under color, and the jury could not have been misled. The issues were sufficient to present all controverted matters, and were properly submitted by the court, instead of those tendered by the defendant. Albert v. Insurance Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693; Ratliff v. Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963; Hatcher v. Dabbs, 133 N. C. 239, 45 S. E. 562; Zollicoffer v. Zollicoffer, 84 S. E. 349. The other exceptions are without any merit.

After a careful review of the record and a studious consideration of the arguments of counsel, we have not been able to find any error committed by the court at the trial.

No error.

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(168 N. C. 370)

## MASON v. STEPHENS et al. (No. 181.)

(Supreme Court of North Carolina. March 10, 1915.)

1. DISMISSAL AND NONSUIT ⟸26—SETTLEMENTS WITH JOINT TORT-FEASOR.

Where plaintiff brought an action against the individual defendant for wrongfully cutting timber on his land, and against the corporate defendant for the value of such timber received and cut by it under contract with the other defendant, a nonsuit as to the corporate defendant on compromise and payment by it of the amount due, does not authorize the granting of a nonsuit as to the individual defendant, since the individual would have no right of action against the corporate defendant in any event.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 46, 48-59; Dec. Dig. ⟸26.]

2. RELEASE ⟸29—JOINT TORT-FEASORS—DISMISSAL.

An agreement for a valuable consideration not to sue one joint tort-feasor or to dismiss an action as to him, releases the other only to the extent of the payment made, though an absolute release of one tort-feasor releases the other.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64-70; Dec. Dig. ⟸29.]

3. DISMISSAL AND NONSUIT ⟸48—NONSUIT—JOINT TORT-FEASOR.

Where a nonsuit was taken as to one joint tort-feasor, it was error to direct a nonsuit on that account against the other, against whom there was a judgment by default and inquiry entered at the previous term.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 96; Dec. Dig. ⟸48.]

Appeal from Superior Court, Craven County; Peebles, Judge.

Action by C. N. Mason against A. H. Stephens and another. From a judgment directing a nonsuit as to defendant Stephens, the plaintiff appeals. Reversed.

W. D. McIver and R. A. Nunn, both of Newbern, for appellant. H. L. Gibbs, of Oriental, and A. D. Ward, of Newbern, for appellees.

CLARK, C. J. This is an action against the defendant Stephens for wrongfully cutting timber on plaintiff's land and against the Blades Lumber Company for wrongfully

receiving part of the same and not paying therefor. Judgment by default, and inquiry as to Stephens was taken at February term, 1913, and at May term, 1913, a nonsuit was taken as to the lumber company.

[1] At the trial term the judge directed a nonsuit as to Stephens on the ground that the nonsuit as to the lumber company had been entered in consequence of a compromise and payment of the amount due by said lumber company. This was error. It appeared that the recovery was sought of the lumber company only for that part of the lumber which it had wrongfully received and a release of that demand was not a release of Stephens except pro tanto.

[2] Besides, if it had been for the entire amount, an agreement for a valuable consideration not to sue one joint tort-feasor, or a dismissal of the action as to him, does not release the other but only to the extent of the payment made. Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; Jaggard on Torts, § 117; 38 Cyc. 538. It does not have the same effect as the absolute release of one tort-feasor which it has been held releases the other. Indeed the lumber company received the lumber from the defendant Stephens, or rather cut it under a contract with him, and the nonsuit as to the lumber company could do no harm to Stephens who had no action against the company in any event.

[3] It was also error to direct a nonsuit as to the defendant Stephens against whom there was a judgment by default and inquiry, taken at a previous term, and which inquiry was then being duly made. Jordan v. Pool, 27 N. C. 111.

There was also error in excluding certain testimony offered which it is not now necessary to discuss.

The judgment of nonsuit is reversed.

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(168 N. C. 369)

## MASON v. STEPHENS. (No. 182.)

(Supreme Court of North Carolina. March 10, 1915.)

1. INJUNCTION ⟸129—DISMISSAL—DEFECTS IN PLEADINGS—AMENDMENT—TITLE.

Under Revisal 1905, § 495, providing that pleadings shall be liberally construed with a view to substantial justice between the parties, the court was not justified in dismissing an action on the ground that no complaint had been filed, where the affidavit of plaintiff for a restraining order was treated as a complaint by both parties, and the plaintiff asked leave to amend the affidavit so as to entitle it as a complaint.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 279–287; Dec. Dig. ⟸129.]

2. APPEAL AND ERROR ⟸959—PLEADING ⟸236 — REVIEW — DISCRETION OF COURT — AMENDMENT.

Under Revisal 1905, § 505, providing that a pleading can be amended at any time unless it be made to appear to the court that it was done for the purpose of delay, the granting or refusal of a motion to amend pleadings is ordinarily in the discretion of the trial court, and not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825–3831; Dec. Dig. ⟸959; Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. ⟸236.]

3. INJUNCTION ⟸129 — INVOLUNTARY DISMISSAL—GROUNDS—SETTLEMENT.

Where the parties to a suit for injunction to restrain the cutting of timber on certain lands agreed that the defendant might continue the cutting and retain the proceeds to await the final result of the action, and plaintiff had instituted another action to recover such proceeds, that action would determine the rights of the parties, and the injunction suit was properly dismissed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 279–287; Dec. Dig. ⟸129.]

Appeal from Superior Court, Craven County; Peebles, Judge.

Action by C. N. Mason against A. H. Stephens. From a judgment dismissing the action, the plaintiff appeals. Modified and affirmed.

W. D. McIver and R. A. Nunn, both of Newbern, for appellant. H. L. Gibbs, of Oriental, and A. D. Ward, of Newbern, for appellee.

CLARK, C. J. The action was brought to obtain a restraining order and an injunction against the defendant cutting certain timber which was granted. The affidavit was treated as a complaint, though it was not so entitled. The answer refers to it as the "complaint." During the progress of the cause the parties entered into an agreement by which the timber was to be cut by the defendant, and the proceeds secured to await the final result of action. A new action was brought to recover such proceeds.

[1] Subsequently the defendant moved to dismiss the action because no complaint had been filed. The plaintiff thereupon moved to be allowed to amend his pleading so as to entitle his affidavit as a complaint. This motion the court refused and dismissed the action.

[2] It is true that the granting or refusal of a motion to amend pleadings is in the discretion of the court. Rev. § 505. But in this case the affidavit of the plaintiff had been treated as a complaint, and the answer had recognized it as such, and the court was not justified in dismissing the proceeding upon that ground. Rev. § 495.

[3] But the object of the action had been attained by the agreement between the parties that the defendant should cut the timber, securing the proceeds, and, a new action having been brought by this plaintiff against the same defendant to recover such proceeds, there was no reason why the cause should have been retained longer on the docket. It was therefore properly dismissed, but for a different reason from that assigned by the court.

While the judgment should be affirmed, the

cause of action having been admitted by the agreement which dispensed with the necessity of a restraining order, the costs below and the costs in this appeal should be divided between the parties.

Modified and affirmed.

(169 N. C. 284)

STATE v. LANCASTER et al. (No. 162.)

(Supreme Court of North Carolina. March 10, 1915.)

1. AFFRAY ⊂⊃1 — NATURE — LANGUAGE OR CONDUCT INCITING AFFRAY.

If a person by such abusive language or offensive conduct towards another, as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty of an "affray," though he did not return the blow.

[Ed. Note.—For other cases, see Affray, Cent. Dig. §§ 1-4; Dec. Dig. ⊂⊃1.

For other definitions, see Words and Phrases, First and Second Series, Affray.]

2. AFFRAY ⊂⊃4—INDICTMENT—PLACE.

An indictment for an affray in a public place was sufficient, though it did not specify the place.

[Ed. Note.—For other cases, see Affray, Cent. Dig. §§ 6, 7; Dec. Dig. ⊂⊃4.]

3. AFFRAY ⊂⊃4 — INDICTMENT—SUFFICIENCY.

An indictment for an affray, charging that defendants did willfully and unlawfully assemble together, and did mutually assault and beat each other, R. by using language calculated and intended to bring on a fight and a fight ensuing, and L. using a deadly weapon, to wit, a gun, and to, with, and against each other in a public place did fight and make an affray, was sufficient in form as to both defendants.

[Ed. Note.—For other cases, see Affray, Cent. Dig. §§ 6, 7; Dec. Dig. ⊂⊃4.]

4. CRIMINAL LAW ⊂⊃93—JURISDICTION—AFFRAY.

An affray is cognizable in the superior court as to both defendants, where a deadly weapon was used by either.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 129, 137-166; Dec. Dig. ⊂⊃93.]

Appeal from Superior Court, Craven County; Peebles, Judge.

James Lancaster and Richard Parker were indicted for an affray. From the action of the court in quashing the indictment as to Parker and dismissing as to him, the State appeals. Reversed.

The Attorney General, for the State. D. H. Henderson, of Newbern, for appellee.

CLARK, C. J. The defendants were indicted for an affray. The indictment charged that the defendants—

"did willfully and unlawfully assemble together, and did mutually assault and beat each other, Richard Parker by using language calculated and intended to bring on a fight and a fight ensuing, and James Lancaster using a deadly weapon, to wit, a gun, and to, with, and against each other in a public place did fight and make an affray," etc.

The court, on his own motion, quashed the indictment as to Parker and dismissed the action as to him, from which decision the state appealed. Rev. § 3276 (3).

[1] In State v. Fanning, 94 N. C. 940, 55 Am. Rep. 653, the defendants were indicted for an affray, and it was held that if a person, by such abusive language or offensive conduct towards another as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty, although he did not return the blow. To same purport, State v. Davis, 80 N. C. 351, 30 Am. Rep. 86; State v. Robbins, 78 N. C. 431; State v. Downing, 74 N. C. 184; State v. Perry, 50 N. C. 9, 69 Am. Dec. 768. Here the charge is "did mutually assault and beat each other."

[2, 3] In State v. Griffin, 125 N. C. 692, 34 S. E. 513, it was held that the place need not be charged nor proven. The form of the indictment is sufficient. Rev. §§ 3254, 3255.

[4] His honor seems to have been of the opinion that the defendant Parker could not be tried for the affray in the superior court, because he did not use a deadly weapon. In State v. Coppersmith, 88 N. C. 614, it is held:

"An affray is cognizable in the superior court, as to both defendants, where it appears that a deadly weapon was used by either."

This has been cited and approved. State v. Albertson, 113 N. C. 634, 18 S. E. 321. To same effect, State v. Ray, 89 N. C. 587, and cases cited to that case and to State v. Ray in the Anno. Ed.

If Parker, not having used a deadly weapon, had been convicted or acquitted before a justice of the peace, this would have been a full defense as to him. State v. Fagg, 125 N. C. 609, 34 S. E. 197. But this could not appear on a motion to quash.

The judgment quashing the bill as to the defendant Parker is reversed.

(168 N. C. 377)

LANCASTER et al. v. BLAND et al. (No. 187.)

(Supreme Court of North Carolina. March 10, 1915.)

1. APPEAL AND ERROR ⊂⊃452—DISMISSAL OF APPEAL—EFFECT—MOTION FOR NEW TRIAL.

Where plaintiff appealed from a judgment, but did not perfect his appeal, and it was dismissed by the Supreme Court, the case was terminated, and the trial court could not at the next term entertain a motion for new trial on the ground of newly discovered evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2212, 2213; Dec. Dig. ⊂⊃452.]

2. APPEAL AND ERROR ⊂⊃1194—DETERMINATION—EFFECT.

Where a judgment has been affirmed or reversed on appeal, but no final judgment entered by the Supreme Court, the case is a live one until judgment has been entered in the court below in conformity with the certificate from the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4648-4656, 4660; Dec. Dig. ⊂⊃1194.]

3. APPEAL AND ERROR ⊂⊃87—ORDERS APPEALABLE—DENYING NEW TRIAL.

The denial on the merits of a motion for new trial on the ground of newly discovered

evidence, after appeal from the judgment has been dismissed, is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 559–569, 577–596; Dec. Dig. ⊂⊃87.]

Petition by Laura Lancaster and others against J. L. Bland and others for certiorari to review an order of the superior court. Certiorari denied.

W. D. McIver, of Newbern, for petitioners. D. L. Ward, of Newbern, for defendants.

CLARK, C. J. [1] This cause was tried and judgment entered at April term, 1914, of Craven. The plaintiff appealed, but did not perfect his appeal, and at the call of the district at the fall term of this court the defendant docketed the required certificate and moved under rule 17 (81 S. E. ix) to dismiss, which was allowed. Thereafter, at the November term of the court below, the plaintiff filed a petition for a new trial for newly discovered evidence.

His honor properly held that he had no jurisdiction to entertain the motion. The case was terminated by the final judgment at the April term of Craven, unless it had been kept alive by prosecuting an appeal. This not being done, the defendant could have had the case put off the docket at the next term in the court below, on motion, for failure to prosecute the appeal. Avery v. Pritchard, 93 N. C. 266, and cases citing the same in the Annotated Edition. Or the defendant could make the same motion in this court by docketing the certificate and moving to dismiss under rule 17. Whichever method the appellee might resort to, and whether the judgment dismissing the appeal, for failure to prosecute, was entered in the superior court, or in this court, such adjudication dates back to the final judgment, from which the appeal was not prosecuted.

This case having been adjudged, by the order of dismissal in this court, to have been terminated at the April term, 1914, of the superior court, the attempt to file a motion for a new trial for newly discovered testimony at the November term of said superior court could avail nothing. The bare fact that the name of the case was still on the docket did not make it a live cause. It had been terminated, fully and completely, by the final judgment at the April term, from which the appeal had not been prosecuted.

[2] The court below, therefore, correctly held that he had no power to entertain a motion for a new trial at a term subsequent to that at which final judgment had been entered. Whether a judgment has been affirmed or reversed on appeal, it is a live case till, on receipt of the certificate, judgment has been entered below in conformity therewith, unless final judgment is entered here. Smith v. Moore, 150 N. C. 158, 63 S. E. 158.

Black v. Black, 111 N. C. 300, 16 S. E. 412, and Banking Co. v. Morehead, 126 N. C. 279, 35 S. E. 593, were live cases, in which proper motions could be made, because, though the certificate had been sent down, judgment had not been entered in accordance therewith in the court below.

In the present case the adjudication was not on the merits, but simply that the appeal had been abandoned at April term, 1914, of the lower court, and there was no judgment to be entered in accordance therewith, and no motion could be made in a dead case. The judge had no jurisdiction, except to put the case off the docket. The case was not sent back to the lower court at all.

[3] If the court had jurisdiction, and had refused the motion on its merits, no appeal lay. Fleming v. Railroad (at this term) 84 S. E. 270.

Certiorari denied.

(168 N. C. 390)

## BRINN v. INDEPENDENT STEAMBOAT LINE. (No. 171.)

(Supreme Court of North Carolina. March 10, 1915.)

SALES ⊂⊃202—TIME OF PASSAGE OF TITLE.

Where a boat is sold on agreement that a depositary would deliver the price to the seller and bill of sale to the purchaser on cancellation of mortgages thereon, title passes as between the parties on delivery of the boat, and the money is absolutely due on cancellation of the mortgage, though there are incumbrances on the machinery, and the boat is libeled for injuries to cargo sustained before cancellation of the mortgage.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 542–551; Dec. Dig. ⊂⊃202.]

Appeal from Superior Court, Craven County; Peebles, Judge.

Action by Charles Brinn against the Independent Steamboat Line. From a judgment for plaintiff, defendant appeals. No error.

R. A. Nunn, of Newbern, for appellant. D. L. Ward, of Newbern, for appellee.

CLARK, C. J. On December 27, 1912, the plaintiff Brinn sold a certain boat, called the "H. L. N.," for $300, to the defendant steamboat line, who took possession of the same. A bill of sale was drawn by Brinn and a check for $300 by the defendant, and both were deposited with one Hardison, to be held until the mortgages on the boat should be canceled, when the bill of sale should be recorded and the check delivered to Brinn. The mortgages were canceled February 4, 1913, but the defendant company notified Hardison not to deliver said check nor to record said bill of sale, and refused to pay the $300, to recover which this action was brought.

The defendant alleged and offered evidence that it bought the boat upon the express condition that it should be delivered free from all incumbrances; that, besides the mortgages which have been canceled, there was a

lien on the machinery for $38, and another on the boat for $83, and that, before the bill of sale was recorded, the vessel was libeled for damages to its cargo, and that, in the proceedings to enforce collection of such damages, the holders of the above liens intervened, and the boat was sold under the decree of the United States Circuit Court, and the proceeds of the sale were applied to such damages and these two small liens.

The plaintiff contends that, as the damages to the cargo were sustained after the defendant took charge of the boat, no liability attaches to the plaintiff therefor. The defendant contends that title had not passed at the time, and that the mortgages were not canceled when the vessel was libeled, and hence the plaintiff cannot recover.

The court, being of opinion that as between the parties the title passed without recording the bill of sale upon the delivery of the boat, instructed the jury that, if they believed the evidence, there was a delivery of the boat to the defendant, and that when the mortgages were canceled on February 4, 1913, Brinn became entitled to the check and gave judgment that he should recover $300, with interest from that date. The court was evidently of the opinion that the two small liens for $38 and $83 above stated were not embraced in the agreement for the cancellation of the mortgages, or that the defendant, having taken possession of the vessel, was liable for such liens, or at most had a claim against the plaintiff for the amount of such incumbrances.

In this there was no error.

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(100 S. C. 281)

## WATSON v. PASCHALL et al. (No. 9005.)

(Supreme Court of South Carolina. Feb. 25, 1915.)

1. NEW TRIAL ⟸163 — INSUFFICIENCY OF EVIDENCE—ORDER—CONSTRUCTION.

An order granting a new trial on the ground that the verdict was "capricious and against the weight of the testimony," and because a telegram, in the light of the evidence, could not be construed as an acceptance by defendant of plaintiff's offer, justifies the construction that a new trial was granted on the ground that the verdict was contrary to the weight of the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 330–332; Dec. Dig. ⟸163.]

2. APPEAL AND ERROR ⟸1015 — REVIEW — GRANT OF NEW TRIAL.

Where a new trial is granted on the ground that the verdict is against the weight of the evidence, and the evidence is susceptible of more than one inference, the Supreme Court cannot interfere.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876; Dec. Dig. ⟸1015.]

3. APPEAL AND ERROR ⟸977—REVIEW—DISCRETION OF TRIAL COURT—GRANT OF NEW TRIAL.

Where a new trial is granted in the exercise of discretion conferred on circuit judges to grant new trial, the Supreme Court will not interfere, unless there was manifest error in the exercise of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3865; Dec. Dig. ⟸977.]

Appeal from Common Pleas Circuit Court of Chesterfield County; Frank B. Gary, Judge.

Action by E. T. Watson against J. R. Paschall and others. From an order granting a new trial after verdict for plaintiff, he appeals. Affirmed.

The defendants moved to set aside the verdict and grant a new trial, which motion was granted in the following order:

"This case has been before the Supreme Court two or three times. The nature of the case may be ascertained from some of the reports of the case. It is unnecessary to say more in a preliminary statement than that the case came before me for trial, and resulted in a verdict in favor of the plaintiff for $5,000. The defendants made a motion that the verdict be set aside and a new trial granted, basing the motion upon five grounds. It is needless to take up the grounds of the motion seriatim.

I think the verdict should be set aside, for the reason that it was capricious and against the weight of the testimony.

I do not think that, under any reasonable construction of the telegram which was offered in evidence as the basis of contention the defendants accepted the offer made by plaintiff, it could be construed, in the light of the other evidence, as an acceptance of the said offer. This being my view of the evidence, I must, with great reluctance, set aside what was done by the jury. It is important that there should be an end of litigation, but it is equally important that it should be ended right.

It is therefore ordered that the verdict of the jury herein be, and the same is, set aside, and a new trial ordered.

Stevenson & Prince, of Cheraw, for appellant. R. T. Caston, Edward McIver, and W. P. Pollock, all of Cheraw, for respondents.

HYDRICK, J. [1] This appeal is from an order granting a new trial. Appellant's sole contention is that the order was based upon error of law; to wit, the conclusion that there was no evidence to support the verdict. But the language of the order, which will be reported, shows that the decision was based, in part at least, on the ground that the judge was not satisfied with the verdict as a just and true finding of the facts. He says it was "capricious and against the weight of the testimony," and, further, that the telegram, "*in the light of the other evidence*," could not reasonably be construed as an acceptance by defendants of plaintiff's offer. The words italicized show that the judge's conclusion was based, not entirely upon the ground that there was no evidence to sustain the verdict, but upon the ground that it was contrary to the weight of the evidence. At any rate, the language used is susceptible of that interpretation.

Appellant would have us infer that the judge's use of the word "capricious," in char-

acterizing the verdict, can mean but one thing; to wit, that his conclusion was that it was wholly unsupported by evidence. While that inference may be warranted, it is certainly not the only inference that may be drawn, especially when the other language used is considered, for a verdict may properly be said to be capricious if it is against the overwhelming weight of the evidence.

[2, 3] Where a new trial is granted on the ground that the verdict is against the weight of the evidence, and the evidence is susceptible of more than one inference, as it is in this case, this court cannot interfere; and, where it is granted in the exercise of that discretion which is vested by law in the circuit judges to grant new trials, as it seems to have been done, in part at least, in this case, this court will not interfere, unless it is made to appear that there was manifest error in the exercise of that discretion, which has not been made to appear in this case.

Order affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

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(100 S. C. 157)

## FORRESTER v. MOON. (No. 9021.)

(Supreme Court of South Carolina. March 5, 1915.)

1. REFORMATION OF INSTRUMENTS ⟸16—GROUNDS—MISTAKE.

The court will reform an instrument where there is a mutual mistake as to the facts on which it is based, or as to the stipulations therein, or where one of the parties acted under a mistake induced by the fraud, deceit, or imposition of the other.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. ⟸16.]

2. REFORMATION OF INSTRUMENTS ⟸19—GROUNDS—MISTAKE.

Where only one of the parties to an instrument was under a mistake as to the facts or stipulations in the instrument, equity will not reform it except under very strong and extraordinary circumstances showing imbecility or something which would make it a wrong to enforce the agreement.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74–78; Dec. Dig. ⟸19.]

3. REFORMATION OF INSTRUMENTS ⟸17—GROUNDS—MISTAKE.

Where a grantee bargained for the land actually conveyed by the grantor and the grantee acted in good faith and was in no way responsible for an error of the grantor who possessed capacity, equity would not reform the deed at the suit of the grantor.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 69–71; Dec. Dig. ⟸17.]

4. APPEAL AND ERROR ⟸1022—FINDINGS—REVIEW.

A party appealing from an adverse judgment rendered on findings of a special master, approved by the trial court, must satisfy the Supreme Court by a preponderance of the evidence that the findings are erroneous, or the judgment will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⟸1022.]

Appeal from Common Pleas Circuit Court of Greenville County; H. F. Rice, Judge.

Action by Mettie Z. Forrester against J. P. Moon. From a judgment for defendant, plaintiff appeals. Affirmed.

The special master, R. F. Watson, filed the following report:

The plaintiff being the owner of certain lands at Mauldin Station, abutting the railroad right of way, subdivided the same into small lots with a view of offering them for sale. The first plat which was prepared for the plaintiff indicated a street 40 feet wide adjoining the right of way and certain lots fronting on that street. Later the plaintiff had another plat prepared, on which the numbers of the lots were changed, and the street adjoining the right of way was left off so that on the new plat the lots fronted on the right of way. This latter plat was placed on record, and it seems the lots so platted on it were offered for sale. Negotiations were commenced with the defendant which resulted in his purchase of lot No. 21, as represented on the second plat. Having agreed upon the terms, the plaintiff had her attorney, Gen. J. W. Gray, to draw a deed. This deed was prepared by Gen. Gray in the presence of the plaintiff and of the defendant, and in preparing the deed the general had before him the second plat and described the lot according to that plat. The deed being thus prepared, the plaintiff executed the deed and delivered it to the defendant, who thereupon paid her the price. The defendant placed the deed upon record, and immediately went in possession of the land thus purchased, and he and his tenants ever since have been cultivating the land up to the right of way, without objection on the part of the plaintiff. A shore time before the commencement of this action, the plaintiff set up the claim that the defendant's lot extended, not to the right of way, but to the street which was indicated on the first plat; and on the defendant's denying this she instituted this action to have it declared that there was a mistake in the original deed, and asking that this mistake be corrected so as to leave a street between the right of way and the defendant's lot.

[1] The court will reform an instrument on the ground of mistake under the following circumstances: "(1) Where there is a mutual mistake as to the facts upon which it is based, or as to the terms and stipulations embraced therein. (2) Where one of the parties only is under such mistake, either of the facts or the stipulations, and such mistake has been occasioned by the fraud, deceit or imposition in any form of the other." Kennerty v. Etiwan Phosphate Company, 21 S. C. 231.

[2] But where one of the parties only is under such mistake, "equity will refuse its aid, except under very strong and extraordinary circumstances, showing imbecility, or something which would make it a very great wrong to enforce the agreement and this be made to appear by competent testimony of the clearest kind." Kennerty v. Etiwan Phosphate Co., supra.

[3] I thing it is clear under the testimony that the defendant was bargaining for the lot which he actually got. There is nothing which would impeach his good faith. It was not then a case of mutual mistake. Nor was he in any way responsible for the error on the part of the plaintiff. Nor is there any evidence showing want of capacity on the part of the plaintiff. Under these circumstances, it seems to me,

equity must refuse to interfere. Certain circumstances would indicate that the plaintiff, after having first prepared a plat, leaving a street between the lots and the right of way, afterwards concluded to leave off the street and to front the lots on the right of way with the view of using the right of way as a means of access to them. At any rate, this second plat was prepared by her own surveyor at her instance, and negotiations between her and the defendant were based upon the lots as indicated on this second plat, and it was plainly indicated on this plat, which was used by the plaintiff's attorney, that the lots fronted on the right of way. This deed was drawn in the plaintiff's presence and was signed by her. If the plaintiff intended to reserve a street between the lot and the right of way, she was clearly guilty of negligence in this case, and under such circumstances the court of equity will afford no relief. It is rather difficult anyhow to see how the plaintiff's contention could in any substantial way benefit her. Lot No. 21, which was conveyed to the defendant, adjoined a lot which the defendant already owned, and this lot which he already owned fronts on the main street of the town and extends at one point to the right of way, so that the street which the plaintiff originally intended to open, in order to serve the purpose of access from the plaintiff's other lots to the main street of the town, must needs pass either over the right of way or across defendant's other lot. The defendant had not dedicated any part of his original lot for the purposes of a street and consequently the plaintiff would have no right to cross any part thereof.

The plaintiff urges that lot No. 21 measuring from the street to the alley has a greater depth than 160 feet, while the plat shows only 160 feet. After 160 feet, however, the words, "more or less," were added. The very fact that these words were added seems to indicate that in contemplation of the parties the lot might have a greater depth than 160 feet.

On the whole, I find that the plaintiff has failed to make out a case entitling her to have the deed corrected as prayed for. I therefore recommend that the complaint be dismissed.

Haynsworth & Haynsworth, of Greenville, for appellant. McCullough, Martin & Blythe, of Greenville, for respondent.

WATTS, J. This was an action to reform a deed executed by plaintiff to defendant and described particularly in the complaint on the ground that the lot conveyed in the deed was incorrectly described because of a mistake of the scrivener caused by a mistake in the plats from which the deed was drawn, and that the deed as made did not carry out the agreement made between the plaintiff and defendant. After issue joined, the case was referred to R. F. Watson, Esq., as special master, to hear and determine all issues of law and fact and report to the court. Upon filing his report in favor of defendant, exceptions were duly filed by plaintiff, and the matter was heard by his honor, Judge Rice, who, on March 30, 1914, filed his decree, overruling the exceptions and confirming the report of special master, and dismissing the complaint. From this decree plaintiff appeals, and by seven exceptions impute error on the part of the court in not sustaining exceptions to master's report in his finding of facts, and allege error on the part of his honor in confirming master's finding of facts. There was no controversy as to the law of the case between counsel in the argument before this court. It was conceded that the plaintiff must show from the testimony either that the error in the deed was due to a mutual mistake as to the facts upon which it was based, or must show that the mistake was occasioned by the fraud, deceit, or imposition of the defendant.

The plaintiff-appellant has attempted to show by argument in this court that the preponderance of the testimony shows that both the special master and circuit judge were in error as to their findings of fact, and that by the preponderance of the testimony it shows that the mistake made was either a mutual mistake or was induced by the conduct of the defendant amounting to a fraud or imposition upon the plaintiff. The master had the witnesses before him. He saw and heard them, he made his findings, and filed his report. Upon exceptions to this report, his honor, Judge Rice, heard the case and concurred with the master in his findings of fact, and confirmed the report. A careful examination of the whole case fails to convince us that the master and circuit judge were in error, or that the preponderance of the testimony establishes the contention of plaintiff-appellant. For the reasons stated by the special master, concurred in by the circuit judge, we are satisfied with the findings of the circuit court.

[4] As was said by Chief Justice Gary in Hickson Lumber Co. v. Stallings, 91 S. C. 473, 74 S. E. 1072:

"It was incumbent on the appellant, to satisfy this court, by the preponderance of the evidence, that his honor, the presiding judge, erred in his findings of fact, which he has failed to do."

All exceptions are overruled, and judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

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(100 S. C. 150)

ROUSE, County Superintendent of Education for Hampton County, et al. v. BENTON, County Superintendent of Education for Jasper County, et al. (No. 9019.)

(Supreme Court of South Carolina. March 3, 1915.)

1. MANDAMUS ⟸4 — REMEDY BY APPEAL — APPEAL TO STATE BOARD.

Mandamus will not issue to compel a county superintendent to honor a claim by the trustees of a school district of another county for the support of a joint school, since there is an adequate remedy by appeal to the state board of education.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9–21, 24–34; Dec. Dig. ⟸4.]

2. MANDAMUS ⟸10—GROUNDS—REMEDY INEFFECTUAL.

Mandamus will not issue to compel a county superintendent to approve a warrant, where it does not appear that the county treasurer had sufficient funds to pay it.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 87; Dec. Dig. ⟸10.]

3. SCHOOLS AND SCHOOL DISTRICTS ⟸78 — POWERS OF SCHOOL BOARD—CONTRACTS.

A county board of education could not enter into a contract with the board of an adjoining county for the joint conduct of a school, which would bind the successors of the boards to maintain the school.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 187; Dec. Dig. ⟸78.]

Appeal from Common Pleas Circuit Court of Jasper County; R. W. Memminger, Judge.

Petition for mandamus by J. W. Rouse, as County Superintendent of Education for Hampton County, and another, against J. B. Benton, as County Superintendent of Education for Jasper County, and others. From an order granting the writ, the respondents appeal. Reversed and remanded.

The order of Hon. R. W. Memminger, the trial judge, was as follows:

On the 21st of April, 1914, his honor, Judge H. F. Rice, issued a rule in this cause, based upon the verified petition, requiring the respondents to show cause before me on the 11th day of May, 1914, why the prayer of the petition should not be granted. The prayer was for a writ of mandamus for certain relief, and the demand therefor was based upon the following facts set out in the petition:

In the year 1912 Jasper county was formed by cutting off portions of Beaufort and Hampton counties. The line on the Hampton side cut into school district No. 21 of Hampton county, state of South Carolina, leaving a portion of said district in Hampton county, and a portion in Jasper county. This new state of affairs was met and disposed of to the satisfaction of the county boards of education for both Jasper and Hampton counties by an agreement to run and operate school district No. 21 jointly. This agreement was in writing and is a part of the petition. During the scholastic year of 1912–1913, Jasper county paid over to this school district a satisfactory portion of the expenses of the district. The Hampton county school board went forward with their work in the district for the scholastic year of 1913–1914, feeling that Jasper county would contribute its part of the expenses of the district as in the previous year. On the 24th of January, 1914, certain warrants were drawn on the fund supposed to be in Jasper county to meet the expenses of the district, and the superintendent of education for Jasper county refused to honor same. The petitioners complain that the interests of the school have been embarrassed by the actions of the county board of education for Jasper county.

The respondents appeared before me, represented by H. K. Purdy, Esq., and made return to the rule. The allegations of the petition are all admitted, except certain portions of paragraphs 7 and 9, which facts are not material to the case. As a further defense to the petition, the respondents set forth the facts that on September 1, 1913, they passed a resolution discontinuing the agreement to run said school district jointly with Hampton, and annexed that part of said school district in Jasper county to Gray's school district; further, that they have built a schoolhouse at a cost of $160 and spent $150 for services of a teacher; further, that the auditor's books for Jasper county show that from that portion of Furman school district in Jasper county the school taxes amount to $446.30.

Upon the whole case, it appears to me that it was the plain, mandatory duty of the county board of education for Jasper county to continue to run and operate this school district jointly with Hampton county until the proper steps were taken under the law to dissolve the school district, irrespective of the agreement entered into. It was their duty to pay into the fund for expenses of the district all taxes collected from that portion of the district lying in Jasper county until the district was legally dissolved. The statute requires the county superintendent of education to apportion the school funds as shown by the treasurer's report among the school districts in his county. In this case the superintendent in Jasper county should have apportioned and set apart for the expenses of the school district in question the sum of $446.30, or so much thereof as was collected by the treasurer. Likewise, under the law, and especially under the agreement in question, it was his plain duty to honor the warrants drawn by the trustees of the said school district (unless he had reason to believe that the said warrants were not proper, and there was no such contention made before me) to the extent of the fund apportioned for that purpose.

Counsel for the respondents admitted on argument that his clients were willing, and recognized their duty, to pay whatever part of the expenses of said school that are properly chargeable to Jasper county. It was admitted that some of the pupils attending the school at Furman come from Jasper county, and that they were willing to bear the proportionate part of the expenses of the school that the number of children from Jasper county bore to the number from Hampton county. This is not the test. The taxes raised for school purposes, including the special four-mill tax for this particular district, whatever be the amount, is the true amount that county must contribute to the expenses of the school of the Furman school district.

Upon consideration of the facts and circumstances, it is ordered: That J. B. Benton, as county superintendent of education for Jasper county, do forthwith proceed to apportion upon his books for school district No. 21 of Hampton county, state of South Carolina, whatever sum is shown to have been collected by the county treasurer for Jasper county out of the sum of $446.30 as shown by the auditor's books to be the school taxes for that portion of said school district, and that said J. B. Benton do notify the county superintendent of Hampton county, J. W. Rouse, of the amount of money thus apportioned. Further ordered: That said J. B. Benton do approve for payment all legal and proper warrants drawn by the trustees of said school district to the amount apportioned for said district.

H. Klugh Purdy, of Ridgeland, for appellants. J. W. Vincent, of Hampton, for respondents.

WATTS, J. This is an appeal from an order of his honor, Judge Memminger, granting a writ of mandamus as prayed for by the petitioners, and his order sets forth the facts of the case practically and will be reported. Upon call of the case in this court a motion to dismiss the appeal was duly

made and argued. This motion is overruled and refused.

Exceptions 1 and 2 impute error on the part of his honor in not sustaining their demurrer to the petition on the ground that the petitioners had a plain and adequate remedy by appeal to the state board of education and in deciding that the approval or disapproval of a school warrant was not in the discretion of a superintendent of education. The facts of this case show that it is an attempt to compel the superintendent of Jasper county to approve and honor a claim approved by the trustees of Hampton county school district No. 21. There was an agreement made by the board of education of Hampton and Jasper counties to run the school jointly, and it was so run during the scholastic year 1912–1913 satisfactorily; but in September, 1913, the respondents (appellants here) passed a resolution discontinuing the agreement to run the school jointly with Hampton county and annexed it to Gray's school district in Jasper county and erected a school building at a cost of $160, and paid a teacher $150, and the taxes for that district were $446.30.

[1-3] We do not think, under the cases of Ex parte Greenville College, 75 S. C. 93, 55 S. E. 132, Hughes v. School District, 66 S. C. 259, 44 S. E. 784, and Sligh v. Bowers, 62 S. C. 409, 40 S. E. 885, that the petitioners are entitled to the extraordinary remedy of mandamus, especially in view of the fact that it does not appear that the county treasurer had in his hands sufficient funds applicable to this fund to pay the same, and in view of the fact that the agreement made in the first instance to run the school jointly for 1912–1913 could not bind the successors in office of the board of education of the two counties for the year 1913–1914, and they had the right not to renew the agreement, which it appears they did in September, 1913, all of which is alleged error on the part of his honor in the other exceptions in the case.

The order appealed from must be reversed, but inasmuch as the respondents (appellants here) admit that they are willing and recognize their duty to pay whatever part of the expenses of school that are properly chargeable to Jasper county, and admit that some of the pupils attending the school were from Jasper county, and are willing to pay the proportionate part of the expenses of the school that the number of children from Jasper county bore to the number of Hampton county, the case will have to be remanded, to ascertain what this will be, and unless the parties arrive at an arrangement by agreement that evidence be taken to establish what the facts are on this point.

Reversed and remanded.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(100 S. C. 162)

## FRIERSON v. UNITED STATES CASUALTY CO. (No. 9022.)

(Supreme Court of South Carolina. March 9, 1915.)

1. INSURANCE ⟸668—ACTION ON POLICY—DIRECTION OF VERDICT—EVIDENCE.

Where, in an action on an insurance policy, providing that insured must give notice of his claim within ten days after commencement of his illness, unless such notice were not "reasonably possible," there was evidence that plaintiff's failure to give notice within ten days was due to sickness and suffering, requiring the administration of anodynes to relieve his pain, the court properly refused to direct a verdict for defendant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732–1770; Dec. Dig. ⟸ 668.]

2. INSURANCE ⟸646—ACTION ON POLICY—BURDEN OF PROOF—COMPLIANCE WITH CONDITIONS.

Since noncompliance with the conditions of an insurance policy was a matter of defense, there was no burden on plaintiff to prove, in the first instance, strict compliance with such terms.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645–1668; Dec. Dig. ⟸ 646.]

Appeal from Common Pleas Circuit Court of Florence County; C. J. Ramage, Special Judge.

Action by W. D. Frierson against the United States Casualty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Willcox & Willcox, of Florence, for appellant. Gasque & Page, of Florence, for respondent.

WATTS, J. This was an action by plaintiff against the defendant for recovery of $104.28 alleged to be due plaintiff under a policy of insurance issued on August 8, 1911, by the New Amsterdam Casualty Company, and subsequently assumed by the defendant. The cause was tried before Hon. C. J. Ramage, special judge, and a jury, at the April term of court, 1914, for Florence county, and resulted in a verdict in favor of plaintiff for $84.28. After entry of judgment defendant appealed, and by two exceptions imputes error on the part of the trial judge in refusing to direct a verdict for the defendant, as moved for in trial of case, for the reason that the contract of insurance between the parties shows that, in order for the plaintiff to recover, he must have given written notice of his claim within ten days after the commencement of his illness, unless such notice should be shown not to have been "reasonably possible," when, according to all the evidence, including the plaintiff himself, such notice was not given. These exceptions narrow the appeal down to one point: Was it reasonably possible for such notice to have been given within the ten days provided for in the contract of insurance under which plaintiff seeks to recover in this action? The only evidence

in the case is that introduced on part of plaintiff. The defendant offered none.

[1, 2] The judge could not direct a verdict if, from the evidence, more than one inference could be drawn. If the evidence was susceptible of more than one conclusion, then it became a question of fact for the jury to pass upon and determine. It was not the duty of the plaintiff to prove a strict compliance with the terms of the contract. If there was a breach subsequent which would go to defeat the liability of the insurer in case they are not complied with, that is a matter of defense. For this principle see Pickett v. Insurance Co., 60 S. C. 485, 38 S. E. 163, 629; Thompson Bros. v. Piedmont Insurance Co., 77 S. C. 294, 57 S. E. 848; Spann v. Phœnix Insurance Co., 83 S. C. 262, 65 S. E. 232; Carpenter v. American Accident Co., 46 S. C. 541, 24 S. E. 500; Huguenin v. Continental Casualty Co., 94 S. C. 138, 77 S. E. 751. A careful reading of the plaintiff's evidence and that of his witnesses, especially that of Dr. McMaster, direct, cross, and taken as a whole, shows there was sufficient evidence to make an issuable fact for the jury to pass upon as to whether or not the plaintiff, by reason of suffering and sickness and at times under the influence of anodynes, was in such a condition as it was "reasonably possible" for him to have given the notice within ten days, as provided for under the contract of insurance. It was for the jury to say whether the plaintiff was sick and suffering to such an extent that anodynes had to be administered to him to relieve his pains, was in a condition to think about the terms of his policy of health insurance, so as it was "reasonably possible" to give notice of his sickness within the ten days. There is no complaint as to his honor's clear, fair, and impartial charge to the jury on this point. It was favorable to the defendant. We see no errors on the part of his honor, as complained of by the exceptions. The exceptions are overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(100 S. C. 91)

## STATE v. SCHIADARESSI. (No. 9007.)

(Supreme Court of South Carolina. March 1, 1915.)

INTOXICATING LIQUORS ⟸236 — OFFENSE — SUFFICIENCY OF EVIDENCE.

In a prosecution for the violation of an ordinance forbidding the sale of alcoholic liquor, defendant's own evidence *held* to sustain a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 800-822; Dec. Dig. ⟸ 236.]

Appeal from Common Pleas Circuit Court of Charleston County; R. W. Memminger, Judge.

S. T. Schiadaressi was convicted in recorder's court for a sale of alcoholic liquor, and from an affirmance on appeal he appeals. Affirmed.

The affidavit, the warrant thereon, and the demurrer to the affidavit were as follows:

Affidavit.

State of South Carolina, County of Charleston:

Personally appeared Dennis Quinn, who, being duly sworn, says that he is a police officer of the city, county, and state aforesaid, and that he is informed and believes on the 28th day of October, 1913, one S. T. Schiadaressi is guilty of violating section 828, Dispensary Ordinances, 828, City Ordinances, selling liquor, containing alcohol in violation of section ——— and against the peace and dignity of the said state. D. Quinn.

Sworn to before me this 29th day of October, A. D. 1913. Theo. D. Jervey, Recorder.

Warrant.

State of South Carolina, to Any Police Officer:

Whereas complaint has been made to me under oath that S. T. Schiadaressi is guilty of violating section 828, Dispensary Ordinances, 828, City Ordinances, selling alcohol: These are to command you to apprehend the said S. T. Schiadaressi and bring him up to be dealt with according to law.

Given under my hand and seal this 29th day of October, 1913.

[Signed] Theo. D. Jervey, Recorder.

Demurrer.

Defendant's counsel demurred to the warrant on the ground that it did not state facts sufficient to constitute a criminal offense, and asked that it be quashed, because it did not allege to whom the liquor, when and where it was sold, and, moreover, the warrant as amended constitutes no violation of the dispensary ordinance.

Mr. S. T. Schiadaressi, defendant, sworn, says, on direct examination by Mr. Blank:

Q. Just go ahead and tell the court and jury what you want to. A. Sunday, in the afternoon, I took a car at Meeting, corner Wentworth, to Hampton Park—a friend and myself. I went up to Hampton Park for an hour and a half. After we came back, and as I walked around the corner at Gadsden alley and Poinsett street, and was walking down King street, a friend of mine said: "Ted, the strong arm squad went to your place." I said I was not doing any business. I showed them my keys. Just as I got to the corner on my way down King street to go home, I saw Mr. Labelle and Mr. Cantwell going in the place. I thought the best thing for me to do was to go on home. I went down to the house because I had an engagement that night and went home and shaved. I went home and stayed there, and came up and came back to the place about half past 7. The clerk said: "Mr. Ted, the gentlemen have been here." They certainly worried me a whole lot. They saw some men drinking in the yard. About three weeks ago three fellows came out of the street and came in my yard. I was in the back room, and my bar was locked. I told them they had a good deal of nerve, and told them I would not stand for it. One fellow was drunk. They said they were eating in the restaurant. I told them they couldn't come in the yard. I did not pay any attention to it until I was served with the warrant on Tuesday morning. I came up here and they told me I had violated section 828. They told me it was for violating the dispensary ordinance. The slip at my door said it was the dispensary ordinance. That afternoon, I was served with a warrant. They told me I had to put up $75. I don't pay any attention to Officer Greenhill. I have no use for him. I told him at the corner of Columbus and Drake streets that he had a

yellow streak in him, and that I could find it. This fellow, Greenhill, has a personal grievance against me. I did not get up Sunday morning until 11 or half past 11. They asked me where I was going. They told me the squad had been in to see me to-day. I asked them how many, and I think they said five or seven. I said that was all right. I had a little desk in there. I went in the drawer where I kept my money and saw that everything was all right. I did not stay at the place, because I knew it would be suspicious. I keep my money in the drawer, and no key in the world can open it. I have no bartender. The boy cleans out the place, and does not do any business. The drinking in the yard has nothing to do with it. There was no drinking in my bar Sunday at all. I only sold it myself the next morning when I was there. I had a place to go at a quarter to 8 Sunday night, and did not get up until half past 11. My bar was closed tight.

Defendant's exceptions were as follows:

First. It was error of law in not sustaining the demurrer interposed to the warrant on the ground that it did not state facts sufficient to constitute a criminal offense, and to quash it for that reason, in that the warrant failed to state what specific part of section 828, Dispensary Ordinance of the City of Charleston, had been violated, and when, where, and to whom the liquor was sold.

Second. That the amended warrant constitutes no violation within the meaning of section 828, Dispensary Ordinance of the City of Charleston, by defendant, and a conviction upon same is a nullity and void.

Third. That the accused was not fully informed of the nature and cause of the accusation, although the same was demanded, in violation of section 18, art. 1, of the Constitution of 1895, and in violation of section 28 of the Criminal Code.

Fourth. That no sale was charged in the warrant against the defendant within the meaning of section 828 Dispensary Ordinance of the City of Charleston, in that the warrant failed to specify: (a) To whom spirituous liquor was sold; (b) when same was sold; (c) where same was sold; (d) that it was sold.

Fifth. That there was no evidence that spirituous liquor was sold, and no evidence against the defendant that he sold personally, or through any authorized agent, to any specific individual.

Sixth. That a verdict should have been directed as requested, as there was no evidence of spirituous liquor being sold by the defendant or any agent authorized so to do in his behalf.

Seventh. That the verdict was against the law and evidence, and contrary to same, in that it was uncontradicted that the bar was locked at the time of the alleged sale; that the key of the bar was in possession of the defendant, who was not present at the time, either in person or by authorized agent; and that the drinking of the Falstaff beer was in the lane owned by the Kennesaw Restaurant, which is a separate and distinct place from the property of the defendant, operated by others to whom defendant was not associated.

Eighth. That there was no testimony that Falstaff beer is spirituous liquor.

Ninth. That there was no sale alleged, and no sale of spirituous liquor proven, in that, drinking of liquor will not support a conviction for selling spirituous liquor when there was no money passed or consideration promised.

Tenth. That the defendant was illegally before the court, and his conviction is null and void: (a) In that the warrant was served on the defendant before the affidavit on which it is supposed to have been based was signed; (b) the affidavit was not probated as required by law.

Eleventh. That his honor committed error of law it is respectfully submitted, in charging upon the facts, in violation of section 26, art. 5, of the state Constitution of 1895, and inferred his opinion to the jury, and otherwise committed error of law when he charged as follows: (a) "The facts are taken from the judge." (b) "The court cannot take judicial cognizance of the fact that the warrant was not signed until after it was served. I denied the motion of defendant's counsel to direct a verdict because the warrant was signed and sworn to subsequent to the issuance of the same." (c) "I have nothing to do with their business. I have to punish them when they come here. I cannot help being pleased when the responsibility is placed upon them. I trust that, if the law is disagreeable, it will be enforced anyhow." (d) "You have the right to find the defendant guilty because you are convinced that the laws have been violated. You must do it then; that's your duty." (e) "I cannot, either, admit to you that we, the people of Charleston, are law-bidding. I cannot say that. I don't think there is any particular class or particular people to blame, but as long as I have lived here and as much as I think of and love the people of Charleston, I think they are the most lawless set that ever was. It matters not who they are, or what they are, they seem to do pretty much exactly as they want to. The hunter shoots deer without the least regard for the law. Another man will pay another to vote for him, and another, if he has the necessary nerve and ferocity, will keep another from the polls if he doesn't vote as he wants. There is nothing they will not do." (f) "I have charged you that we are not law-abiding."

Edwin J. Blank, of Charleston, for appellant. W. Turner Logan, Corp. Counsel, of Charleston, for the State.

GAGE, J. This is a cause of novel impression. The defendant was tried before the recorder's court of the city of Charleston for a violation of section 828 of the city ordinances. In plain parlance, the defendant was tried for selling alcohol. The affidavit, the warrant thereon, and the demurrer to the warrant will be reported. The recorder overruled the demurrer, the cause went to trial, and a jury wrote "Guilty," and judgment went against the defendant. The defendant appealed to the circuit court, and the judgment there was affirmed. The defendant appeals here again, and judgment must go against him here.

There are 11 exceptions, and 2 of them are subdivided. They will be reported. It would be frivolous to consider the exceptions in face of the defendant's own admission on the witness stand. The sale was charged to have been made on Sunday, October 28, 1913, The warrant was issued next day.

The defendant testified:

"There was no drinking in my bar Sunday at all. I only sold it myself the next morning when I was there."

The language of the seventh exception smells of the gutter.

There is no room to parley; the defendant is guilty by his own mouth.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(143 Ga. 212)

DUMAS v. WARE & HARPER. (No. 216.)

(Supreme Court of Georgia. Feb. 20, 1915.)

*(Syllabus by the Court.)*

FRAUD ⊂⊃13—ACTION FOR DECEIT—EVIDENCE —NONSUIT.

The plaintiff having failed to establish that the representations made by the agent of the defendants were known by him to be false, or were of such a fraudulent or reckless nature that, although they may not have been known by him to be false, they yet were made with intention to deceive, equivalent to knowledge of their falsity, she failed to establish one of the essential elements of a cause of action founded on alleged false and fraudulent representations inducing her to enter into a contract with his principals, whereby she had been defrauded; and the court did not err in granting a nonsuit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3–5; Dec. Dig. ⊂⊃13.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Mrs. N. B. Dumas against Ware & Harper. Judgment for defendant, and plaintiff brings error. Affirmed.

Mrs. Dumas brought an action of deceit against D. E. Evans and the firm of Ware & Harper, to recover the sum of $500, alleged to have been paid by her to one Braswell, the agent of Ware & Harper, as part payment for a lease on a certain rooming house in the city of Atlanta. It was alleged that prior to the payment of the $500, the plaintiff informed all of the defendants that she was practically a stranger in Atlanta and was not acquainted with the character and reputation of the Carnegie Hotel, the premises leased, or the vicinity where it was located, and that she would therefore rely on them as to its character and reputation. Defendants represented that the hotel and vicinity bore a clean moral reputation, and that none but persons of clean moral repute boarded or roomed in the hotel, and only such persons were catered to and none others tolerated. These representations were false, and were made with a view to induce the plaintiff to act on same. The defendant Evans knew them to be false when made; and Ware & Harper made them, either with knowledge of their falsity, or in reckless disregard of their truth or falsity, and plaintiff acted and relied on them when she parted with her money. Since so doing she learned of the falsity of the representations and demanded the return of her money, but the defendants refused to return it, and she brings suit to regain the damages caused by the false representations. Ware & Harper defended by denying the material allegations of the petition.

The evidence for the plaintiff tended to show that Evans operated the rooming house, and that he placed the lease he held on it in the hands of Ware & Harper, brokers, for sale. Braswell was a salesman in their office. The plaintiff went to their office in response to an advertisement of the property for lease. She had operated a rooming house within a block and a half of the Carnegie Hotel for a year and a half. She did not see Ware or Harper prior to signing the contract and making the purchase. Certain representations were made to her by Evans as to the good character of the house and vicinity. (Evans is not a party excepting.) Certain representations were made by Braswell, the agent of Ware & Harper, to the effect that he did not know about the hotel himself, but he assured the plaintiff that the community was all right, and that "the reputation of the immediate vicinity was satisfactory, that there was a church there, and that the Carnegie Library was there." A detective in the police department of the city testified for the plaintiff that the reputation of the hotel and its immediate vicinity, as it existed at and prior to the date the contract was executed, was bad. At the conclusion of the plaintiff's evidence, the court granted a nonsuit, and the plaintiff excepted.

Hendrix & Silverman, of Atlanta, for plaintiff in error. Moore & Pomeroy, of Atlanta, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 214)

TRUST CO. OF GEORGIA et al. v. WALLACE. (No. 218.)

(Supreme Court of Georgia. Feb. 20, 1915.)

*(Syllabus by the Court.)*

1. ESTOPPEL ⊂⊃3—ALLEGATIONS OF PETITION.

The allegation in the petition, "that the defendants herein, as administrators of the estate of James R. McKeldin, deceased, entered into" the contract, commits the plaintiff to the proposition that the trust company acted in such representative capacity. The same allegation also commits the plaintiff to the proposition that the signature of the corporation, "as agent for Mrs. Bessie Draper Palmer," was made in representative capacity. With such allegations remaining in the petition, the plaintiff will not be heard to deny that the contract was made in a representative capacity. Wadley v. Oertel, 140 Ga. 326, 78 S. E. 912.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 2–5, 7; Dec. Dig. ⊂⊃3.]

2. CONTRACTS ⊂⊃346—ACTION—VARIANCE.

The suit was against the defendants as individuals. Glisson v. Weil, 117 Ga. 842, 45 S. E. 221. As the contract was confessedly made in a representative capacity, it will not afford a basis of recovery under the allegations in the present case.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1714, 1718–1751; Dec. Dig. ⊂⊃346.]

3. CORPORATIONS ⊂⊃513 — PRINCIPAL AND AGENT ⊂⊃189—CONTRACT—ENFORCEMENT.

The contract, being for the sale of land, was one required to be in writing. The signature by the corporation, and also as agent for Mrs. Bessie Draper Palmer, purported to have been affixed by a "trust officer." No seal of the corporation was attached, nor was there any written au-

thority to sell, granted by Mrs. Bessie Draper Palmer, set forth in the petition. *Held* that, even if the action was based on a breach of personal covenant upon the part of the defendants, the petition was subject to general demurrer, for the reason that it did not show that the person purporting to sign the instrument was authorized to bind either of the defendants to a contract for the sale of land.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2017–2027, 2031–2034, 2036–2045; Dec. Dig. ⊂⊃513; Principal and Agent, Cent. Dig. §§ 713–717; Dec. Dig. ⊂⊃189.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by J. N. Wallace against the Trust Company of Georgia, a corporation, and another. Judgment for plaintiff, and defendants bring error. Reversed.

J. N. Wallace instituted an action against the Trust Company of Georgia, a corporation, and Mrs. Bessie Draper Palmer. It was alleged that the defendants had injured and damaged the petitioner in a designated sum for breach of contract executed between the defendants "as administrators of the estate of James R. McKeldin, deceased," as follows:

"Georgia, Fulton County. Memorandum of agreement between J. N. Wallace (as purchaser) and Trust Company of Georgia (as vendor), respecting sale of property described below. (This agreement is made subject to right of purchaser to investigate titles to property and to decline to perform if title of the vendor be legally insufficient and * * * fails to perfect the same within a reasonable time.) Subject-matter of sale, two houses and lots, being Nos. 76 and 78 East Linden street, located on the northeast corner of Linden and Courtland Sts. lot 116x120. Terms: Purchase price, $15,425. Cash payment of $5,000. Balance to be divided into * * * installments payable after date fixed for making each payment as follows: 1. $—— due —— months 2. $—— due —— months after said date, balance in one, two, three, and four years, at 6% interest. (Cash payment to be made when vendor complies with * * * obligation to make satisfactory showing as to title. Purchase-money notes for deferred payments to be given at the same time, bearing interest from date at the rate of 6 per cent. per annum, falling due as indicated above, payable at or before maturity.)

"I assent to the terms of the foregoing agreement this 7th day of June, 1912. J. N. Wallace, Purchaser. Trust Company of Georgia, Administrators of the Estate of James R. McKeldin, Decd., and as Agent for Mrs. Bessie Draper Palmer, by E. R. Rawlings, Trust Officer.

"I agree to pay commission of $425.00 to M. L. Petty and E. L. Harding for making the above sale. Trust Company of Georgia, Administrators of the Estate of James R. McKeldin, Decd., and as Agent for Mrs. Bessie Draper Palmer, by E. R. Rawlings, Trust Officer."

It was also alleged that plaintiff had offered to comply with his part of the contract, and had tendered the cash payment and offered to deliver the notes as provided therein; but that the defendants, though acknowledging tender, refused to carry out the contract and to deliver the property. Other allegations were that the property was of a stated value, more than the contract price, and the difference was sought to be recovered as damages. An amendment to the petition was filed, in which it was alleged that a described part of the property embraced in the contract was not a part of the estate of James R. McKeldin, deceased, and that the defendants had no authority "as administrators of the estate of James R. McKeldin, deceased," to sell or contract to sell such part of the property. The defendants filed a demurrer upon the following grounds: (a) That the petition sets forth no cause of action against the defendants. (b) That it shows on its face that there was no contract between the defendants or either of them and the plaintiff, which could be a basis for any cause of action against the defendants. This demurrer was overruled, and the defendants excepted.

R. W. Crenshaw and Anderson & Rountree, all of Atlanta, for plaintiffs in error. Calhoun & Connally and Etheridge & Etheridge, all of Atlanta, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 252)

ENNIS, Sol. Gen., v. POLLOCK et al.
(No. 231.)

(Supreme Court of Georgia. Feb. 25, 1915.)

*(Syllabus by the Court.)*

INJUNCTION ⊂⊃114, 137—PARTIES—MAINTENANCE OF BRIDGE.

While there may be cases in which the writ of mandamus may be used to compel county officials to discharge a duty imposed upon them by law, or they may be enjoined from the commission of a trespass or other tort under circumstances rendering equitable interposition proper, yet a most substantial part of the controversy involved in the present case is whether the duty of keeping in repair or rebuilding a certain bridge located in the corporate limits of the city of Rome rests upon the county of Floyd or upon the city of Rome. This controversy cannot be properly determined in the absence of the county as a party, by seeking to enjoin the county commissioners from maintaining the present bridge. Accordingly, the point as to whether there were proper parties having been raised, there was no error in refusing to grant an interlocutory injunction against the county commissioners alone, seeking to prevent them from maintaining the bridge as being a nuisance and compelling them to build a new bridge.

(a) Whether or not the county commissioners could have been joined with the county as parties, it is unnecessary to decide.

(b) The injunction sought was furthermore largely mandatory in character.

(c) It is not decided whether, even with proper parties, there was any merit in the petition, or whether on the county of Floyd, rather than on the city of Rome, rested the duty of maintaining the bridge or of rebuilding it, if necessary. On this subject, see Acts 1880–81, p. 540, § 3; Acts 1909, pp. 1255, 1285, § 51; Commissioners of Polk County v. Cedartown, 110 Ga. 824, 36 S. E. 50; Georgia Railway & Electric Co. v. Tompkins, 138 Ga. 596 (5), 600, 75 S. E. 664.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202–220, 307–309; Dec. Dig. ⊂⊃114, 137.]

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by W. H. Ennis, Solicitor General, against J. G. Pollock and others, Commissioners. Judgment for defendants, and plaintiff brings error. Affirmed.

Junius F. Hillyer and W. M. Henry, both of Rome, for plaintiff in error. M. B. Eubanks, Max Meyerhardt, and Dean & Dean, all of Rome, for defendants in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 251)

## McFARLAND v. MORRISON. (No. 230.)

(Supreme Court of Georgia. Feb. 25, 1915.)

*(Syllabus by the Court.)*

TROVER AND CONVERSION ⟸68—VERDICT.

Under the peculiar facts of this case, the verdict which was directed was contrary to law.

(a) Trover was brought by a temporary administrator appointed pending litigation over the probate of a will in this state against an individual, seeking to recover certain certificates of deposit in banks in Tennessee, passbooks showing deposits in that state, certain money deposited in a bank, a watch and chain, several promissory notes, "a deposit box" in a bank, containing deeds, etc. The defendant denied that the deceased died testate, and asserted that he had been appointed administrator in Tennessee and was legally in possession of the property under such appointment; that a petition had been filed in Tennessee by the present plaintiff for the purpose of having revoked the letters of administration there granted, and of having the property held by the Tennessee administrator delivered to the petitioner; and that this resulted in a judgment denying the prayer, but retaining the case on the docket to await the result of the litigation in Georgia over the probate of the will. Under the evidence introduced in the present case the presiding judge directed a verdict for the plaintiff for a certain amount, but subject to be satisfied by the indorsement and delivery to the plaintiff of certain certificates of deposit (apparently not those sued for, but others which had been issued to the defendant as administrator in lieu of them), and by the payment to the plaintiff of an amount of money on deposit in a bank in Tennessee, to the credit of the defendant as administrator. The verdict so directed allowed the defendant to retain an amount sufficient to pay his expenses as administrator in Tennessee, including reasonable compensation for his services as such administrator, and including certain attorney's fees, but not those in this case, or in the proceeding in Tennessee, to obtain a revocation of the administration in that state. Finally the defendant was required to deliver to the plaintiff all the other notes, mortgages, etc., described in the petition, except one which it was recited had been paid. *Held*, that in an ordinary common-law action, in the nature of a trover suit, to recover personal property alleged to have been converted, there was no authority of law for the judge to direct, and the jury to find, such a verdict seeking to compel such affirmative action by the defendant as an indorsement and delivery of certificates other than those sued for, a delivery of cash deposited in a foreign state in the name of the defendant as administrator under appointment in that state, and to have an equitable settlement of the accounts of the defendant as such administrator.

(b) The only grounds of the motion for new trial were the general ones that the verdict was not authorized by the evidence and was contrary to law, and, as it is held that the verdict directed and rendered was not authorized, this court forbears to discuss various propositions of law argued in the briefs, and which may be more clearly brought out on another trial.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 304–307; Dec. Dig. ⟸68.]

Error from Superior Court, Walker County; Moses Wright, Judge.

Action by Elizabeth Morrison, administratrix, against T. F. McFarland. Judgment for plaintiff, and defendant brings error. Reversed.

W. M. Henry, of Rome, J. E. Rosser, of La Fayette, and W. H. Payne, of Chattanooga, Tenn., for plaintiff in error. R. M. W. Glenn, of La Fayette, Maddox & Doyal, of Rome, and Sizer, Chambliss & Chambliss, of Chattanooga, Tenn., for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 125)

## CONDON, GRAHAM & MILNER v. DEHART. (No. 205.)

(Supreme Court of Georgia. Feb. 12, 1915.)

*(Syllabus by the Court.)*

1. ATTACHMENT ⟸211—DECLARATION—RIGHT TO AMEND.

Where an attachment was issued, levied, and returned to the superior court, and in proper time a declaration in attachment was filed, which was headed with the name of the case and commenced with the allegation that the plaintiff showed to the court that the attachment had been issued and levied, it was amendable by adding an address to the superior court.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 706–721; Dec. Dig. ⟸211.]

2. APPEAL AND ERROR ⟸1078—ASSIGNMENTS OF ERROR—ABANDONMENT.

The declaration in attachment was not subject to any of the grounds of demurrer urged against it.

(a) The first ground of the demurrer was not referred to in the brief of the plaintiffs in error and will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. ⟸1078.]

3. APPEAL AND ERROR ⟸518—EXCEPTIONS PENDENTE LITE—SUFFICIENCY.

A bill of exceptions pendente lite, which alleged that an amendment was offered to the petition and was allowed over objection of the defendant, without showing any ground of objection made to it, does not sufficiently present any question for decision by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342–2355; Dec. Dig. ⟸518.]

4. INSTRUCTIONS—GROUND FOR NEW TRIAL.

Some of the grounds of the motion for a new trial complained of the failure or omission to charge certain principles of law without showing that any proper written requests for such charges were made. In other instances complaints were made that certain requested instructions were not given. None of these as-

signments of error were meritorious, when considered in connection with the entire charge of the court, which covered the issues involved and substantially covered the requests to charge in so far as they stated the pertinent principles of law applicable to the case.

5. VERDICT AND RULINGS APPROVED.

The evidence was sufficient to support the verdict, and there was no error either in refusing to grant a nonsuit or in overruling the general grounds of the motion for a new trial.

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action by E. L. Dehart against Condon, Graham & Milner. Judgment for plaintiff, and defendants bring error. Affirmed.

McMillan & Erwin, of Clarkesville, for plaintiffs in error. R. D. Sisk, of Franklin, N. C., Geo. B. Rush, of Atlanta, and J. C. Edwards & Sons, of Clarkesville, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(142 Ga. 131)

## HAYES v. RICHMOND HOSIERY MILLS.

(No. 183.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

DISMISSAL OF PETITION.

The petition and the amendment thereto set forth a cause of action as against the demurrer filed by the defendant, and the court erred in dismissing the same.

Error from Superior Court, Walker County; Moses Wright, Judge.

Action between James Hayes, by next friend, and the Richmond Hosiery Mills. From the judgment, Hayes brings error. Reversed.

W. H. Payne, of Chattanooga, Tenn., for plaintiff in error. Watkins & Watkins, of Chattanooga, Tenn., and R. M. W. Glenn, of La Fayette, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 152)

## DE BOW v. VICKSBURG, S. & P. RY. CO.

(No. 190.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

NEW TRIAL ⟸118—TIME TO PERFECT MOTION—EXTENSION—GROUNDS.

Where, during the term and within two days after the rendition of a verdict in the superior court, the losing party presented to the court a motion for a new trial in all respects regular, and thereupon a rule nisi was issued, calling upon the opposite party to show cause at a later date (the same being specified in the order) why the motion should not be granted, and, in connection with the rule nisi and in the same order, the movant was granted an extension of time (allowing "until the hearing of the motion") in which to prepare and present for approval and filing a brief of the evidence in the case, it being recited in the order that it was "made to appear that it was impossible to make out and prepare a brief of the testimony in said case before the adjournment of court," and it further appearing that this motion and rule nisi were promptly served upon the respondent, the court did not err in overruling a motion to vacate the order allowing the movant an extension of time within which to perfect the motion in the respects mentioned, upon the grounds: (1) That the order was granted ex parte, without any rule nisi thereon directed to the defendant to show cause against the grant of the order, without notice to the plaintiff, without his knowledge or consent or an opportunity to show cause against the grant of the order, and therefore the court was without jurisdiction to grant the same; (2) that the time granted in the order was in excess of the time allowed by law for the filing of a brief of evidence upon a motion for a new trial, and was unreasonable, and in this respect the order was an abuse of the discretion vested in the court; and (3) that the court was without power to grant the defendant the privilege which, under the terms of the order, extended the time for filing the brief of evidence beyond the next regular term of court and thence forward indefinitely in the future, and it appeared from the record that no brief of evidence had been filed, and that more than 30 days had elapsed since the adjournment of the term of court at which the verdict complained of was rendered.

(a) If the time allowed by way of extension was as a matter of fact unreasonable, the respondent should have moved promptly to vacate this order and to set the case down for a hearing at some time less remote than that named in the order granted. In the present case the rule nisi was granted on the 17th day of June, 1911, and served on the same day, and the motion to vacate and dismiss was apparently made on the 19th day of July, 1912.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 242; Dec. Dig. ⟸118.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between J. D. B. De Bow and the Vicksburg, Shreveport & Pacific Railway Company. From the judgment, De Bow brings error. Affirmed.

Atkinson & Born, of Atlanta, for plaintiff in error. Anderson & Rountree, of Atlanta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent, and ATKINSON, J., disqualified.

(143 Ga. 235)

## VAUGHAN v. PERRY et al.
## PERRY et al. v. VAUGHAN.

(No. 226.)

(Supreme Court of Georgia. Feb. 22, 1915.)

*(Syllabus by the Court.)*

1. CONTRACTS ⟸352—BREACH—QUESTION FOR JURY.

Both parties predicated their demands upon the contract, neither of them seeking rescission. It appeared from the evidence that both parties had breached the contract in such manner that neither was entitled to have the other perform. Accordingly, there was no error in

granting a nonsuit as to the claims of each of the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1200, 1828; Dec. Dig. ⊂⊃352.]

2. ASSIGNMENTS OF ERROR.

It is unnecessary to pass upon the other assignments of error, as the result would not be affected by so doing.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by B. L. Vaughan against J. C. Perry and others. Nonsuit granted and both parties bring error. Affirmed on both bills of exceptions.

J. H. Porter, of Atlanta, and J. T. Norris, of Cartersville, for plaintiff in error. Watkins & Latimer, of Atlanta, for defendants in error.

PER CURIAM. Judgment affirmed on both bills of exceptions. All the Justices concur except FISH, C. J., absent.

(143 Ga. 127)

## DOBBS v. McCANDLESS. (No. 178.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⊂⊃671—PRESENTATION FOR REVIEW—EVIDENCE.

The case was brought to this court by direct bill of exceptions. It did not contain any brief of the evidence, nor was any such brief made a part of the record. Most of the errors complained of involve a consideration of the evidence, and cannot be properly decided without reference thereto. In several instances the bill of exceptions recites that evidence of a certain character, and tending to prove certain things, was introduced, but the judge declined to certify that such was the fact. None of the assignments of error of this character, or which would involve a consideration of the evidence for their correct determination will be considered by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867–2872; Dec. Dig. ⊂⊃671.]

2. PLEADING ⊂⊃239—PETITION—AMENDMENT—DISCRETION.

Where an amendment to the plaintiff's petition was prepared on the fifth day of the month, and was not tendered until the eighth thereof, after the plaintiff had closed his testimony, and after nearly all of the defendant's witnesses had been examined, and no sufficient reason was shown why it should not have been tendered sooner, there was no abuse of discretion in declining to allow it, except upon the payment of cost. Civil Code 1910, § 5685.

(a) The statements in the bill of exceptions were not sufficient to show an abuse of discretion in such ruling.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 626–635; Dec. Dig. ⊂⊃239.]

3. INSTRUCTIONS.

While there may have been some slight inaccuracy in the charge in stating the contentions of the parties, yet when the pleadings are considered as a whole, and the charge is viewed in its entirety, there is nothing which requires a reversal.

Error from Superior Court, Cherokee County; H. L. Patterson, Judge.

Action by C. F. Dobbs, administrator, against W. M. McCandless. Judgment for defendant, and plaintiff brings error. Affirmed.

J. P. Brooke, of Alpharetta, and Dorsey, Brewster, Howell & Heyman, of Atlanta, for plaintiff in error. J. Z. Foster, of Marietta, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 150)

## BELL v. ROSINGNOL. (No. 189.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

HUSBAND AND WIFE ⊂⊃19 — NECESSARIES FURNISHED WIFE—LIABILITY.

Where a married woman personally applies to a tradesman for the purchase of groceries, stating that she wishes to open an account in her own name and directs the plaintiff to charge the goods to her, and where in pursuance of this arrangement the goods are delivered at her home and charged to her, she will be personally liable therefor, notwithstanding the legal obligation of the husband to support his wife, and the groceries being such as would be a proper support to be provided by the husband for the family.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 109, 121–138, 142, 146, 322; Dec. Dig. ⊂⊃19.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. F. Bell against Cora Rosingnol. Judgment for defendant, and plaintiff brings error. Reversed.

Jos. W. & Jno. D. Humphries, of Atlanta, for plaintiff in error. Smith & Hastings, of Atlanta, for defendant in error.

EVANS, P. J. The plaintiff, a grocery merchant, brought suit against the defendant, a married woman, to recover upon an alleged indebtedness for groceries. The defendant pleaded that all the purchases were made for her husband's account, as head of the family, which was well known to the plaintiff. She did not deny that the merchandise was furnished, or that it was worth the amounts charged. On the conclusion of the plaintiff's evidence he was nonsuited. The testimony submitted by him tended to show that he was a grocery merchant. The defendant applied to him for credit, stating that she wanted to open an account with him in her own name; that her husband was a good, easy fellow and allowed himself to be imposed upon, and she ran the house herself. She directed the plaintiff to charge the goods in her name. The plaintiff had heard that the husband was a bankrupt at the time his wife opened the account. In supplying the goods he made out with each delivery a duplicate statement, one of which was delivered with the goods and the other was kept by him. These state-

ments were made out on a printed blank and the line for the name was preceded by the capital letter, "M." On many of the statements was written the name "Rosignol;" on many, the letters "RS" followed the capital letter "M," and these letters were followed by the name of Rosingnol; on others appeared only the address, "106 Cherokee Ave.," without any name. When the plaintiff called at defendant's home, he always talked to the defendant about the account and asked her for the money. On some occasions the defendant's husband would be at home and would meet plaintiff at the door and would say, "You want to see Cora." The defendant made the payments on the account. The husband brought him one payment, and said that his wife had sent the money to be credited on her account. The groceries were furnished for the defendant, her husband and child. The plaintiff knew that the defendant owned a vacant lot, and that the husband worked sometimes for railroads, and that his family lived with him.

There can be no doubt that a married woman on her own credit may, by express contract, bind herself for the purchase of necessaries for herself and family. It is true that the husband is bound to support his wife and family, but this legal obligation does not prevent the wife from buying on her own responsibility groceries for the support of the family, and personally agreeing to pay for them. In the instant case it is inferable from the evidence that, unattended by her husband, the wife applied to the merchant for a line of credit to be extended individually to her, that the credit was extended to her and not to her husband, and that the goods were furnished to her on her credit. This amounts to an express contract on her part to buy the goods as an individual.

The facts in the cases of Freeman v. Holmes, 62 Ga. 556, and Rushing v. Clancy, 92 Ga. 769, 19 S. E. 711, are dissimilar from those of the case at bar. In the former case a husband accompanied his wife and child to the office of a dentist, and introduced them to the dentist. Under these circumstances it was held there could be no recovery against the wife for dentistry done for herself and child, especially where it appeared that the dentist knew nothing about her having any separate estate, and impliedly gave credit to the husband and not the wife. In the latter case, the wife and her husband applied for board, but the husband took no part in the negotiations, and it was held that, in the absence of an express promise by the wife to charge herself or her separate estate, the board contracted for being such as her husband is bound to furnish to her and her children, the husband and not the wife was liable therefor. In both cases the husband was present when the services and board were contracted for, and in the absence of an express contract by the wife to pay for same, the implication was that the credit was extended to the husband. In the instant case there was evidence that the wife, without being attended by her husband, applied for credit and requested the goods be charged to her. The court erred in sustaining the motion for nonsuit.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 216)

## BENSON v. HAYS. (No. 219.)

(Supreme Court of Georgia. Feb. 20, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⟸1078—GROUNDS FOR NEW TRIAL—ABANDONMENT.

The general grounds of the motion for a new trial are not referred to in the brief of counsel for the plaintiff in error, and, under repeated rulings of this court, will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. ⟸ 1078.]

2. NEGLIGENCE ⟸136—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Under the pleadings and evidence in this case, whether or not the plaintiff by the exercise of ordinary care could have avoided the consequences of the alleged negligence of the defendant was a question for the jury. Miller v. Smythe, 95 Ga. 288, 22 S. E. 532.

The grounds of the amended motion for a new trial, which complained in some instances of excerpts from the charge, and in others of omissions to charge without request, and in others of refusals of requests to charge, furnish no cause for the grant of a new trial, when considered in the light of the evidence and the entire charge as given.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. ⟸136.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between C. F. Benson and M. J. Hays. From the judgment, Benson brings error. Affirmed.

Jas. L. Key, of Atlanta, for plaintiff in error. Hewlett, Dennis & Whitman, of Atlanta, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 213)

## RICHARDS et al. v. JOHNSON. (No. 217.)

(Supreme Court of Georgia. Feb. 20, 1915.)

*(Syllabus by the Court.)*

1. DEMURRER TO PETITION.

There was no error in sustaining the demurrer to paragraphs 5 and 6 of the amendment to the petition.

2. RULINGS OF AUDITOR—ADMISSION OF EVIDENCE.

There was no error requiring a reversal in overruling the exceptions of law to the auditor's report, or in declining to approve the exceptions of fact.

(a) While the auditor admitted some irrelevant evidence over objection, some of it was en-

tirely immaterial, and none of it was of such materiality as to require a reversal of the judgment overruling the exceptions of law.

3. VENDOR AND PURCHASER ⟸3—CONTRACT OF SALE—WHAT CONSTITUTES.

There was no error in construing the contract involved in this litigation as one of purchase and sale. The provisions in regard to selling off the property in parcels and paying the proceeds to the vendor until he should have been fully paid, and the other terms contained in the agreement, while modifying some of the usual incidents of the ordinary executory contract of bargain and sale, did not destroy the fact that in its entirety the contract under consideration was one of purchase and sale.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 8; Dec. Dig. ⟸3.]

4. ALLOWANCE OF COSTS.

Under the facts contained in the record, there was no abuse of discretion in awarding the costs, including the fee of the auditor, against the plaintiffs in error.

5. JUDGMENT ON BOND—RECEIVERS.

There was no error in entering judgment on the bond given by the plaintiffs in error for the purpose of obtaining the appointment of a receiver.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between G. A. Richards and others and C. H. Johnson. From a judgment, the parties first mentioned bring error. Affirmed.

R. W. Crenshaw and Anderson & Rountree, all of Atlanta, for plaintiffs in error. Smith, Hammond & Smith, of Atlanta, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 168)

MALSBY & CO. v. WIDINCAMP. (No. 196.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. ATTORNEY AND CLIENT ⟸63—EXISTENCE OF RELATION—INSTRUCTIONS.

In the trial of this case it was material for inquiry and determination as to whether or not certain claims had been filed in the name of the present defendant by a certain person as the attorney at law and agent for the plaintiffs in the present suit, using the name of the present defendant with his consent, or whether the person referred to acted as the attorney at law for this defendant. Apparently, in filing the claims, the person in question acted as attorney for the defendant in the present case, while the defendant insists that, though his name was used in filing the claims, the attorney appearing as acting for him really represented, as agent and attorney at law, the plaintiffs in the instant case, and in representing the plaintiffs that attorney made certain material representations and entered into certain material undertakings of which the defendant now claims the benefit. In reference to this issue, as to whom the attorney represented in filing the claim referred to, the court charged the jury as follows: "You look to the facts and circumstances to see what the status of the case was when those claims were filed, and see whether" the attorney in question "was acting for Malsby & Co. [the present plaintiffs] or Mr. Widincamp [the present defendant]. These are matters for you to determine. If he was acting for Malsby & Co. in filing those claims, then Malsby & Co. would be bound, and not Mr. Widincamp. If he was acting for Mr. Widincamp, and Mr. Widincamp undertook to defend that title, then Malsby & Co. would not be bound. You look to the evidence, and determine whether or not Malsby & Co. were the parties conducting that defense under the claim of Mr. Widincamp. See whether or not that was their defense or Mr. Widincamp's." This charge might have misled and confused the jury. They might have thought that, if the attorney referred to undertook to act for Malsby & Co., they would be bound by what he did and undertook, without regard to the question whether or not they had conferred upon him the power to act for them and bind them. While the court probably meant that they would be bound in case the attorney acted for them under authority conferred by them upon him, and within the scope of his agency, it was error to give the instructions in the language quoted, without also instructing the jury, when duly requested in writing by counsel for the plaintiffs, that no statement made by the attorney in question would be binding on the plaintiffs, unless it appeared that he had authority, conferred by the plaintiffs, to make the statement; for if the instruction requested had been given, the jury would have clearly understood that the statements made by the attorney himself would not prove his agency or right to act in the premises, and that the fact of his agency and right to act would have to be established by other testimony.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 85, 87; Dec. Dig. ⟸63.]

2. RULINGS AND INSTRUCTIONS.

Otherwise than as indicated in the preceding headnote, no material errors were made to appear in the court's rulings or the charge to the jury.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Action by Malsby & Co. against E. Widincamp. Judgment for defendant, and plaintiffs bring error. Reversed.

Way & Burkhalter, of Reidsville, for plaintiffs in error. Hines & Jordan, of Atlanta, and H. C. Beasley, of Reidsville, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 182)

FORTUNE v. WARD et al. (No. 134.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

INJUNCTION ⟸125—DIRECTION OF VERDICT—PROOF—FRAUDULENT ADMINISTRATION.

Under the facts of this case, it was error for the court to direct a verdict.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 272–275; Dec. Dig. ⟸125.]

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Sarah Ward against A. B. Fortune and another. Judgment for plaintiff on directed verdict, and defendant named brings error. Reversed.

Sharp & Sharp, of Rome, for plaintiff in error. M. B. Eubanks and C. A. Thornwell, both of Rome, for defendants in error.

EVANS, P. J. Sarah Ward filed a petition against A. B. Fortune and the county administrator, alleging that her father, Monroe Horton, died, leaving her his sole heir at law, and leaving an estate consisting of two pieces of real estate; that at the time of his death he only owed one debt, which petitioner immediately paid after the death of her father; afterwards Fortune filed an application for letters of administration on the estate of her father, alleging that he was a member of a firm, who was a creditor of her father, and requested the appointment of the county administrator to administer the estate; that Fortune was neither next of kin nor a creditor of the estate of her father, nor a member of any firm that was a creditor of that estate; that the estate owed no debts, and there was no necessity for the appointment of an administrator, and she did not know of the appointment of the county administrator on her father's estate until after his appointment; that immediately upon the death of her father she entered into possession of his estate; and that, while she denied that the estate owed any debts, if any could be shown to exist she was willing to pay them without administration. She prayed that the county administrator be enjoined from any attempt on his part to administer the estate or to interfere with her possession and occupancy of the property; that Fortune be required to set up in this proceeding any debt that he may have against the estate; and that she be allowed to defend it, and, if found to exist, to pay the same without administration, and that the judgment appointing the administrator be set aside. The defendants separately answered. Each averred that the county administrator had been appointed on the estate of the plaintiff's father after due application; that the proceedings were regular; and that no fraud or imposition had been practiced in the grant of administration. Fortune averred that he was the president of a corporation which held a debt against the estate of the decedent, and in behalf of the corporation as a creditor he made the application for administration, and also that the intestate owed other debts at the time of his death. The county administrator set up that the records showed a mortgage against the property of the intestate, which he was informed was still unpaid, and that there was a necessity for administration on the decedent's estate. The bill of exceptions recites that the case was duly called for trial, and a jury stricken, and the pleadings read. The attorney for Fortune called on the attorney for the plaintiff to respond to a notice to produce certain documentary evidence. In response to the notice, the attorney produced certain papers and stated that they did not have others specified in the notice. Counsel for the plaintiff asked the court, before any testimony was introduced, to direct a verdict for the plaintiff, stating that the only issue to be tried in the case was who should pay the cost which accrued on the administration, and also in the case then being submitted to the jury; that the debts of the estate had been paid after the appointment of the administrator, some having been paid since the present litigation was begun. Counsel for Fortune moved to be allowed to introduce evidence to the effect that the debts were paid after the appointment of the administrator; that the debt due to the corporation, of which his client was president, was for the burial expenses of the deceased, and was the debt which his client represented in applying for administration; and that this debt and the taxes due by the decedent had been paid since the institution of the present suit. The court refused to allow Fortune to introduce any evidence, and directed a verdict in favor of the plaintiff for an injunction as prayed. Error is assigned upon the direction of this verdict.

The plaintiff's right to enjoin the administrator from further proceeding with the administration of the estate is founded on the charge that the administration had been fraudulently obtained. The court directed a verdict granting an injunction without requiring the plaintiff to establish the truth of her allegations in this respect. The pleadings of the parties showed that the proceedings for the appointment of the county administrator were regular on their face. If no fraud was practiced in the causing letters of administration to issue to the county administrator, the superior court will not interfere with the due administration of the estate. Even if it be conceded that all of the debts of the decedent had been paid, since the grant of the letters of administration, by the sole heir at law, this alone would not authorize a court of equity to enjoin the administrator from closing up the administration and obtaining a discharge from his trust. It appears from a recital in the bill of exceptions that the court acted upon a statement of the plaintiff that only a question of costs was involved. It does not appear that the defendants assented to this proposition; but, even if they had acquiesced in the admission, the court would not have been warranted in directing a verdict enjoining the county administrator from winding up the administration of the decedent's estate. It was error to direct a verdict for the plaintiff without any evidence to show that her charge of fraudulent administration had any substantial foundation.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 137)

FOURTH NAT. BANK OF COLUMBUS v. MOOTY et al. (No. 186.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

VENUE ⟸22—ACTION FOR DEBT.

A creditor may proceed against his debtor in the superior court of the latter's residence, for judgment on his demand, and in the same action may have cancellation of his debtor's fraudulent deed, if necessary to enforce his judgment, although his debtor's grantee resided in another county, provided the latter is a party to the action. But such creditor cannot maintain an action for his debt, and for ancillary relief of canceling his debtor's deed, in a county of the venue of the debtor's grantee, which is different from that of the debtor, though the debtor be made a party with his grantee.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 35-37; Dec. Dig. ⟸22.]

Error from Superior Court, Muscogee County; Robt. T. Daniel, Judge.

Action by the Fourth National Bank of Columbus against H. M. Mooty and another. Judgment for defendants, and plaintiff brings error. Affirmed.

The Fourth National Bank of Columbus, Ga., brought an action in the superior court of Muscogee county against H. M. Mooty, a resident of Fulton county, and Lee Loewenherz, a resident of Muscogee county, alleging as follows: Mooty is indebted to the plaintiff on certain promissory notes, copies of which are attached to the petition. For many years past Loewenherz has conducted a mercantile business, and that Mooty was in his employment. According to information being conveyed to the plaintiff Loewenherz, on divers occasions and within four years prior to February 27, 1913, Mooty did fraudulently take and carry away and convert to his own use various sums of money, to the injury and without the consent of Loewenherz; and on the day last named Loewenherz charged and accused Mooty with a felony, and did coerce and intimidate Mooty to convey to him several lots or parcels of land lying in the city of Columbus, Muscogee county. These deeds embraced all the property which Mooty owned or possessed of any value. Upon information and belief it is charged that no present consideration was paid to Mooty, but that the real consideration moving him to execute and deliver the deeds was a forbearance of prosecution for the offense of felony, held out and promised him by Loewenherz. Loewenherz after receiving the lands and tenements described in the deeds from Mooty, and after charging Mooty with a criminal offense, did in consideration of the execution and delivery of the deeds, and in consideration of the receipt of the lands, compound the offense, and did promise and forbear to prosecute therefor. Mooty and Loewenherz did fraudulently conspire to suppress a prosecution for crime, and did fraudulently conspire to hinder, delay, and defraud bona fide creditors of Mooty in the enforcement of their debts. The deeds of conveyance were void in that there was no legal or moral consideration therefor. Mooty has no other property upon which petitioner or any of his other creditors can impress their debts, and he is insolvent. The prayers were for judgment against Mooty on the notes; for cancellation of the conveyance from Mooty to Loewenherz; for injunction against Loewenherz's incumbering the real estate; for an accounting by Loewenherz for the rents and profits of the property; that the judgments prayed for be impressed upon and made out of the real estate held by Loewenherz under the conveyances from Mooty; and for general relief. Both defendants demurred on the ground, among others, that the superior court of Muscogee county was without jurisdiction to entertain the action. The demurrers were sustained, and the plaintiff excepted.

Battle & Hollis, of Columbus, for plaintiff in error. A. W. Cozart, G. Y. Tigner, and T. T. Miller, all of Columbus, for defendants in error.

EVANS, P. J. (after stating the facts as above). The uniform procedure act of 1887, permitting the joinder of legal and equitable causes, and obtaining appropriate relief in the same action, did not change any essential feature of the law respecting the venue of actions. Before its passage, a creditor without a lien, under ordinary conditions, could not first maintain an action to set aside a fraudulent conveyance of his debtor; but since its enactment a creditor, in one action, may attack a sale made by his debtor as fraudulent and obtain judgment against his debtor for the debt. Booth v. Mohr, 122 Ga. 333, 50 S. E. 173. This does not mean that a creditor without a lien may go out of the county of his debtor and institute an action against the debtor's grantee, in the county of the latter's residence, for the purpose of obtaining judgment against his nonresident debtor and subjecting to its lien property which it is alleged the debtor fraudulently conveyed to his grantee. A creditor may sue his debtor in the county of the latter's residence, and in the same action (if it be in a court which has equitable jurisdiction) may have equitable relief in canceling his debtor's fraudulent deed, although the grantee may reside in a different county. The jurisdiction of the court having equitable jurisdiction draws to its power of rendering judgment against the debtor the power of administering proper, ancillary, equitable relief. It is not the power to render the ancillary relief which fixes the jurisdiction of the court over the person, but rather the jurisdiction over the person to render judgment includes the jurisdiction to grant an-

cillary relief appropriate to the enforcement of the judgment to be obtained in the same action. The plaintiff's right to cancellation is dependent upon his right to a judgment against his debtor who lives in Fulton county. The uniform procedure act of 1887 did not provide that a creditor could go out of the county of the debtor's residence and obtain a judgment and ancillary relief against him, but that simultaneously in his action for a judgment, in the county of the debtor's residence, he could join therein a supplementary cause of action for equitable aid in the enforcement of his judgment. De Lacy v. Hurst, 83 Ga. 223, 9 S. E. 1052; Cunningham v. Williams Co., 135 Ga. 249, 69 S. E. 101.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 224)

## TURPIN et al. v. TAYLOR et al. TAYLOR et al. v. TURPIN et al. (No. 222.)

(Supreme Court of Georgia. Feb. 20, 1915.)

*(Syllabus by the Court.)*

1. APPEARANCE ⟸24—PROCESS ⟸48, 163—DEFECTIVE PROCESS—DISMISSAL.

Under the facts of this case, the court did not err in refusing to dismiss the case and in allowing the plaintiffs to amend the process making it returnable to the next succeeding term of court after that to which it was actually made returnable. But the court should have gone a step further in the order and provided for service anew of the suit, with the amended process attached.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118–143; Dec. Dig. ⟸24; Process, Cent. Dig. §§ 46, 47, 55, 224–238; Dec. Dig. ⟸48, 163.]

2. APPEAL AND ERROR ⟸843—SCOPE OF REVIEW—RULINGS ON DEMURRERS.

As the complaining parties were not properly before the court when the rulings upon the demurrers were made, such rulings were entirely nugatory, and the assignments of error upon them in the main bill and cross-bill of exceptions will not be considered here; but when the defendants have been properly brought before the court under service of the suit and amended process, in accordance with direction given by this court, the demurrers can be resubmitted for decision in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3341; Dec. Dig. ⟸843.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by R. J. Taylor and others, receivers, against Mrs. E. N. Turpin, Sr., and others. Judgment for plaintiffs, and defendants bring error, and plaintiffs file cross-bill of exceptions. Main bill affirmed, with direction, and cross-bill dismissed.

In 1907 Schofield and other directors of the Exchange Bank of Macon filed in the superior court of Bibb county a suit in which they made the bank and certain stockholders the defendants, and prayed for a receiver to be appointed for the bank, which they, as directors, found themselves no longer able to operate. R. J. Taylor, B. P. O'Neal, and C. P. King were in due course appointed permanent receivers. These receivers, after administering the bank's affairs for about five years, and claiming that they had realized upon practically all of its assets in hand, made application to the court for leave to bring suit against the stockholders upon their charter liability, and leave being granted, on August 26, 1912, they filed suit in the office of the clerk of Bibb superior court against 100 or more stockholders. Besides directing the suit to be filed, the court ordered that notices be sent to all the proposed defendants, and that such defendants as might wish to settle at a stipulated amount for their shares of stock be allowed to do so. The receivers were also authorized to employ attorneys to represent them in filing and prosecuting the suit. The taxing of fees, whether against the depositors or stockholders and against which class of stockholders, was left as an open question to be passed upon by the court later. It was further provided in the order granted August 26, 1912, under which the petition was filed, that the suit remain on file for 30 days in the office of the clerk of the superior court of Bibb county, subject to inspection by any person interested therein, and that any person interested might file his objection in writing with the clerk within 30 days from the date of the order. Such objections were assigned for hearing on September 30, 1912, and, if no objection should be filed, the receivers were authorized to make settlements with any stockholder of the bank upon his charter liability at the sum of $20 per share, and, upon the payment of that amount per share, the stockholder paying it was released from any further liability to the bank or its receivers on account of the charter liability of such stockholder. It was further provided in the order that the receivers were authorized to accept settlement on the terms stated until and up to October 10, 1912, after which no settlement could be made under this order, and the suit filed, as aforesaid, by the receivers against the stockholders was directed to proceed against those stockholders who did not settle in accordance with the terms of the order.

Objections to the order for the filing of the suit and allowing the settlement upon the terms set forth above were filed by the plaintiffs in this case and application made to set aside the order. The hearing of the application containing these objections and the consideration of the same was protracted until October 8, 1912, upon which day the court overruled the objections and modified the order, authorizing the receivers to accept the settlement therein provided up to and until the 20th day of October, 1912; the remaining portions of the order to remain of force.

The plaintiffs in error in this case and other stockholders not having settled under the terms and provisions of the order referred to on October 20th, process issued on the suit which had been filed on August 26, 1912, on the 21st day of October, 1912, bearing that date, and returnable to the November term, 1912, which was less than 15 days of the commencement of the November term of Bibb superior court; the 4th day of November being the date of the convening of the court for that term. At the November term the plaintiffs in error and other defendants in the suit filed on August 26, 1912, made their motion in writing to dismiss the suit, upon the grounds: That no legal process had ever been issued in the case; that no legal service of process had been made upon defendants; that said alleged process was issued less than 15 days before the term to which it had been made returnable; and that said lack of legal process and legal service was directly due to the interference of plaintiffs' counsel and their express instructions to the clerk of said court and the sheriff of said county. After the introduction of evidence, and after argument had on the motion to dismiss the suit, the court overruled that motion and allowed the plaintiffs to amend the process by making the same returnable to the term following the November term, to wit, to the February term, 1913. To this order the plaintiffs in error excepted, and filed a bill of exceptions pendente lite. When the case came on for hearing during the April term, 1913, of Bibb superior court, the plaintiffs in error urged their demurrers, general and special, which they had filed to the suit, and after the hearing the court overruled the general demurrer and certain of the grounds of the special demurrers. The plaintiffs in error in the main bill of exceptions excepted to the judgment overruling their demurrers, and the plaintiffs in error in their cross-bill of exceptions assigned error on so much of the judgment as sustained certain grounds of the demurrer.

Nottingham & Nottingham, Guerry & Son and Hall & Roberts, all of Macon, for plaintiffs in error. Miller & Jones and Hardeman, Jones, Park & Johnston, all of Macon, for defendants in error.

BECK, J. (after stating the facts as above). [1] 1. We are of the opinion that the court did not err in refusing to dismiss the suit upon the motion of the plaintiffs in error. The motion was general and meant that the court was called upon to dismiss the entire suit. This could not have been done under the circumstances in any event, because numerous defendants in the suit appeared and answered in response to the suit under the process as it stood when process was issued. Certainly as to them the suit should not have been dismissed. Section 5569 of the Civil Code, providing for cases where processes are delivered too late, declares:

"If the process is delivered to the sheriff, or his deputy, too late for service within the time specified, he shall return the same, with an entry stating the truth of the case; and if the defendant cannot be found, and does not reside within the county, the sheriff shall make return of the fact in the same manner."

And the succeeding section declares:

"Whenever process is not served the length of time required by law before the appearance term, such service shall be good for the next succeeding term thereafter, which shall be the appearance term."

And in section 5572 it is provided:

"No technical or formal objections shall invalidate any petition or process; but if the same substantially conforms to the requisitions of this Code, and the defendant has had notice of the pendency of the cause, all other objections shall be disregarded: Provided, there is a legal cause of action set forth as required by this Code."

Under the provisions of these sections and the decisions of this court construing and applying them, and under the special facts of this case, we think it was entirely proper for the court to refuse to dismiss the case and allow an amendment of the process. We say, under the special facts of this case, because we do not care now, and it is not necessary, to make a ruling as to what would be the effect of arbitrary or capricious interference by counsel who had filed a suit in time for the next term of court, and who by such interference should prevent the issuance and service of process in due time according to the provisions of the statute. But in the present case, upon the showing made by plaintiffs and their counsel in response to the motion to dismiss, the court was authorized to find that counsel had acted in good faith and in pursuance of the spirit of the order previously granted by the court allowing a period of time during which the defendants named in the suit might settle the demand against them, which period of time allowed for a settlement extended up to the 10th day of October, 1912, and which was afterwards extended to the 20th day of October, and, immediately after the expiration of this extended period allowed for settlement, counsel for plaintiffs directed the issuance of the process, and the clerk of the court immediately acted in pursuance of that direction. As above said, many of the defendants named appeared at the November term and answered without questioning the validity of the process, and thereby waived any question of its validity. Under these circumstances, the entire case should not have been dismissed. The court took a step in the right direction in allowing the amendment of the process; it was a saving of the cost, expenses, and time which would have been involved in a dismissal of the suit as to the plaintiffs in error here and a bringing of the case anew against them. But we think that the court should have taken one other step, and should have directed service to be made anew of the suit, with the amended process attached, upon the defendants

who made timely objection to the process as it stood. But the failure of the court to take this further step, which we have indicated as the proper one, should not be permitted to work a dismissal of this case, and we therefore direct that, at the term of the court below at which the remittitur from this court shall be made the judgment of that court, the process be so amended as to be returnable to the next succeeding term of court, and that service be made anew upon the plaintiffs in error, so that they may make the defense which they have to the merits of the case at a term of court to which they are regularly summoned to appear.

[2] While the court did not err in refusing to dismiss the case upon motion of plaintiffs in error, but rightly retained the cause and allowed the process to be amended, the plaintiffs in error were not properly before the court at that time, so as to give the court jurisdiction to decide the questions made by the demurrers filed by the plaintiffs in error, subject to the rulings of the court upon a motion to dismiss, and the action taken by the court upon the demurrers must be treated as nugatory; consequently no ruling is made upon the exceptions in the main bill or the cross-bill of exceptions assigning error upon the court's ruling on the several grounds of demurrer. Direction having been given that the plaintiffs in error be served anew under the amended process, the complaining parties will, when they are brought before the court under the new service, have the right at the first term after such service to submit their demurrers for decision.

Judgment on main bill of exceptions affirmed, with direction. Cross-bill dismissed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 142)

JORDAN v. BEECHER et al. (No. 188.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. CONTRACTS ⟸128 — IMPRISONMENT FOR DEBT—CONVEYANCE TO SECURE RELEASE.

The law does not countenance the employment of criminal process for the collection of debts. Where a criminal warrant is issued, and its principal object is to enforce the collection of a debt due to a corporation of which the magistrate issuing the warrant is the president, and the defendant is imprisoned under such warrant, a conveyance of property to the prosecuting creditor, obtained by means of such imprisonment, in order to secure his release, is void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 633–653; Dec. Dig. ⟸128.]

2. VENDOR AND PURCHASER ⟸228—CONVEYANCE BY WIFE — PAYMENT OF HUSBAND'S DEBT—DURESS—BONA FIDE PURCHASER.

Where the fears or affections of a wife are worked upon through criminal proceedings instituted against her husband, and she is induced thereby against her will to convey her property, through the medium of her husband, to her husband's creditor to pay her husband's debt and obtain his release from imprisonment, there is duress as to her, and a purchaser from the husband's creditor, with notice of the wife's equity, cannot prevail in an action to recover the land from her.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495–501; Dec. Dig. ⟸228.]

3. INSTRUCTIONS.

The court's instruction is not open to the criticism made of it.

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Action by H. H. Jordan against E. C. Beecher and another. Judgment for defendants, and plaintiff brings error. Affirmed.

H. H. Jordan brought an action against E. C. Beecher and Drucilla Beecher to recover possession of a tract of land. In the abstract of title incorporated in the petition it appeared that the plaintiff claimed title by virtue of a deed from Drucilla Beecher to E. C. Beecher, dated December 16, 1908, upon a voluntary consideration, and a deed from E. C. Beecher to the Henderson-Powell Company, dated December 17, 1908, and a deed from Henderson-Powell Company to the plaintiff, dated August 23, 1911. The defendants pleaded that they sustained the relation of husband and wife, that the deed from the wife to the husband and his deed to the Henderson-Powell Company were obtained by duress and were without consideration, and were given for the purpose of settling a debt due by the husband to the Henderson-Powell Company and in settlement of a criminal prosecution instituted by the Henderson-Powell Company against the husband. The evidence made the following case: The plaintiff testified that he bought the land from the Henderson-Powell Company in August, 1911, on a consideration of $500, which was evidenced by his two notes of $250 each, indorsed by his brother-in-law, and payable in December, 1912 and 1913; that he did not pay the first note when it fell due, nor has he paid either of them; that he is a farmer by occupation; that the manager of the Henderson-Powell Company approached him to sell him the land, and informed him that it was unoccupied. He had never seen the land, but inquired as to its value, and was told that it was worth from $1,000 to $1,200. In fact, the land was worth $1,500. He did not inspect the land, but agreed to purchase it, if the title was approved by his brother-in-law. He did not know at the time he bought the land that the defendants had any claim to it, and he bought in good faith. The draftsman of the deeds from Mr. and Mrs. Beecher testified, in behalf of the plaintiff, that he explained to Mrs. Beecher, at the time the deeds were drawn, that the only way she could transfer her property to her husband was by making him a deed of gift; that she could not be forced to make such a deed, and need not do it unless she wanted to, to which Mrs. Beecher replied that it was her desire

to make the deed and pay her husband's debt. He further told the defendants, at the time of making the deeds, that they did not settle the criminal prosecution against her husband, and that it could not be settled. Mrs. Beecher signed the deed willingly, stating that she was perfectly willing to deed this property to her husband, so he could pay his debts.

The substance of the testimony of the defendants was as follows: In 1908 the husband became indebted to the Henderson-Powell Company for supplies, and, on failing to pay in the fall of the year, the manager of that corporation sued out a warrant before a justice of the peace, who was the president of the corporation. He was arrested and put in jail. His creditors agreed to his release on condition that he would procure his wife to make him a deed to the land, and he in turn execute a deed to them. Beecher promised to do this and was allowed to go to his home, but in a few days he was rearrested and put in jail. Henderson, the president of the Henderson-Powell Company, told him that if he would convey this property to that company in settlement of his debt they would release him from jail and settle the criminal prosecution which they had instituted, but if he refused to do it they intended to push the prosecution, and he would probably be found guilty and have to serve a term in the chain gang. He informed his wife that the only way to get out of his trouble and settle the prosecution was to give a deed to the Henderson-Powell Company to her land. The wife met her husband in the office of the attorney of the Henderson-Powell Company, and there, in the presence of the president of the Henderson-Powell Company and the sheriff, who had the husband in custody, the wife made the husband a deed upon a purported consideration of love and affection, and the husband executed to his creditors, the Henderson-Powell Company, a deed upon a purported consideration of $275, and he was then released at the bidding of the creditor. The wife was unwilling to convey her land to her husband, and only did so to bring about his release from imprisonment. During the time between this transaction and the bringing of the suit (more than three years), neither the Henderson-Powell Company nor the plaintiff ever returned the property for taxation, but it was returned for taxation by Mrs. Beecher, and she paid the taxes on it. She and her husband have been in possession of the land since the execution of the deeds. The jury returned a verdict for the defendants.

H. E. Oxford and Newbern & Meeks, all of Ocilla, and F. W. Dart, of Douglas, for plaintiff in error. L. E. Heath and C. A. Ward, both of Douglas, for defendants in error.

EVANS, P. J. (after stating the facts as above). [1] The defendants set up two defenses. One was that the deeds from the wife to the husband and from the husband to his creditor were executed for the purpose of paying the husband's creditor with the wife's land, and that plaintiff acquired his deed from the husband's creditor with notice of the wife's equity. This issue was submitted to the jury by the court, under instructions to which no exception is taken. The defendants further defended on the ground that the deeds were procured by duress, and in settlement of a criminal prosecution against the husband. Upon that plea the court instructed the jury that, if they should find that the deeds from Mrs. Beecher to her husband and from him to the Henderson-Powell Company were executed in consideration that the Henderson-Powell Company were not to press the criminal prosecution against the husband, such deeds would be void, even as against a bona fide purchaser. In assigning error on this instruction, no exception is taken to the court's declaration on the effect of such conveyance upon subsequent bona fide purchasers without notice. The criticism is that an absolute deed of conveyance is an executed contract, and the grantor cannot impeach it as a muniment of title in the hands of the grantee or a purchaser from him, even though possession has not been yielded under it and it is not founded on a valuable consideration; that E. C. Beecher and Drucilla Beecher are estopped from taking advantage of their own wrong by contending that their deeds are void; that they do not come into court with clean hands, and are not entitled to a cancellation of their deeds. There can be no doubt that a contract to stifle a criminal prosecution is illegal and opposed to public policy, and, if the parties voluntarily enter into such contract, they are in pari delicto, and neither a court of law nor of equity will interpose to give relief to either party, but will leave the parties where they find them. Adams v. Barrett, 5 Ga. 404. It has also been decided that a deed upon an illegal consideration, being an executed contract, binds the parties where the illegality does not appear in the deed, and passes to the grantee a title upon which he can recover the premises from the grantor in ejectment. Parrott v. Baker, 82 Ga. 304, 371, 9 S. E. 1068; Beard v. White, 120 Ga. 1018, 48 S. E. 400.

[2] The case presented by this record is not one for the enforcement of an executed contract, but for the cancellation of deeds executed under duress of imprisonment. Our Code declares:

"The free assent of the parties being essential to a valid contract, duress, either of imprisonment or by threats, or other acts, by which the free will of the party is restrained and his consent induced, will void the contract. Legal imprisonment, if not used for illegal purposes, is not duress." Civil Code 1910, § 4255.

"Duress," as defined by the Civil Code 1910, § 4116, "consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or

other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will."

In the instant case not only was the imprisonment of Beecher used to coerce a deed from his wife to himself and from him to his creditor, but that imprisonment, according to the uncontroverted testimony, was upon a warrant issued by his creditor, who was a magistrate. Its principal purpose was to accomplish a payment of the husband's debt with the wife's land, the value of which was largely in excess of the debt. This court has said that it was improper for a magistrate to give a warrant to the prosecutor to execute, although the prosecutor be a constable, and that it was doubtful whether such constable had the right to deputize another person to assist him in the execution of the warrant. Davis v. State, 79 Ga. 767, 4 S. E. 318. Surely it is against public policy for a magistrate to issue a warrant for an alleged offense against himself, and for the purpose of having the warrant used as a means of collecting a debt in which he is beneficially interested. Richardson v. Welcome, 60 Mass. (6 Cush.) 331; Jordan v. Henry, 22 Minn. 245. Says Mr. Justice Clifford, in Baker v. Morton, 12 Wall. 150, 158 (20 L. Ed. 262):

"Actual violence is not necessary to constitute duress even at common law, as understood in the parent country, because consent is the very essence of a contract, and if there be compulsion there is no consent, and it is well-settled law that moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient to destroy free agency, without which there can be no contract, as in that state of the case there is no consent."

So far as the record discloses, there was no foundation for the charge preferred against the husband. He was allowed to go home, on his promise to procure a deed from his wife and return to make his creditor a deed. The creditor became impatient of his return and had him rearrested and put in jail. When he and his wife signed deeds conveying his wife's land to his creditor, he was in the custody of the sheriff, who then released him at the creditor's bidding.

Though a person is arrested under a legal warrant by a proper officer, yet, if one of the objects of the arrest is thereby to enforce the settlement of a civil claim, such arrest is a false imprisonment, and a release and conveyance of property obtained by means of such arrest is void. Hackett v. King, 6 Allen (Mass.) 58; Watkins v. Baird, 6 Mass. 506, 4 Am. Dec. 170; Brown v. Pierce, 7 Wall. 205, 215, 19 L. Ed. 134; Fillman v. Ryon, 168 Pa. 484, 32 Atl. 89; Hartford Fire Insurance Co. v. Kirkpatrick, 111 Ala. 456, 20 South. 651; Osborn v. Giles, 36 N. Y. 365.

As has already been adverted to, where parties enter into an agreement seeking to stifle a criminal prosecution, the parties are in pari delicto, and the law refuses to aid either of them against the other. That rule applies where the nature of the undertakings and stipulation of each, if considered by themselves alone, would show the parties equally in fault; but where the incidental circumstances, such as imposition, oppression, duress, undue influence, taking advantage of necessities or weaknesses, and the like, are used as a means of inducing the party to enter into the agreement, the law will not deem the party influenced by such circumstances as being in pari delicto, so as to deny him any relief from the contract infected with illegality. 2 Pomeroy's Eq. Jur. § 942. Where the fears or affections of a wife are worked upon through criminal proceedings instituted against her husband, and she is induced thereby against her will to convey her property to pay his debt and obtain his release from prison, there is duress as to her, even though the debt may be valid, and the prosecution be for a crime which has in fact been committed by the husband. Giddings v. Iowa Savings Bank, 104 Iowa, 676, 74 N. W. 21; Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Harper v. Harper, 85 Ky. 160, 3 S. W. 5, 7 Am. St. Rep. 583; Adams v. Irving National Bank, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. Rep. 447; Southern Express Co. v. Duffey, 48 Ga. 358. In the last-named case a mother made a deed to procure the release of her son from arrest under a criminal warrant. The purported consideration of the deed was claimed to represent money embezzled by the son. It was in proof that the son was under arrest and in chains, and the grantee in the deed agreed to release the son and stop the proceedings, though he expressly refused to settle the prosecution, stating that he could not control the public officials. The son was released and the prosecution stopped, and it was held that the deed from the mother was illegal and void. In the opinion McCay, J., said:

"If the agreement to release a man under arrest and stop that proceeding is not an attempt to suppress a prosecution, we are at a loss to put a state of facts that does make a case within the rule. If this arrest was illegal, if the agents of the express company had this boy in their own custody, and could let him go or not at their pleasure, then this deed was the clear result of duress, since it was made to release the child of the grantor from illegal imprisonment. A man's child stands, under the law, in the same situation as himself in such cases."

It follows that, if the deeds from Mrs. Beecher to her husband and from him to his creditor were obtained in the manner as claimed by the defendants, they would be void as against the grantee, or a purchaser from him with notice.

[3] The instruction to the jury is not criticized on the ground that such deeds would be treated as void instruments, so as to affect subsequent bona fide purchasers without notice. The evidence was without conflict that there was no change in the possession of the land as a result of the execution of the deeds to the Henderson-Powell Company,

and that the defendants were in possession of the land at the time the plaintiff bought from that company. As to the possession affecting the plaintiff with notice, see Civil Code 1910, §§ 4528, 4530; Austin v. Southern Home Ass'n, 122 Ga. 439, 50 S. E. 382; Kent v. Simpson, 142 Ga. 49, 82 S. E. 440.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 134)

## GREEN v. DRIVER et al. (No. 185.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

DESCENT AND DISTRIBUTION ⟸17 — WILLS ⟸634—VESTED REMAINDER.

A devise to one for life, and, at his death, to be equally divided among his children, where the will contains no manifest intention to the contrary, creates a vested remainder in the life tenant's children living at the testator's death. If a child of the life tenant living at the testator's death should die before the death of the life tenant, leaving children, such children take by descent the share of their deceased parent.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 51, 52; Dec. Dig. ⟸17; Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. ⟸634.]

Error from Superior Court, Pike County; Robt. T. Daniel, Judge.

Action by T. C. Driver and others against Hassie Green. Judgment for plaintiffs, and defendant brings error. Affirmed.

E. C. Armistead, of Zebulon, for plaintiff in error. E. P. Patterson, of Griffin, for defendants in error.

EVANS, P. J. This writ of error is to a judgment of partition, and the sole question presented is whether the applicants for partition, who were grandchildren of Julius Driver, took any interest in the remainder estate upon the death of Julius Driver by virtue of the devise in the will of Giles Driver. The general estate of the testator was devised to his children, one of whom was Julius, in equal shares, "observing the restrictions, qualifications, and differences in this will." The relevant portions of the will are as follows:

"Item 6. I throw this restriction and qualification around the property or effect that may fall to my son, Julius W., that is, it is not to be subject to any of his debts or contracts now made or hereafter made, but he is to use it for his support and benefit and that of his family, and at his death to be equally divided among his children. * * *

"Item 8. If any of my children die on, or before, or after me, and leave a child or children, such child or children to have their parents interest in my estate under this will.

"Item 9. I hereby put this condition and qualification upon the property or its effects that may be received by each of my children, to wit: If any of them die and leave no living or posthumous child, then the property or its effects falling to such child to return to my estate and to be equally divided among all of my children, or their children as the case may be in the manner herein specified for division, observing the restrictions and qualifications in this will."

The applicants for partition are the grandchildren of Julius Driver, the life tenant, whose parents died before his death. The case was submitted to the judge on an agreed statement of facts, who decreed that the remainder estate to the children of Giles Driver vested upon the death of the testator, and upon the death of Julius Driver his grandchildren inherited the interest of their parents, children of Julius, who died before him. The record is indistinct upon the point whether the children of Julius, who died before he did, were in life at the time of the death of the testator, Giles Driver. The case is presented to us on that basis, and the plaintiff in error states his contention as follows:

"Plaintiff in error contends that the testator (Giles Driver) restricted the remainder estate to the children of Julius Driver that was in life at the death of the life tenant."

We shall accordingly deal with the proposition on the basis that the children of Julius, whose children are claiming a part of the remainder estate, were in life at the death of the testator, Giles Driver, and were deceased when their father, Julius, died. No question is made in the record of the rights of children (if any) of Julius Driver who were born after the testator's death.

We think the testamentary scheme was to create a life estate in Julius, with remainder to his children, and that children of Julius in life at the testator's death took a vested remainder, which descended to their heirs upon their death, and became an estate in possession upon the death of Julius. The Code declares that:

"The law favors the vesting of remainders in all cases of doubt. In construing wills, words of survivorship shall refer to the death of the testator in order to vest remainders, unless a manifest intention to the contrary appears."

Not only is there no manifest intention to the contrary, but the eighth item of the will reflects the testator's intention that, if any of his children should die before he died, leaving a child or children, such child or children should stand in loco parentis, so far as his benefactions were concerned. The provision in the ninth item more particularly related to a failure of issue, in which event the property was to revert to the testator's estate for distribution under his will. A will similar in its provision was construed in Crossley v. Leslie, 130 Ga. 782, 61 S. E. 851, 14 Ann. Cas. 703. There the will of the testator contained the following clause:

"I give and bequeath to my wife, Patience Leslie, the following property, * * * for and during her natural life, and after her death to be sold, and the proceeds to be equally divided between my surviving children and the children of any of my deceased children."

And it was held that this bequest created a life estate in the wife; that the words of survivorship applied to the time of the death

of the testator; and that his children then living took a vested remainder estate. The principle enunciated in that case, as well as in the many cases that are cited, compel a construction that the children of Julius Driver in life at the death of his father, Giles, took a vested remainder upon the death of Giles, and that the interest of those who were in life at the time of the death of Giles, and who died before the life tenant, Julius, passed by inheritance to their children.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 129)

## FIELD v. QUEEN CITY PUNCH & SHEAR CO. (No. 181.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. TRAVERSE OF OFFICER'S RETURN.
"The entry of the sheriff or any officer of the court, or his deputy, may be traversed by the defendant at the first term after notice of such entry is had by him, and before pleading to the merits." Civil Code 1910, § 5566.

2. ATTACHMENT ⟸328 — CONSTABLE'S RETURN—COLLATERAL ATTACK.
Where an action is commenced by attachment and levy upon certain property, the plaintiff may give notice in writing to the defendant of the pendency of the proceedings, "which shall be served personally on the defendant by the sheriff, his deputy, or a constable of the county to which said attachment is returnable, by giving him a copy of such notice at least ten days before final judgment on said attachment, and returning said original notice with his service entered thereon to the court in which said attachment is pending, which being done, the judgment rendered upon such attachment shall have the same force and effect as judgments rendered at common law." Civil Code 1910, § 5103.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1170–1173; Dec. Dig. ⟸328.]

3. ATTACHMENT ⟸328—CONSTABLE'S RETURN —COLLATERAL ATTACK.
Where, under the provisions of the Code section last above stated, a constable of the county makes an entry of service as required, and returns the original notice with his entry thereon to the superior court in which the attachment case is pending, such entry is that of an officer of court, and cannot be attacked collaterally without traversing the same at the first term after notice thereof.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1170–1173; Dec. Dig. ⟸328.]

4. AFFIDAVIT OF ILLEGALITY—DISMISSAL.
Upon considering the facts contained in the record, there was no error in dismissing the affidavit of illegality.

5. ATTACHMENT ⟸328—AFFIDAVIT OF ILLEGALITY—TRAVERSE OF RETURN.
Where it appears from the face of the affidavit of illegality, or the paper filed as an amendment thereto, that the defendant did not traverse the entry of service within the time required by law, and at the time of the trial did not seek to have the officer making such entry made a party, and the affidavit of illegality was accordingly dismissed on demurrer, it was not error to refuse to reopen the case upon a motion which the movant called a motion to set aside or arrest the judgment thereafter made, and to allow him to amend the affidavit of illegality which had previously been stricken.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1170–1173; Dec. Dig. ⟸328.]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action between C. H. Field and the Queen City Punch & Shear Company. From the judgment, Field brings error. Affirmed.

J. M. Rudolph, of Dalton, for plaintiff in error. F. K. McCutchen, of Dalton, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 128)

## ROPER v. ROBERTS et al. (No. 180.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⟸802—PRESENTATION —GROUND OF MOTION FOR NEW TRIAL.
The overruling of a ground of a motion for a new trial which complains that certain interrogatories were not executed by the two commissioners agreed upon, but which failed to show that written notice of the exception to their execution had been given as required by Civ. Code 1910, § 5904, or that the interrogatories had not been of file in the clerk's office for more than 24 hours before the trial, furnishes no ground for reversal. Rogers v. Truett, 73 Ga. 386.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744–1752; Dec. Dig. ⟸302.]

2. TRIAL ⟸256—INSTRUCTIONS—ADMISSIONS.
"Admissions of one of the parties to the suit, given in evidence by the other, need not be referred to specially in charging the jury, where no request to do so is made by either party." Hawkins v. Kermode, 85 Ga. 116, 11 S. E. 560.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628–641; Dec. Dig. ⟸256.]

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.
There was no merit in any of the other grounds of the motion for a new trial. The verdict was supported by the evidence, and there was no error in overruling the motion for new trial.

Error from Superior Court, Cherokee County; H. L. Patterson, Judge.

Action between M. E. Roper and J. G. Roberts and others, executors. From the judgment, Roper brings error. Affirmed.

Herbert Clay and Chas. H. Griffin, both of Marietta, for plaintiff in error. J. G. Roberts, of Atlanta, and D. W. Blair, of Marietta, for defendants in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 130)

GORDON v. FRITTS. (No. 182.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. DEMURRER TO PETITION.

Under the decision in Brown v. Brown, 132 Ga. 712, 64 S. E. 1092, 131 Am. St. Rep. 229, it was error to overrule the special demurrer to the petition in this case, calling for greater particularity in the statement of the account sued on.

2. LIMITATION OF ACTIONS ⟸192—PLEADING TOLL OF STATUTE—AMENDED PETITION.

Where an action was brought on an account in a county of this state, with an allegation in the petition that the defendant was of that county, and where many of the items bore date more than four years before suit was commenced, and the defendant interposed a demurrer on the ground, among others, that the items which antedated the suit by more than four years were barred, it was not a sufficient reply to such ground of demurrer to allege by amendment that "no part of said account is barred by the statute of limitation, for the reason that said [defendant] has not resided in Georgia or Tennessee or in any other state for as much as four years at any one time." By the Civil Code 1910, § 4378, it is declared that, if the defendant "shall remove from the state, the time of his absence from the state, and until he returns to reside, shall not be counted or estimated in his favor." The allegation above quoted was not sufficient to meet the provisions of this section, so as to toll the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 699–702; Dec. Dig. ⟸192.]

3. QUESTIONS NOT REVIEWED.

The rulings above made render it unnecessary to deal with questions arising upon the trial after the overruling of the demurrer.

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Action by Julia Fritts against J. B. Gordon. Judgment for plaintiff, and defendant brings error. Reversed.

W. H. Payne, of Chattanooga, Tenn., and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. H. P. Lumpkin and Earl Jackson, both of La Fayette, and Baxter Smith, of Chattanooga, Tenn., for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 156)

SHARPE v. DENMARK. (No. 193.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. HUSBAND AND WIFE ⟸171—SEPARATE ESTATE OF WIFE—MORTGAGE—VALIDITY—"CREDITORS."

Where certain securities on the bond of a tax collector borrowed money from a bank and loaned it to the wife of the tax collector, who paid it to the county in settlement of a shortage due the county by the collector, and the wife executed a mortgage to the sureties on her land to secure the payment of the money thus loaned, such a transaction would come within the provisions of the statute, which declares that a wife cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, and that any sale of her separate estate, made to a creditor of her husband in extinguishment of his debts, shall be absolutely void.

(a) In such a case the sureties on the husband's bond are his creditors within contemplation of law.

(b) It follows that a mortgage executed and delivered by the wife on land belonging to her individually, to the sureties on her husband's bond, as set out in the first headnote, is absolutely void, and on foreclosure proceedings in behalf of the sureties, the wife can defend on such ground and defeat the proceedings.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 671–683, 721, 950, 951; Dec. Dig. ⟸171.]

2. DENIAL OF NEW TRIAL.

The court erred in refusing a new trial.

Error from Superior Court, Toombs County; B. T. Rawlings, Judge.

Action by R. L. Denmark, as administrator of the estate of James H. Odom, deceased, and others, against S. C. Sharpe. Judgment for plaintiffs, and defendant brings error. Reversed.

C. W. Sparks, of Vidalia, and Hines & Jordan, of Atlanta, for plaintiff in error. Enoch J. Giles, of Lyons, and Hitch & Denmark, of Savannah, for defendant in error.

HILL, J. Remer L. Denmark, as administrator on the estate of James H. Odom, Joseph H. Odom, and A. G. Williamson, were plaintiffs in a case seeking the foreclosure of a mortgage executed by Sallie C. Sharpe for the purpose of securing her promissory note for $4,425.26, payable to the order of James H. Odom, Joseph H. Odom, and A. G. Williamson. The defendant admitted the execution of the note and mortgage, and defended on the ground that they had been fully paid by a conveyance of certain land to one of the plaintiffs, James H. Odom, by Miss Sallie Odom, her aunt. The suit was further defended on the ground that the note and mortgage were given to pay the debt of her husband, who was tax collector of Toombs county, and who, according to an audit of his books, had been found to be short in his accounts and indebted to the county in a certain sum. The plaintiffs were sureties on his bond as tax collector, and the consideration of the mortgage was alleged to be for money borrowed of one of the plaintiffs for the purpose of paying the amount claimed to be due by the tax collector and his sureties on the bond. On the trial of the issue thus raised by the pleadings, and after evidence and charge of the court, the jury returned a verdict for the plaintiffs. The defendant, being dissatisfied with the verdict, made a motion for a new trial, which was overruled, and she excepted.

[1] The motion for a new trial complains of the charge of the court, and of failure to

charge, and that the verdict is contrary to the law and the evidence. The plaintiffs contend that Mrs. Sharpe voluntarily borrowed the money from James H. Odom, Joseph H. Odom, and A. G. Williamson, for the purpose of paying it to Toombs county for a shortage of her husband due to the county as tax collector; that she herself received the money from the plaintiffs and paid it over to the ordinary of Toombs county; that the lenders were not the creditors of her husband, to be paid with the money borrowed, and were not parties to any scheme or arrangement between the husband and wife to borrow the money for such purpose. On the other hand, it is insisted that the sureties were creditors of the husband, and that the mortgage was given to the creditors for money with which to pay the husband's debt, and is void because it is in violation of the statute, which provides that:

"While the wife may contract, she cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, and any sale of her separate estate, made to a creditor of her husband, in extinguishment of his debts, shall be absolutely void." Civil Code, § 3007.

Are the sureties here creditors of the husband? "One who has entered into contract with a party as indorser, guarantor, or surety" is a creditor. 11 Cyc. 1195, and cases cited; Banks v. McCandless, 119 Ga. 793, 47 S. E. 332. Bank of Tifton v. Smith, 142 Ga. 663, 83 S. E. 526, was an action by the bank against Mrs. Smith to recover the amount due on a note signed by her, payable to the order of the James Manufacturing Company, and indorsed by that company and W. E. James. The defendant pleaded that the note was given to the company without consideration, and was made by her solely as an accommodation to W. E. James and the company, in order that the latter might secure the indorsement of E. A. Buck on notes given to the Commercial National Bank and the American National Bank of Macon; that she was a married woman, and E. A. Buck had full notice of that fact and of all the circumstances attending the execution of the note and the purposes for which it was made; that in substance her contract was one of suretyship, and, being a married woman, she was not liable thereon by reason of the statute forbidding a married woman to bond her separate estate by a contract of suretyship. The jury found for Mrs. Smith. It was held:

"One who contracts with the payee of an accommodation note, executed by a married woman, that on the faith of its security he will indorse a note for the payee for discount at a bank, and receives her note with full knowledge of all the facts, enters into an arrangement to make the married woman ultimately liable to pay the debt of another; and such a contract will fall within the law's condemnation of contracts of suretyship by a married woman."

We think the instant case comes within the principle decided in the Smith Case. The sureties are creditors of the husband, and when the wife's separate estate is mortgaged to secure those creditors, who have borrowed the money from a bank to lend the defendant's wife for the purpose of paying the deficit in her husband's account as tax collector, and the creditors take the wife's mortgage on her land, given to secure the note of the creditors, with a full knowledge of all the facts, as the evidence in this case discloses, this is but another way of making the wife a surety by taking her property in pledge to pay the husband's debt. The evidence is undisputed that one of the creditors, James H. Odom, agreed to raise the money with which to pay the shortage of the husband as tax collector, and thus relieve him and his sureties, if Mrs. Sharpe would secure the sureties by a mortgage, which was done. It is argued that this was an original undertaking on the part of the wife, and that she voluntarily mortgaged her property to secure the money borrowed by the sureties in order to lend it to the wife, who was to settle the shortage with the county; but it is equally true that if the sureties are creditors of the husband—and we hold that they are—this act is, on the principle decided in the Smith Case, making the wife liable to pay the debt of her husband, which the law says shall not be done. So, irrespective of the instructions of the court to the jury, and of the failure to charge as complained of, we think that the wife's property, under the facts of this case, cannot be thus taken in extinguishment of her husband's debts.

[2] From what has been said, it follows that the court erred in refusing a new trial.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(142 Ga. 153)

ROGERS v. CITY OF ATLANTA. (No. 191.)
(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

MUNICIPAL CORPORATIONS ⟸747—NEGLIGENCE OF FIREMAN—LIABILITY OF CITY.

The court properly sustained a general demurrer to a petition in a suit brought against a city for the recovery of damages for personal injuries alleged to have been received by the plaintiff in consequence of having stepped into a hole which had been cut in the floor of a building, occupied by her as a tenant, by the firemen of the city, who, in response to an alarm sent in by the daughter of the plaintiff, came to the building and, finding smoke issuing from parts of the building, cut the hole either for the purpose of ascertaining the character of the fire or so that they might reach it with water. Even if the cutting of the hole and the leaving of it in an exposed condition was negligence on the part of the firemen, the city was not liable in damages to a person injured in consequence of the negligence. A municipality is not liable for the acts of its servants and officers in the performance of public or governmental duties. Love v. Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; Wright v. City of Augusta, 78 Ga. 241, 6 Am.

St. Rep. 256; Watson v. Atlanta, 136 Ga. 370, 71 S. E. 664; 2 Dillon, Mun. Corp. (5th Ed.) § 1661; Mayor, etc., of Savannah v. Jordan, 142 Ga. 409, 83 S. E. 109.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1570–1577; Dec. Dig. ⟸747.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Mrs. W. A. Rogers against the City of Atlanta. Judgment for defendant, and plaintiff brings error. Affirmed.

H. B. Terrell and W. H. Terrell, both of Atlanta, for plaintiff in error. Jas. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 153)

## AARON v. COCA-COLA BOTTLING CO. et al. (No. 192.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

PARTIES ⟸27 — PETITION — SUFFICIENCY AGAINST DEMURRER—MISJOINDER OF PARTIES DEFENDANT.

Under the allegations of the petition in this case, negligence on the part of both of the joint defendants contributing to produce the injury complained of is sufficiently shown to withstand the demurrer on the single ground that there was a misjoinder of parties defendant; and the court erred in sustaining this ground of the demurrer and dismissing the case.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 35; Dec. Dig. ⟸27.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by O. C. Aaron, as next friend of Lucile Aaron, a minor, against the Coca-Cola Bottling Company and another. Judgment for defendants, and plaintiff brings error. Reversed.

O. C. Aaron, as next friend of Lucile Aaron, a minor, brought suit against the Coca-Cola Bottling Company, and M. J. Merlin, to recover damages for personal injuries sustained by Lucile Aaron in consequence of having stepped upon certain sharp fragments of broken glass bottles, whereby her feet were cut. The petition charges that the broken glass was on the sidewalk in front of Merlin's store in consequence of certain acts of negligence, upon the part of defendants, which are set forth in the petition, that they carelessly and negligently allowed the fragments of glass to remain upon the sidewalk, and that Lucile Aaron, without fault upon her part, stepped on the broken glass and in doing so received the injuries complained of. Both of the defendants demurred to the petition upon the ground, among others, that there was a misjoinder of parties defendant. The court sustained this ground of the demurrer, and, no amendment having been tendered by the plaintiff after an opportunity to amend was allowed, the petition was dismissed.

McClelland & McClelland, of Atlanta, for plaintiff in error. Jones & Chambers and Little, Powell, Hooper & Goldstein, all of Atlanta, for defendants in error.

BECK, J. (after stating the facts as above). The only ground on which the demurrer was sustained was that of a misjoinder of parties defendant. The order stated that the other grounds of demurrer were not passed upon. Accordingly, it only remains to be determined whether the allegations sufficiently show that the injury resulted from negligence in which each of the defendants was guilty. As to the Coca-Cola Bottling Company, it was alleged that it supplied Merlin with coca-cola, and by custom and under contract it delivered the full bottles at the store of Merlin and took up and carried back to their place of business all empty bottles of the company. On the day named the company just named through its agents delivered a quantity of coca-cola in bottles to Merlin at his store, collected up the empty bottles, about two dozen in number, for the purpose of carrying them away, and carried them to the front of the store. At that point, directly on the left of the door entering from the street, was a small projection upon which the agents of the company set the empty bottles, and stopped for a few minutes while conversing with an employé of Merlin and waiting for the rain to subside. The place where the bottles were set was a hazardous and dangerous place, and was so known to both Merlin and the agents of the company. During the temporary delay of these agents, a clerk employed by Merlin opened the screen door which was attached to the front door of the store, and in so doing knocked the bottles from the projection down upon the sidewalk where they were broken. The company (doubtless meaning through its agents) witnessed the bottles being precipitated to the sidewalk and broken, and knew of the danger to pedestrians who traversed the sidewalk, or who tried to enter the store of Merlin, but carelessly and negligently allowed the broken bottles to remain on the sidewalk and in front of Merlin's door, and injury resulted to the plaintiff, who was passing along the sidewalk and stepped with her bare feet upon the broken glass. Thus, so far as the company is concerned, the allegations show that while its agents were engaged in gathering and carrying away empty bottles, which necessitated crossing the sidewalk, they stopped temporarily to avoid the rain, and placed the bottles over the sidewalk in a dangerous place, where they were likely to be knocked off and cause injury. In fact they were knocked off by the opening of the store door. But the company's agents, though seeing the breaking of the bottles, allowed

them to remain on the sidewalk so that the injury resulted. These allegations are sufficient to show negligence on the part of the company's servants, from which, in whole or in part, injury resulted. The opening of the store door was not shown to have been negligently done, and it cannot be said that the alleged negligence of the company's agents was disconnected from the injury. They could not, in the discharge of their duty to carry the bottles away, put them in a place of danger, see the danger become a reality by having them knocked on the sidewalk and broken, make no effort to remove them, and then claim exemption.

So far as Merlin was concerned, in addition to the allegations already mentioned, more especially affecting the acts and conduct of the agents of the company, it was alleged that he conducted a general store which was open to the public and where they were invited to be; that he knew that the place where the empty bottles were set by the agents of the company was a hazardous and dangerous place; that his clerk opened his store door and caused the bottles to be precipitated from such place upon the sidewalk and broken; that Merlin, as well as the agents of the company, witnessed this knocking of the bottles upon the sidewalk and breaking them, and knew the danger to pedestrians who traversed the sidewalk or who tried to enter his store; and that he, as well as the company, carelessly and negligently allowed the broken bottles to remain on the sidewalk in front of his store door, and injury resulted from their so remaining. Thus he was connected with the cause of the injury. The bottles were being removed under an agreement with him. The place was his store, fronting on a public sidewalk, where pedestrians were likely to pass. He saw the bottles placed on a dangerous ledge or projection overhanging the sidewalk, and knew that it was a hazardous place. He saw his clerk open his store door and knock the bottles from such ledge, and saw this dangerous pile of glass thus thrown on the sidewalk in front of his store, where he knew that pedestrians were likely to be, and yet made no effort to protect them, but negligently permitted the broken glass to remain in this dangerous situation.

We think that the allegations sufficiently show negligence on the part of each of the defendants contributing to produce the injury; at least so far as to withstand the demurrer on the single ground that there was a misjoinder of parties defendant. The other grounds of the demurrer were not passed upon. Whether or not the defendants, or either of them, were as a matter of fact guilty of negligence, proximately causing the injury is not now determined, but that issue may be for determination hereafter. What we now hold is that it was error to dismiss the petition on the ground of misjoinder of parties defendant.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 139)

McWILLIAMS et al. v. LEHMAN. (No. 187.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

FRAUD ⟸58—ACTIONABLE FRAUD—SUFFICIENCY OF EVIDENCE—DEPRIVING OF INHERITANCE.

Where two persons, being neither creditors nor next of kin of a decedent, with intent to benefit themselves by having a sale of the land of the decedent as that of his widow, who was their sister, and dividing the proceeds among themselves and other heirs of their sister, procured administration on the decedent's estate, one qualifying as administrator, and the other being surety on his bond, and where afterwards they obtained an order to sell the land, not for the purpose of paying the debts of the decedent or making distribution among his heirs, but for the purpose of depriving the heir of the decedent of his rights in his father's estate, they were guilty of actionable fraud and liable to the defrauded heir for all damages sustained by their fraudulent interference with his father's estate.

(a) The excerpts from the charge are not subject to the criticism made of them. The verdict is authorized by the evidence, and the court did not abuse his discretion in refusing a new trial.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55–59; Dec. Dig. ⟸58.]

Error from Superior Court, Randolph County; W. C. Worrill, Judge.

Action by Henry Lehman against J. B. McWilliams and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Albert Lehman in 1849 intermarried with Kate Barnwell, who died in 1851, leaving one son, Henry. Subsequently he intermarried with Lydia McWilliams. In 1869, being a resident of the county of Randolph, he had set apart as a homestead a lot in the city of Cuthbert, known as the Lehman carriage shop site. In November, 1871, Henry Lehman removed from the state of Georgia to the state of Texas, where he has since continuously resided. On October 14, 1878, Albert Lehman died. He left surviving his widow, two sons, Eugene and Slaton, children of the second marriage, and Henry, the son by the first marriage. The widow elected to continue her interest as a homestead beneficiary, and remained in possession of the land. Slaton and Eugene died, the one in 1892, and the other in 1910, leaving their mother and half-brother as their sole heirs at law, whereby their mother became the owner of a one-third interest and Henry the owner of a two-third interest in the city lot. Henry attended the funeral of his brother Slaton at Cuthbert in 1892, and did not come again to this state until the year 1912. The widow of Albert Lehman died in 1910, and her brothers, T. A. and J. B. McWilliams, qualified as administrators on her estate. As such administra-

tors, they applied to the ordinary for leave to sell the Lehman shop property as the property of their intestate, and an order was duly granted authorizing them to sell. They advertised the property, and brought it to sale pursuant to the advertisement, when it was bid off by one Mrs. Key for the sum of $810. Mrs. Key declined to pay the purchase money, unless there was administration on the estate of Albert Lehman and his interest was sold. Thereupon T. A. McWilliams applied for and obtained letters of administration on the estate of Albert Lehman, and J. B. McWilliams became surety on his administrator's bond. T. A. McWilliams, as the administrator of Albert Lehman applied for and obtained from the ordinary leave to sell the Lehman shop property as belonging to the estate of Albert Lehman. J. B. and T. A. McWilliams, as administrators of Lydia Lehman, advertised the property for sale, on the first Tuesday in January, 1912, as the property of Lydia Lehman; and T. A. McWilliams, as administrator of Albert Lehman, advertised the same property for sale, on the same day, as the property of Albert Lehman. The property was sold under both advertisements; the purchasers bidding separately on the interest of each. D. M. Jacobs became the purchaser, paying $155 for the interest of Albert Lehman, and $660 for the interest of Lydia Lehman, and the administrators made him a deed to the property. The money received by T. A. and J. B. McWilliams, as administrators of Lydia Lehman, was distributed among her heirs, two of whom were the administrators, who received each a considerable share. In December, 1912, Henry Lehman came on a visit to Cuthbert, ascertained that the land belonging to the estate of his father had been disposed of, demanded of T. A. and J. B. McWilliams that they pay him two-thirds of the value of the lot, and, upon their refusal, brought against them a petition alleging that the conduct of the defendants in the sale of the property of his deceased father was fraudulent, and designed to defeat his claims in the estate; that T. A. McWilliams, in applying for administration on the estate, fraudulently represented that he was one of the next kin of Albert Lehman, and in the application for leave to sell the land the administrator, in pursuance of his fraudulent scheme to divest the plaintiff of any interest in his father's estate, represented that it was necessary that the sale be had for the purpose of perfecting title to the property, and to make distribution among the heirs; that on the day of the sale the defendants, being joint administrators on Lydia Lehman's estate, and one of them being administrator on Albert Lehman's estate, in advancement of their purpose to defeat petitioner of his inheritance, employed an auctioneer to cry off the land as the accredited representative of both estates, and instructed him to simply offer the land for sale as the Lehman property, without designating whether same was being sold as the estate of Lydia or of Albert Lehman, and, to further create the impression that the property really belonged to the estate of Lydia Lehman, they fraudulently procured an order authorizing the sale of the property as the property of Albert Lehman for the purpose of perfecting the title of Lydia, and caused their attorney to commence the bidding by offering the sum of $100 for the Albert Lehman interest and $500 for the Lydia Lehman interest, with the intention that prospective purchasers would make similar bids in the same relative proportion, which was done until the property was finally knocked off to Jacobs, who acted in entire good faith and without notice of the true facts, being deceived and imposed upon by the fraudulent conduct of the defendants; and that Jacobs, on the faith of his purchase, has erected valuable improvements on the property. The plaintiff prayed judgment against the defendants for the damages sustained in the loss of his interest in his father's property and for attorney's fees. The defendants made answer, averring that for 20 years the plaintiff had not been heard from; that they had made diligent efforts to ascertain if he was living, and they in good faith believed him to be dead without issue, and that the two sons of Lydia Lehman took by inheritance the entire estate of their father, and, upon their death, their mother, Lydia Lehman, became their sole heir; that, acting upon this belief, they applied for administration on the estate of Lydia, believing that she was the sole owner of the property, and exposed it for sale, when it was bid off by Mrs. Key, who refused to comply with her bid, on the ground that Albert Lehman had an interest therein; that, under the advice of counsel, T. A. McWilliams applied and was appointed administrator on the estate of Albert Lehman, believing at the time that Henry Lehman was dead, and that his interest in the shop lot had become vested in the estate of his father; that an order authorizing the sale of the interest of Albert Lehman in the shop lot was obtained, and the defendants, as administrators of the estate of Lydia Lehman, and T. A. McWilliams, as administrator of the estate of Albert Lehman, believing it to be to the interest of both estates to have the lot sold as an entirety, jointly advertised it for sale, and sold it as the property of both estates; that they did nothing to deter bidding, and the property brought its full value; that their entire conduct in the matter was in good faith, under the advice of counsel, and under the belief that Henry Lehman was dead, and with no intention to defraud him of any interest in his father's estate; and that he was only entitled to receive his share of what the interest of his father brought at that sale, after deducting the expenses of administration. The plaintiff introduced evidence tend-

ing to support his contentions. The value of the land at the time of the sale was variously estimated by the witnesses from $1,500 to $1,600. The defendants introduced no testimony. The jury returned a verdict for the plaintiff for $1,128, and for the further sum of $100 attorney's fees. The defendants made a motion for new trial, which was overruled, and they except.

J. R. Irwin and W. H. Gurr, both of Dawson, and R. L. Moye, of Cuthbert, for plaintiffs in error. Glessner & Park, of Blakely, and Jas. W. Harris, of Cuthbert, for defendant in error.

EVANS, P. J. (after stating the facts as above). The plaintiff's case was projected on the theory that the defendants had conspired to defraud him of an inheritance from his father, and that, as a result of the fraud, he had sustained damage. If the defendants, being neither creditors nor next of kin of Albert Lehman, with intent to benefit themselves by having a sale of the land as their sister's property, and dividing the proceeds of the sale between themselves and other heirs of their sister, procured administration upon Albert Lehman's estate, and afterwards obtained an order to sell the land, not for the purpose of paying the debts of the estate or making distribution among his heirs, but for the purpose of depriving the plaintiff of his rights in his father's estate, the defendants would be guilty of actionable fraud, and liable to the plaintiff for all damages which he may have sustained by their fraudulent interference with his father's estate. Bell v. Bell, 20 Ga. 250, 253. The evidence authorized this inference. Neither defendant testified respecting their good faith, or attempted to rebut the plaintiff's evidence adduced to establish his case. The general charge of the court fairly submitted the issues, and the excerpts to which exception is taken are not open to the criticisms made against them.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 127)

## J. A. COOK & SON v. PARSONS. (No. 179.)

(Supreme Court of Georgia. Feb. 11, 1915.)

*(Syllabus by the Court.)*

1. EXCEPTIONS, BILL OF ⟸58—SERVICE — TIME—WAIVER OF OBJECTIONS.

It is provided by Civil Code 1910, § 6160 (3), that "no case shall be dismissed by the Supreme Court for want of service, when the party benefited by a failure to serve shall—if the bill of exceptions and a copy of the record in any case shall be in the hands of the clerk of the Supreme Court—waive service and agree that said case may be heard." By the act of August 21, 1911 (Acts 1911, p. 149), it is declared that, "where counsel acknowledges service upon a bill of exceptions, such acknowledgment shall be held to be a complete waiver of all defects in the service which the counsel signing it is legally competent to waive, whether such signing is done before or after the signing of the writ of error, unless counsel in the entry of acknowledgment distinctly and specifically states that it is not to be construed as waiving some particular defect then pointed out by him." Accordingly, since the passage of that act, where counsel for the defendant in error acknowledged service upon the bill of exceptions and waived copy, service, and other notice, without making or reserving any objection as to the time of such acknowledgment, the writ of error will not be dismissed because the acknowledgment was dated more than 10 days after the signing of the bill of exceptions by the presiding judge.

(a) The other grounds of the motion to dismiss the writ of error are without merit.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 100–105; Dec. Dig. ⟸ 58.]

2. APPEAL AND ERROR ⟸1042 — PLEADING ⟸93—INCONSISTENT DEFENSES—HARMLESS ERROR—STRIKING OF AMENDMENT TO PETITION.

It was error to strike on demurrer the first, second, third, and fifth paragraphs of the amendment to the plaintiffs' petition. There was no error in striking the fourth and sixth paragraphs thereof. But inasmuch as the paragraphs erroneously stricken did not involve the essential allegations as to the existence of the alleged contract and the failure to carry it out, but rather matters explanatory of the conduct of the parties and of the delay on the part of the plaintiffs, which had been set up by the defendant in his answer, the plaintiffs were permitted to introduce substantially the same evidence as could have been introduced on those subjects had the amendment been allowed; and, inasmuch as the defendant pleaded the statute of frauds, and the evidence introduced showed that the contract was one in parol in regard to the sale of land, and failed to show such facts as would take it out of the operation of the statute, the court did not err in granting a nonsuit, whether the case be termed one for specific performance or to recover damages for breach of contract. And, under the facts above stated, a reversal will not be required because of the striking of the paragraphs of the amendment above stated, but the judgment will be affirmed, with direction that the erroneous sustaining of the demurrer as to the paragraphs 1, 2, 3, and 5 of the amendment shall not operate as a conclusive judgment that such allegations were improper.

(a) Under Civil Code 1910, § 5649, a defendant in this state may plead inconsistent defenses; and where he pleads the statute of frauds his rights under such a defense are not waived by also pleading recoupment for a breach of the contract sought to be enforced by the plaintiff. Mendel v. Miller, 134 Ga. 610, 68 S. E. 430.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110–4114; Dec. Dig. ⟸ 1042; Pleading, Cent. Dig. §§ 189, 190; Dec. Dig. ⟸93.]

Error from Superior Court, Milton County; H. L. Patterson, Judge.

Action by J. A. Cook & Son against C. M. Parsons. Judgment for defendant and plaintiff brings error. Affirmed, with directions.

J. A. Hunt and Geo. F. Gober, both of Atlanta, for plaintiff in error. J. P. Brooke, of Alpharetta, for defendant in error.

PER CURIAM. Judgment affirmed, with direction. All the Justices concur, except FISH, C. J., absent.

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16 Ga. App. 144)

STEPHENS v. STATE. (No. 6143.)

(Court of Appeals of Georgia. March 18, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸1169—HARMLESS ERROR—ADMISSION OF EVIDENCE.

On a trial for robbery, the admission in evidence of three bottles of whisky, obtained from the person of the accused when he was arrested without a warrant and searched, was not so prejudicial to his legal rights as to demand a new trial. So far as appears, he had the liquor in his possession for legitimate purposes, and no state law or municipal ordinance was thereby violated by him; and hence this possession could not have influenced the opinion of the jury as to his guilt or innocence of the crime of robbery. If there was error in admitting this evidence, the error was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. ⟸1169.]

2. INSTRUCTIONS.

Viewing the charge of the court as a whole, there is no substantial merit in any of the exceptions based upon excerpts therefrom, or in the exceptions based upon the failure of the court to charge certain abstract propositions, in the absence of a timely written request.

3. WITNESSES ⟸268—CROSS-EXAMINATION.

The defendant sought to prove an alibi, and there was no error in permitting the prosecuting attorney, on cross-examination of the witnesses relied upon to establish this defense, to sift them thoroughly as to the whereabouts of the defendant on the night of the crime, and incidentally to test the memory of these witnesses and the correctness of their recollection, as well as the probability of their statements as to the nature and character of the defendant's employment on that night, and to interrogate them as to the length of time he had worked at the particular place at which he claimed to have been at the hour of the commission of the crime.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. ⟸268.]

4. CONVICTION SUSTAINED.

The trial was free from error calculated to prejudice the lawful rights of the defendant, and the evidence was amply sufficient to sustain the verdict.

Error from Superior Court, Fulton County; B. H. Hill, Judge.

John Stephens was convicted of robbery, and brings error. Affirmed.

Morris Macks, of Atlanta, for plaintiff in error. H. M. Dorsey, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

WADE, J. Judgment affirmed.

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(16 Ga. App. 121)

RAPER v. STATE. (No. 5863.)

(Court of Appeals of Georgia. March 18, 1915.)

*(Syllabus by the Court.)*

1. FORGERY ⟸5—ELEMENTS OF OFFENSE—INTENT.

"To complete the offense of uttering a forged paper, it must not only be published as true when the party knows it to be fraudulent, but also with intent to injure some one." Stephens v. State, 56 Ga. 604.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 4–6; Dec. Dig. ⟸5.]

2. FORGERY ⟸48—INSTRUCTIONS—ELEMENTS OF OFFENSE—INDICTMENT.

Where one is on trial under an indictment containing two counts, in one of which he is charged with making and forging a certain writing and receipt with intent to defraud the state of Georgia and certain persons named, and in the other with the offense of forgery in uttering and publishing as true this false and fraudulent writing and receipt, knowing the same to be falsely and fraudulently made, with the intent to defraud the state of Georgia and persons named, it is error to instruct the jury that any person who shall utter or publish as true the false, fraudulent, forged, altered, or counterfeited receipt shall be punished by imprisonment and labor in the penitentiary, etc., without further instructing the jury to the effect that, to authorize a conviction of this offense, the defendant must have uttered and published the paper as true, knowing it to be fraudulent, and with intent to injure some one—in this case the state of Georgia or certain persons named in the indictment.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 124–128; Dec. Dig. ⟸48.]

3. CRIMINAL LAW ⟸806 — INSTRUCTIONS — REPETITION—REASONABLE DOUBT.

Where the law as to the burden on the state to convince the jury of the guilt of the accused beyond a reasonable doubt is given in charge by the judge in such manner as to apply to the whole case and include every feature of it, it is not necessary that he shall repeat such instructions in connection with each reference he makes to the different elements constituting the crime charged, or in connection with each reference to different counts in the indictment, or in connection with each contention of the state or the accused, or in connection with each reference made to evidence adduced at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1973, 1991; Dec. Dig. ⟸806.]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

J. W. Raper was convicted of forgery, and brings error. Reversed.

W. E. Mann, of Dalton, for plaintiff in error. Sam P. Maddox, Sol. Gen., of Dalton, for the State.

WADE, J. J. W. Raper was indicted in two counts, the first of which charged the offense of forgery, in that he did, on a day named, "unlawfully and with force and arms falsely and fraudulently make and forge a certain writing and receipt, which said writing and receipt is in the following words and figures, to wit, that is to say: 'Received of J. W. Raper $11.72, to be credited on tax receipt. February 7, 1913. J. H. Smith'—with intent to defraud the state of Georgia, and with intent to defraud Whitfield county, and with intent to defraud the estate of J. H. Smith, and with intent to defraud the securities upon the bond given by J. H. Smith, as tax collector of Whitfield county [naming the

said securities], contrary to the laws of said state," etc. The second count charged the accused with the offense of forgery, for that he did, on a day named, "unlawfully and with force and arms utter and publish as true the following false and fraudulent writing and receipt, knowing the same to be falsely and fraudulently made, said writing and receipt being in the following words and figures, to wit, that is to say: 'Received of J. W. Raper $11.72, to be credited on tax receipt. February 7, 1913. J. H. Smith'—with intent to defraud the state of Georgia, the county of Whitfield, the estate of J. H. Smith, and the securities on the bond of J. H. Smith, as tax collector of Whitfield county," naming the said securities.

The first count was based on section 231 of the Penal Code, and the precise provisions of section 231 on which the first count was based are as follows:

"Whoever, with intent to defraud the state or any person, shall falsely and fraudulently make, forge, alter, or counterfeit: * * * (6) Any deed, will, testament, acquittance, or receipt; * * * shall be punished by imprisonment and labor in the penitentiary," etc.

Section 232, on which the second count was based, is as follows:

"If any person shall utter or publish as true any of the false, fraudulent, forged, altered, or counterfeited matters mentioned in the preceding section, or any indorsement or assignment of any bond, writing obligatory, bill of exchange, promissory note, or order for money or goods or other thing of value, with intent to defraud the state, public officers, courts, or persons authorized as aforesaid, or any other person, knowing the same to be so falsely and fraudulently made, forged, altered, or counterfeited, he shall be punished by imprisonment and labor in the penitentiary," etc.

The jury returned a general verdict of guilty, with a recommendation to the mercy of the court. The defendant made a motion for a new trial, and to the judgment overruling his motion he excepted. There was evidence tending to establish the guilt of the defendant under both counts, and also evidence tending to show that no forgery had been committed; and since there was sufficient evidence to support the verdict, it is unnecessary to recite or discuss the testimony.

[1] The court charged the jury as follows:

"There are two counts in this bill of indictment. One charges the defendant with forging a certain tax receipt, and the other charges him with uttering as true the receipt alleged to be forged, knowing it to be a forged receipt."

In the motion for a new trial it is alleged that this charge is erroneous: (a) Because it was too limited and narrow, in that it "made the first count complete if the receipt was simply a forged receipt," and failed to tell the jury that it must appear that the receipt was signed with intent to defraud some one—that is, the state, or persons named in the indictment; (b) because the assertion made by the court as to the second count, that "the other charges him with uttering as true the receipt alleged to be forged, knowing it to be a forged receipt," amounted to an expression of an opinion that the receipt was in fact forged; (c) because it eliminated from the second count, as it did from the first count, the essential idea that the act charged must have been done with intent to defraud some one, either the state or the persons mentioned in the indictment; (d) because it submitted merely the question whether the receipt set out in the indictment was forged, and authorized the jury to find the accused guilty on either the first or the second count, irrespective of intent to defraud any one; and (e) because the charge was "not the law."

It appears, from an examination of the entire charge of the court, that the excerpt complained of in this ground of the motion amounted to no more than a general statement by the court that the defendant was indicted under two counts, one charging him with forging a receipt, and the other with uttering as true the receipt alleged to be forged, knowing it to be a forged instrument. There was no attempt, at this point, to define to the jury the crime of forgery, or to explain to them what was necessary to constitute forgery, or to constitute the offense of uttering a forged instrument. Later in the charge the court attempted to instruct the jury specifically as to the essential elements which must be shown by the prosecution, in order to warrant the conviction of the defendant under either count in the indictment. We think, therefore, that it is enough to say as to this ground that it is without substantial merit for any of the reasons assigned.

In the next ground of the motion for a new trial it is contended that the court erred in charging as follows:

"The defendant denies the alleged forgery, but admits having gotten the receipt, but says it was not a forgery. Therefore he pleads not guilty to the charge, and the charge and the plea make the issue for you to try and determine by your verdict."

This instruction is excepted to on the idea that it eliminates everything from the case except the question whether or not the receipt was forged, without reference to whether there was fraudulent intent on the part of the accused. We think that what was said as to the preceding ground of the motion for a new trial applies equally here. There was no request in writing for any more specific instruction, and the court later in the charge gave a definition of forgery, and sought to inform the jury as to the elements required to convict under either count.

[2] In the third ground of the amendment to the motion for a new trial it is contended that the court erred in charging the jury as follows:

"This is as to the second count: If any person shall utter or publish as true any of the false, fraudulent, forged, altered, or counterfeit-

ed matters mentioned in the preceding section, he shall be punished by labor in the penitentiary for not less than four nor longer than ten years."

The ground of exception to the instruction is that it excludes from consideration the necessity for determining whether the defendant had knowledge of the false, fraudulent, or counterfeit character of the instrument, and also of the intent with which the paper was uttered, and fails to instruct the jury that the uttering must be with intent to defraud some one, either the state or some of the persons mentioned in the bill of indictment. From an examination of the entire charge it appears that this was the only precise instruction given as to what was necessary to constitute the crime of forgery by uttering and publishing as true the false, fraudulent, forged, altered, or counterfeited writing referred to in the indictment. Section 232 of the Penal Code, which is quoted above, itself declares that the crime of uttering forged certificates, etc., is committed where such "false, fraudulent, forged, altered, or counterfeited matters" mentioned in section 231 are uttered or published as true "with intent to defraud the state, public officers, courts, or persons authorized as aforesaid, or any other person, knowing the same to be so falsely and fraudulently made, forged, altered, or counterfeited."

It is apparent that the exception taken to this excerpt from the charge of the court is well founded, since the intent in uttering is not elsewhere referred to in the charge, and the excerpt complained of nowhere suggests that an intent to defraud the state or some person named in the indictment must be inferred by the jury from the facts or circumstances in proof, before a verdict finding the defendant guilty would be authorized; nor is there in this excerpt or elsewhere in the charge any suggestion that the defendant must have knowledge that the instrument in question had been falsely and fraudulently made, forged, altered, or counterfeited. The indictment charges the crime as defined by the statute, but this excerpt authorized the jury to convict the defendant if they should find that he had uttered or published as true the false, forged, altered or counterfeited instrument, regardless of what his intention may have been, and regardless of whether he uttered the false instrument in the utmost good faith, believing it to be genuine, or did so knowing that it was fraudulently made, altered, or counterfeited.

In the case of Ezzard v. State, 11 Ga. App. 30, 74 S. E. 551, this court held that a verdict finding a defendant "guilty of publishing and passing the receipt in question, knowing it to be a forgery," was a mere nullity. In Stephens v. State, 56 Ga. 604, the Supreme Court said:

"To complete the offense of uttering a forged paper, it must not only be published as true when the party knows it to be fraudulent, but also with intent to injure some one."

In Couch v. State, 28 Ga. 367, it is held that:

"To complete the offense of uttering a forged paper, it must be published *as true*, when the party knows it to be fraudulent, and with intent to injure somebody. And if the jury failed to find this, their verdict is a nullity, upon which no judgment can be awarded but one of acquittal."

In that case the defendant was indicted for passing a forged paper, and the jury found him guilty of passing a receipt, knowing it to be forged. The court said:

"To complete the offense the Code requires, not only that the accused should pass the receipt, knowing it to be forged, but, also, that he must pass it '*as true*,' and 'with intent to defraud' somebody. And is not this reasonable and right? If the defendant passes the paper as a forged instrument, and with no intent to injure any one, whether seriously or in jest, should he be convicted of a crime and imprisoned in the penitentiary from four to ten years?"

If a verdict finding one guilty of the offense of uttering a forged paper is a mere nullity, as held in the Couch Case, supra, where the jury fail to find that the defendant published the forged paper as true, knowing it to be fraudulent, and with the intent to defraud some one, it follows as a logical conclusion that in failing to instruct the jury that, in order to establish guilt under a count charging the accused with uttering or publishing as true the false, fraudulent, forged, altered, or counterfeited instrument, an intent to defraud the state or the persons named in the indictment must be shown, and that it must appear that the defendant uttered or published the fraudulent instrument, knowing the same to be fraudulently made, altered, or conterfeited, the judge eliminated from the consideration of the jury two of the necessary elements constituting the offense as defined by the statute. Since it appears that nowhere else in the charge was this error corrected, or a precise and correct definition given of the offense of forgery by uttering or publishing a false, fraudulent, or counterfeited instrument, it must be conceded that the error was material, for it deprived the jury of the right to consider the intent prompting the accused to utter the fraudulent instrument, and authorized them to convict the defendant without first determining from the evidence that the uttering or publishing had been with knowledge on his part.

[3] It is complained that the court erred in failing to instruct the jury that, before they could convict the defendant on the first count in the indictment, they must believe, beyond a reasonable doubt, that the receipt was falsely and fraudulently made, with intent to defraud some of the persons named in the bill of indictment. The next ground raises the same point as to the instruction in regard to the second count in the indictment. As to both of these grounds it is sufficient to say that it was not necessary that instructions on reasonable doubt should be

given specifically as to each item of evidence adduced, or as to each element involved in the crime as charged in the two counts of the indictment, or as to each count in the indictment itself; for the court gave a general instruction to the jury to the effect that they were not authorized to convict the defendant unless they found him guilty as alleged in the indictment beyond a reasonable doubt, and in that connection fully and correctly instructed them on the law as to reasonable doubt.

It is complained that the court erred in charging the jury as follows:

"As to the evidence of good character, I charge you that is a substantive fact you may consider, along with the other evidence in the case. I charge you that, when the guilt of the defendant is made to appear to the satisfaction of the jury, it would be your duty to convict him, regardless of the character he may bear; but the jury has a right to consider his good character, not merely when his guilt is doubtful under the other evidence in the case, but when such testimony of good character may itself generate a doubt of the defendant's guilt."

It is contended that this was error: (a) Because it authorized the jury to convict the defendant if his guilt appeared to their satisfaction, and not to the exclusion of a reasonable doubt; (b) because the jury were not thereby instructed that it was their duty to consider the evidence as to the good character of the defendant, while at the same time instructing them that, if his guilt appeared to their satisfaction, it would be their duty to convict him, regardless of the character he bore, and it is insisted that the language used as to the duty of the jury to the defendant was not as favorable to him as to the state. It is insisted in the next ground that the court erred in the following charge:

"Now, gentlemen, you take all the facts and circumstances proven in the case, along with the statement of the defendant, giving it such weight as you think proper, and also with the record evidence you will have out with you; consider it all together, and determine whether or not the defendant be guilty, either on the first count or second count, or either, as you may determine the facts."

It is alleged that this instruction excluded from the jury all consideration of the evidence as to the good character of the defendant. It is enough to say in regard to these last two grounds of the motion for a new trial that the reference to the duty of the jury to convict, and the inaccuracy in instructing the jury that they might convict if the guilt of the accused is made to appear to their "satisfaction," regardless of his character, are doubtless mere accidental verbal errors, which will be corrected on the next trial.

For the reasons assigned in the discussion of the third ground of the amendment to the motion for a new trial, the judgment refusing the motion for a new trial is reversed.

Judgment reversed.

BROYLES, J., not presiding.

(75 W. Va. 659)

## H. C. POWELL MUSIC CO. v. PARKERSBURG TRANSFER & STORAGE CO.

(Supreme Court of Appeals of West Virginia. Feb. 16, 1915.)

*(Syllabus by the Court.)*

1. BAILMENT ⟸14—DUTY OF BAILEE—PROTECTION OF PROPERTY—"ORDINARY CARE."
A bailee for hire must exercise ordinary care for the protection of the property in his custody; that is, such care as prudent men would ordinarily use toward their own under similar circumstances.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 45–55; Dec. Dig. ⟸14.

For other definitions, see Words and Phrases, First and Second Series, Ordinary Care.]

2. BAILMENT ⟸33—ACTION AGAINST BAILEE—ORDINARY CARE—QUESTION FOR JURY.
In an action for damages based on the failure of a bailee to use ordinary care, the question whether such care was used is usually one for the jury under all the circumstances of the case.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. § 56; Dec. Dig. ⟸33.]

3. BAILMENT ⟸11—LOSS OF GOODS—PROXIMATE CAUSE.
Where goods in bailment are lost in an unprecedented flood, if the exercise of ordinary care on the part of the bailee would have saved them, not the act of God but a failure to use such care is the proximate cause of the loss.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 33–36; Dec. Dig. ⟸11.]

4. TRIAL ⟸296—INSTRUCTIONS—CURE OF ERROR.
Incompleteness in one instruction may be cured by another, where they are not inconsistent with each other.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–718, 715, 716, 718; Dec. Dig. ⟸296.]

5. TRIAL ⟸232—INSTRUCTIONS—IRRELEVANT MATTER.
Irrelevant matter in an instruction, not of the character to mislead, will not vitiate the instruction if it is otherwise sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 524, 525; Dec. Dig. ⟸232.]

6. TRIAL ⟸260—INSTRUCTIONS—REPETITION.
Where instructions already given cover the entire case and properly submit it to the jury, the court may refuse other proposed instructions which would not further aid the jury in reaching a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⟸260.]

7. BAILMENT ⟸11—DUTY OF BAILEE—CARE REQUIRED.
The care which a bailee takes of his own property is not a standard of his legal duty toward the property of the bailor.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 33–36; Dec. Dig. ⟸11.]

8. BAILMENT ⟸32—LOSS OF PROPERTY—DAMAGES.
Where the property has been totally lost by the negligence of the bailee, a proper measure of the damages is the fair value of the property to the bailor at the time and place of the loss.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 69, 133; Dec. Dig. ⟸32.]

Error to Circuit Court, Wood County.

Action by the H. C. Powell Music Company against the Parkersburg Transfer & Storage Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Merrick & Smith, of Parkersburg, for plaintiff in error. V. B. Archer, of Parkersburg, for defendant in error.

ROBINSON, P. Twenty pianos stored by plaintiff in defendant's warehouse at Parkersburg were caught by the waters of an unprecedented flood in the Ohio River. In this action, upon the charge that the pianos were wholly lost to plaintiff by reason of the failure of defendant to exercise ordinary care to protect the property, plaintiff has recovered a judgment for $3,500.00, from which defendant brings error.

As grounds of the general assignment that the court erred in refusing to set aside the verdict of the jury and grant a new trial, it is submitted: (1) That the verdict was contrary to law and the evidence; (2) that the court erred in the giving and refusing of instructions; and (3) that the verdict was excessive.

[1] Defendant, by taking plaintiff's goods into its warehouse, at a fixed compensation for the storage furnished, became a bailee for hire. This relation imposed the legal duty on defendant to use such care to protect the property as prudent men would ordinarily use toward their own under similar circumstances. Defendant was a warehouseman by trade. In the pursuit of that trade it took plaintiff's goods for keeping. It thereby assumed to use ordinary care for their protection. "Ordinary care means such care as ordinarily prudent men, as a class, would exercise in caring for their own property under like circumstances, or, as it has sometimes been expressed, when applied to such bailees as make a business of keeping property for hire, as depositaries or warehousemen, that degree of care and diligence which may reasonably be expected from ordinarily prudent persons under similar circumstances, or that which business men, experienced and faithful in the particular department, are accustomed to exercise when in the discharge of their duties." 8 R. C. L. 97. Whether defendant exercised ordinary care under all the circumstances of this case was a question for the jury to solve. Their finding that defendant did not use such care was a warranted deduction from the evidence.

[2] It is true that the flood was not expected to rise to the unprecedented height that it did. But it appears that the river rose gradually and steadily, and at last, despite all predictions, gave gradual and steady warning that it was exceeding all previous records. By its going higher, it gave notice that it might still go higher. Thus the gauge of danger continued to rise. In the face of all this, could defendant blamelessly take no steps to remove plaintiff's goods to the next floor of the building, where it is conceded there was ample room for them, and to which it was proved they could have been removed beyond danger of injury? What would prudent men do under similar circumstances? Of course, time, place, circumstances, all entered into the question. But considering all these the jury said that ordinary care prompted a removal of the goods to the higher floor. That finding is not contrary to the evidence. The jury were entitled to take into consideration the character of the property of which defendant was the custodian, the threatening danger thereto by the onrising flood, the sufficiency or insufficiency of notice which the same gave defendant for action, the opportunities for defendant to meet the exigencies of the occasion or the want of the same, and other pertinent matters. Out of all these the jury have said that the exercise of ordinary care by defendant under all the circumstances confronting it would have saved the pianos. Whether or not care was exercised by a bailee is generally a question for the determination of the jury. Particularly was it so here, in view of the conflicting facts and circumstances from which the question had to be determined. And who are better qualified to determine such a question than average men, schooled in the affairs and exigencies of ordinary life?

[3] As the jury have determined the fact, it was the failure of defendant to use ordinary care, not the act of God in sending the unprecedented flood, that brought the loss to plaintiff. The flood was the remote cause of the loss; the negligence of defendant the proximate cause. If ordinary human foresight, pains and care had been used, the loss would have been prevented regardless of the flood. Defendant can not charge the flood with that which it could have prevented. Atkinson v. Railway Co., 82 S. E. 502.

There is no appreciable evidence in the case sustaining the argument of defendant that plaintiff itself was responsible for the care of the property. No contract of bailment appears but an implied one arising from the delivery of the property to defendant for storage in the warehouse. We have observed the legal obligation arising from such relation. No special contract affecting or modifying the ordinary relation of bailor and bailee for mutual benefit is proved. Nor does the evidence sustain the argument that plaintiff undertook to protect the property from the flood, and thereby released defendant of its duty in that regard. It conclusively appears that plaintiff relied on defendant to fulfil the legal duty resting on it as bailee. Until plaintiff had notice that defendant would not fulfil its legal duty to use ordinary care, plaintiff could rest on defendant's fulfillment of that duty. Plaintiff had no such notice until it was too late

to do anything availing to save the property. All this is practically uncontroverted.

The instructions given fairly covered the case and properly submitted the law applicable to it. The first three given at the request of plaintiff submitted to the jury the determination of the question whether defendant exercised ordinary care under the circumstances of the occasion, and whether, if there was failure on the part of defendant to use such care, that failure was the proximate cause of the loss of the property. These instructions together with one given for defendant plainly and completely submitted to the jury the very question on which the determination of liability turned—whether defendant caused the loss by failure to exercise ordinary care under all the circumstances. We do not find them susceptible to the criticism made by defendant's counsel.

[4] The fourth instruction for plaintiff was one pertaining only to the measure of damages, as we view it. Read by itself it would perhaps be erroneous for incompleteness. But it was expressly conditioned on the jury's finding from the evidence that plaintiff was entitled to recover. Thus the other instructions which preceded it and prescribed the rule by which plaintiff might be found entitled to recover, were brought into and made a part of this one. It virtually told the jury that if by the preceding instructions the case was for plaintiff because they found defendant had not used ordinary care, then the measure of damages was the injury which the evidence showed the pianos to have sustained by the flood from which defendant negligently failed to remove them. Then the instruction defined the measure of damages in case the injury amounted to a total loss of the pianos. It told the jury that if they should find from the evidence that the pianos were *destroyed* by the flood, plaintiff was entitled to recover the fair market value of the same at the time and place where they were destroyed. Defendant submits that this told the jury that plaintiff was entitled to recover in any event if they found that the pianos were caught by the flood. But we have observed that the preceding instructions told the jury that plaintiff could only recover in case defendant had failed to exercise ordinary care. Surely there could be no misunderstanding on the part of the jury as to what this last instruction meant. They were intelligent enough to know that it was not intended to change the rule of liability stated in the instructions which preceded it. The want of ordinary care as an essential to liability had been plainly prescribed to the jury. Incompleteness in one instruction may be cured by another, where they are not inconsistent with each other. State v. Cottrill, 52 W. Va. 363, 43 S. E. 244; State v. Dodds, 54 W. Va. 289, 46 S. E. 228. This last instruction was entirely consistent with those that preceded it, and wherein it was incomplete, they sufficiently added to it and made it clear.

[5] Another criticism of the instruction to which we have last referred is that it begins with the sentence:

"The court instructs the jury that from the evidence in this case the plaintiff is entitled to prosecute this suit."

We do not quite appreciate the necessity and purpose of this, but we deem it harmless. We must assume that the jury knew that there was a difference between being entitled to prosecute a suit and being entitled to recover therein. Moreover, the very next sentence in the instruction told the jury that only from the evidence could they find whether plaintiff was *entitled to recover*. Irrelevant matter in an instruction not of the character to mislead, will not vitiate the instruction if it is otherwise sufficient.

[6] The court gave only two of the fourteen instructions asked by defendant. We do not find that defendant was prejudiced by the court's ruling in this particular. The two instructions given presented the proper theories of the case to which defendant was entitled. Taken with those given for plaintiff the law of the case was fairly and impartially covered. Though one or more of the refused instructions might properly have been given, other instructions given sufficiently submit the same substance and there is no error. Where instructions already given cover the entire case and properly submit it to the jury, the court may refuse other proposed instructions which would not further aid the jury in reaching a verdict. 7 Enc. Dig. Va. & W. Va. Rep. 742.

Defendant says it was entitled to its proposed instructions that the burden of proof rested on plaintiff to show that defendant was negligent. Plaintiff assumed the proving of defendant's negligence, whether legally obligated to do so or not. Therefore, saying to the jury that the proving of negligence was on plaintiff seems unimportant. As the case presented itself the material inquiry was whether failure on the part of defendant to use ordinary care appeared by a preponderance of the evidence. One of the instructions given for defendant told the jury that there must be such a showing. This, on the principle hereinbefore mentioned, was sufficient.

The evidence did not warrant the giving of instructions embracing the questions whether the pianos remained in the care of plaintiff, and whether plaintiff had notice of the danger in time to protect the property itself.

[7] The fact that some of defendant's own property located on the same floor with the pianos was injured by the flood was not proper as a standard on the question whether defendant used ordinary care to protect plaintiff's property, and the instructions on this line were properly refused. Defendant may have neglected its own property. It may not

have acted the part of prudent men as to its own. Not how defendant treated its property, but how ordinarily prudent men would have treated theirs was the proper criterion. It is certainly not reasonable to say that a warehouseman may reduce his liability for the goods of others which are entrusted to him by simply neglecting his own. There was a marked difference in the character of defendant's property from that of plaintiff. The question was not what defendant did to save its feed, but what prudent men would have done to save plaintiff's delicate and valuable pianos. For all we know, if the property of defendant had been pianos, it would have acted differently toward the same. "What a warehouseman chooses to do with his own property or what risks he may assume in connection therewith, is not the test of his legal obligation to the property of the bailor." Carolina Rice Co. v. West Point Mill Co., 98 S. C. 476, 82 S. E. 679.

[8] Defendant's proposed instruction as to the measure of damages was too limited. Merely what it would cost to replace the pianos was not a proper measure. In such a case as this the measure should be the fair value of the property to plaintiff at the time and place of the loss. 1 Sedgwick on Damages (9th Ed.) sec. 248a. It takes that to compensate the owner. Into the ascertainment of such value other elements than what it would cost to replace the property must necessarily in most cases enter. Suydam v. Jenkins, 3 Sandf. (N. Y.) 614.

The verdict was not excessive. The jury seem to have fixed a fair standard for the loss. From the evidence they were warranted in finding that the pianos were a total loss and in returning that it would take the amount of the verdict to make plaintiff whole in the premises. The evidence sufficiently proves that the pianos were fairly worth to plaintiff the sum of thirty-five hundred dollars at the time and place of the loss.

There has been a fair trial on the whole case. The judgment must stand. An order will be entered affirming it.

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(75 W. Va. 714)

## W. M. RITTER LUMBER CO. v. LOWE et al.

(Supreme Court of Appeals of West Virginia. Feb. 23, 1915.)

*(Syllabus by the Court.)*

1. TRUSTS ⟹104—IMPLIED TRUST—ADVERSE CLAIMANTS—SALE OF TIMBER.

There is no such relation between adverse bona fide claimants of title to land as will raise, for the benefit of the true owner, an implied trust in the contract price of timber sold from the land by the other claimant while in possession, though the latter took title pending an action of ejectment by which the title of the true owner was afterwards established.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 155; Dec. Dig. ⟹104.]

2. INJUNCTION ⟹16—GROUNDS—REMEDY AT LAW.

Where there is plain, complete and adequate remedy at law, equity refuses jurisdiction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 15; Dec. Dig. ⟹16.]

Appeal from Circuit Court, McDowell County.

Bill by the W. M. Ritter Lumber Company against H. L. Lowe and others. From decree for the defendant named, plaintiff appeals. Modified and affirmed.

Cook, Litz & Harman, of Welch, for appellant. Strother, Taylor & Taylor, of Welch, for appellee Lowe.

ROBINSON, P. We are of opinion that the bill was properly dismissed. This is not a case for the jurisdiction of equity.

King claimed title to land known as the Monteville Hunt tract, in Buchanan County, Virginia, title to which was also claimed by Hunt. In the Circuit Court of the United States, the former recovered a judgment in ejectment against the latter, by default. Upon scire facias proceedings for execution on the judgment, certain issues were made and determined, resulting in the award of a writ of possession to put Hunt out of possession of the land. A writ of error was prosecuted therefrom to the Circuit Court of Appeals, which affirmed the judgment. Pending all this litigation, extending over a period of several years, Hunt conveyed his claimed title to Kroll, who conveyed the same to Lowe. The latter sold the timber on the premises to Walker and the Hurricane Lumber Company. They cut, manufactured, and removed the same. But they did not pay Lowe the purchase price agreed upon.

After the judgment in the ejectment suit had been affirmed, Lowe sued Walker and the Hurricane Lumber Company for the purchase price of the timber sold them, by an action in assumpsit in the Circuit Court of Buchanan County, Virginia, and recovered a judgment in the premises. Later, upon writ of error, the judgment was affirmed by the Supreme Court of Appeals of Virginia. Lowe then brought an action on the appeal and supersedeas bond and was prosecuting the same when the suit which we have under review was instituted.

The present suit is by the Ritter Lumber Company, which took a conveyance of the King title to the land, pending the litigation in ejectment to which we have referred. The bill prays that Lowe be enjoined from further proceeding by his action on the bond to collect the purchase price of the timber which he sold to Walker and the Hurricane Lumber Company, and that the money due from the last named parties be decreed to it. So plaintiff herein claims in equity the price which Walker and the Hurricane Lumber Company agreed to pay Lowe for the timber.

The bill alleges that Lowe is insolvent. This, however, is denied by the answer, and not a word of proof in that regard appears. There is no charge that Walker and the Hurricane Lumber Company are insolvent. It in no wise appears that a recovery at law for a trespass in taking the timber from the land would be unavailing.

[1] Plaintiff's theory is that the judgment in ejectment establishes its title to the land, and that therefore it may waive the trespass and claim the contract price of the timber cut and removed. But it does not appear that plaintiff's title was finally established by such a judgment at the time the timber was taken away. When the Hunt claim of title was conveyed to Lowe, the title was still being litigated in the ejectment suit. For all that is shown, this conveyance by Hunt was in absolute good faith—in reliance on a bona fide claim of title. He was contesting the validity of the default judgment in ejectment, even to the last resort. The timber was cut and removed while the litigation in ejectment was still pending on appeal—while Hunt, or his vendees, were still maintaining his title in the ejectment suit.

Hunt conveyed to Kroll, and the latter to Lowe, a title adverse to that of plaintiff. Under this adverse title Lowe sold the timber to Walker and the Hurricane Lumber Company and put them into possession. Later it was settled by the ejectment suit that plaintiff's title is superior. Then, is plaintiff in equity entitled to the unpaid purchase price from the purchasers of the timber? If plaintiff is so entitled, the incidental relief asked by way of injunction against Lowe's further prosecution of his action is perhaps pertinent.

But we fail to see any equity that plaintiff has in the fund. It arises out of no privity, contractual relation, trust, confidence, or fraud, whereby equity may declare it to be plaintiff's. It plainly arises out of an adverse claim of title. Lowe, in selling to Walker and the Hurricane Lumber Company, and they in the removal of the timber, were not dealing with the estate as plaintiff's, but with it as their own—at arm's length with plaintiff. They were guilty of no conversion of plaintiff's property, for they in good faith claimed it as their own, adversely to plaintiff. They were in no such relation to plaintiff, or to plaintiff's vendor, that an implied trust would arise in favor of plaintiff. The purchase price of the timber did not grow out of plaintiff's title. It has no such connection therewith that plaintiff may impress it with an implied trust. It grew out of that which was distinct from, and at war with, plaintiff's claim to the land. It grew out of an adverse claim. Since it so arose, what breach of duty to plaintiff, what relation, or other equitable consideration, clothes it with a trust in plaintiff's favor?

It is suggested that Lowe and his vendees of the timber were purchasers pendente lite. True, they purchased while the ejectment suit was pending. But what equity in favor of plaintiff grows out of that? That amounts to no more than a matter of law whereby defendants lost title to the land by the judgment against Hunt. Defendants' relation to plaintiff as pendente lite purchasers was not established until after they had dealt with the property in good faith as their own and as in no way belonging to or connected with plaintiff or its vendor. The rule of a purchase pendente lite will at law put them out of possession of the land. It will assist plaintiff in an action for a trespass thereto. But it can not relate back and make defendants trustees for plaintiff for what they took from the land under a claim which at the time in no way bound them to care for plaintiff's adverse rights.

In Gaines v. Lizardi et al., Fed. Cas. No. 5,174, the court held:

"Where a party is in possession of lands, claiming under an adverse but defective title, without any fraud either of himself or his grantors, he cannot be held to be the trustee of the party holding the true title, nor if he has sold the lands, made to account for the proceeds of the sale to the true owner."

In the course of the opinion, Mr. Justice Bradley says that which is pertinent and applicable to the facts of the case before us:

"The claim of the defendants is adverse to that of the complainant. There is no privity between them. They stand and have always stood at arm's length. The defendants claimed the lands to be theirs by one title; she claimed them to be hers by another. There was no privity or trusteeship between them. Had the defendants, by any fraudulent practice, or by the fraudulent practice of their grantors or predecessors (known to them), procured the legal title to the lands, then they might have been held as trustees, and if they had disposed of the same, especially to innocent purchasers, might have been made to respond for the proceeds thereof. In such case the lands themselves might have been placed beyond the complainant's reach, and the proceeds might have been the only fund to which the complainant could resort. But in the present case the defendants never acquired the title of the complainant, nor legal title at all, but a spurious title; and their conveyance of the lands has transferred no title to the vendees; but the lands still remain subject to the complainant's title and are recoverable by her in whosesoever hands they may be."

Just as the complainant in the case to which we have referred still had her remedy for the lands by reason of the true title adjudged to be in her, so in the case before us plaintiff has its remedy by an assertion of the true title, now established to be in it. It has an action for the trespass committed in taking off the timber. But from such a trespass, the same not having been committed out of relation to plaintiff's title, a trust does not arise.

It is said that "a constructive trust may arise where one wrongfully takes possession or assumes control of property belonging to another." 39 Cyc. 190. Undoubtedly this is true in many cases. But it is not true where, as in this case, one in good faith assumes

possession and control of property under a claim of title in himself wholly adverse to and in no way connected with that which may turn out to be the true title. In such instance it can not be said that he "wrongfully takes possession or assumes control of property belonging to another." It is not wrongful for one in good faith to rely on an adverse title. It is his legal right to do so. All this is quite different from a case in which one wrongfully deals with the true owner's title to property, or where one has the title or property of another in such charge or assumes such control over it that he converts it to his own or some other use regardless of a just recognition of the owner's rights.

[2] As we perceive the case, plaintiff is virtually seeking in equity the recovery of damages for that which, by the final judgment in the ejectment case, turned out to be a trespass on its land. We have already stated that no reason is disclosed why equity should intervene. Plaintiff may proceed at law against those who took its timber. Why can not it recover directly by a judgment against them? It does not tell us. The only right that it shows by its bill is one in tort for damages—a mere legal demand on an unliquidated claim. It has remedy at law, and the same is adequate. The law forum is the proper one for the assertion of such a right. The suit against Lowe to recover in lieu of damages the price for which he sold the timber, joining as parties those from whom that price is due him, rather in the nature of an attachment or a suggestion of the funds in their hands, is plainly unsupported by any peculiar grounds of equity cognizance and can not be maintained. 2 Story's Eq. Jur. 794.

The decree should have contained a reservation saving plaintiff's right to sue at law. In such particular the decree will be modified, and as so modified it will be affirmed.

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(75 W. Va. 697)

## PROK v. NORFOLK & W. RY. CO.

(No. 2513.)

(Supreme Court of Appeals of West Virginia. Feb. 23, 1915.)

*(Syllabus by the Court.)*

1. RAILROADS ⟸400 — PERSON ON TRACK — NEGLIGENCE—QUESTION FOR JURY.

Whether it is negligence on the part of a railroad company to run an engine or train of cars backward through a village, without some person on the tender or foremost car, to keep a lookout for persons who may happen to be on the track and take precautions against injury to them, generally depends upon the circumstances of the particular case, and is a question for jury determination.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365–1381; Dec. Dig. ⟸400.]

2. NEGLIGENCE ⟸12 — DUTY — ABNORMAL CONDITIONS.

A general rule of duty, applicable under normal conditions, does not preclude the existence of exceptional ones, justified by abnormal conditions. All grow out of the same general principle and are consistent in the large sense of the term.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 14; Dec. Dig. ⟸12.]

3. EVIDENCE ⟸358 — DOCUMENTARY EVIDENCE—MAPS.

In the trial of a negligence case, it is not error to admit, as evidence, with a proper caution by the court as to its purpose, a map of the place of the injury, showing approximately the locations and the relations of the various objects and places to one another and the material distances in figures, obtained by actual measurement, but not susceptible of verification by scaling the map.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1500–1508; Dec. Dig. ⟸358.]

Error to Circuit Court, McDowell County.

Action by Joseph Prok, administrator, etc., against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Stokes & Sale, of Welch, and Theodore W. Reath, of Philadelphia, Pa., for plaintiff in error. Cook, Litz & Harman and G. W. Howard, all of Welch, for defendant in error.

POFFENBARGER, J. The principal question developed on this writ of error is whether a railroad company, in running an engine backward on its main line through a village, is under duty to keep a lookout for children and trespassers, the situation being such as deprives the engineer and fireman of adequate view of the track at the point of danger.

Plaintiff's decedent, a little girl less than four years old, was struck and killed by an enormous engine of the defendant company, weighing 292,000 pounds, and used for helping coal trains over a heavy grade. She and another little girl, somewhat older, were walking along the west-bound track of the railway, in a mining village of about 1,000 inhabitants, and very close to the end of a considerable curve, when this immense engine, coming around the curve, on its return from a trip up the grade, and running backward at the rate of about 10 miles an hour and without any person on the rear end thereof to look out for persons on the track, struck them.

Owing to the curve, the length of the engine and tender and the size and width of the latter, the fireman could not see the track from his place of work, nor could the engineer at a point nearer than about 150 feet. Before they were struck, the children had walked on the track a distance of about 95 feet. Assuming the engineer, keeping a proper lookout, would have seen them, his view may have been obstructed by an east-bound passenger train for a portion of the time. Witnesses say the child was struck almost immediately after the passenger train had passed. But there is evidence tending to prove it was 340 yards east of the place of

the accident at the time thereof, which affords ground for an inference of noninterference of that train with the engineer's view.

[1, 2] The general rule requiring railway companies to maintain, through their trainmen, such a lookout for trespassers on the track as is consistent with the proper discharge of their duties, is predicated of trains operated in the usual and ordinary way, trains running forward and affording opportunity to the engine men to see the track, or full trains running backward and affording the brakemen or flagman a like opportunity. This loose engine running backward was abnormal in this respect as well as in respect of its size and length. The general rule is founded upon the common knowledge of the frequency and inevitableness of the presence of trespassers upon railroad tracks, and springs out of necessity; the law having high regard for the safety of life, limb, and property, and imposing duty to avoid injury to them, when it is reasonably practicable to do so. But for such regard, railway companies, in the use of their private property devoted to public use, need not keep any lookout at all. As it legally justifies the requirement of duty under the general rule, it may consistently require further duty under abnormal conditions created by the railways themselves. The tests of duty, in each case, the normal and the abnormal, are reason, practicability, and the relative weight of burden or evil. The law frowns upon the destruction of a life that could have been saved with slight exertion or the imposition of a slight burden. Accordingly the courts hold railway company to the duty of maintenance of a proper lookout on backing trains, cars, and engines, in localities in which the presence of trespassers is reasonably to be apprehended, and leave it to the jury to say whether the circumstances of the particular case require it. Railway Co. v. Daves, 108 Va. 378, 61 S. E. 748; Railway Co. v. Ward, 4 Colo. 30; Railroad Co. v. Shearer, 58 Ala. 672; Southern R. Co. v. Chatman, 4 Ann. Cas. 675, note; Palmer v. Short Line R. Co., 16 Ann. Cas. 229, note; 33 Cyc. 789; Shearman & Redfield, Neg. § 464.

In view of testimony tending to prove the child's companion almost succeeded in her effort to effect a rescue, the jury could well infer the speed of the engine could have been sufficiently checked to enable her to do so, if such a lookout had been maintained, or that such warning as could have been given would sooner have apprised the children of the approach of the engine, and so enabled them to avoid injury. Schoonover v. B. & O. R. Co., 69 W. Va. 560, 78 S. E. 266, Ann. Cas. 1913B, 964.

[3] A map showing the location and distances, but not drawn to scale, was admitted in evidence over the objection of the defendant. The material distances noted on it were ascertained by actual measurement, but the map was not drawn so as to conform to them exactly. Nothing on it could possibly have misled the jury, and, giving actual distances with their relation to points approximately located, it was no doubt helpful to the jury. They were advised by the court that it was to be considered only for the purpose of showing approximate locations. Thus explained, it was properly admitted.

The rulings on instructions are in conformity with the legal principle herein stated.

Seeing no error in the judgment, we affirm it.

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(75 W. Va. 623)

## TURK v. NORFOLK & W. RY. CO.
(No. 2510.)

(Supreme Court of Appeals of West Virginia. Feb. 16, 1915.)

*(Syllabus by the Court.)*

1. PLEADING ⊂⊃198 — DEMURRER — GROUND —DECLARATION.

A declaration against a railway company for alleged injuries sustained by a passenger, by being ejected from one of its cars, is not bad on demurrer because it alleges that the acts of defendant's servants complained of were done negligently, willfully, maliciously, and so forth, supposed inconsistent causes of action, such defect therein, if any, being cured by section 29, chapter 125, serial section 4783, Code 1913.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428–435, 437–443; Dec. Dig. ⊂⊃193.]

2. CARRIERS ⊂⊃247—PASSENGERS—CONTINUANCE OF RELATION—RIGHT TO PROTECTION.

Where one is received as a passenger, and while on the way to his destination the journey is interrupted by a wreck on the track, and after waiting some hours for the obstruction to be removed without success, the train is run back to the initial station where he was received as a passenger, at a late hour of the night, and the night is dark and cold, the passenger a stranger, the station a small one in a remote place in the mountains, and on inquiry of the conductor the passenger is told that he knows of no place where he can secure shelter and lodging, and that he might remain on the car until the journey should be resumed in the morning, and the conductor provides him a place to rest on the seats in the car, the relation of passenger and carrier is not then severed, but continues, entitling the passenger to reasonable protection at the hands of the railway company, and from any and all unlawful assaults or imprisonment at the hands of its employés.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984–993; Dec. Dig. ⊂⊃247.]

3. CARRIERS ⊂⊃319—PASSENGERS—DAMAGES—EXCESSIVE RECOVERY—ASSAULT—IMPRISONMENT.

The verdict of the jury for $500.00 compensatory damages, and $1,000.00 punitive damages, under the facts and circumstances of this case, are not excessive, and under the evidence were justified by the following instruction given, which we think properly propounded the law of this case: "The court further instructs the jury that if they shall find the defendant guilty, they are, in estimating the plaintiff's damages, at liberty to consider the bodily and mental pain and anguish resulting from the defendant's acts as

proved, and the humiliation put upon the plaintiff; and if they shall further believe from the evidence that the conduct and acts of the defendant's servant toward the plaintiff were wanton, willful, and in utter disregard of his rights, then the jury are told that they are not bound to adhere, in computing it, to the money loss or damage, but may give such damages as will be exemplary in keeping others from so doing, and the defendant from repeating like conduct."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1338–1345; Dec. Dig. ⟸319.]

Error to Circuit Court, McDowell County.

Action by Morris Turk against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Stokes & Sale, of Welch, and Theodore W. Reath, of Philadelphia, Pa., for plaintiff in error. Cook, Litz & Harman and George W. Howard, all of Welch, for defendant in error.

MILLER, J. Action by plaintiff for injuries sustained while a passenger on defendant's railway, in consequence of an alleged unlawful assault upon him by defendant's servants and his unlawful arrest and removal by them from the railway cars, and imprisonment in a certain lockup or prison.

On the trial the jury returned a verdict for plaintiff for $500.00 compensatory damages, and $1,000.00 punitive damages, and the aggregate verdict of $1,500.00, and on which the court pronounced the judgment complained of on this writ of error.

[1] The first point of error is that the declaration is bad on demurrer. The specifications of error are, first, that it discloses plaintiff a trespasser on the train; second, that the acts complained of are alleged to have been done "wrongfully, negligently, unlawfully, injuriously, willfully, maliciously, and violently," inconsistent causes of action, and which may have resulted in an inconsistent verdict.

We deny the proposition involved in the first specification, upon the ground, as we shall hold on the merits, that plaintiff was at the time of his alleged injuries, a passenger, and entitled to all the protection of a passenger, imposed on defendant by law. On this proposition Loy v. Northern Pac. Ry. Co., 68 Wash. 33, 122 Pac. 372, is cited and relied on. That was the case of a passenger having purchased a ticket over the wrong railroad, and boarding the train on which he intended to take passage, and was ejected by the conductor because he refused to pay, or produce a ticket entitling him to passage. Such is not the case here presented.

On the second specification, defendant's counsel rely on Rideout v. Winnebago Traction Co., 123 Wis. 297, 101 N. W. 672, 69 L. R. A. 601, and Cleveland, etc., Ry. Co. v. Miller, 149 Ind. 490, 49 N. E. 445. We do not think these cases support their proposition to the extent at least of rendering the declaration bad on demurrer. Apropos to this question the Wisconsin court says:

"The theory of appellant's counsel seems to have been then, and to be still, that the charge of inadvertent conduct and of willfulness neutralized each other, rendering the complaint insufficient to state any cause of action. We think otherwise. In a case of this kind, while it is true a charge of gross negligence will not warrant a recovery on the ground of ordinary negligence, even though accompanied by an allegation that plaintiff was in the exercise of ordinary care at the time of the occurrence complained of, it does not necessarily follow that a charge including both elements of wrongful conduct is meaningless. If very strict technical rules of pleading were applied it might be otherwise. Under the proper rule every reasonable intendment is to be considered in favor of the pleading and everything essential to the cause of action sought to be stated, reasonably inferable from the language used, is to be deemed as effectually pleaded as if expressly alleged." Citing a statute and cases.

Or as sometimes stated in other cases, says this court:

"If the essential facts can be gathered from the pleading or may reasonably be inferred from the allegations it is good though such allegations be in form uncertain and incomplete."

The Indiana case decides, among other things, pertinent here, that

"An action for a willful injury is not supported by a finding that the injury was the result of gross negligence."

But why need we dwell on this subject? Our statute, section 29, chapter 125, serial section 4783, Code 1913, cures any supposed defects in this declaration. See that section and the decisions cited under notes 12 and 13 to that section, and especially Union Stopper Co. v. Wood, 66 W. Va. 461, 66 S. E. 702. The demurrer was properly overruled.

[2] The propositions covered by defendant's second and sixth assignments of error, namely, that the court should have stricken out plaintiff's evidence and directed a verdict, as proposed by defendant's several motions and instructions, rejected, all depend upon the leading and controlling question, namely, was Turk, the plaintiff, a passenger, as he alleges, or as defendant contends a mere licensee or trespasser, at the time of the injuries complained of?

We must, therefore, devote ourselves to this question, was Turk a passenger? The controlling facts are few, and not materially controverted: On April 24, 1912, at Berwind, McDowell County, West Virginia, Turk purchased from defendant a ticket from Berwind, by way of Iaeger, to Welch, a total distance of about fifty-five miles. To Iaeger was about twenty-eight miles. At Iaeger it was necessary to change cars for Welch. The train for which Turk purchased his ticket and on which he took passage, and on which it is conceded he became a passenger, was due to leave and did leave Berwind about 4:30 o'clock P. M. When the train had proceeded about ten miles beyond Berwind

a wreck was encountered. After waiting there several hours for the wreck to be cleared the train was run back about two miles to English, a station intermediate between the wreck and Berwind, and where an effort was made by the conductor to learn whether a train would be sent from Iaeger to which the passengers might be transferred and carried on to Iaeger, and learning that such a train would not be provided, the conductor announced to the passengers, that his train would be run back to Berwind, and wait there till morning. And the evidence of plaintiff and others is that the conductor also announced to him and other passengers, on arrival at Berwind, that night about nine o'clock, that any passengers desiring to do so might remain on the cars until they should proceed to Iaeger the next morning. The conductor admits that he told the passengers that so far as he was concerned they might do so. Plaintiff and two or three other passengers, having no other place to go, and the night being dark and cold, and not being able to learn on inquiry of the conductor that there was any place at or in the vicinity of Berwind, a little country station, where they could secure shelter or lodging, remained on the train, and plaintiff swears, the conductor turned the car seats for him so that he might lie down, as he did, and being tired, soon fell asleep. Along about ten or eleven o'clock plaintiff was rudely awakened by one Meade, a car cleaner employed by defendant, and was by him told to get out of the car. Plaintiff explained to Meade that he was a stranger, with no place to go, and that he was there by the conductor's permission to remain over night, until the train should proceed on its journey in the morning. A colloquy ensued between plaintiff and Meade, in which, according to plaintiff, Meade used rough and profane language in ordering him off the car, plaintiff protesting all the while that he had no place to go and had been given permission by the conductor to stay there till morning. After this colloquy Meade left the car, but returned a few minutes later with another employé, Kennedy, the hostler, who took hold of plaintiff in a rough way, and in very profane and abusive language ordered plaintiff out of the car, plaintiff all the while protesting his right to remain in the car by authority of the conductor, until morning, and that he had no place to go for shelter or sleep. After these imbroglios Meade and Kennedy left the car. While they were gone plaintiff says he went out to view the situation and to determine whether it was better to go than remain, and finding the train on a side track, and the night very dark and cold, and being afraid of his life, and not knowing where to go, he went back into the car and laid down again. Shortly afterwards Meade and Kennedy returned bringing with them a big fellow by the name of Sparks, a deputy sheriff, who caught hold of plaintiff roughly, cursed him, knocked him down, and together with Meade and Kennedy, led him out of the car and took him bleeding and wounded by the blows to a dirty filthy lockup in that locality, infested with body lice, and thrust him in and locked him up with another passenger, where he remained bleeding, and cold and chilled, the entire night and till released in the morning, and told he had time to catch the train to Iaeger; that no charges were ever afterwards made or prosecuted against him as a cause for his arrest and imprisonment. And when plaintiff inquired of Sparks, on releasing him, whether he was not going to give him a trial he said, no, that he "puts in a man whenever he wants to, and lets him out whenever he wants to."

This evidence of plaintiff is not materially controverted by these trainmen or Sparks, the deputy sheriff, except the trainmen deny that they assisted in arresting plaintiff, and in taking him to the lockup, and they say plaintiff used profane language toward them and Sparks. That plaintiff was subjected to very unusual and rough treatment, and even gross and wanton abuse by these men, cannot be doubted.

Do these facts make plaintiff a passenger at the time he was so ejected from the train and thrown into prison? The law of carriers is that where one presents himself for passage, buys a ticket, and is received as such, either at the station, a reasonable time before the time for departure, or on board the cars provided, he is a passenger, and continues to be such until the contract of carriage has been fully performed by the carrier, and during that time is entitled to all the protection which the law imposes upon carriers. Layne v. C. & O. Ry. Co., 66 W. Va. 607, 67 S. E. 1103; Kidwell v. C. & O. Ry. Co., 71 W. Va. 664, 77 S. E. 285, 43 L. R. A. (N. S.) 999; Killmyer v. Wheeling Traction Co., 72 W. Va. 148, 77 S. E. 908, 48 L. R. A. (N. S.) 683; Illinois Cent. R. Co. v. O'Keefe, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 148, 61 Am. St. Rep. 68, and valuable note pp. 75, et seq.

That plaintiff had become a passenger and had paid his fare, on the car from which he was so ejected, is conceded. And that defendant company had not performed its contract, for which plaintiff had paid the consideration demanded, and who still held a ticket cancelled to Iaeger, is also a conceded fact. But it is claimed that on returning to Berwind, and notwithstanding the circumstances and conditions existing there, and the temporary suspension of the journey to Iaeger that night, the train was thereby annulled until morning, and that the relationship of carrier and passenger was thereby also suspended, and this notwithstanding the permission of the conductor that plaintiff might remain in the car until morning; that plaintiff was thereafter no longer en-

titled to protection as a passenger, but, if at all, only as a trespasser or licensee, until the journey to Iaeger was resumed in the morning.

It is well settled law that the temporary suspension of a contract of carriage, until arrangements can be made by the carrier to overcome difficulties due to washouts or other obstructions on the track, does not sever the relationship of carrier and passenger already begun. And that during such time the passenger is entitled to all the rights pertaining to a passenger on a train moving towards the point of destination, and stipulated in the contract. 4 R. C. L. section 496; Dwinelle v. N. Y. Cent. & H. R. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; Killmyer v. Wheeling Traction Co., supra. And these cases hold that under such circumstances the obligation still rests on the carrier to protect its passengers against any injury from the negligence or willful misconduct of its servants, and of the fellow passengers and strangers, so far as practicable, and to provide them with the usual accommodations, and any information and facilities necessary for the full performance of the contract on the part of the carrier.

It is not pretended in this case that the relationship of carrier and passenger, as between plaintiff and defendant, ceased until the train was run back to Berwind, and there was reasonable time given to alight. The proposition is that regardless of the circumstances of the night and conditions existing at Berwind, defendant had the right to suspend this relationship, eject the passengers, and leave them to shift for themselves, without shelter and protection, and thereby relieve itself of all duties and liabilities of carrier to passenger. We do not think this can be the law of this case. What defendant's rights might be under other and different circumstances, we are not called upon to say, but as applied to the facts in this case the law ought to be, and we think is, otherwise. When one goes to a railroad station at a proper time and with intention in good faith to become a passenger, he ordinarily occupies the status of a passenger, even though he has not purchased a ticket. Illinois Cent. R. Co. v. O'Keefe, supra, note 61 Am. St. Rep. 76, and cases cited. And high authority is found for the proposition that if a person waiting at a station for passage on a train soon to depart, and who is invited by the ticket agent to sit in an empty car standing on a side track, while the station room is being cleaned, is entitled to the same protection from the company while in the car as while waiting in the regular waiting room. Shannon v. Boston, etc., R. R. Co., 78 Me. 52, 2 Atl. 678, 4 R. C. L. section 491, p. 1035. Upon reason and the general principles of these authorities applied to the facts in this case we think plaintiff continued in the status of passenger at the time he was ejected from the car and maltreated and imprisoned by defendant's servants and Sparks.

Having reached this conclusion the question remains, is defendant liable in damages for the injuries inflicted on plaintiff by its servants and Sparks? While the relationship of passenger and carrier continues, the carrier is held to a very high degree of care in protecting its passengers not only from the wrongs and injuries of its servants, but of strangers also. Gillingham v. Ohio River Railroad Co., 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827; 6 Cyc. 598; 2 Hutchinson on Carriers (3d Ed.) section 980; Brunswick & Western R. R. Co. v. Ponder, 117 Ga. 63, 43 S. E. 430, 60 L. R. A. 713, 97 Am. St. Rep. 152; the West Virginia cases above cited; Dwinelle v. N. Y. Cent. & H. R. R. Co., supra, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611, 612. In the latter case it was held that:

"A sleeping-car porter, who makes an assault on a passenger while the latter is seeking of him information necessary to enable the passenger to pursue his journey in another train which the carrier had provided for his transportation, may be regarded as in the service of the company, and the passenger may therefore recover from it compensation for injuries suffered from such assault."

We think it makes no difference whether the trainmen or Sparks assaulted and arrested and imprisoned plaintiff. Sparks was there at the instance and solicitation of defendant's servants, and they must be regarded as having procured Sparks to commit the assault on plaintiff, and imprison him. All were fully advised by plaintiff of his relationship to defendant company, and of the permission given him by the conductor to remain in the car; and they had no lawful excuse for the assault and brutality towards plaintiff. With this knowledge, and though in the discharge of their duties as car cleaner and hostler, they had no right to disregard plaintiff's rights and call to their assistance a public officer, to commit wrongs and injuries on plaintiff. According to plaintiff's evidence Sparks assaulted and maltreated him before plaintiff had uttered a word. And there is no foundation for the contention that plaintiff invited the injuries or was responsible for his arrest by this officer. Our cases of Raines v. C. & O. Ry. Co., 68 W. Va. 694, 70 S. E. 711, 33 L. R. A. (N. S.) 583, and Layne v. C. & O. Ry. Co., supra, and subsequent cases cited, we think, fully sustain this proposition.

[3] The only other point of error which we will note is that the verdict of the jury awarding compensatory and punitive damages is excessive, and that plaintiff's instruction number 8, given, and on which the verdict was evidently predicated, is erroneous. That instruction is as follows:

"The court further instructs the jury that if they shall find the defendant guilty, they are, in estimating the plaintiff's damages, at liberty to

consider the bodily and mental pain and anguish resulting from the defendant's acts as proved, and the humiliation put upon the plaintiff; and if they shall further believe from the evidence that the conduct and acts of the defendant's servant toward the plaintiff were wanton, willful, and in utter disregard of his rights, then the jury are told that they are not bound to adhere, in computing it, to the money loss or damage, but may give such damages as will be exemplary in keeping others from so doing, and the defendant from repeating like conduct."

We think the instruction properly states the law of this case, and is not opposed to Claiborne v. C. & O. Ry. Co., 46 W. Va. 363, 33 S. E. 262, as interpreted by our subsequent decisions. If plaintiff's treatment was as his evidence tends to show, and the jury had the right to believe, and evidently did believe him, he was grossly maltreated and abused. We cannot say the damages awarded were excessive, nor do we think the punitive damages, under the facts and circumstances of this case, are disproportionate to the compensatory damages awarded.

In view of the conclusion reached, we find no error in the giving or refusing of the other instructions, and are therefore of opinion to affirm the judgment.

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(75 W. Va. 710)

## FERGUSON v. MIDDLE STATES COAL & COKE CO.

(Supreme Court of Appeals of West Virginia. Feb. 23, 1915.)

*(Syllabus by the Court.)*

MASTER AND SERVANT ⟸121 — INJURY TO SERVANT—PROXIMATE CAUSE—FAILURE TO SAFEGUARD MACHINERY.

The statute, Code 1913, c. 15h, § 59 (sec. 518), providing for the safeguarding of machinery and other apparatus in certain establishments, when dangerous to persons employed therein, was intended to protect against injuries by direct contact with the machinery and other apparatus mentioned. Violation of this statute does not afford basis for an action where the injury complained of comes only indirectly and consequentially from the machinery or other apparatus. Liability for such injury must be tested by common-law principles.

[Ed. Note.—For other cases, see Master & Servant, Cent. Dig. §§ 228–231; Dec. Dig. ⟸121.]

Error to Circuit Court, McDowell County.

Action by S. J. Ferguson against the Middle States Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

Strother, Taylor & Taylor, of Welch, for plaintiff in error. N. H. Hairtson, of Roanoke, and Russell S. Ritz, of Bluefield, for defendant in error.

ROBINSON, P. Defendant, a mining corporation, brings error as to a judgment against it, recovered by plaintiff as damages for a personal injury received while employed in defendant's mine.

The mine in which plaintiff was injured is entered by a shaft straight down into the earth, one hundred and eighty feet deep. Through this shaft an elevator is operated for the purpose of carrying up and down the employés working in the mine, taking out the coal mined therein, and letting down such materials as may be needed for the mining operations. At the time of the injury complained of, this elevator was one of modern invention, in its general make substantial and safe, operated by electrical power. When used for carrying the employés, a guard or railing enclosed and protected them. When used for carrying the cars of coal out of the mine or taking material into it, the railing was removed, and the elevator consisted of the platform and the beams. There was a space of more than a foot between the front and back of the platform and the walls of the shaft. It was necessary, it is said, to have this space for ventilation of the mine and other purposes.

On the day plaintiff was injured, the second or third day of his employment, the elevator was being used to take some steel rails into the mine. Plaintiff was directed by the mine foreman to assist in removing the rails from the elevator and in placing them a short distance back in the mine, at the side and in the clear of the car tracks. One load of rails, about ten or twelve, had been taken down, and plaintiff was proceeding in the work at which he had been placed. The elevator had gone again to the top of the shaft, and employés there were placing on it another load of rails. In loading them on the elevator, a rail was allowed to fall into the shaft, through the open space at the front of the platform. When it reached the bottom it buckled, reached slightly into the mine where plaintiff was working, knocked him down, and injured him. The rails were too long to be laid on the platform, so it was necessary to incline them against a cross beam, with one end resting on the platform. A strip of wood or mine tie was nailed along the front of the platform, and the ends of the rails were rested against this. In loading the rails, the platform was lowered a few feet into the shaft; employés then would let down one end of a rail to the platform and tilt the rail over to the beam where another employé was stationed. In the process of this method the rail that struck plaintiff fell into the shaft.

Plaintiff based his action on the following grounds: That defendant did not use reasonable care to provide him a safe place to work; that defendant did not use reasonable care to provide him with experienced and careful fellow-servants; that defendant neglected to warn him of the risks and hazards of the employment; and that defendant failed to comply with a statutory duty to safeguard the elevator.

Many errors are assigned, but it will be unnecessary to take them up specifically. What we shall say generally will sufficiently cover them for the purposes of present review.

As to all the grounds of liability for negligence to which we have referred, the declaration sufficiently states a case, except as to the last—the assertion of liability for vio-

lation of a statute. We are of opinion that the statute relied on does not apply to the facts and circumstances pleaded. The reference to liability on that ground, however, amounts only to surplusage in the declaration. Excluding it, a good cause on the other grounds nevertheless appears. Union Stopper Co. v. McGara, 66 W. Va. 403, 66 S. E. 698.

The case was submitted by instructions to the jury on the theory of liability for violation of a statute. The law did not warrant this. The law and the evidence did however warrant a submission to the jury of the question whether defendant had exercised reasonable care to provide plaintiff a safe place to work, whether it had properly warned him of dangers in the premises, and perhaps other questions associated with these, together with the theories of contributory negligence and assumption of risk relied on as defenses. Wherein the court instructed the jury that they might find liability for a violation of a statute, there is error plainly prejudicial to defendant.

The statute relied on by plaintiff is as follows:

"In all manufacturing, mechanical and other establishments, in this State, where the machinery, belting, shafting, gearing, drums and elevators, are so arranged and placed as to be dangerous to persons employed therein, while engaged in their ordinary duties, shall be safely and securely guarded when possible, and if not possible, the notices of the danger shall be conspicuously posted in such establishments, and no minor or female of any age shall be permitted to clean any of the mill gearing or machinery in such establishments while the same is in motion." Code 1913, c. 15h, § 59 (sec. 518).

Defendant insists that this statute applies only to establishments like factories, and that it does not apply at all to mines. We shall not directly decide that point. It is not necessary to decision herein. Still it would seem that a coal mining plant is an establishment within the provisions of this statute, and that if there are machinery, belting, shafting, gearing, drums and elevators used in connection therewith, which are dangerous to persons employed therein, they must be safely guarded when it is possible to do so. However this may be, this statute plainly was not meant to prevent injuries such as the one proved in this case. It was evidently intended to guard against injuries to employés by coming in direct contact with the machinery, belting, shafting, gearing, drums and elevators in the establishments where they are employed. It was made to fence employés away from machinery, other mechanical apparatus, and elevators, however perfect they may be, and not to guard against imperfections in the same reaching into the distance and causing injury. The makers of the statute left that to be covered by the common law as it already was. The statute discloses the evil sought to be remedied by it. We must confine it to the purpose that brought it into existence. In all such establishments as it mentions there is palpable danger that those employed therein may get their limbs or bodies in the machines and other mechanical apparatus near which they must work or pass, let them be ever so careful. To guard against this, the statutory duty of fencing the machines and apparatus was put on the owners of such establishments. In view of this evident purpose that called the statute into enactment, we must give it a construction that goes no further than protection from the dangers which were in the legislative mind. We would not be warranted in extending the force of the statute to injuries coming to employés indirectly or consequentially from the machines and so forth, thereby fitting it to dangers that did not call for its enactment. To do so would be judicially to legislate.

A revolving drum attached to a wall, if dangerous, must be guarded, by this statute, not to keep the drum from falling and thus causing injury, nor to provide against imperfections in its make or suitability, but to keep persons from coming in direct contact with it. On the same principle the statute requires an elevator to be guarded, to keep persons from being hurt by direct contact with the elevating apparatus or the elevator shaft. This being the evident purpose of the statute, it does not embrace the idea that an elevator shall be guarded in order to provide against its imperfections which may allow inanimate objects to fall into the shaft. Liability for injury by such imperfections, both in the instance of the revolving drum and the elevator, rest on another score.

No statute provides that mine hoists or elevators shall be guarded when carrying coal and other materials, to keep the same from falling into the shaft. If there is liability on defendant for negligence, as there may be, it must be ascertained on common-law principles.

The trial court erred in applying the statute to the facts proved. Whether negligence on the part of defendant brought on the injury to plaintiff must be determined on other grounds by a new trial. The judgment will be reversed, the verdict set aside, and a new trial awarded.

(75 W. Va. 653)

## MARTIN v. CARTER COAL CO. (No. 2760.)†

(Supreme Court of Appeals of West Virginia. Feb. 16, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ⊜107—INJURY TO SERVANT—DEFECTIVE APPLIANCES.

Though generally, as a means of protection to his servants, a master must exercise reasonable care and diligence to keep in repair and good order the machines and appliances used by them and keep himself informed as to their condition by inspection, he is not liable for an injury occasioned by a defect arising out of the use of an appliance and susceptible of simple, easy, adequate, and timely remedy by the servants themselves, in the absence of proof of

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

†Rehearing denied April 20, 1915.

his assumption of duty to inspect for such defects and correct them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199–202, 212, 254, 255; Dec. Dig. ⊂⊃107.]

2. EVIDENCE ⊂⊃5 — JUDICIAL NOTICE — DEFECTIVE APPLIANCES — SUSCEPTIBILITY OF REMEDY—MATTER OF COMMON KNOWLEDGE.

Though susceptibility of such remedy is not shown by the testimony of witnesses, the court will take judicial notice thereof, if it is matter of common knowledge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. ⊂⊃5.]

3. MASTER AND SERVANT ⊂⊃201—INJURY TO SERVANT — NEGLIGENCE OF FELLOW SERVANT.

If injury to one servant results from the use of an appliance having such a defect, by another, the legal cause of the injury is the act of the latter, a fellow servant, in making use of the implement without having corrected the defect.

[Ed. Note.—For other cases, see Master & Servant, Cent. Dig. §§ 515–534; Dec. Dig. ⊂⊃201.]

4. MASTER AND SERVANT ⊂⊃265—INJURY TO SERVANT—NEGLIGENCE—BURDEN OF PROOF.

In an action by the personal representative of a deceased minor servant for recovery of damages for wrongful death, on the ground of failure to instruct the servant as to his duties and warn him of the danger incident to his employment, it is incumbent upon the plaintiff to prove lack of such instruction and warning.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908, 955; Dec. Dig. ⊂⊃265.]

5. MASTER AND SERVANT ⊂⊃91—INJURY TO SERVANT—LIABILITY OF MASTER—KNOWLEDGE.

Having employed, as a servant, a minor over the age of 14 years, the master cannot be held liable for injury to him, on the ground of mental inferiority reducing his capacity to that of a person under such age, in the absence of proof of knowledge of such fact or of circumstances sufficient to put him upon inquiry as to it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 141; Dec. Dig. ⊂⊃91.]

Error to Circuit Court, McDowell County.

Action by W. M. Martin, administrator, etc., against the Carter Coal Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

W. B. Kegley, of Wytheville, and Anderson, Strother & Hughes, of Welch, for plaintiff in error. Ross & Kahle and Sanders & Crockett, all of Bluefield, for defendant in error.

POFFENBARGER, J. On this writ of error to a judgment for $4,000 for the death of a servant, alleged to have been caused by the negligence of the master, there are six assignments of error; but the argument is practically limited to the question of the sufficiency of the evidence and the rulings on instructions.

The declaration no doubt contains some unnecessary averments of immaterial matters, as is often the case, but all the counts contain sufficient allegations. The immaterial matter is mere harmless surplusage.

Plaintiff's decedent, a boy 15 years old and a brakeman in a coal mine, fell between the cars, by reason of a parting of the train, while going down a slight grade, and was run over by the rear cars, or pushed ahead of them, and injured to such an extent that he died. The declaration contains three counts based, respectively, upon defectiveness of the car coupling, lack of instructions and warning of danger, the servant being a minor, and unsafety of the place of work.

The couplings were effected by means of what are called bumpers, drawheads, links, and pins. Protruding ends of a piece of timber running through the car constitute the bumpers. An iron bar three-quarters of an inch or an inch thick and four inches wide, lying on top of the timber and attached to it, is called the drawhead or drawbar. Extending out on the bumpers nearly to the ends thereof, this bar is raised by a compound bend so as to allow space between it and the timber for an iron coupling link, more than a foot long. An iron pin, an inch in diameter and approximately seven inches long, goes through a hole in the drawhead, the link, and the bumper. Defectiveness of a drawhead and a coupling pin is the alleged cause of the parting of the train and proximate cause of the injury. In accordance with his usual method, the boy, after coupling the motor to the train, got on the car next to the motor on which he rode to the drift mouth, where he alighted and then got on the last car, as it passed, and began setting the brakes on the separate cars, passing from one to another as the brakes were set. While he was in the act of stepping from the third to the fourth car, they separated, and he fell between them. An immediate examination of the coupling disclosed the bent pin hanging on the third car by a chain, the coupling link attached to the fourth, and a defect in the drawhead. The latter was bent upward so that the end of it was about an inch higher than it should have been. Whether the bend was gradual or sharp is not clearly indicated by the evidence. No disturbance of the rust on it, by cracking or scaling, indicating coincidence of injury to the drawbar with the parting of the train, or nearness of the two facts in point of time, was observed by any of the witnesses. In connection with the inquiry as to the rust and its appearance, one of the witnesses was asked more than once if he had examined the defective attachment and replied that he had. In aid of this evidence, it was shown that couplings made with drawbars in the condition of the one in question often parted.

[1-4] The general rule requiring the master to keep machines and appliances in order and to inspect them for information as to their condition, as a means of safety to the servant, like all others, has its well-recognized exceptions. He is not required to repair defects arising in the daily use of an appliance, for remedy of which proper and suitable materials are supplied, and which may easily be remedied by the workmen themselves,

without the assistance of skilled mechanics. Cregan v. Marston, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854; Moynihan v. Hills Co., 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 348; Rice v. King Philip Mills, 144 Mass. 229, 11 N. E. 101, 59 Am. Rep. 80; McGee v. Boston Storage Co., 139 Mass. 445, 1 N. E. 745; Johnson v. Tow-Boat Co., 135 Mass. 209, 46 Am. Rep. 458; Daley v. Boston, etc., R. Co., 147 Mass. 101, 16 N. E. 690; Mining & Mfg. Co. v. Erling, 148 Ill. 521, 36 N. E. 117, 39 Am. St. Rep. 187. Though not applied, because the evidence did not warrant application thereof, in the case, the principle was well and concisely stated in Nord Deutscher, etc., Co. v. Ingerbregsten, 57 N. J. Law, 400, 31 Atl. 619, 51 Am. St. Rep. 604, as follows:

"Discrepancies, however, have arisen in the application of the latter rule, because of another rule firmly established, that the master is not responsible to his servant for the negligence of a fellow servant engaged in a common employment. In determining whether an employé, through whose negligence defects in the machinery have failed of discovery or repair, is a representative of the master in the discharge of the master's duty to the servant, or is a fellow servant of the latter engaged in a common employment, many incongruous decisions have been rendered. On this topic a rational distinction would seem to be that, when the employé's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not intrusted with the master's duty to his fellow servant, and the master is not responsible to his fellow servant for his fault, but that, if the master has cast a duty of inspection or repair upon an employé who is not engaged in using the apparatus in a common employment with his fellow servant, then that employé in that duty represents the master, and the master is chargeable with his default."

See, also, Labatt, Master & Serv. § 1550 et seq., citing numerous authorities, illustrating the rule, and Sherman & Red. Neg. § 195, p. 489.

That a servant charged with the duty of coupling or loading coal cars and seeing an iron bar of the dimensions given in the evidence, bent slightly out of position, can bend it back to its place by a blow or two from a hammer, pick, or other ordinary implement used about his place of work, is matter of common knowledge of which courts may take judicial notice. The iron was flexible, else it would have broken instead of bending, and a displacement of an inch at the end of a bar, in a distance or length of seven or eight inches, by a bend, would not be likely to crack or weaken it so as to render it incapable of bearing the strain. Moreover, the defect was one of minor and ordinarily harmless character, such as we may well suppose is often corrected in the manner suggested. Of course, there was a fault, a wrong, negligence in the use of the drawbar in its defective condition, but the defect grew out of its use and was such as would be corrected ordinarily by servants themselves in making the coupling. In other words, the remedy was so simple and easy that presumptively and naturally it would fall within the province and duty of the car coupler. Provision of a system of inspection for discovery of such defects would be practically useless, wherefore the law does not impose it, in the absence of assumption of duty in that respect by the master, and none has been shown.

No instructions were given for the plaintiff. Those given for the defendant assumed the existence of evidence tending to prove the plaintiff's case, but they were taken under compulsion; for the defendant moved to exclude the plaintiff's evidence on the ground of insufficiency and did not waive the benefit of the motion. It introduced no evidence. That motion was improperly overruled, in so far as it pertains to the evidence relied upon as proving an actionable defect, for reasons stated. The second and third counts, charging failure to warn against danger and to provide a safe place for work, are unsustained by any evidence at all. There was no effort to prove lack of instruction and warning. In the absence of proof to the contrary, the law presumes the master has performed every duty imposed upon him by the law. Labatt, Mast. & Serv. 1599. An exception to this rule is found in the application of the maxim "res ipsa loquitur," but it seems to be the only one in the law of negligence, and is more apparent than real. For its inconsistency with this conclusion as to the burden of proof, an unnecessary observation in the opinion in Adams v. C. & O. Railway Co., 80 S. E. 1115, 52 L. R. A. (N. S.) 175, is hereby disapproved.

[5] Though the boy was over 14 years old, there was some evidence tending to prove immaturity and mental inferiority, such as to limit his capacity to that of a boy under 14, and right to go to the jury upon the question of negligence in his employment, under principles declared in Bare v. Coal Co., 61 W. Va. 28, 55 S. E. 907, 8 L. R. A. (N. S.) 284, 123 Am. St. Rep. 966. But, as he was, in fact, over 14, no legal duty was violated by giving him employment. Nor does it appear from the evidence that the superintendent or other managing agent of the company had any knowledge of his alleged lethargy and lack of the capacity usually found in boys of his age. We are not aware of any rule or principle imposing duty upon the master to make inquiry as to whether a servant has some extraordinary or unusual characteristics. Agreeably to general principles, he may assume the existence of normal conditions, until he is, in some way, advised of the contrary, or, at least, until something sufficient to put him upon inquiry as to them is brought to his attention. The mine foreman employed and discharged the men at the mine at which the boy was hurt, but there is no evidence that he had observed the abnormal characteristics relied upon. Nor are they shown to have been, in any sense, notorious.

The verdict being unsustained by evidence, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(143 Ga. 273)

## CLARK v. MACON TELEGRAPH PUB. CO. et al. (No. 259.)

(Supreme Court of Georgia. March 10, 1915.)

*(Syllabus by the Court.)*

REPLEVIN ⊂=123 — BOND BY DEFENDANT — DISCHARGE OF SURETY.

Where a plaintiff in an action to recover personal property obtained bail process, and the defendant, in order to retain possession of the property, executed a bond with a single surety, which was refused by the deputy sheriff, because such surety was not considered sufficient, and where such surety was so notified by the principal, and the latter agreed to erase his name, but did not do so, and obtained another surety to sign the bond, which was then delivered, and the property was left in the possession of the principal (the second surety having introduced evidence tending to show that he did know of the rejection of the bond with one surety), after verdict against the principal, and an entry of judgment on the bond, there was no error in refusing to grant an injunction at the instance of the second surety to prevent a sale of his property to satisfy the judgment, on the ground that, if the first surety was discharged, he was likewise discharged, and the judgment should also be set aside as to him, if set aside as to the first surety, as prayed by the latter.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 481–486; Dec. Dig. ⊂=123.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by A. F. Kuhns against the Macon Telegraph Publishing Company and others. The injunction prayed for in the cross-petition by defendant I. C. Clark was denied, and he brings error. Affirmed.

A. F. Kuhns filed his petition against the Macon Telegraph Publishing Company, L. W. Dunn, and I. C. Clark, alleging in substance as follows: An action of trover with bail process was brought in Fulton superior court by the Macon Telegraph Publishing Company against L. W. Dunn to recover certain "printing machinery." Dunn, desiring to give bond in order to retain possession of the property, went to one Kuhns and procured the latter to sign the bond as surety. As thus executed by Dunn, as principal, and Kuhns, as surety, the bond was tendered to the deputy sheriff, who rejected it on the ground that Kuhns was not a sufficient or satisfactory surety. Upon being informed of such rejection, and that another bond would have to be executed, he returned to Dunn the amount which he had charged as a premium for signing the bond, and his agreement to become surety was withdrawn. He is informed and believes that thereafter Dunn procured one I. C. Clark to become his surety upon the bond, and Clark executed the bond as surety, and it was tendered to the deputy sheriff without Kuhns' name having been erased, as Dunn had agreed should be done. In this way, without his knowledge or consent, his name remained on the bond as surety, without any intention on the part of Dunn to again offer him as such, and without his having been accepted as surety by the deputy sheriff. When the case came on for trial, the plaintiff recovered a judgment against Dunn, and a judgment was entered on the bond against Kuhns and Clark as sureties. Kuhns had no knowledge of the unauthorized use of his name until some time after the judgment had been entered. He prayed that the judgment should be vacated as to him.

Clark demurred to the petition and answered it. On information and belief he denied that Dunn did not intend to again offer Kuhns as a surety but alleged that in fact he did so intend, and did offer Kuhns as a surety, and Clark signed the bond, regarding himself as a cosurety with Kuhns; the bond being signed by the latter when tendered to him by Dunn for the purpose of signing as a cosurety. A part of the inducement offered to Clark to sign as a surety was that Kuhns was a cosurety with him. It was through the negligence of Kuhns, and no one else, that his name remained on the bond, if he intended that it should not be so retained, as the duty developed upon him to take possession of or destroy the bond when the contract between himself and Dunn had been canceled or repudiated, and not to leave the bond in possession of Dunn, so that innocent persons might be misled thereby. Clark is informed that Dunn is insolvent, and that the sureties will be required to pay off the judgment; and he should not be required to pay off the whole of it, since Kuhns put it in the power of Dunn to mislead him. If the bond is void as to Kuhns, it is also void as to Clark, who entered into the contract as a cosurety, and to relieve Kuhns will be such a material alteration of the bond as to make it void as to Clark. The prayers were that Kuhns be not relieved from the judgment; that, if it should be set aside as to him, it be set aside also as to Clark; that the Macon Telegraph Publishing Company be enjoined from enforcing or attempting to enforce the judgment against Clark; and that he have general relief. By amendment Clark alleged that, since the filing of his original answer and cross-petition, the Macon Telegraph Publishing Company through its attorneys had pointed out to the sheriff certain real estate belonging to Clark, and had instructed him to proceed to enforce the execution, and that this will be done, and that the publishing company was not insisting that Dunn and Kuhns pay the judgment, but is threatening to levy on the property of Clark. He prayed that the publishing company and the sheriff be enjoined from levying on and selling his property.

The Macon Telegraph Publishing Company answered, in substance, that it pointed out no particular property to be levied on, but requested the sheriff to make the money by levying on the property of Clark, hav-

ing learned that he was the owner of unincumbered property; that it was making no invidious discrimination as between the parties to the judgment; and that as to any controversy between Kuhns and Clark this defendant is an innocent party, and should not be delayed thereby. The sheriff answered that he was proceeding to realize the amount of the execution by levy and sale; that the judgment and execution were against both Kuhns and Clark, and he had the right to levy upon the property of either; and that he was not concerned with any legal controversy between them.

There was a hearing upon the application of Clark for an injunction. He introduced in evidence the sworn petition of Kuhns, and his answer thereto, and his sworn amendment and cross-petition; also the notice of the levy on certain property. The Macon Telegraph Publishing Company introduced its sworn answer to the cross-petition of Clark. The sheriff and his deputy testified, by affidavits, to the effect that when Dunn presented the bond, with the name of Kuhns signed thereto as the only surety, it was refused because Kuhns was not considered a sufficient security; that later Dunn came back with the same bond, and presented it again with the name of Clark signed thereto as a surety with Kuhns; and that the deponents did not know what occurred between Dunn, Kuhns, and Clark. The presiding judge refused the injunction prayed in the cross-petition of Clark, and he excepted.

Holbrook & Corbett, of Atlanta, for plaintiff in error. Smith, Hammond & Smith and Daley, Chambers & Daley, all of Atlanta, for defendants in error.

LUMPKIN, J. (after stating the facts as above). There is much conflict and some confusion in the authorities in regard to adding new makers or obligors to an instrument after its original execution. After there has been a complete execution and delivery, and even sometimes before there has been a complete delivery to the obligee, it has been held that such a change is material, as rendering all the promisors jointly and equally liable to the obligee, as well as among themselves, and as tending to lessen the ultimate liability of the maker or makers. It has been held that the addition of a surety to a complete bond after execution and delivery by the original sureties is an alteration which will discharge the latter. Oneale v. Long, 4 Cranch, 60, 2 L. Ed. 550; Anderson v. Bellenger, 87 Ala. 334, 6 South. 82, 4 L. R. A. 680, 13 Am. St. Rep. 46. See the discussion in Taylor v. Johnson, 17 Ga. 521, though the exact point seems not to have been finally decided in that case. On the other hand, it has been declared that the question is controlled by a consideration as to the character of the change, and whether it is in the body of the instrument or otherwise, the extent to which the instrument has been completed in its execution, and of authority to be implied from the condition of the instrument, as to its state of completeness in connection with the relation of the parties. Accordingly it has been held in some decisions that if a surety be added to a promissory note before it has been "fairly launched" so as to become an available security for the purpose for which it was intended, as where such a change was made while the instrument was in the hands of the principal in order to discount it, it will not be considered an alteration which will discharge the original surety. 2 Cyc. 219, 221; Ward v. Hackett, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187 (where it was said, "We have been referred to no case, and have found none, going so far as to hold, where a surety signs a promissory note and intrusts it to his principal, and the principal, while the instrument is still inchoate and has not become effectual as a contract by delivery, procures an additional signer, that this would be a material alteration and release the first surety"); Crandall v. First National Bank of Auburn, 61 Ind. 349; Miller v. Finley, 26 Mich. 249, 12 Am. Rep. 306; McCaughey v. Smith, 27 N. Y. 39; Snyder v. Van Doren, 46 Wis. 602, 1 N. W. 285, 32 Am. Rep. 739; Graham v. Rush, 73 Iowa, 451, 35 N. W. 518; 2 Dan. Neg. Inst. (6th Ed.) § 1389.

Without deciding whether Kuhns was or was not discharged, as he is not excepting, and in fact appears not to be a party to the writ of error, relatively to Clark, who alone complains of a refusal to grant an injunction in his favor, certain things should be noted. In the first place, he does not concede that Kuhns is discharged, but denies it, stating in the alternative that, if Kuhns is discharged, he should be likewise discharged. In the second place, if Kuhns was discharged, it must have been either because Clark signed the bond as additional security, or because it had been rejected with Kuhns as the sole surety, and a new delivery with his consent was necessary. There had been no complete delivery of the bond to the obligee, as was the case of Taylor v. Johnson, supra. The evidence of the deputy sheriff was to the effect that he refused to accept the bond as first tendered, because he did not consider Kuhns a sufficient surety, and that an additional surety was furnished by the signature of Clark. In his cross-petition Clark does not deny that he knew that the bond had been tendered with the signature of Kuhns, and had been refused without additional security, and that he signed with that knowledge. He introduced in evidence the petition of Kuhns, which alleged that Clark had such knowledge. If he knew this, and signed as an additional surety, could he claim that his signing operated to discharge Kuhns, and likewise operated to discharge himself? The bond is not set out in the record, and

it does not appear whether it was joint, or joint and several. Clark knew that the purpose of it was to enable his principal to retain possession of the personal property. He aided his principal to accomplish that result. The property may have been destroyed or consumed. Under such facts, Clark could not be held to be free from liability; and there was no error in refusing to grant the interlocutory injunction prayed for by him. So far as there was any controversy in regard to issues of fact, we must treat them as determined in favor of the ruling of the trial court.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 270)

## NEWMAN v. STATE. (No. 248.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

CRIMINAL LAW ⟹126—CHANGE OF VENUE—PREJUDICE.

Under the facts of this case the court erred in refusing a change of venue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 243; Dec. Dig. ⟹126.]

Beck, J., dissenting.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Henry Newman was indicted for murder. From an order denying a change of venue, he brings error. Reversed.

This case is here on exceptions to the judgment of the court below, denying a motion for a change of venue under the act of 1911 (Acts 1911, p. 74). At the hearing of the motion the movant, by affidavit, testified substantially as follows: He had been indicted by the grand jury of Floyd county for the offense of murder; the indictment alleging that he did, on the 2d day of January, 1915, kill and murder one Benjamin Franklin in that county. At the time of making the affidavit the January term, 1915, of the superior court was in session, and a jury was impaneled, and affiant was about to be tried before the jury at that term. On January 5, 1915, he was carried to jail in Fulton county for the purpose of safe-keeping, having been removed by the sheriff of Floyd county to the latter jail. In movant's judgment an impartial jury cannot be obtained to try him in Floyd county. The public mind there is highly inflamed on account of the alleged crime. The deceased was a white man and affiant is a negro, and on account of the difference in the races the public sentiment is abnormal towards affiant. He charges and believes, and has been informed, that two members of the Rome bar have been employed by parties unknown to him for the purpose of assisting the solicitor general in his prosecution. Since the homicide it has been heralded over the county by a newspaper having a large circulation in the county. It was published therein that it was necessary to remove affiant to the Fulton county jail for protection, and this helped to scatter broadcast the nature of the feeling of the public in the community against affiant, and helped to engender the general ill-feeling that now prevails against him. There is probability of lynching or other violence being done affiant, if he is tried in Floyd county. On the day he was removed from jail in Floyd county, the sheriff of that county heard statements freely made by various parties, asserting their intention of lynching affiant that night. Crowds were beginning to collect; and affiant charges and believes, and has been informed, that the crowds were collecting for the purpose of forming a mob to lynch affiant. The sheriff did not attempt to take him to Atlanta by boarding a train in Rome; but he procured an automobile, and, in company with affiant, one George West Bowen, who is charged with the same offense, and Deputy Sheriffs Watts and Bobo, went to the Rome Brick Company station on the Western & Atlantic Railroad and there boarded a train; this station being about three miles northeast of Rome. It is necessary to change trains at Kingston for Atlanta, and when Sheriff J. R. Barron arrived in Kingston, the marshal of Kingston stated to the sheriff that he had received a telephone message from one of the deputy sheriffs of Floyd county (G. W. Smith), suggesting that the sheriff, unless a train was ready, go immediately to Cartersville in an automobile. Affiant was informed and believes that five automobiles, filled with armed men, followed the sheriff, who had affiant in charge, and that their purpose was to lynch affiant.

The sheriff of Floyd county testified that on January 5, 1915, he was summoned by Judge Wright, judge of the superior courts of the Rome circuit; and when he responded, the judge suggested that he thought it would be best to have the defendant carried to Atlanta for safe-keeping. On that date he did carry the defendant to Atlanta. He was in a restaurant in Rome, and while there overheard four or five people, whom he did not know, making threats that they would get him (meaning the defendant Newman) that night. The crime which the defendant was charged with having committed was being generally discussed, and for that reason he knew the threats were being directed against the defendant. It was arranged that the defendant was to be carried to Atlanta, first by the police department of Rome taking him in the police patrol beyond the city limits, and there delivering him to the sheriff and his deputies. The defendant was to lie down in the patrol wagon, so that he could not be seen. When he arrived at Kingston, the marshal notified the sheriff

that he had been telephoned by the deputy sheriff in Rome that, if the train for Atlanta was not ready when the sheriff arrived, the latter should go by automobile to Cartersville and catch a train at that place for Atlanta, as five automobiles loaded with armed men were following the sheriff. The sheriff turned the defendant over to the jailer in Fulton county, Ga., where he has since remained.

G. W. Smith, one of the deputy sheriffs of Floyd county, testified that, a short time after the motion for a change of venue in this case had been presented to the court, he was accosted by a resident of Rome, who, among other things, stated that had the defendant, Newman, remained in Rome, he would have been lynched. He stated that he, together with about 30 others, went as far as Kingston, following the defendant; that some people were waiting there to help in the matter, and that he did not believe the sheriff would have refused to surrender the defendant to the mob if it had reached Kingston in time.

T. J. Barron testified that, on the date the sheriff took the defendant to Atlanta, he went to the old Mitchell homestead, beyond the city limits, and while on his way back he met two automobiles going towards Kingston at a very rapid rate of speed, and both of the cars were loaded with men.

M. C. Broach testified that on the above-named date he saw an automobile being filled with men. One of the men had a gun, and one of them had a gun case, but whether or not a gun was in the case he did not know. This was on Broad street in Rome, between 3 and 4 o'clock p. m., and a short time after defendant had been carried on the way to Atlanta. It was generally understood that the automobile was preparing to, and afterwards did, follow the car in which the defendant was being taken to Kingston.

Copies of the Tribune-Herald, a newspaper published in Rome on January 7, 1915, or so much thereof as contained an account of the inquest held over the body of the deceased, and portions of the evidence displayed in large headlines on the front page of the paper, were in evidence.

C. I. Harris, chief of police of Rome, sworn for the state, testified that he did not think the defendant, Newman, was in any danger whatever of being mobbed on the day he was carried to Atlanta, and did not personally hear any threats made against him. He heard it was talked. He was of the opinion that there was no danger in bringing Newman back to Floyd county to be tried, and that "he would secure a fair, impartial, and quick trial in Floyd county." He said it was not customary for persons preparing to participate in mob violence to talk about it in the presence of peace officers, though such officers are very likely to hear of such talk. In the afternoon of the day the defendant was taken to Atlanta, upon his return from the point where the affiant carried Newman to meet Sheriff Barron, he met an automobile, probably two, up on Broad street, and when he reached the city proper he heard that they had followed the sheriff and the defendant. On that afternoon he heard some discussion that five automobiles, loaded with men armed with guns, were in pursuit of the sheriff and the defendant. He made the defendant, Newman, lie down in the public patrol wagon when taking him beyond the city limits to the point where he delivered him to the sheriff. He did this because he had orders from the sheriff to carry him that way, so no one would see him. His motive in doing that was that no one should see him. The reason he did not think the defendant in danger of being lynched was that he "did not think those persons brave enough to participate in a mob."

John Bobo, deputy sheriff of Floyd county since January 1, 1915, testified that it was his judgment that if the defendant had remained in Floyd county he would not have been molested, and that he can get a fair and impartial trial. Henry Watts, J. L. Foster, and M. Haisfield testified to the same effect as did Bobo.

Harris & Harris, of Rome, for plaintiff in error. W. H. Ennis, Sol. Gen., McHenry & Porter, and Max Meyerhardt, all of Rome, for the State.

HILL, J. Reversed. All the Justices concur, except FISH, C. J., absent, and

BECK, J. (dissenting). In cases like the present, the court is vested with a discretion as to whether he will grant the order applied for, and under the facts presented in the record there was no abuse of discretion in refusing the order.

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(143 Ga. 285)

## WHITEHEAD v. WHITEHEAD. (No. 261.)

(Supreme Court of Georgia. March 10, 1915.)

*(Syllabus by the Court.)*

1. WITNESSES ⟹60—APPLICATION FOR TEMPORARY ALIMONY—WIFE.

Where the husband sued for divorce, alleging cruel treatment and adultery, and the wife in her answer sought by way of cross-action a divorce on the ground of cruelty, and asked alimony and counsel fees, on the hearing of her application for temporary alimony there was no error in permitting her to testify as to relevant matters not involving the question of adultery. Arnold v. Arnold, 141 Ga. 158 (3), 160, 80 S. E. 652.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 167–173; Dec. Dig. ⟹60.]

2. AWARD OF ALIMONY.

The court did not abuse its discretion in awarding temporary alimony and attorney's fees.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by Willy Whitehead against Sallie Whitehead. From the judgment, plaintiff brings error. Affirmed.

Newman & Newman, of Macon, for plaintiff in error. J. C. Estes and W. A. McClellan, both of Macon, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 286)

PHILLIPS v. PHILLIPS. (No. 262.)

(Supreme Court of Georgia. March 10, 1915.)

*(Syllabus by the Court.)*

1. AWARD OF TEMPORARY ALIMONY.
There was no abuse of discretion in the order allowing temporary alimony, on the ground that the amount allowed for that purpose and for attorney's fees was too small.

2. DIVORCE ⟸216—ORDER GRANTING TEMPORARY ALIMONY—VALIDITY OF PROVISIONS—EXERCISE OF DISCRETION.
Though the evidence was conflicting (there being much evidence tending to show that the plaintiff and the defendant had been living together at the house of the plaintiff's father; that on account of some trivial difference the father of the plaintiff had ordered the defendant to leave; that the latter prepared a home to which he desired to take his wife, but her parents objected; and that, after first agreeing to go with him, she later declined to do so), as against the wife there was no abuse of discretion in providing, in the order granting temporary alimony, that if the defendant would provide a reasonable home for his wife and child, apart from the residence of any other family, and would give bond in the sum of $200, conditioned to support and to properly treat his wife and child, and not to go beyond the jurisdiction of the court for 12 months, and, upon preparation of such home and the giving of such bond, would notify his wife, and would in good faith offer to receive her and provide for her and her child to the best of his ability, he would not be required to continue to pay alimony.
(a) It is not the best practice to make provisions of this character in advance, rather than for the presiding judge to hear an application to modify the original order upon a proper showing, so that the judge may pass upon the situation at it may then exist. The question of compliance with the provisions of the order can be tested, if so desired, upon a proceeding to enforce the claim for alimony; and, under the facts of the case, the form of the order will not require a reversal.
[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 635, 636; Dec. Dig. ⟸216.]

Error from Superior Court, Glascock County; B. F. Walker, Judge.

Action between R. W. Phillips and Joseph Phillips. From the judgment, R. W. Phillips brings error. Affirmed.

M. L. Felts, of Warrenton, for plaintiff in error. J. B. Burnside, of Thomson, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 285)

SHIELDS v. STATE. (No. 243.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

CRIMINAL LAW ⟸1160—APPEAL—DENIAL OF NEW TRIAL.
The motion for a new trial was based solely on the general grounds that the verdict was contrary to the law and evidence and without evidence to support it. There being sufficient evidence to sustain the finding, and the presiding judge having overruled the motion, this court will not interfere.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. ⟸1160.]

Error from Superior Court, McDuffie County; C. B. Conyers, Judge.

Hudson Shields was convicted of crime, and brings error. Affirmed.

John T. West, of Thomson, for plaintiff in error. A. L. Franklin, Sol. Gen., of Augusta, Warren Grice, Atty Gen., J. B. Burnside, of Thomson, and A. L. Henson, of Atlanta, for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 286)

STOKES v. STATE. (No. 245.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

1. REVIEW ON APPEAL.
When considered in connection with the context, there was no error in any of the excerpts from the charge, on which error was assigned, sufficient to require the grant of a new trial.

2. REQUESTED CHARGES COVERED.
In so far as the request to charge embodied correct principles of law applicable to the case, it was covered by the general charge.

3. OMISSIONS TO CHARGE NOT ERROR.
There was no evidence on which to base a charge on the law of voluntary manslaughter, and the omission to charge on that subject was not erroneous. If the defendant's statement authorized such a charge, it was incumbent upon him to present an appropriate request.

4. VERDICT SUPPORTED.
The evidence was sufficient to support the verdict.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

A. W. Stokes was convicted of crime, and brings error. Affirmed.

Feagin & Hancock, Napier, Maynard & Plunkett, and Sam B. Hunter, all of Macon, for plaintiff in error. John P. Ross, Sol. Gen., of Macon, Warren Grice, Atty. Gen., and A. L. Henson, of Atlanta, for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 277)

## BURTON v. STATE. (No. 256.)

(Supreme Court of Georgia. March 10, 1915.)

*(Syllabus by the Court.)*

1. FAILURE TO INSTRUCT.
Under the evidence there was no error in failing to charge on the subject of voluntary or involuntary manslaughter.

2. INSTRUCTION ON REASONABLE FEARS.
When the entire charge on the subject of reasonable fears is considered, there is nothing in it showing error prejudicial to the accused.

3. CRIMINAL LAW ⊂⊃829 — INSTRUCTIONS — REPETITION.
Where the charge fully covered a certain contention and as a part of it the presiding judge gave an instruction requested by counsel for the accused, it was not necessary that he should comply with another request upon the same subject which was substantially covered by the general charge and the requested charge that was given. The presiding judge was not required to emphasize a charge on a particular subject by reiterating it by giving more than one request thereon.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⊂⊃829.]

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

Walter Burton was convicted of crime, and brings error. Affirmed.

W. G. Martin, of Leesburg, for plaintiff in error. J. R. Williams, Sol. Gen., of Americus, and Warren Grice, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 264)

## LAWRENCE v. STATE. (No. 241.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

CRIMINAL LAW ⊂⊃829 — "VOLUNTARY MANSLAUGHTER" — REFUSAL OF INSTRUCTIONS COVERED.
Where, upon the trial of one under an indictment charging murder, the court properly charged the jury upon the subject of "voluntary manslaughter," that grade of homicide being involved under the evidence in the case, and, following the definition of voluntary manslaughter as contained in Pen. Code 1910, § 65, the court charged: "You will observe, from this definition of voluntary manslaughter, that, in order to reduce a homicide from murder to voluntary manslaughter, there must have been some actual assault upon the person killing by the person killed, or an attempt by the person killed to commit serious personal injury on the person killing, or other equivalent circumstances sufficient to justify the excitement of passion, and to exclude all idea of deliberation or malice, express or implied. * * * If you believe in this case that this defendant killed the deceased, and at the time of the killing, or just before the killing, that the deceased made an actual assault upon him, or was attempting to commit a serious injury upon him, or other equivalent circumstances to justify the excitement of passion, and he killed him for those reasons, then the crime would not be murder, but voluntary manslaughter"—it was not error for the court to refuse to charge further, upon written request, that "an assault and battery is a serious injury, as contemplated by the law of voluntary manslaughter given you in charge." So far as the request to charge was legal and pertinent, it had been sufficiently covered by the charge upon the subject of voluntary manslaughter, as given.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⊂⊃829.
For other definitions, see Words and Phrases, First and Second Series, Voluntary Manslaughter.]

2. VERDICT AND DENIAL OF NEW TRIAL APPROVED.
The evidence authorized the verdict rendered, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Butts County; Robt. T. Daniel, Judge.

Joe Lawrence was convicted of crime, and brings error. Affirmed.

O. M. Duke, of Flovilla, and J. T. Moore and C. L. Redman, both of Jackson, for plaintiff in error. E. M. Owen, Sol. Gen., of Zebulon, Warren Grice, Atty. Gen., and A. L. Henson, of Atlanta, for the State.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 275)

## POPE v. SCOTT. (No. 254.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

1. EXECUTION ⊂⊃171—INJUNCTION — DISCRETION.
There being conflicting evidence on the subject of whether notice of a motion for a new trial was given, and also as to whether there was proper notice of the setting down of the case for a trial after a new trial had been granted, there was no abuse of discretion in refusing to grant an injunction to restrain the enforcement of the judgment entered upon a replevy bond given by the plaintiff in the bail trover proceeding, because of an alleged want of notice in the particulars mentioned.
[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497–518; Dec. Dig. ⊂⊃171.]

2. REPLEVIN ⊂⊃125—BAIL — TROVER—DISMISSAL.
Where a plaintiff in an action of trover sues out bill process, and upon failure of the defendant to give bond gives a bond and obtains possession of the property, and subsequently fails to prosecute his action, whereupon it is dismissed for want of prosecution, the judgment of dismissal so far operates as a judgment of restitution as to authorize the court to enter judgment on the replevy bond for the value of the property. Marshall v. Livingston, 77 Ga. 21; Smith v. Adams, 79 Ga. 802, 5 S. E. 242; Thomas v. Price, 88 Ga. 533, 15 S. E. 11.
(a) As against the replevying party, a judgment may be entered on such bond by the court for the value of the property replevied, as stated in the pleading of such party and in the bond given by him; and it is not necessary to bring suit on the bond, or to have a jury trial. Lauchheimer v. Jacobs, 126 Ga. 261, 55 S. E. 55.
(b) In determining the amount for which judgment shall be rendered in lieu of a writ of restitution, the court may consider the bond itself, and the plaintiff's declaration and affidavit to require bail. It does not appear in the pres-

ent case that the court did not have before it sufficient data from which to ascertain the amount of the judgment rendered. See the authorities cited supra.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 503, 504; Dec. Dig. ⊂⊃125.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by A. Pope against Will Scott. Judgment for plaintiff, and defendant brings error. Affirmed.

S. C. Crane and Gober & Jackson, all of Atlanta, for plaintiff in error. Geo. Westmoreland and J. W. & J. D. Humphries, all of Atlanta, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 274)

LECKIE v. LECKIE. (No. 250.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

TEMPORARY ALIMONY.

Under the facts of this case there was no abuse of discretion in granting the wife temporary alimony and attorney's fees.

Error from Superior Court, Hall County; J. B. Jones, Judge.

Action between J. F. Leckie and Beulah Leckie. From the judgment, J. F. Leckie brings error. Affirmed.

W. B. Sloan and B. P. Gaillard, Jr., both of Gainesville, for plaintiff in error. Wm. M. Johnson and A. C. Wheeler, both of Gainesville, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 274)

DICKENSON & WILLIAMS v. BARWICK et al. (No. 252.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

DENIAL OF INTERLOCUTORY INJUNCTION.

There was no error in denying an interlocutory injunction in this case.

Error from Superior Court, Decatur County; E. E. Cox, Judge.

Action between Dickenson & Williams and L. P. Barwick, trustee, and others. From the judgment, Dickenson & Williams bring error. Affirmed.

W. V. Custer, of Bainbridge, for plaintiffs in error. W. D. Martin, of Bainbridge, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 276)

ATLANTA & C. RY. v. HOLLINGSWORTH et al. (No. 255.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

1. APPOINTMENT OF RECEIVER.

Under the peculiar facts of this case, the court did not err in appointing a receiver.

2. EVIDENCE REJECTED—HARMLESS ERROR.

Had the evidence, which was rejected, been admitted, it should not have changed the result.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by W. B. Hollingsworth, administrator, and others, against the Atlanta & Carolina Railway. From an order appointing a receiver, defendant brings error. Affirmed.

Simmons & Simmons, of Atlanta, for plaintiff in error. Burton Smith, Lyman S. Hulbert, Robt. C. & Philip H. Alston, Daley & Chambers, and W. A. Fuller, all of Atlanta, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent, and LUMPKIN, J., disqualified.

(143 Ga. 265)

HAMILTON v. STATE. (No. 244.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⊂⊃419, 420, 1169—EVIDENCE—HEARSAY—HARMLESS ERROR.

Two warrants were sworn out by the father of the female upon whom a rape was alleged to have been committed. The first was for a misdemeanor, and the last for the crime of rape. The magistrate who issued the warrants was allowed to testify that the father made certain statements when the warrants were issued, as explaining his course of conduct. The statements were inadmissible; but, in view of the evidence and the defendant's statement, we do not think the hearsay testimony prejudiced the defendant or required the grant of a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 973–983, 3088, 3130, 3137–3143; Dec. Dig. ⊂⊃419, 420, 1169.]

2. CRIMINAL LAW ⊂⊃763, 764, 811 — COMPLAINT OF PROSECUTRIX—INSTRUCTIONS.

An instruction, "In a prosecution for this offense [rape], the fact of the girl's having made complaint, if proven, soon after the alleged assault took place, is evidence, but the details or particulars of her complaint cannot be gone into or considered by the jury," is not cause for a new trial, on the ground that it emphasizes the testimony of the female alleged to have been raped, and amounts to an instruction that, if she made complaint, it is conclusive evidence of that fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731–1748, 1752, 1768, 1770, 1787, 1969–1972; Dec. Dig. ⊂⊃763, 764, 811.]

3. RAPE ⊂⊃59—INSTRUCTIONS — COMPLAINTS BY FEMALE.

An instruction that "the defendant in this case should not be convicted upon the testimony of [the female alleged to have been raped] alone, however positive it may be, unless the same is corroborated by some concurrent circumstances," is not cause for new trial, on the

ground that it amounted to an instruction that the defendant should be convicted if the witness' testimony was corroborated by concurrent circumstances, and excluded from the jury a consideration of her credibility as affected by other facts in evidence, which might not be concurrent circumstances.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88–100; Dec. Dig. ⟸59.]

4. Criminal Law ⟸785—Impeachment—Instructions.

The court instructed the jury as follows: "There are three ways of impeaching a witness: One is by disproving the facts testified to by him; another is by proof of contradictory statements previously made by him of matters relevant to his testimony and to the case; another is by proof of general bad character. Where a witness has been successfully impeached, by any mode known to the law, it is the duty of the jury to disregard his entire testimony, if his unworthiness of credit is absolutely established in the minds of the jury, unless it is corroborated; it being always a matter for the jury to determine whether a witness has been in fact so impeached." Under the facts of this case, this charge is not cause for new trial. Powell v. State, 101 Ga. 9 (5), 19, 29 S. E. 309, 65 Am. St. Rep. 277.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776–1781, 1889–1894; Dec. Dig. ⟸785.]

5. Criminal Law ⟸785 — Credibility of Witnesses—Question for Jury.

The following charge was not erroneous: "The credibility of witnesses and the weight to be given their testimony is a matter exclusively for the jury. When witnesses appear and testify in a court of justice, they are presumed to speak the truth, and are to be believed by the jury, unless impeached in some mode known to the law, or otherwise discredited in the judgment of the jury." Cornwall v. State, 91 Ga. 277 (5), 278, 18 S. E. 154.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776–1781, 1889–1894; Dec. Dig. ⟸785.]

6. Rape ⟸64—Instructions—Punishment.

It was no error for the court to instruct the jury that the punishment of the crime of rape, where the jury recommends mercy, is that provided for assault with intent to rape, which is from 1 to 20 years at hard labor in the penitentiary.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 105; Dec. Dig. ⟸64.]

7. Verdict and Denial of New Trial Approved.

The charges complained of, when considered in connection with their context, are not open to the criticisms made against them; the various rulings complained of are without substantial error; the verdict is supported by the evidence; and the court did not abuse his discretion in refusing a new trial.

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Angelo Hamilton was convicted of rape, and brings error. Affirmed.

G. A. Johns, of Winder, and T. J. Shackelford, of Athens, for plaintiff in error. John B. Gamble, Sol. Gen., of Athens, Warren Grice, Atty. Gen., W. H. Quarterman, of Winder, J. A. B. Mahaffey, of Jackson, and A. L. Henson, of Atlanta, for the State.

EVANS, P. J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 267)

## WILLIAMSON v. STATE. (No. 246.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

1. Criminal Law ⟸1156—Appeal—Discretionary Ruling—Denial of New Trial.

Where one ground of a motion for a new trial was that certain named jurors trying the case were not impartial and qualified, for the reason that they were biased and prejudiced, and had expressed opinions before the trial to the effect that "they were going to try the defendant and they ought to hang him," and that hanging was too good for him, and if on the jury they would so find, the judge on the hearing of such motion is the trior of the competency of the jurors; and where the jurors attacked deny making the statements attributed to them on oath, and under the conflicting evidence the judge finds that the jurors were competent, his discretion will not be controlled, unless abused. Hall v. State, 141 Ga. 7, 80 S. E. 307; Frank v. State, 141 Ga. 243 (18), 283, 80 S. E. 1016; Wall v. State, 128 Ga. 550 (4), 553, 55 S. E. 484. He did not abuse his discretion in the present case.

(a) Nor was it error to hold, on conflicting evidence, that the jurors had not disqualified themselves by separating during the trial, nor by talking to a witness for the state about the case pending the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067–3071; Dec. Dig. ⟸1156.]

2. Criminal Law ⟸922 — Instruction on Impeachment—Request.

Failure to charge the jury the law with reference to the impeachment of witnesses, even where the same is applicable, in the absence of a timely written request for a charge on that subject, is not cause for a new trial. Robinson v. State, 114 Ga. 445, 40 S. E. 253.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210–2218; Dec. Dig. ⟸922.]

3. Verdict and Denial of New Trial Approved.

The evidence was sufficient to support the verdict, and none of the other assignments of error show cause for the grant of a new trial.

Error from Superior Court, Taylor County; W. F. George, Judge.

Pleas Williamson was convicted of crime, and brings error. Affirmed.

Jere M. Moore, of Montezuma, and C. B. Marshall, of Reynolds, for plaintiff in error. Geo. C. Palmer, Sol. Gen., of Columbus, Warren Grice, Atty. Gen., A. L. Henson, of Atlanta, and C. W. Foy, of Butler, for the State.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 259)

## LAWRENCEVILLE OIL MILL v. WALTON. (No. 249.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

1. Pleading ⟸205—General Demurrer—Implied Allegations.

In an action for damages by an employé against his employer, under the general law of master and servant as existing in this state,

based upon an injury resulting from a latent defect in machinery with which the plaintiff is employed to work, if the petition fails to allege in express terms that the master knew, or by the exercise of ordinary care could have known, of the defect, and failed to warn the servant thereof, and fails to allege that the servant did not have equal means with the master of knowing of the defect, the petition will not be subject to general demurrer on the ground of the absence of such allegations, if it contains other allegations which in substance import such knowledge upon the part of the master and unequal means on the part of the servant of knowing the defect. Properly construed, the allegations of the petition were such as in effect to import knowledge as just stated; and it was not error at the trial term to overrule the motion to dismiss the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491–493, 495, 496, 498–510; Dec. Dig. ⟸206.]

2. Damages ⟸216—Personal Injuries—Instruction.

In an action of the character already mentioned, where it was sought to recover damages for loss of time, for permanent diminution in earning capacity, for expenses for medical treatment, and for pain and suffering resulting from the injury sustained by the employé, it was erroneous to charge broadly: "In some torts the entire injury is to the peace, happiness, and feelings of the plaintiff. In such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors" without instructing the jury that the charge was applicable only to the element of damage based on pain and suffering. As the charge was not so restricted, and as other elements of damages were involved, to which the charge was not applicable, the error is sufficient to require the grant of a new trial.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548–555; Dec. Dig. ⟸216.]

3. Motion for New Trial.

It is unnecessary to make any decision upon the assignments of error based on the general grounds of the motion for new trial.

Error from Superior Court, Gwinnett County; J. B. Park, Judge.

Action by J. L. Walton against the Lawrenceville Oil Mill, a corporation. Judgment for plaintiff, and defendant brings error. Reversed.

J. L. Walton instituted an action for damages against the Lawrenceville Oil Mill, a corporation. The petition alleged, among other things, the following in substance:

The plaintiff, an employé of the defendant at its oil mill, while in the performance of his duties, was endeavoring, as it was his duty to do at the beginning of his day's work, "to blow out the boiler." He "applied, in the usual, ordinary manner, a wrench to the nut" on a valve. Owing to a defect the valve was leaking, and when the wrench was applied an excessive amount of hot water and steam was released from the boiler, and with such force as to explode a certain pipe, emitting a volume of steam against petitioner, throwing him to the ground, and scalding him in the face and on his arms and legs. The defect in the valve was not known to him, and was one which he could not discover by the use of ordinary care. The valve was not in proper condition, but was loose and defective, being old, and not such as was in common use for the purpose intended. The valve was intended as a contrivance to permit the "slow escape of steam," in order that through it the boiler might be blown out with safety. Such valve "was usually constructed and maintained to prevent the escape of a large volume of steam and hot water; but this particular contrivance was so constructed and maintained that it gave the result that it was designed to prevent. * * * Said valve had been inspected a short time before petitioner was injured." It was also alleged:

"That defendant furnished said valve for petitioner to work with, and that defendant was negligent in furnishing the same without it being in proper condition to be used by petitioner. * * * Petitioner shows that his injury was due to the negligence of defendant in failing to furnish petitioner with proper machinery with which to work."

In other paragraphs of the petition the extent of the injuries were described, indicating that they were very serious; and it was alleged that, as a result, the plaintiff had been incapacitated from work for a considerable time, that the injuries would probably be permanent, and that he had sustained great pain and suffering, and had incurred a stated amount of indebtedness for medical treatment. It was alleged that he was 33 years of age, and capable of earning $1,100 per annum. It was prayed that he be allowed to "recover for the injuries received, for pain and suffering, and for the amount of medical bills and expenses for medical treatment."

The defendant did not file a demurrer, but at the trial term, and before the case was submitted to the jury, a written motion was made to dismiss the petition, on the ground that it "sets forth no cause of action against defendant." The motion was overruled. The case proceeded to trial, and a verdict was returned for the plaintiff. The defendant made a motion for new trial, which was overruled. The defendant excepted to this ruling, and to the overruling of the motion to dismiss. Other facts will sufficiently appear in the opinion.

Smith, Hammond & Smith, of Atlanta, and I. L. Oakes, of Lawrenceville, for plaintiff in error. Evans & Evans, of Sandersville, and O. A. Nix, of Lawrenceville, for defendant in error.

ATKINSON, J. [1] 1. As a matter of practice, a motion to dismiss a petition, on the ground that it sets forth no cause of action, may be entertained when presented for the first time at the trial term. Capps v. Edwards, 130 Ga. 146, 60 S. E. 455. Whether such motion should be sustained is another question. From the briefs of counsel for the plaintiff in error, it develops that the grounds

relied on for dismissing the action are that the petition fails to allege that the defendant had knowledge of the defect in the valve from which it is claimed that the injury resulted, and that there is no allegation that the plaintiff did not have equal means with the defendant of knowing the defect. Under the law in this state in regard to the liability of the master to his servant for injuries, on account of negligence in the matter of furnishing safe machinery with which to work, it should ordinarily appear, in cases of latent defects, that the master knew or ought to have known of the defect; also that the servant did not have equal means with the master of knowing of the defect. Civil Code, §§ 3130, 3131; Holland v. Durham Coal & Coke Co., 131 Ga. 715, 63 S. E. 290. It is not in express terms alleged in the petition that the defendant had knowledge or ought to have known of the defect, or that the plaintiff did not have equal means with the defendant of knowing thereof. If, however, there are other allegations which, in substance, import the same thing, the judgment refusing to dismiss the case on general demurrer should not be reversed for the want of more specific allegations on the subject. In the case of Johnson v. Missouri Pacific Railway Co., 96 Mo. 340, 345, 9 S. W. 790, 791 (9 Am. St. Rep. 351), it was said:

"The specific objection urged to the above petition is that it does not allege that defendant either knew, or might by the exercise of ordinary care have known, that said hammer was not reasonably safe for the purposes for which it was to be used. In the case of Crane v. Mo. Pac. Ry. Co., 87 Mo. 588, it was held that, in an action by a servant against his master for negligence in furnishing improper or unsafe appliances for the servant's use in his work, the petition must allege that the master either knew, or might by the exercise of ordinary care have known, of the dangerous and defective construction of the appliance, or it must contain an equivalent averment, and that an allegation that the master negligently furnished an appliance which was defective and unsafe is an equivalent averment, and sufficient. Under this ruling, the objection to the sufficiency of the petition, based on the ground stated, is not well taken, as it is therein averred that the unsafe hammer was negligently furnished plaintiff by defendant."

In the case of O'Connor v. Illinois Central Ry. Co., 83 Iowa, 105, 48 N. W. 1002, it was held:

"In an action by an employé of a railroad company for damages for injuries sustained in being thrown from a freight car alleged to be so defectively constructed that it would not turn a curve, an allegation that the plaintiff's injury was caused wholly by the defendant's negligently using and permitting to be used the car so defectively constructed sufficiently charges negligence on the part of the defendant, although such negligence could only be proven by showing that the defendant had either actual or constructive knowledge of the defect."

In the case of Chicago, Burlington & Quincy R. Co. v. Kellogg, 55 Neb. 748, 76 N. W. 462, it was held:

"An averment in a petition that the defendant negligently permitted a certain appliance to become defective, and negligently suffered it to remain in a defective condition, implies that the defendant knew or was culpably ignorant of the defect."

From the allegations of the petition now under consideration, it appears that the valve in which the defect existed was not supplied as a separate instrument, but as an attachment forming a part of a steam boiler, a complex piece of machinery. It was different from a chisel, jackscrew, or cant hook, as involved in the cases of Banks v. Schofield's Sons Co., 126 Ga. 667, 55 S. E. 939; Bolden v. Central Ry. Co., 130 Ga. 456, 60 S. E. 1047. The recitals descriptive of the valve and the manner in which the injury occurred do not, within themselves, import an obvious defect or danger. In general terms it was alleged that the plaintiff, whose duty it was to use the machinery in the manner attempted, did not know of the defect and by the exercise of ordinary care could not discover it. This general allegation, when considered in connection with the context, implies a latent defect. Under those circumstances, plaintiff's means of knowing of the defect would not be equal to those of the master, if, as alleged, the latter knew, or by the exercise of ordinary care could have discovered it. In substance, such allegations were the equivalent of allegations that the plaintiff did not have equal means with the defendant of knowing of the defect. Though a latent defect, the master would be negligent in not warning the servant of its existence, if he knew, or by the exercise of ordinary care could have known, of its existence. Civil Code, § 3130. The law just cited declares it to be the duty of the master to furnish "machinery equal in kind to that in general use, and reasonably safe for all persons who operate it with ordinary care and diligence." After alleging facts constituting an omission of duty in this regard, it was alleged in general terms that, on account of such omission, the defendant was negligent, and the plaintiff's injury resulted from such negligence. Under the circumstances, this, in substance, was an indirect way of charging the master with knowledge of the defect. It therefore appears that the petition was not subject to general demurrer for either of the reasons urged for its dismissal.

[2] 2. One ground of the motion for new trial complains of the following charge:

"In some torts the entire injury is to the peace, happiness, or feelings of the plaintiff. In such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors."

This charge was appropriate to the element of damages based on pain and suffering, but not to the elements consisting of special damages for loss of time, loss of earning capacity, and expenses incurred for medicines, physicians' bills, and the like. Linden v. Brown, 137 Ga. 352, 73 S. E. 734. The charge complained of should have been limited by the judge to damages for pain and suffering. It was not so limited. On this point the case

on its facts is controlled by the decision in Southern Ry. Co. v. Broughton, 128 Ga. 814, 58 S. E. 470, and a new trial must be ordered.

[3] 3. As the judgment will be reversed, and there will be another trial, no ruling will be made with reference to the general grounds of the motion.

Judgment reversed. All the Justices concur, except FISH, C. J., absent, and EVANS, P. J., disqualified.

(143 Ga. 277)

WINDER LUMBER CO. v. MARY-LEILA COTTON MILLS et al. (No. 257.)

(Supreme Court of Georgia. March 10, 1915.)

*(Syllabus by the Court.)*

APPEAL AND ERROR ⟹337—WRIT OF ERROR PREMATURELY BROUGHT — DISMISSAL — MECHANICS' LIENS.

The Washington Brick Company brought suit against the Winder Lumber Company, of Jackson county, and the Mary-Leila Cotton Mills, of Greene county, for the purpose of obtaining a judgment against the Winder Lumber Company for brick sold to it and used by it, as contractor, in building the cotton mills, and for the establishment of a special materialman's lien by such judgment on the property of the Mary-Leila Cotton Mills. The last-named corporation filed its answer, averring that it was unable to say whether the Winder Lumber Company owed the Washington Brick Company, but that the latter had no debt against the responding defendant, and that this defendant did not owe the Winder Lumber Company any debt, but that company owed the defendant Mary-Leila Cotton Mills. The court, on motion, struck the Mary-Leila Cotton Mills as a party defendant, in so far as any controversy between it and the Winder Lumber Company was concerned, and left as the sole issue to be tried against the Mary-Leila Cotton Mills the one question whether the Washington Brick Company might obtain judgment against the Mary-Leila Cotton Mills, establishing and foreclosing a lien for the amount for which the Washington Brick Company might obtain judgment against the Winder Lumber Company. To this judgment the Winder Lumber Company excepted. *Held*, that a motion to dismiss the writ of error will be sustained, for the reason that the case with respect to foreclosure of lien against the Mary-Leila Cotton Mills is still pending in the court below, and the writ of error to this court is prematurely brought.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1877, 1878; Dec. Dig. ⟹337.]

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action by the Washington Brick Company against the Winder Lumber Company and the Mary-Leila Cotton Mills. From a partial dismissal, the Winder Lumber Company brings error. Writ of error dismissed.

Lewis C. Russell, of Winder, for plaintiff in error. John J. & Roy M. Strickland, of Athens, and Noel P. Park, of Greensboro, for defendant in error.

HILL, J. Writ of error dismissed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 265)

THOMAS v. STATE. (No. 247.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟹419, 420—EVIDENCE—HEARSAY—HOMICIDE.

In a prosecution of a wife for the murder of her husband, testimony that a codefendant told the witness that the deceased suspected his wife of illicit relations with him is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973–983; Dec. Dig. ⟹419, 420.]

2. CRIMINAL LAW ⟹363, 427 — PERSONS JOINTLY ACCUSED—EVIDENCE.

Where two are jointly accused of murder, and the tracks of two persons are shown as leading from a road to the place where the body of the deceased was found, evidence tending to identify the tracks as having been made by both defendants is admissible on the separate trial of one of them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 804, 1012–1017; Dec. Dig. ⟹363, 427.]

3. CRIMINAL LAW ⟹814—INSTRUCTIONS ON CONFESSIONS—EVIDENCE.

Where the evidence fails to show a confession of guilt by the accused, it is error to charge on the law of confessions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. ⟹814.]

4. INSTRUCTIONS.

In so far as the requests to charge were pertinent and legal, they were covered by the general charge.

*(Additional Syllabus by Editorial Staff.)*

5. WORDS AND PHRASES—"CONFESSION."

A "confession" of guilt is an acknowledgment in express terms by a party in a criminal case of the crime charged, or of facts which of themselves constitute the crime charged.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Confession.]

Error from Superior Court, Lee County; W. F. George, Judge.

Mattie Thomas was convicted of murder, and brings error. Reversed.

J. B. Hoyl, of Leesburg, for plaintiff in error. J. R. Williams, Sol. Gen., of Americus, Warren Grice, Atty. Gen., and A. L. Henson, of Atlanta, for the State.

EVANS, P. J. The plaintiff in error was jointly indicted, with Boizy Watkins and Joseph Jackson, for the murder of Edmond Thomas, the husband of the plaintiff in error. The defendants severed on the trial, and the plaintiff in error was convicted and recommended to life imprisonment. The court refused to grant her a new trial, and she excepted.

[1] 1. A witness was allowed to testify that Boizy Watkins, a codefendant, told the witness that the deceased did not want him to have his cooking done at his house, because of suspected illicit relations with the plaintiff in error. Such testimony is hearsay

and inadmissible. Collins v. State, 88 Ga. 347, 14 S. E. 474.

[2] 2. The state introduced testimony that the tracks of two persons led from the road to the place where the body of the deceased had been placed, and that such tracks corresponded in all particulars with the tracks made by the plaintiff in error and her codefendant, Boizy Watkins, and in the opinion of the witnesses the tracks were made by those parties. In connection with this evidence the state was permitted to offer in evidence the shoes of the codefendant, Boizy Watkins, over the objection that the evidence was insufficient to show a conspiracy between the plaintiff in error and her codefendant. We think evidence tending to establish the identity of the tracks of the two defendants as those of the persons who carried the body of the deceased for purposes of concealment was admissible as part of the res gestæ of the transaction, and as bearing on the question of conspiracy and joint participation in the commission of the homicide.

[3] 3. Complaint is made that the court instructed the jury on the law of confessions of guilt. There was no admission by the plaintiff in error of any participation in or knowledge of the homicide at the time of its commission. There was testimony of a witness that the plaintiff in error had, upon inquiry as to the cause of her incarceration in jail, said they had put her and her brother, Joseph Jackson, and Boizy Watkins, in jail, but they had turned her brother loose, and it looked like they ought to turn her loose; that "he knows as much about it as us do, he is into it as much as us, and looks like they ought to turn me loose." The same witness testified that later on he had a conversation with Boizy Watkins, who was confined in jail with him, and that the plaintiff in error also was in the jail, and could have heard and did hear the conversation between him and Boizy Watkins, in which conversation Boizy Watkins said that the brother of the plaintiff in error hit the deceased with an ax, and he hit him with a stick, and the plaintiff in error smothered him, and they took him in a buggy to a place down the road, dragged him across the road, and that her brother dropped some money and struck a match and lit some splinters to find the money. The money was found but they could not turn around and they went further down the road, and came back after they had carried off the body of the deceased. The witness said that the plaintiff in error never admitted any participation in the homicide, or knowledge of the circumstances under which it was committed. This testimony did not authorize an instruction on the subject of confessions. The conversation relating to the plaintiff in error's statement that her brother, who had been discharged, was as much into it as she and the other codefendant, may be considered in incriminating admission, but is insufficient to authorize a charge on the subject of confessions. Dumas v. State, 63 Ga. 600; Knight v. State, 114 Ga. 51, 39 S. E. 928, 88 Am. St. Rep. 17. The court most probably treated the statement of Boizy Watkins, implicating the plaintiff in error, as an implied confession of guilt, because it was made in her presence and under circumstances calling for a denial, which was not made.

[5] A confession of guilt is an acknowledgment in express terms, by a party in a criminal case, of the crime charged, or of facts which of themselves constitute the crime charged. The statute declares that:

"Acquiescence, or silence, when the circumstances require an answer or denial or other conduct, may amount to an admission." Penal Code 1910, § 1029.

The ground of admission of the statement of a third person in the presence of the accused is that the omission to controvert the statement affords a basis for an inference of its truth. Such accusations are admissible in evidence, to show that it calls for a reply, and to show the acquiescence of the accused. Says Mr. Wharton:

"Where such accusations are admitted in evidence, the court should instruct the jury that such accusations or statements are limited as evidence to the purpose of showing that the accused acquiesced in them, but they are not evidence of the facts stated." 2 Wharton's Crim. Ev. § 679.

The failure to controvert the accusation is not an affirmative act on the part of the accused expressive of her guilt of the crime charged. Its evidentiary value is that of an incriminating admission, to be considered along with the other circumstances in inferring the guilt of the accused.

[4] 4. In so far as the requests to charge were pertinent and legal, they were covered by the general charge. The testimony against the accused was circumstantial; and inasmuch as the case is sent back because the evidence did not authorize an instruction on the law of confessions, we forbear a discussion of it.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(142 Ga. 283)

## McDONOUGH et al. v. BACON et al.

(No. 260.)

(Supreme Court of Georgia. March 10, 1915.)

*(Syllabus by the Court.)*

1. QUO WARRANTO ⟹13, 14—RIGHT TO REMEDY—OFFICIAL MISCONDUCT.

Proceedings in the nature of quo warranto are not the proper remedy for official misconduct; and where certain persons, constituting the board of commissioners of a named county, who had been duly elected and qualified as members of the board, there being no question as to their title to the office, were charged with certain acts of malpractice in office and official misconduct, which did not ipso facto work a

forfeiture of the office, such proceedings were not the proper remedy for trying the question as to whether or not they had been guilty of the malpractice and official misconduct charged, and to oust them from office in case their guilt were ascertained.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. §§ 15, 16; Dec. Dig. ⊂⊃13, 14.]

2. WRIT OF QUO WARRANTO—LEAVE TO FILE PETITION.

Under the ruling announced in the foregoing headnote, the judge did not err in refusing leave to file the petition and information in the nature of a writ of quo warranto, presented him by the plaintiffs in error.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

John J. McDonough and another presented an application for leave to file a petition in the nature of quo warranto against Oliver T. Bacon and others. From a judgment refusing leave, petitioners bring error. Affirmed.

John J. McDonough and W. W. Aimar, alleging that they were citizens and taxpayers of Chatham county, presented to the judge of the superior court an application for leave to file a petition in the nature of a writ of quo warranto against Oliver T. Bacon and others, constituting the board of commissioners of Chatham county. The application was accompanied by an information which contained three counts, in each of which it was alleged that the commissioners had forfeited their office, and prayed that they might be removed therefrom. The first count was based upon an alleged violation of section 393 of the Civil Code, which contains, among other things, a prohibition against the making of certain purchases, under circumstances in said section specified, by any county commissioner or board of county commissioners. The second count was based upon an alleged violation of sections 387–389 of the Civil Code, and charges that the commissioners had themselves executed public works costing more than $300, instead of having the work done by contract, and this was alleged to constitute malpractice and misconduct in office. The third count charged that, without contract in writing entered on their minutes, the commissioners had authorized the payment of certain sums of money from the county funds. The judge refused leave to file the application and information, and declined to issue a rule to show cause why leave should not be given to file such proceedings, holding that quo warranto was not the remedy in regard to the matters complained of in the application. This judgment was excepted to by petitioners.

Geo. H. Richter, of Savannah, for plaintiffs in error. Anderson, Cann & Cann, of Savannah, for defendants in error.

BECK, J. (after stating the facts as above). [1, 2] We are of the opinion that the court correctly held that the petitioners, the plaintiffs in error here, were not entitled, upon the petition presented, to leave to file an information in the nature of a writ of quo warranto against the defendants. Section 5451 of the Civil Code reads:

"The writ of quo warranto may issue to inquire into the right of any person to any public office the duties of which he is in fact discharging, but must be granted at the suit of some person either claiming the office or interested therein."

But the writ of quo warranto is not the remedy to oust one holding an office who has been elected and inducted therein. There is no denial in the petition or the information that the defendants were duly elected and inducted into the office from which it is sought to oust them. Nor does the commission of the acts which are charged against them ipso facto determine the period of their office. They did not cease to be public officers by the commission of those acts, and by the continuance of the discharge of the duties of the office they were not guilty of any act of usurpation. It is true that malpractice in office and certain acts of official misconduct are charged against the defendants; but these acts of malpractice and official misconduct do not render the writ of quo warranto, or information in the nature thereof, the appropriate remedy for the evils complained of in the petition and in the statement of facts called an information, accompanying the petition, which plaintiffs in error sought leave to file. In High's Extraordinary Legal Remedies, § 618, p. 573, it is stated:

"Since the remedy by quo warranto, or information in the nature thereof, is employed only to test the actual right to an office or franchise, it follows that it can afford no relief for official misconduct, and cannot be used to test the legality of the official action of public or corporate officers. Thus, in the case of breaches of trust alleged to have been committed by trustees of an incorporated association, relief should properly be sought in equity, and not by proceedings in quo warranto."

The latter statement of this quotation is based upon the authority of a Georgia case. Dart v. Houston, 22 Ga. 506. And the rule stated in the first part of the passage quoted seems to be the general one, though here and there are to be found dicta in the decisions of some of the courts which seem to impinge upon it. Authorities discussing the rule can be found cited in a note to the passage quoted.

The court below properly held that quo warranto was not the remedy under the facts alleged in the plaintiffs' petition. In so ruling we have not overlooked the provisions of section 394 of the Civil Code, which provides that any county official violating the provisions of the preceding section (section 393, being one of the sections hereinabove referred to, which it is charged the defendants violated) shall be removed from office upon proceedings instituted by any tax-

payer in said county; but the ruling made in this decision goes to the extent of holding that the proceedings sought to be instituted were not the proper proceedings.

Having taken the view of the case announced above, it is unnecessary to consider and pass upon another question raised by the defendants, as to whether or not the proceedings should have been instituted in the name of the solicitor general of the circuit in which Chatham county is, or in the name of the Attorney General of the state. In this connection, see High's Extraordinary Legal Remedies, § 697, p. 653; also section 489, Mechem's Public Offices and Officers.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 274)

## BRADLEY v. LITHONIA & A. M. RY. CO. et al. (No. 253.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⟸70—DECISIONS APPEALABLE—JUDGMENT SUBJECTED TO EXCEPTIONS PENDENTE LITE.

A railroad company sought to condemn a right of way across certain land. An equitable petition was filed by the landowner, attacking the right of the company to do so. A temporary restraining order was granted, but was later modified by reciting that the railroad was constructed across a certain strip before the restraining order was granted, and permitting the defendant to operate its trains and carry on its business pending the disposition of the case, on condition that the tracks should be removed if it should be determined that there was no right of condemnation. On the hearing an interlocutory injunction was granted, and the defendant was directed to remove its tracks. On exception, this judgment was affirmed. In the meantime another company was incorporated, and succeeded to the property and rights of the first. A question having been raised as to the power of the first company to condemn, the second instituted condemnation proceedings. An injunction to restrain this was denied, and the judgment was affirmed. In the first case, the second company filed its petition praying to be made a party, to be allowed to continue to use the strip as a right of way until the determination of its proceeding to condemn, and for other relief. This petition was allowed, subject to demurrer and objection. Objection to the making of the second company a party and a demurrer to the pleading were filed and overruled. Exceptions pendente lite were filed. The judgment of this court was made the judgment of the trial court, and the injunction was so modified as to suspend the requirement of the removal of the track until the right of the second company to make the condemnation should be determined. The plaintiff excepted. *Held*, that the judgment as to which exceptions pendente lite were filed, even if it could otherwise have been excepted to as final, was, by filing such exceptions, treated as an interlocutory ruling, and thereafter would not furnish a basis for a direct exception before the final termination of the case. Durrence v. Waters, 140 Ga. 762, 79 S. E. 841.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 225, 228–241; Dec. Dig. ⟸70.]

2. APPEAL AND ERROR ⟸100—DECISIONS APPEALABLE—INTERLOCUTORY INJUNCTION.

The modification of the interlocutory injunction, above stated, was not such a final judgment as to furnish a basis for a direct bill of exceptions. Nor, under former rulings of this court, was such judgment the refusing of an injunction, so as to furnish a basis for direct exception. Stubbs v. McConnell, 119 Ga. 21, 45 S. E. 710, and cases cited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 670–680; Dec. Dig. ⟸100.]

3. WRIT OF ERROR—DISMISSAL.

It follows that the motion to dismiss the writ of error must be sustained.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by John Bradley against the Lithonia & Arabia Mountain Railway Company and others. Judgment for defendants, and plaintiff brings error. Writ of error dismissed.

See, also, 82 S. E. 138.

R. B. Blackburn, of Atlanta, for plaintiff in error. Jas. L. Key, McDaniel & Black, and E. A. Neely, all of Atlanta, for defendants in error.

LUMPKIN, J. Writ of error dismissed. All the Justices concur, except FISH, C. J., absent.

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(15 Ga. App. 143)

## HOLLOWAY v. STATE. (No. 6008.)

(Court of Appeals of Georgia. March 18, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸1109—BILL OF EXCEPTIONS—GROUNDS FOR DISMISSAL.

Since the passage of the Practice Act of 1911 (Acts 1911, p. 150, § 4), "where counsel acknowledges service upon a bill of exceptions, such acknowledgment shall be held to be a complete waiver of all defects in the service which the counsel signing it is legally competent to waive, whether such signing is done before or after the signing of the writ of error, unless counsel in the entry of acknowledgment distinctly and specifically states that it is *not* to be construed as waiving some particular defect then pointed out by him." In the present case service was acknowledged on September 23d, and the writ of error was not signed until September 24th; but in the entry of acknowledgment there was no reservation of any right on the part of the party acknowledging service, nor was any defect as to the service or the certification of the bill of exceptions pointed out by him. Consequently the motion to dismiss the bill of exceptions must be overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2897, 2898, 2900, 2902, 3204; Dec. Dig. ⟸1109.]

2. CRIMINAL LAW ⟸783½—EVIDENCE OBTAINED ILLEGALLY—INSTRUCTIONS.

While as a general rule the admissibility of evidence is for the court (and for that reason the use of the term "inadmissible" was inappropriate in the connection in which it was employed by the court), still in a case in which there is conflict and doubt as to whether knowledge of an inculpatory fact was obtained by illegal seizure and search, or whether the disclosure of the fact was legal, the trial judge may properly instruct the jury that if they believe, from the evidence, that the disclosure of

the existence of the incriminatory fact was compelled without the voluntary consent of the accused, they should disregard such testimony, but that if they are satisfied, from the evidence, that the disclosure was voluntary or accidental, and not obtained without the consent of the accused, they may consider such testimony in arriving at a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1879, 1986; Dec. Dig. ⟸ 783½.]

3. CRIMINAL LAW ⟸935—NEW TRIAL—EVIDENCE ILLEGALLY PROCURED.

There is nothing in the record to show that the defendant was endeavoring to escape, or that from any other cause there was likely to be a failure of justice for want of an officer to issue a warrant, and the fact that the defendant was carrying a pistol concealed was disclosed only by an unlawful assault by the officer and in invasion of the defendant's right of personal privacy, which amounted to an illegal search; and consequently the case is controlled by the ruling of this court in Hughes v. State, 2 Ga. App. 29, 58 S. E. 390. And since the only evidence of the defendant's guilt was obtained in violation of his constitutional privilege to be protected from criminating evidence obtained by illegal search and seizure of his person, the court erred in overruling the motion for a new trial.

[Ed. Note.—For other cases see Criminal Law, Cent. Dig. §§ 2193, 2194, 2297, 2298, 3068; Dec. Dig. ⟸935.]

Error from City Court of Statesboro; H. B. Strange, Judge.

Herschel Holloway was convicted of an offense, and brings error. Reversed.

J. R. Roach, of Statesboro, for plaintiff in error. Fred T. Lanier, Sol., of Statesboro, for the State.

RUSSELL, C. J. Judgment reversed.

BROYLES, J., not presiding.

(16 Ga. App. 95)

BLOUNT v. RADFORD. (No. 5829.)

(Court of Appeals of Georgia. March 18, 1915.)

*(Syllabus by the Court.)*

1. BILLS AND NOTES ⟸365 — BONA FIDE HOLDER—DEFENSES.

A bona fide holder of a promissory note for a consideration, before maturity, is protected from any defenses that can be set up by the maker, acceptor, or indorser, save a plea of non est factum, gambling, or immoral and illegal consideration, or fraud in its procurement. Civil Code 1910, § 4286; Farmers' & Traders' Bank v. Eubanks, 2 Ga. App. 839, 59 S. E. 193. This being true, the trial court did not err in striking the fourth paragraph of the defendant's answer, which pleaded other defenses.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 944, 958, 959; Dec. Dig. ⟸365.]

2. PLEADING ⟸365—MOTION TO STRIKE PLEA—TIME FOR MAKING.

An oral motion to strike a plea can be made at any time before the verdict, if the motion is in the nature of a general demurrer. Kelly v. Strouss, 116 Ga. 872, 43 S. E. 280; Cooney v. Sweat, 133 Ga. 511, 66 S. E. 257, 25 L. R. A. (N. S.) 75. In this case the oral motion to strike the plea, or as much of it as was contained in paragraph 4 of the answer, was upon the ground that it set up no defense whatever as against the plaintiff's petition. This was clearly in the nature of a general demurrer, and consequently, although not made until the trial term, the court did not err in striking the plea.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1163–1172; Dec. Dig. ⟸365.]

3. BILLS AND NOTES ⟸489—PROOF OF EXECUTION—NECESSITY.

A promissory note which is the basis of a suit need not have its execution proven, where no plea of non est factum has been filed. Civil Code 1910, § 4295; Neal v. Gray, 124 Ga. 510 (4), 52 S. E. 622; Howard Piano Co. v. Glover, 7 Ga. App. 548, 67 S. E. 277; Gray v. Oglesby, 9 Ga. App. 356, 71 S. E. 605.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1587–1642; Dec. Dig. ⟸489; Pleading, Cent. Dig. § 1325.]

4. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the verdict, and there was no error in the overruling of the motion for a new trial.

Error from City Court of Waynesboro; Wm. H. Davis, Judge.

Action by M. M. Radford against M. C. Blount, administratrix. Judgment for plaintiff, and defendant brings error. Affirmed.

H. J. Fullbright, of Waynesboro, for plaintiff in error. Brinson & Hatcher, of Waynesboro, for defendant in error.

BROYLES, J. Judgment affirmed.

(16 Ga. App. 332)

THOMPSON v. STATE. (No. 5512.)

(Court of Appeals of Georgia. Dec. 24, 1914.)

*(Syllabus by the Court.)*

1. WITNESSES ⟸319—IMPEACHMENT—TIME.

It was error to permit the identification of the person of one who had been subpœned and sequestered as a witness before he had been offered as a witness, when the only probable purpose and effect of the personal identification was to assail his general credibility, should he be offered as a witness, and thereby to weaken the force of his testimony and to detract from the weight to be given it. The credibility of a witness cannot properly be attacked until after he has been examined, and evidence cannot be introduced for the purpose of impeaching a person (merely because it is probable that he may be introduced as a witness) until he has been introduced, sworn, and examined.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1087–1093; Dec. Dig. ⟸319.]

2. CRIMINAL LAW ⟸80, 673—CONVICTION OF PRINCIPAL—EVIDENCE—INSTRUCTIONS.

The record of the trial and conviction of the alleged principal is admissible in the trial of one charged with the offense of receiving stolen goods, as evidence of the fact that the principal has been convicted, and as prima facie proof of the guilt of the principal, but the record of the conviction of the principal is not evidence of the guilt of the accessory; consequently it is error, over objection of the defendant, to admit such record, with the mere statement that it is admitted as a circumstance in the case, unless the jury be expressly told (either at that time or later, in the charge of the court) that the use of this evidence is restricted to the purpose of showing the guilt and conviction of the principal, and that the record is not to be considered in determining wheth-

er the accused himself is guilty, as charged, of the essential fact of receiving the goods alleged to have been stolen. Proof of the fact that there was a principal in the commission of the crime, and that the principal is the same individual as the person named as principal in the accusation, may be supplied by the record; but the guilt of the accused as an accessory must be established as an independent fact, and to the satisfaction of the jury beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 103–111, 1384, 1597, 1872–1876; Dec. Dig. ⇐80, 673.]

3. CRIMINAL LAW ⇐1172—FAILURE TO INSTRUCT—CURE OF ERROR—STATEMENT OF COUNSEL.

A statement by counsel that the use of certain evidence admitted in the case is to be restricted to a single purpose is not a substitute for proper instructions on the part of the court, limiting the use of that evidence to its proper application. It is the duty of the court, and not of counsel, to instruct the jury as to the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. ⇐1172.]

4. CRIMINAL LAW ⇐772—INSTRUCTIONS—EVIDENCE SUPPORTING DEFENSE.

"An instruction which, while stating the nature of the charge or of the evidence against the accused, omits to charge the jury as to the defense set up by him is error, unless the defense upon which the accused relies is properly submitted to the jury in other parts of the charge." 12 Cyc. 616. Where there is only one defense on which a party relies, failure to instruct the jury as to the evidence supporting this defense, so specifically that the jury will not only be required to pass upon it, but will be enabled to do so intelligently, under pertinent rules of law and evidence, practically withdraws that defense, and to that extent prejudices the defendant's right to a fair and impartial trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1812–1814, 1816, 1817; Dec. Dig. ⇐772.]

Error from City Court of Blackshear; R. G. Mitchell, Jr., Judge.

Elby Thompson was convicted of crime, and brings error. Reversed.

O. M. Smith, of Valdosta, and A. O. Bray, of Waycross, for plaintiff in error. S. F. Memory, Sol., of Blackshear, for the State.

RUSSELL, C. J. Judgment reversed.

BROYLES, J., not presiding.

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(16 Ga. App. 94)

## BAKER v. SAPPINGTON. (No. 5822.)

(Court of Appeals of Georgia. March 18, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⇐1061—SCOPE OF REVIEW—REFUSAL OF NONSUIT.

The court's refusal to grant a nonsuit will not be considered where, after the case is submitted to the jury, a verdict is given against the defendant, and a motion for a new trial is made which presents the complaint that the verdict is contrary to the evidence and without evidence to support it. In such a case the reviewing court will consider the sufficiency of the evidence as a whole, in the light of the verdict rendered, and will not pass on the question whether the nonsuit should have been granted at the close of the plaintiff's evidence. Atlantic Coast Line R. Co. v. Blalock, 8 Ga. App. 44 (2), 68 S. E. 743; Atlantic & Birmingham Ry. Co. v. Sumner, 134 Ga. 673 (1), 68 S. E. 593.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4137, 4209–4211; Dec. Dig. ⇐1061.]

2. CONTRACTS ⇐176—CONSTRUCTION—SUBMISSION TO JURY—AMBIGUITY.

Where there is a dispute between the plaintiff and the defendant about a contract made between them, and the contract is obscurely worded, and parol evidence is admitted to explain the ambiguity, it is not error for the court to refer to the jury the question whether the contract was as the plaintiff claimed, or as the defendant claimed. Civil Code 1910, § 4265.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767–770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. ⇐176.]

3. APPEAL AND ERROR ⇐1002—FINDING OF FACT — CONCLUSIVENESS — AMBIGUITY IN CONTRACT.

There was considerable conflict in the testimony as to whether the plaintiff was to receive his commission of $100 if he sold the property (or procured a purchaser who was ready, able, and willing to purchase), or was to receive it only on condition that the sale was completed or consummated; but that conflict was a question of fact for the jury to pass upon, and their decision settled the point, as there was sufficient evidence to authorize their finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. ⇐1002.]

4. APPEAL AND ERROR ⇐1078—ASSIGNMENTS OF ERROR—ABANDONMENT.

The other assignments of error, not being referred to in the brief of counsel for the plaintiff in error, are considered abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. ⇐1078.]

5. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence supported the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by T. H. Sappington against W. A. Baker. Judgment for plaintiff, and defendant brings error. Affirmed.

W. O. Wilson, of Atlanta, for plaintiff in error. Moore & Pomeroy and W. P. Coles, all of Atlanta, for defendant in error.

BROYLES, J. Judgment affirmed.

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(16 Ga. App. 135)

## DENNARD v. STATE. (No. 5947.)

(Court of Appeals of Georgia. March 18, 1915.)

*(Syllabus by the Court.)*

1. ERECTION OF LIGHTNING RODS—INTERSTATE COMMERCE.

This case is controlled by the ruling of this court in Browning v. Waycross, 11 Ga. App. 46, 74 S. E. 564, and the court (which, by agreement of the parties, tried the case without a jury) did not err in adjudging the accused to be guilty.

2. LICENSES ⇐11—LICENSE TAX—LIGHTNING ROD AGENTS—VIOLATION OF STATUTE.

The affixing of lightning rods to houses is a business of purely local character and ex-

clusively within the control of the state authority; and, although under the terms of the contract the purchaser of the lightning rods and fixtures had the option to affix them himself and at his own expense, it would be unreasonable to suppose that any person of ordinary intelligence would prefer to assume the burden and expense of putting up the lightning rods himself rather than avail himself of the provision of his contract of purchase, by which the seller was bound to erect or affix the lightning rods, and the purchaser was relieved from both labor and expense; and the court therefore was authorized to find that the form of the contract plainly disclosed a mere device by which it was attempted to convert "what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause." Browning v. Waycross, 233 U. S. 16, 23, 34 Sup. Ct. 578, 580, 58 L. Ed. 828, 833. The terms of the sale as stated in the agreed statement of facts (viewed in the light of the court's judicial knowledge, based upon general observation and the experience of mankind), as well as the undisputed proof to the effect that the accused aided and superintended the erection of the lightning rods, warranted the judgment that he was subject to the special license imposed by the state, and that in refusing to pay the tax and in failing to register he violated section 940 of Civil Code 1910.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 18–20, 21; Dec. Dig. ⟸11.]

Error from City Court of La Grange; Frank Harwell, Judge.

W. M. Dennard was convicted of violating Civ. Code 1910, § 940, and brings error. Affirmed.

M. U. Mooty and A. J. Andrews, both of La Grange, for plaintiff in error. Henry Reeves, of La Grange, for the State.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

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(16 Ga. App. 163)

WADE v. STATE. (No. 6228.)

(Court of Appeals of Georgia. March 23, 1915.)

*(Syllabus by the Court.)*

ARSON ⟸87—SUFFICIENCY OF EVIDENCE.

The evidence, while circumstantial, was sufficient to establish the corpus delicti, and showed a motive on the part of the defendant to commit the crime, and sufficiently connected him therewith to exclude every other reasonable hypothesis than that of his guilt.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 71–73; Dec. Dig. ⟸37.]

Russell, C. J., dissenting.

Error from Superior Court, Crisp County; W. F. George, Judge.

Charlie Wade was convicted of feloniously firing a building, and brings error. Affirmed.

John B. Guerry, of Montezuma, for plaintiff in error. Jos. B. Wall, Sol. Gen., of Fitzgerald, for the State.

WADE, J. About 2 o'clock in the morning of January 9, 1914, a barn in which were 7 mules and 2 horses, besides hay and fodder, on the place of Mrs. J. R. Felder, about 200 yards from her dwelling house, was destroyed by fire, together with the live stock and other contents thereof. There had been no fire about the barn during the day preceding the burning, and the fire broke out long after any one had legitimate occasion to be in or around the barn. The evidence showed also that no gasoline, oil, or like combustible materials were stored in the barn, and, when the fire was observed by the owner's husband, it appeared to him to have started in front of the barn, though the entire structure was then blazing all over. The plaintiff in error, Charlie Wade, a negro, worked for J. R. Felder, the owner's husband, during the year 1913, but left his employer a short time before Christmas of that year, after assuring Mr. Felder that he expected to remain with him; though there was no occasion for his giving this assurance, as he had permission to go if he wished to do so. He removed to a place belonging to Dr. Liggin, adjoining the Felder place, and only a short distance from the barn in question, and was living there when the fire occurred. A day or so before the burning, he stated to a witness that John Felder, the son of the owner of the barn, had frightened his mule with an automobile and caused it to tear up his buggy, and if Mr. Felder did not pay for having the buggy repaired he would make him (Felder) "lose ten times the worth of that buggy." It appeared also that the buggy and some cotton were levied upon in behalf of Felder, and the defendant said in this connection that he would make Felder lose ten times the worth of the buggy; and it was shown by different witnesses that on another occasion he made threats to the effect that he would cause Mr. Felder to lose something. The defendant's buggy was then on the side of the road, with two wheels broken down, and he said that his mule ran against a post and broke the buggy because it was frightened by a car driven by Mr. Felder's son, and further that he had some cotton in town which Mr. Felder had attached, and, if Mr. Felder did not pay for the buggy, he would make it cost him several times as much, though he did not say what he was going to do to accomplish this result. This was said a few days only before the barn was burned.

Early the next day after the fire, the sheriff was sent for and came with dogs belonging to the county. Fresh tracks were discovered, leading up to the barn, and going away from it in the direction of the house where the defendant lived. These tracks were made by a pair of worn-out shoes which were "worn all around the counters, and, where one of the shoes made a track, the leather would catch on the ground, and one of the shoes had no sole much on it." The tracks were discovered where hogs had been rooting in a sweet potato patch, and the ground was soft

and moist, and the tracks were quite distinct. The tracks leading towards the barn were closer together than those leading away, and indicated that the person going from the barn was going at a more rapid rate than when he approached it. Dogs followed the tracks leading from the barn to a point on a ditch in the direction of the house of the defendant. Here it appeared, from marks on the bank of this dry ditch, that the person wearing the badly worn shoes and making the tracks which the dogs had followed to this point had seated himself and changed his shoes for another pair, for the dogs refused to follow the tracks further, and the only tracks leading off from this point, except the tracks going towards the barn and returning, led in the direction of and up to the house of the defendant and were made by other and different shoes. The last-mentioned tracks (which were clearly defined, as they crossed over soft plowed ground) were followed by the sheriff and his posse to the defendant's house. The defendant was not at his house, but at the house of his employer, Dr. Liggin, where he was found eating breakfast. He then had on his feet a pair of shoes which were later measured and compared with the tracks between the ditch and his house, and found to correspond exactly in every particular. He accompanied the sheriff from his house to the point on the ditch already referred to, and the tracks then made by him, as he walked along in the same direction and parallel with the line of tracks going from that point to his house, were identical in every particular with those leading to his house. At his house the posse discovered a pair of shoes which were badly worn, and which, when pressed into the soft earth, made tracks identical in every minute particular with the tracks leading towards the barn from the direction of the defendant's house and back from the barn towards the ditch and his house. These shoes when discovered were somewhat moist underneath, and damp sand was clinging to them, and there were some grass seeds in them. There was testimony showing that the tracks from the barn to the ditch were made by the same shoes discovered in the defendant's house a few hours after the burning, and that the tracks from the ditch to his house were made by the shoes that were on his feet at the time he was arrested by the sheriff, the morning following the commission of the crime. There was also testimony from several witnesses that he stated early in the morning when the fire occurred, and some hours thereafter, while discussing the burning with several other negroes on the plantation where he lived, that it was Mr. Felder's barn that was burning, as he had been out in his yard between 1 and 2 o'clock that morning, and had seen the fire, though in his statement at the trial he said that he had not been out of his house the night of the fire, after he had gone to bed some hours before. And it appeared further that he was the first person on the plantation where he lived to discover the fire; that none of those there, by whom it was discussed, except the defendant, could determine what particular building on the place of Mr. Felder was burning; and that, when requested by one Mr. Whiteside to saddle the horse and go over to Mr. Felder's place and ascertain whether it was his house or barn which had been destroyed, the defendant declined to go, and gave no reason for not going. When he spoke to this witness about the fire, he said: "Look over yonder! Mr. Felder's barn is burning up." The witness testified that he noticed the fire that the defendant spoke about, but could not tell whether it was the barn or the residence of Mr. Felder; that he could see the house because it was between the witness and the barn, but could not determine by looking over it whether the barn or the house was burning. The shoes found in the defendant's house, and which several witnesses testified made tracks identical with the tracks leading away from the burned barn, were introduced in evidence, and the defendant did not deny the ownership thereof, but contented himself with asserting that he had not been on the place of Mr. Felder at all, and denying that he had any grudge against Mr. Felder, or that he had ever made threats against him. The tracks approaching the barn, as already stated, indicated, according to some testimony, that the person making the tracks approached stealthily; and the tracks leading away from the barn, made by the same pair of shoes, indicated that the person wearing them ran away from the barn, as the tracks were further apart, and, from their general appearance, were made, as asserted by several witnesses, by a person running.

The plaintiff in error insists that the corpus delicti is not sufficiently shown by the circumstances in evidence to exclude every reasonable hypothesis other than that the barn was feloniously burned. He insists also that even if it be conceded that the burning was felonious, the evidence for the state is not sufficient to connect him with the crime, to the exclusion of every reasonable hypothesis to the contrary. It is well recognized that, where nothing appears to the contrary, a fire will be presumed to have originated from some accidental or providential cause; and the burden of course rests upon the state to establish the contrary beyond a reasonable doubt; and, where circumstantial evidence is relied upon for that purpose, it must exclude every other reasonable hypothesis. Here the evidence discloses that a barn in and near which there had been no fire during the day preceding its destruction, and where no one had, for hours immediately before its destruction, had occasion to go for any legitimate reason, was discovered at 2 o'clock in the morning to be burning "all over"; and the fire appeared to have started at the front of the building. The struc-

ture had no combustibles, such as oil, gasoline, etc., housed therein, but was partially filled with hay and fodder, which when ignited would blaze out almost instantaneously and burn with great rapidity. The fire must therefore have been burning but a few minutes before it was discovered by the owner of the barn, living 200 yards away, and could not have been smoldering for any considerable time. The stealthy tracks leading up to the barn and the running tracks leading away from the barn, which were discovered early the next day, were fresh tracks, which the testimony showed must have been made at or about the time the fire originated.

These facts, taken in conjunction with the facts already recited, which connected the defendant with the commission of the crime and showed that he held a grudge against the husband of the owner of the barn, appear to us to be amply sufficient, not only to show the corpus delicti, but to connect the defendant with the crime to the exclusion of every other reasonable hypothesis. It is not often possible to make out a case of arson by direct proof establishing the corpus delicti or showing the connection of the defendant with the commission of the crime, for arson is seldom committed except at an hour when there is small chance that the criminal will be actually observed in the execution of his nefarious purpose, and it is also generally easy to commit the crime secretly without the help of an accomplice, and without the beating of drums or blare of trumpets or any betraying noises, and therefore circumstances must generally be depended upon, not only to show the guilt of the accused, but to establish the corpus delicti. The rule that the circumstances proved should exclude every other reasonable hypothesis save that of the guilt of the accused should not be relaxed, but it does not follow that the criminal must go unwhipped of justice because absolute proof is not presented by the state. If there be enough shown to convince the jury beyond a reasonable doubt that the guilt of the accused has been established to the exclusion of every other reasonable hypothesis, and no other reasonable hypothesis is suggested by the evidence, and there is nothing to indicate that the jury failed to accord to the defendant every consideration to which he was entitled, a reviewing court will not arbitrarily say that the conviction should be set aside.

In the case of Green v. State, 111 Ga. 139, 36 S. E. 609, relied upon by the plaintiff in error, the tracks discovered about the burned building were not compared with tracks known to have been made by the defendant, except that one witness testified that she had noticed the tracks of the defendant while he worked at a certain place, and that she had looked at his tracks made in some sand, which corresponded, "to the best of her knowledge, with the tracks discovered near the scene of the burning." The tracks were followed from the barn, in that case, only to a point within a mile of the place where the defendant lived. The court very properly held that the evidence, which was entirely circumstantial, in no way connected the accused with the arson and did not exclude every other reasonable hypothesis than that of his guilt. Also, there was no sufficient motive shown in that case.

In the case of Cummings v. State, 110 Ga. 298, 35 S. E. 117, which the plaintiff in error likewise relies upon, the Supreme Court said:

"Though the state's evidence very strongly and conclusively tended to establish the fact that tracks seen near the place of the crime, and which must have been made on the night it was committed, corresponded in minute particulars with shoes belonging to the accused, this, without more, was not sufficient to show, to the exclusion of every other reasonable hypothesis, that he committed the crime."

It will be observed, however, that in that case, while the tracks seen near the place of the crime, and which must have been made on the night it was committed, corresponded in minute particulars to shoes belonging to the accused, there was nothing more to show to the exclusion of every other reasonable hypothesis, that the defendant committed the crime. In the case under consideration the tracks approaching the barn lead from the direction of the defendant's house, and the tracks leaving the barn lead towards his house. The shoes belonging to the defendant and found in his house corresponded in minute particulars with the tracks leading towards and away from the barn. The tracks were fresh, and the shoes found in the house of the defendant showed unmistakable signs of recent wear; they were wet, moist sand was clinging to them, and grass seeds were found within them. The shoes actually on the defendant's feet at the time he was arrested made a track identical with the track leading from a ditch on the direct route from the barn to his house, where the person making the track nearest the barn had apparently removed one pair of shoes and placed on his feet the identical shoes found on the feet of the defendant when arrested, which made the only tracks leading away from the ditch, except towards that barn and back from the barn to that point; and desire for revenge was shown to exist in the heart of the defendant, as a motive for the crime in this case. It appeared, also, that the defendant was able to determine what particular house was burning when others, who had the same opportunity to make observations and who were at the same distance from the house, were unable to say which house it was. It is obvious that in this case much more was shown than in the Cummings Case, Supra.

In the Gaither Case, 119 Ga. 118, 45 S. E. 973, the court said:

"It does not appear that the tracks or the dogs went to any particular place in the yard, or that any further use was made of the dogs. The dogs did not go near the accused or to his house.

* * * There was no evidence as to motive for the alleged crime."

It further appeared that the accused had stated to a witness, after the fire occurred, that he had stayed at a certain plantation in the neighborhood, after having spent the day at other places mentioned, and stayed there all night with a certain woman in a house in the yard, and there was no contradiction as to this, but to the contrary a witness testified, "We investigated the matter, and were told that he did spend the night there." Referring the evidence as to footprints at or near the scene of a crime, this court, in Lindsey v. State, 9 Ga. App. 299, 70 S. E. 1114, said:

"This character of circumstantial evidence * * * is not usually sufficient to authorize a conviction, unless there is some peculiarity in the tracks * * * to clearly identify them as the tracks of the accused."

Here it appeared that the person who left the scene of the crime about the time the fire was discovered made a track which had several unmistakable peculiarities, up to the point where he changed his shoes at the ditch, and from there on to the house of the accused made a different track, which was clearly and unequivocally identified as exactly the same in every minute particular with the tracks made by the defendant when a few hours later he walked parallel to and near these tracks, and while he was wearing shoes found upon his feet when he was arrested; and it further appeared that the old pair of shoes, which were peculiar in several particulars, belonged to the defendant, and were found in his house immediately after the commission of the crime, with evidences of their recent use. See, also, Hawthorne v. State, 12 Ga. App. 811, 78 S. E. 473; Brown v. State, 6 Ga. App. 357, 358, 64 S. E. 1119; Gregory v. State, 80 Ga. 270, 7 S. E. 222.

The testimony in behalf of the state sufficiently established the corpus delicti, and sufficiently connected the defendant with the commission of the crime to authorize the verdict returned by the jury.

Judgment affirmed.

RUSSELL, C. J. (dissenting). In my judgment the apprehension that a possibly guilty man may escape unduly constrains my colleagues to affirm the judgment in the present case. For myself, I am compelled to say that I see no proof whatever of the corpus delicti. Presumably every burning is accidental or providential, where the contrary does not appear. The burden rests upon the state to satisfy the jury beyond any reasonable doubt that the building alleged to have been burned was feloniously fired, with the intent to destroy the building to the injury of its owner; and, where circumstantial evidence alone is relied upon, the degree of proof necessary for the purpose must be such as to remove every other reasonable supposition than that the building was purposely fired by the accused. Even if there had been direct proof that the defendant had during the night passed by the barn, or even if he had been seen to run from it, I do not think that this, without more, would have authorized the inference that he set fire to it, if it burned later in the night. The fact that tracks alone, even if distinctly identified, are insufficient of themselves to authorize conviction, is almost universally recognized. So far as the present case is concerned, the mere circumstance that tracks similar to these made by two pairs of shoes (admittedly in the possession of the defendant) were found near the barn does not afford sufficient identification to fix upon the defendant the making of the tracks in question, especially in these times of depression, when shoes with both counters run down and without half soles, and perchance with a piece of loose leather on the side, are not rarities. Such shoes were perhaps the only footwear of the laboring population in a radius of five miles. The defendant happened to have also a pair of good shoes, and of course the tracks made by him in wearing them would not only be similar but identical with the tracks of shoes of the same size and make worn by any other individual. The remark attributed to the defendant that the barn, which he saw burning, was that of the prosecutor, must, in view of the jury's finding, be assumed to have been made by him; but a person would be in a helpless plight if he were convicted of barn burning because, by chance, he happened to guess the exact location of a fire. In my judgment none of the circumstances relied upon by the prosecution, nor all the circumstances collectively, suffice either to establish the corpus delicti or to show the participation of the accused in the alleged arson; and, as regrettable as it may be that the detection of this dastardly crime is extremely difficult, the enforcement of the law cannot be advanced by the punishment of any one not shown to be guilty under those well-established rules of law which have stood the test of centuries of experience. The conviction of an innocent man always emboldens the real culprit, who thus escapes punishment, to commit graver offenses.

(16 Ga. App. 161)

## DAVIS v. STATE. (No. 6138.)

(Court of Appeals of Georgia. March 23, 1915.)

*(Syllabus by the Court.)*

CRIMINAL LAW ⟸108, 913 — NEW TRIAL — PROSECUTION UNDER LABOR CONTRACT ACT — VENUE.

"The venue of a prosecution under the labor contract act (Penal Code of 1910, §§ 715, 716) is in the county where the advances were received." Lewis v. State, 15 Ga. App. —, 83 S. E. 489, 440; Dyas v. State, 126 Ga. 556, 55 S. E. 488. Since there was no proof of venue

in the present case, and the particular point was specifically raised in the motion for a new trial (Acts 1911, pp. 149, 150), the court erred in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 220–226, 230, 231, 234, 2137–2145; Dec. Dig. ⊂⊃108, 913.]

Error from City Court of Louisville; W. L. Phillips, Judge.

Charlie Davis was convicted of violation of the labor contract act, and brings error. Reversed.

Price & Price, of Louisville, for plaintiff in error. J. R. Phillips, Sol., of Louisville, for the State.

RUSSELL, C. J. Judgment reversed.

(16 Ga. App. 145)

WARREN v. BEARDEN. (No. 5791.)

(Court of Appeals of Georgia. March 23, 1915.)

*(Syllabus by the Court.)*

1. PLEADING ⊂⊃210—"SPEAKING DEMURRER."

It is not proper for a demurrer to allege facts which are not set forth in the petition which it seeks to attack; it thereby becomes speaking in character, and should be overruled. Clarke v. East Atlanta Land Co., 113 Ga. 21 (2), 38 S. E. 323; Smith v. Ice Delivery Co., 8 Ga. App. 767 (4), 70 S. E. 195. The court, therefore, did not err in overruling the demurrer in this case.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. ⊂⊃210.

For other definitions, see Words and Phrases, First and Second Series, Speaking Demurrer.]

2. WITNESSES ⊂⊃150—COMPETENCY — TRANSACTIONS WITH PERSON SINCE DECEASED.

Where suit is brought on a promissory note, which has been transferred to the plaintiff by the administrator of a deceased person, the defendant (the maker of the note), and also her husband acting as her agent, are competent witnesses to testify in her behalf as to transactions between the deceased person and herself. Civil Code 1910, § 5858. None of the exceptions set forth in this section of the Code are applicable to this case. Woodson v. Jones, 92 Ga. 662, 19 S. E. 60; Phillips v. Cooper, 93 Ga. 644 (4), 20 S. E. 78; Gunn v. Pettygrew, 93 Ga. 327 (1), 20 S. E. 328; White v. Jones, 105 Ga. 26, 31 S. E. 119; Hendrick v. Daniel, 119 Ga. 360, 46 S. E. 438; Castleberry v. Parrish, 135 Ga. 527 (5), 69 S. E. 817; Talley v. Swindle, 6 Ga. App. 482, 65 S. E. 256. Therefore the court erred in holding that the defendant and her husband were incompetent to testify as to such transactions, and in excluding their testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 560, 653–657; Dec. Dig. ⊂⊃150.]

3. TRIAL ⊂⊃170—DIRECTION OF VERDICT—EVIDENCE ERRONEOUSLY EXCLUDED.

If the proffered testimony of the defendant and her husband (as set forth in the record) had been admitted, the evidence would not have demanded a verdict for the plaintiff; hence the court erred in so directing it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 390–394; Dec. Dig. ⊂⊃170.]

Error from City Court of Madison; K. S. Anderson, Judge.

Action by W. P. Bearden against Emma Warren. Judgment for plaintiff on a directed verdict, and defendant brings error. Reversed.

M. C. Few, of Madison, for plaintiff in error. Middlebrooks & Burruss, of Madison, for defendant in error.

BROYLES, J. Judgment reversed.

(16 Ga. App. 149)

BALLEW v. WARE & HARPER. (No. 5860.)

(Court of Appeals of Georgia. March 23, 1915.)

*(Syllabus by the Court.)*

1. BROKERS ⊂⊃67 — PRINCIPAL AND AGENT ⊂⊃70—CONTRACTS OF DUAL AGENCY—VALIDITY—BURDEN OF PROOF.

Contracts of dual agency are not void per se, but only so when the fact that the agent represented both parties was not known to each. The burden of making out a complete defense lies on the defendant; and where duality of agency is relied on as a defense, it is necessary for the defendant to prove, not only the fact of such agency, but also that the same was not known to both parties. Red Cypress Lumber Co. v. Perry, 118 Ga. 876, 45 S. E. 674, and cases therein cited. In this case the evidence clearly shows that each party knew that the real estate brokers, Ware & Harper, represented the other party as well as himself.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 52–54; Dec. Dig. ⊂⊃67; Principal and Agent, Cent. Dig. § 146; Dec. Dig. ⊂⊃70.]

2. DEMURRERS TO PETITION.

The contract sued upon set forth a good cause of action, and accordingly was not subject to general demurrer; nor was it subject to the special demurrer, which alleged that the contract set out in paragraph 3 of the petition placed no binding obligation on the defendant, because the said contract shows a duality of agency by the plaintiffs, Ware & Harper—the contract itself showing that this duality of agency was known to both parties to the contract. See authority cited above.

3. CONTRACTS ⊂⊃349—DISCREPANCY IN EVIDENCE—ADMISSION OF CONTRACT SUED ON.

The court did not err in admitting in evidence the contract attached to the depositions of George Ware, a member of the firm of Ware & Harper, over the defendant's objection that it was not the contract sued on, nor the contract identified by the witness Ware as the contract sued on, because in his depositions he stated that the contract sued on was dated September 11, 1911, and the contract attached to the depositions showed that it was dated September 8, 1911. The contract attached to Ware's depositions itself shows that it was dated September 8, 1911, and was identified by him as the contract sued on; and the fact that the witness stated in his depositions that it was dated September 11, 1911, whether a typographical error or a mistake of the witness, is immaterial—the contract itself being the best proof of the date, and another witness, Ollie W. Elliott, having testified that it was dated September 8, 1911. However, even if this objection was good, this discrepancy in the testimony as to the date of the contract made it a question of fact for the jury to determine whether, under the evidence, the contract attached to Ware's depositions was the contract sued on; and, they having passed on that question, the error, if one, was cured by their verdict.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1096, 1781–1784, 1788–1798, 1809, 1811–1814, 1817, 1818; Dec. Dig. ⊂⊃349.]

4. EVIDENCE ⟸353 — DOCUMENTARY EVIDENCE — DESCRIPTION OF LAND — SUFFICIENCY.

The court did not err in admitting in evidence the same contract, over the further objection of the defendant that it was, in the description of the land which was the subject-matter of the suit, too indefinite and uncertain to be the subject of a suit or an enforceable contract. As said in Crawford v. Verner, 122 Ga. 816, 50 S. E. 959: "Where it can be gathered from the words employed in a deed that the intention of the grantor was to convey the whole of the tract owned by him, even a vague description of the same will suffice, if by competent parol evidence its precise location is capable of ascertainment and its identity can * * * be established." The description of the land in the contract, coupled with the admissions in the defendant's answer, was sufficiently definite and certain to make the contract an enforceable one. See, also, Bush v. Black, 142 Ga. —, 82 S. E. 530.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404–1428, 1430, 1431; Dec. Dig. ⟸353.]

5. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence authorized the verdict, and the court did not err in overruling the motion for a new trial.

Error from City Court of Elberton; Geo. C. Grogan, Judge.

Action by Ware & Harper against W. J. Ballew. Judgment for plaintiffs, and defendant brings error. Affirmed.

James T. Sisk, of Elberton, for plaintiff in error. Worley & Nall, of Elberton, and Moore & Pomeroy, of Atlanta, for defendants in error.

BROYLES, J. Judgment affirmed.

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(16 Ga. App. 106)

## WADE v. HEFNER. (No. 5846.)

(Court of Appeals of Georgia. March 18, 1915.)

*(Syllabus by the Court.)*

1. TRIAL ⟸25—ARGUMENT—RIGHT TO OPEN AND CLOSE — ACTIONS ARISING EX CONTRACTU.

In an action arising ex contractu, the defendant is not entitled to open and close the argument, unless the admissions in his answer or plea are such as to concede a prima facie case for the plaintiff. Crankshaw v. Schweizer Mfg. Co., 1 Ga. App. 363 (3), 58 S. E. 222. In this case the admissions in the answer were not sufficient to shift the burden of proof from the plaintiff to the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44–75; Dec. Dig. ⟸25.]

2. MASTER AND SERVANT ⟸30, 43 — DISCHARGE OF SERVANT—DISRESPECTFUL LANGUAGE—QUESTION FOR JURY.

An employé owes to his employer respectful and decent behavior, and disrespectful and abusive language constitutes sufficient ground for his discharge and the rescission of the contract of employment. But where, in an action based on an alleged wrongful discharge, the employer seeks to justify the discharge on this ground, it is for the jury to determine whether the language used was sufficiently disrespectful and abusive to authorize the discharge and the termination of the contract, and whether there had been sufficient provocation, if any, by the employer, to justify or excuse the use of such language.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 30–36, 57, 58; Dec. Dig. ⟸30, 43.]

3. DENIAL OF NEW TRIAL.

The other grounds of the motion for a new trial are without merit.

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action by E. C. Hefner against I. C. Wade. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Perkins, of Cornelia, and J. C. Edwards & Sons, of Clarkesville, for plaintiff in error. Samuel Kimzey and E. J. Kimsey, both of Cornelia, for defendant in error.

BROYLES, J. E. C. Hefner brought suit against I. C. Wade for damages for wrongful discharge, alleging that he had a verbal contract with the defendant to work in his peach orchard from January 30, 1909, until January 1, 1910, and that the defendant discharged him without any cause on June 7, 1909. The defendant testified that he discharged Hefner because Hefner came up to him, and began to curse and abuse him, and called him "the damnedest meanest man he ever saw." The plaintiff admitted that he went to the defendant on the defendant's own premises, and told the defendant that he was "the grandest rascal he had ever worked for"; and he testified that when this was said the defendant had a walking stick in his hand, appeared to be wrought up, and threw the stick up as though intending to strike him, and "I told him to 'shoot his dog water'; that I was not afraid of him." "I went to see him because he found a bull in his pasture, and insulted my wife about it, and I found her crying."

[1] 1. Counsel for the plaintiff in error contend that the court erred in refusing to allow the defendant to take the burden and open and conclude the argument before the jury, as the admissions in the defendant's plea were sufficient to concede a prima facie case for the plaintiff; and they cite Widincamp v. Widencamp, 135 Ga. 644, 70 S. E. 566, Atlanta Suburban Land Corporation v. Austin, 122 Ga. 374, 50 S. E. 124, and 9 Cyc. 762. In the two cases cited, the admissions in the defendant's plea were clearly sufficient to make a prima facie case for the plaintiff, and thus the burden was shifted from the plaintiff to the defendant. In this case, however, it is only necessary to read the defendant's plea to see that the admissions therein do not concede a prima facie case for the plaintiff. The plea is as follows:

"And now comes the defendant in the above-stated cause of action, at this the appearance term, and for plea and answer thereto says: (1) That while plaintiff did work for him (the defendant) he has fully paid plaintiff for all his services and is now indebted to him in no sum or amount whatever. (2) That defendant is and

was fully justified in his discharge of plaintiff, and in so doing violated no contract or agreement whatever with plaintiff. (3) Defendant denies each and every other allegation of plaintiff's suit, denying all the indebtedness as itemized and alleged against him by plaintiff. (4) Plaintiff sought to get defendant's hands to quit work with him, thus damaging defendant in excess of demands of plaintiff in this suit, to wit, loss in this respect as much as $5 or $10, also loss by taking care of a bull, $5. (5) Wherefore defendant prays judgment for costs of suit and for damages as alleged.

"And now comes defendant and shows that the plaintiff could have gotten as much or more wages since his discharge, and will ever pray and plead the same as a set-off in this suit."

[2] 2. While a servant owes to his master respectful and decent behavior, and while disrespectful and abusive language constitutes sufficient ground for his discharge, it is for the jury to say whether the language used was sufficiently disrespectful and insulting to authorize the discharge and the termination of the contract. And where there is evidence of previous provocation on the part of the master, it is for the jury to decide whether or not such provocation was sufficient to justify or excuse the use of the abusive language.

"The weight and sufficiency of the evidence in an action for wrongful discharge is a question dependent upon the facts and circumstances of the particular case, and is one wholly for the determination of the jury, whose finding will not be disturbed unless manifestly erroneous." 26 Cyc. 1009.

In 1 Labatt, Master and Servant (2d Ed.) 932, it is said:

"As the various kinds of language and behavior which constitute a breach of the duty now under discussion are described by terms which are not susceptible of any precise legal definition, the question whether, in any given instance, a breach was committed, is essentially one of fact, and therefore primarily for the jury."

And in note 7 on the same page it is stated that this rule was taken for granted in all of the cases cited in the preceding notes to section 299, which is headed, "Duty [of the Servant] to Refrain from Insolent, Offensive, and Threatening Words and Behavior."

In Hamlin v. Race, 78 Ill. 422, it was held that the question whether or not the servant was insolent to his employer was a matter of fact for the determination of the jury. Certainly, in the case at bar, the expression "shoot your dog water," used by the servant to his master, is "not susceptible of any precise legal definition," and this court is unable to say what it does mean. We have searched "Words and Phrases," the dictionaries, and the encyclopædias, but with no success. See, also, Echols v. Fleming, 58 Ga. 156; Cason v. Tye, 9 Ga. App. 325, 71 S. E. 593.

The learned counsel for plaintiff in error cite Henderson v. Stiles, 14 Ga. 135; but the facts in that case were quite different from those in the case at bar, as shown by the following language of Judge Nisbet, who wrote the opinion:

"It appears, from this record, that the plaintiff, *without provocation* [italics ours], fell aboard of Mr. Stiles, being on his own premises, and brutally beat him with the barrel of his gun, even to the endangerment of limb and life, and that this assault and battery preceded any breach of the contract by Stiles, if, indeed, any was ever made or contemplated, which we do not by any means assert."

The same counsel cite 26 Cyc. 990, 991, 992, where it is said:

"While it has been held that to justify the discharge of a servant he must have been guilty of some moral misconduct, pecuniary or otherwise, willful disobedience, or habitual neglect, the better view seems to be that any misconduct, inconsistent with the relation of master and servant, will justify the master in terminating the contract of service at any time."

The only Georgia case there cited to sustain this doctrine is Newman v. Reagan, 65 Ga. 513, where the jury returned a verdict in favor of a servant for a wrongful discharge, and upon an appeal to the Supreme Court, on the ground that the verdict was contrary to law and the evidence, it was held that where an employé fails to obey orders, to comply with his contract, is incompetent for the position he has assumed, or his conduct is such that he is injuring the business of his employer by selling at a loss, or by driving off the employer's customers, he cannot, in case of his discharge, recover for the time he did not serve, and whatever damage the employer has sustained he can recoup against wages due the employé.

"Such conduct would authorize the discharge of the employé. The jury must determine whether his discharge was really caused thereby, or whether it resulted from the dullness of business."

And Justice Hawkins who wrote the opinion, said:

"We think the evidence in the case would have justified a verdict for either the plaintiff or defendant, and for that reason a verdict will not be disturbed by this court on that ground. This court has so often held that it is the province of the jury to decide upon the credibility and weight of evidence, and also that this court will not disturb the verdict of a jury when there is sufficient evidence to support it, that it ought to be regarded by the profession as a settled question."

Another case cited in 26 Cyc., in this connection, is Darden v. Nolan, 4 La. Ann. 374, where a servant was discharged for using abusive and insulting language to his employer, and a recovery by the servant was set aside by the Supreme Court of Louisiana; but that case is distinguished from the one at bar by the following words in the opinion:

"The evidence shows that the plaintiff used the most grossly abusive and insulting language to the defendant, accompanied with a threatening manner, which *was not provoked* by the latter, as far as appears from the record." (Italics ours.)

In the case before us the plaintiff testified that the defendant "got as mad as a wet hen" because he found a bull in his pasture, and abused the plaintiff's wife about it, to such an extent that shortly afterwards she was

found crying by the plaintiff, and that this action of the defendant was what provoked him (the plaintiff) to seek out the defendant and to apply to him the abusive language. This testimony of the plaintiff was uncontradicted by the defendant or any other witness in the case. In our opinion it was clearly a matter for the jury to decide whether or not this alleged provocation on the part of the employer justified or excused the use of the abusive language of the employé.

[3] No error of law appears; and while the evidence in support of the verdict is weak and unsatisfactory, and while the language used by the employé to his employer was extremely disrespectful and insulting, there being evidence of some provocation therefor on the part of the employer, and the jury having passed upon the case, and their verdict having been approved by the trial judge, his judgment overruling the motion for a new trial is affirmed.

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(16 Ga. App. 136)

## HORSELY v. STATE. (No. 5992.)

(Court of Appeals of Georgia. March 18, 1915.)

*(Syllabus by the Court.)*

1. TRESPASS ⊂⊃78 — CRIMINAL TRESPASS — "CULTIVATED LAND."

The words "cultivated land," in section 217 of the Penal Code of 1910, are not intended to apply exclusively to land with growing crops upon it. If the land is actually prepared for a crop, or if it has been used for growing crops and the owner intends to devote it again, in due season, to such use, a trespass upon it may be punished under this section.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 168; Dec. Dig. ⊂⊃78.

For other definitions, see Words and Phrases, First and Second Series, Cultivated Lands.]

2. LANDLORD AND TENANT ⊂⊃134—TRESPASS ⊂⊃79—USE OF PREMISES—GUESTS OF TENANT.

A tenant is entitled to undisturbed enjoyment of his possession, and the landlord has no right to determine who shall be his guests, or to determine the time of their visits, so long as they do not infringe upon any right of the landlord, and are there on a lawful mission. Nevertheless, such visitors may not trespass upon cultivated lands in going to and from a house occupied by a tenant, but must confine themselves to the usual and proper means of approach and departure.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 482–485; Dec. Dig. ⊂⊃134; Trespass, Cent. Dig. § 169; Dec. Dig. ⊂⊃79.]

3. CONVICTION AND INSTRUCTIONS APPROVED.

The evidence authorized the verdict, and there is no substantial merit in any of the exceptions to the charge of the court.

Error from City Court of Madison; K. S. Anderson, Judge.

King Horsely was convicted of violating Pen. Code 1910, § 217, and brings error. Affirmed.

Middlebrooks & Burrus, of Madison, for plaintiff in error. A. G. Foster, Sol., of Madison, for the State.

WADE, J. King Horsely was convicted of a violation of section 217 of the Penal Code, which is as follows:

"If any person shall willfully enter, go upon, or pass over any field, orchard, garden, or other inclosed or cultivated land of another, after being personally forbidden so to do by the owner or person entitled to the possession for the time being, or authorized agent thereof, he shall be guilty of a misdemeanor."

The evidence was in substance as follows:

J. A. Nolan, the prosecutor, testified that he owned and operated a farm known as the "J. W. Richardson, Jr., place," in Harris district, Morgan county, Ga.; that the title to this land was in him, and he cultivated the land in the year 1913, and during the summer of 1913, he forbade the defendant from going on this land; that, after he forbade him from going there, he saw the defendant on that place during the fall of 1913; that he saw the defendant going through the pasture with a gun on his shoulder; that the defendant came out of a house on the place, and, in going to the pasture, passed over a little strip of land between the house and the pasture, on which had been planted during the year a crop of cotton, which was abandoned; that the defendant did not live on that place or on any other place belonging to the prosecutor, and his wife did not live there; that she had lived there but moved away during the preceding summer, and her mother lived in the house where the witness saw him; that the strip of land he crossed was about 150 feet wide, and there was no path or passage over it going towards the pasture; that Bermuda grass took possession of this strip, and for that reason the crop was abandoned for the year; that the witness had planted in cotton the land that he saw the defendant go upon and across, and he intended to plant that particular strip in cotton during the following year, and did plant it in cotton.

Van Jackson testified that he was working as a cropper with the prosecutor on the "J. W. Richardson, Jr., place," and lived in a house thereon; that the defendant came to this house in November, 1913, coming down the road, and when he went away he "left across the field;" that "cotton was planted there in the field" (referring to the strip of cultivated land, which Nolan testified the defendant crossed); that the defendant "came down the road, and when he got ready to leave he went across the field. Cotton had been planted there, but Mr. Nolan didn't get some of it worked; that there was too much cotton in the field;" that he (the witness) was in the yard when the defendant left, and had been talking pleasantly with him, as he "had nothing against him;" that there was no path where the defendant walked across this strip of land to the pasture; that the defendant's wife was not at this house, though her mother was; that the defendant remained a considerable time talking to him and finally saluted him and walked off; that the de-

fendant came there "and spoke to his mother-in-law and walked away."

The defendant denied that the prosecutor had personally forbidden his going on the land, and said, in explanation of his visit there, that his wife was living on Mr. Nolan's place, and had started a crop there, and she was staying with Jackson; that he started over there with no intention of interfering, as his wife told him she wanted to move away; "then Mr. Nolan forbade him to go over there;" that the day Mr. Nolan saw him there he went across the pasture; that his wife "had slipped off over there, and we were all standing around talking," and Jackson told him to go away, as they did not want any trouble, and he went, but did not cross any garden or pasture.

[1] 1. In the motion for a new trial it is contended that the court erred in the following charge to the jury:

"If he personally notified the defendant not to go upon his lands, then you go further and see if he did go upon the cultivated lands. If he did not personally notify or forbid the defendant from going upon his field, then he would not be guilty; but if he had notified him personally not to go upon his premises or upon his land, and he afterwards went upon the cultivated lands of the prosecutor, as alleged in the indictment, then he would be guilty."

It is insisted that there was no evidence to support this instruction, and that it was misleading and confusing to the jury and prejudicial to the defendant, in that the jury was led to believe from it that if he went on the "premises" or "land" of Nolan, after having been personally notified not to do so, he would be guilty, regardless of whether the ingress or egress was over a plantation road or over cultivated lands. We do not think the instruction is subject to the exception, and certainly there was evidence to warrant it. The prosecutor testified that during the previous summer he forbade the defendant from going on the "J. W. Richardson, Jr., place"; and the judge carefully guarded all the rights of the defendant by instructing the jury that, should they find that the prosecutor had notified the defendant not to go upon his lands, they should "go further and see if he did go upon the cultivated lands." And further, the court instructed the jury that if the owner notified the defendant personally "not" to go upon his land or premises, "and he [the defendant] afterwards went upon the cultivated lands of the prosecutor, as alleged in the indictment, then he would be guilty." A jury of ordinary intelligence could not have been misled by this plain and clear instruction that the defendant would not be guilty, unless the proof showed that, after being forbidden to go upon the lands or premises of the prosecutor, he went upon the "cultivated lands." This charge did not authorize the jury to convict the defendant if they found that he had entered or left the place over a plantation road or over uncultivated lands.

In the next ground of the motion for a new trial it is contended that the court erred in the following charge to the jury:

"'Cultivated lands' does not mean lands upon which there are growing crops all the year round, but means lands that have grown crops on them from year to year—crops for this year for instance. And if at the end of the year there are no crops planted for another year, and the land is used generally for cultivating purposes, then under the laws of this state it would be considered cultivated land."

It is insisted that the question whether the lands were cultivated, and the question whether there was enough to put the defendant on notice that the lands he walked across were really cultivated, were matters for determination by the jury, and that the court thereby took away from the jury the determination of these questions; and it is further contended that there was no evidence to authorize this charge. In Bryce v. State, 113 Ga. 705, 39 S. E. 282, the Supreme Court said:

"The words 'cultivated land' in this section [referring to section 220 of the Penal Code of 1895, which is section 217 of the Penal Code of 1910] are not intended to apply to such land only as at the time has growing crops upon it. If it is actually prepared for a crop, or if it has been used for growing crops and the owner intends to again devote it, in due season, to such use, a trespass upon it may be punished under this section."

The prosecutor testified that, when Horsely crossed the strip of land which the state contends was "cultivated," there was an abandoned crop of cotton thereon which had been planted that year; that he had planted in cotton that part of the place that he saw "King Horsely on"; and that he "intended to plant that part of the place in cotton this year [the year following], and did plant it in cotton." Under the test laid down in Bryce v. State, supra, the strip of land on which a cotton crop had been planted that year, even though the crop had been abandoned for the year on account of grass, and upon which the owner intended to plant and did plant a cotton crop the following year, was plainly "cultivated land," a trespass upon which might be punished under section 217. There was absolutely no testimony and nothing in the defendant's statement that contradicted the testimony to the effect that a cotton crop had been planted on this strip of land during the year 1913, and another crop planted thereon in 1914; and since, under the ruling in the Bryce Case, supra, there could have been no question as to whether this strip of land was "cultivated land," within the meaning of section 217, no material error would have been committed, even if the court had instructed the jury that the particular lands in question were in legal effect "cultivated lands." We do not think, however, that the judge went far enough to take the question from the jury (had there been any conflict on this point), but he simply instructed them as to when, under the law, lands might be considered as cultivated

lands, so that one trespassing thereon, in defiance of a personal prohibition from the owner, would be guilty of trespass.

It is complained that the court erred in refusing to charge as follows:

"If land is apparently abandoned and is not in cultivation at a time when a growing crop of some kind would be upon it, if it were used for purposes of cultivation, then there would be a presumption that the land was not, under the law, 'cultivated land.'"

We think the court did not err in refusing this request. There was direct evidence, undisputed, which, under the decision in the Bryce Case, supra, made the strip in question "cultivated land," within the meaning of section 217, and it was not necessary to resort to presumptions to determine the fact. The question was not to be determined either from the present appearance of the land at the time, or from any presumption which might arise in the mind of the defendant because of the fact that the crop planted thereon had been apparently abandoned. In the Bryce Case, supra, the Supreme Court said:

"If it has been used for growing crops, and the owner intends to again devote it, in due season, to such use, a trespass upon it may be punished under this section."

Ordinarily no presumption in the mind of a trespasser as to the future purpose of the owner in regard to lands upon which there was an abandoned crop would be authorized; and yet under the ruling in the Bryce Case, if the land has been used previously for growing crops, "and the owner again intends to devote it, in due season, to such use," one trespassing upon it might be punished. It would be impossible for the trespasser to determine, merely from the fact that the crop on certain land appeared to have been abandoned, that the owner did not again intend to use this particular land in due season for growing other crops. From this it appears that it is wholly immaterial whether land which had been used for growing crops, and which the owner again intended to use in the same way, was in such condition at the time a trespasser approached it as to raise in his mind a presumption that the land had not been used and would not again be used for farming purposes, and hence was not "cultivated land." When a landowner (who, even in this liberal and democratic country, has some property rights) orders a trespasser to remain off his property, and in defiance of the owner's demand he goes thereon, he acts at his peril, and should he fail to confine himself to the roads and ways, which he has a legal right to traverse, the error is his, and the consequences must rest upon his own head. Despite the laws intended to protect the rights of those who through thrift have acquired property, too little regard is paid to what are commonly known as the rights of property. Often the right of privacy is a man's most cherished possession, and the law should afford him protection in the enjoyment of this right, where by commendable industry and self-denial, or perhaps through the foresight of some ancestor, he is nominally, at least, entitled to the free enjoyment of a small portion of the face of the earth as his own, and to the exclusion of others.

[2] 2. It is argued (though it does not appear from the record that any such excuse for the presence of the defendant actually existed) that, since the defendant's wife lived on the prosecutor's place, he was entitled to visit her there, notwithstanding that he had been forbidden by the owner to go upon the premises; and the case of Mitchell v. State, 12 Ga. App. 557, 77 S. E. 889, is relied upon to sustain this contention. In that case this court held that:

"Where premises are rented to another, the landlord has no right, during the tenancy, to forbid a third person to go upon the rented premises for a lawful purpose with the permission of the tenant. A tenant is entitled to the undisturbed enjoyment of his possession, and the landlord has no right to exercise any control over the personnel of the tenant's guests, or in reference to the time of their visits, so long as they are upon a lawful mission and do not infringe upon any right of the landlord. Though a woman be living separate and apart from her husband, one who has rented to her a house in which she resides has no right to forbid the husband to go upon the rented premises for the purpose of visiting his wife."

It appears, however, in the statement of facts:

That the defendant in that case "was seen in the yard, within about ten feet of the house where his wife lived. There was a road leading from his house out to the public road, but the accused was never seen on any portion of this tract, except in the yard near the house. The accused and his wife had separated some time before he was seen in the yard. The yard in which the accused was seen extended about 10 or 12 feet in width around the house, and this yard was not in cultivation. The five-acre tract was cultivated land, but seems not to have been inclosed."

In the decision this court said:

"In the first place, it was not shown that the accused entered upon any inclosed or cultivated land. Penal laws are strictly construed; and, where the land is not inclosed, it must appear that the accused went upon or passed over land which either was at the time actually in cultivation, or had been used for growing crops, and that the owner intended to devote it again to such use in due season."

It was further said that the accused was on an uninclosed yard which had never been in cultivation, and it was not shown that he did not reach the yard by means of the road which extended from it. It appeared also in that case that the house and yard, which the defendant visited after being forbidden by the owner to come on the premises, were in the possession of the wife of the accused, who was a tenant of the owner, and the court properly held that "one entitled to the possession of land is, for the time being, entitled to the undisturbed enjoyment of such right, regardless of who is the true owner (Wiggins v. State, 119 Ga. 216, 46 S. E. 86)," and that, in the absence of a special contract

the owner has no right to forbid a person to go upon premises in the possession of his tenant, where the person does so for a lawful purpose and by the permission of the latter. The court said further:

"We are unwilling to hold that one who has rented a house to a man's wife can lawfully forbid the husband to visit her at any time when it suits their convenience."

In that case, however, it did not appear that the defendant went upon or passed over any land which either was at the time in cultivation or had been used for growing crops, and which the owner intended to devote again to such a purpose. It appeared that he was in the yard surrounding a house occupied by his wife as a tenant of the owner, and the yard was not in cultivation. It did not appear that the surrounding field was rented by the wife, nor did it appear that he went over, across, or upon this cultivated field. It did affirmatively appear that the house was rented by the wife, and, as was said by the court:

"This carried with it the right to use so much of the yard as was necessary for the undisturbed enjoyment of the rented premises."

The evidence showed that there was a road leading directly to the house, and it may be assumed, in the absence of anything to the contrary, that he traveled the road, which, under the circumstances, he had a right to travel.

In this case, the defendant's wife appears to have herself had no right on the premises; and, if she had lived there previously in illicit relations with the witness Jackson, she had removed herself to some other spot, and in fact she was never a tenant of the owner, and she could not properly extend to the defendant an invitation to visit the house of Jackson or permission to come upon the place, without the consent of the landlord, and in the face of his notice to the defendant to stay away. Even admitting, however, for the sake of the argument, that the defendant had a right to visit his wife at the house of Jackson on the forbidden "J. W. Richardson, Jr., place," under the ruling in the Mitchell Case, supra, he would nevertheless have been guilty of a violation of section 217, if he failed to confine himself to the premises directly under the control of his wife or the house she occupied and the yard surrounding the house. In other words, admitting that he had a right to visit the place, he must, under the ruling in the Mitchell Case, supra, have nevertheless refrained from trespassing thereon by going over, across, or upon the cultivated lands, which Jackson swore he cultivated for Mr. Nolan that year, for certainly, under the evidence, he had no permission from Jackson to cross this strip, and Nolan prohibited his presence there.

[3] 3. The evidence amply warranted the verdict, and no error was committed by the trial judge.

Judgment affirmed.

BROYLES, J., not presiding.

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(16 Ga. App. 24)

EVANS v. ALLGOOD. (No. 5507.)
(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

COURTS ⊂⇒188—CITY COURTS—JURISDICTION—ACTION ON CONTRACT—AMOUNT INVOLVED.

A quarterly term of the city court of Monroe has no jurisdiction of suits upon unconditional contracts in writing involving less than $200, except where, in a suit, brought to a monthly term, the defendant files a plea and demands a trial by jury.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 412, 439, 440, 442, 447, 448, 451, 452, 454, 458, 464, 465, 467, 468; Dec. Dig. ⊂⇒188.]

Error from City Court of Monroe; A. C. Stone, Judge.

Action by W. L. Evans against Mrs. J. W. Allgood, executrix. Judgment for plaintiff, and defendant brings error. Affirmed.

Walker & Roberts, of Monroe, for plaintiff in error. Ben J. Edwards, of Monroe, for defendant in error.

RUSSELL, C. J. The present writ of error raises the single question whether the city court of Monroe, at its quarterly terms, has original jurisdiction of suits upon unconditional contracts in writing involving less than $200. The act provides for the trial of civil business at the quarterly terms of the court, where, in a suit involving less than $200, the defendant files a plea and demands a trial by jury, but the question here presented is whether the act allows the plaintiff an option, in the first instance, to bring a suit to the quarterly term in a case involving an amount less than $200. In the present case the suit was brought to the quarterly term. The amount involved was less than $100. At the appearance term of the January quarterly term, to which the action was returnable, the defendant filed a demurrer setting up that the court at a quarterly term was without jurisdiction to try the case upon its merits and render judgment. The court sustained the demurrer and dismissed the suit.

We are of the opinion that the court ruled correctly. The city court of Monroe was created by a legislative enactment of 1905 (Acts 1905, p. 303), and the act establishing the court has been twice amended. Acts 1906, p. 270; Acts 1913, p. 269. The amendments contained in the act of 1913, supra, do not appear to be material to the question now before us; the only reference therein to the terms of the court being a change in the time of holding the quarterly terms, from the first Mondays in January, April, July, and October, to the third Mondays in the

same months, and a provision that the court may enter judgment at the first or appearance term of any quarterly session, where no plea is filed or the plea filed is stricken or withdrawn. The latter amendment, however, marks a slight difference between the procedure in the monthly and quarterly terms, when a defendant has no defense, which will be referred to later.

In the act of 1905, supra (section 10), it is provided that:

"The terms of said city court shall be monthly and quarterly, the monthly terms for the trial and disposition of criminal business, to be held on the second Monday in each month, and the quarterly terms for the trial and disposition of either or both criminal and civil business, to be held on the first Mondays of January, April, July, and October."

Section 39 provides that:

"The first term of said court to which a civil case is brought shall be the appearance or return term, the second shall be the trial or judgment term, and all the laws, rules and practices in said court with reference to the terms thereof and the continuance, pleadings, and trial of causes therein, shall be the same as in the superior court unless otherwise provided in this act."

Section 10 was amended by the act of 1906, supra, so that:

"The terms of said city court shall be monthly and quarterly, the monthly terms for the trial and disposition of criminal business, and the trial of civil business, both actions ex contractu and ex delicto, when the principal sum claimed, or the principal sum in judgment, is not over $200 (provided no jury is demanded in such civil cases), to be held on the second Monday in each month, and quarterly terms for the trial and disposition of either or both criminal and civil business, to be held on the first Mondays in January, April, July and October."

An amendment contained in section 3 of the act of 1906 provided that if the issue in a claim case "be based on a judgment obtained at a monthly term of said court, such issue may be tried at the next monthly term of said court, sitting fifteen days after the claim or other issue is filed by the court, provided no jury is demanded in said case," etc.

Section 4 of the act of 1906 amended section 39 of the act of 1905, supra, by a proviso creating a distinction between suits brought to a quarterly term and those brought to a monthly term, in that, under the proviso, instead of the first term being the appearance term and the second term the trial or judgment term, for all cases of a civil nature, the provisions of the act of 1905 in that respect do not apply to civil cases returnable to the monthly sessions of the city court. If a plea is filed and a jury demanded, the act provides that the case will stand for trial at the next quarterly term, as in other civil cases; but where the case is brought to the monthly term, "if no plea is filed, or a plea is filed and no jury demanded, such case will stand for trial and judgment at the return or first term of said court, with the same right of continuance as in other civil cases in said court."

Section 5 of the act of 1906 further amended the provisions of the act of 1905, so far as the same related to causes returnable to the monthly sessions of the court, by fixing the costs of the clerk and sheriff in cases cognizable by the city court at one-half the amount allowed in cases returnable to the quarterly terms.

We have referred to these various enactments because we think they indicate a fixed and definite intention on the part of the General Assembly to so define the jurisdiction of the city court of Monroe, as to civil cases, as to create a distinct difference between the scope of the court's jurisdiction (as to amount) at the quarterly and the monthly terms, thereby, by necessary implication, restricting the operation of its jurisdiction, so far as civil cases involving less than $200 is concerned, to the monthly terms of that court. In other words, it appears to us that it was the intention of the General Assembly to give to the city court, at its monthly term, exclusive jurisdiction of amounts involving less than $200, and to take from the quarterly term the jurisdiction as to such cases which it had previously exercised, and that, while the General Assembly has not made an express declaration to that effect, it is reasonably and naturally implied in the amendments to which we have referred.

It is true that in McIntosh v. Patton, 12 Ga. App. 305, 77 S. E. 6, only two judges presiding, it is said that:

"The city court of Monroe has jurisdiction to try at the quarterly session of the court all civil cases of whatever nature, where the amount claimed or involved, inclusive of interest, is as much as $50, except where, under the Constitution, exclusive jurisdiction is given to the superior court."

This is a dictum upon the very point, but the point is now for the first time so presented to this court as to give the court jurisdiction to consider the matter. What was said in that case not only was not the opinion of a full bench, but it plainly appears that, in the overwhelming mass of business with which this court is burdened, the court overlooked the fact that the point was not before it for adjudication. It appears, from the statement of facts in that case (12 Ga. App. 308, 77 S. E. 6), as well as from an examination of the original record, that it was in a motion for a new trial that the plaintiff in error attempted to raise the point now before us. So far as appears from an examination of the record, the point was never raised until after judgment. "A motion for a new trial is not an appropriate remedy to contest the jurisdiction of the court." 29 Cyc. 759; Heery v. Burkhalter, 113 Ga. 1043, 39 S. E. 406; Hawkins v. Chambliss, 120 Ga. 614 (2), 48 S. E. 169. In the latter it was ruled that:

"Want of jurisdiction cannot properly be made a ground for a motion for a new trial, when no question of jurisdiction was raised before verdict."

And in the second division of the opinion the court said:

"One ground of the motion for a new trial sets up that the verdict should be set aside and a new trial granted, because the city court of Americus had no jurisdiction to try the case. This is not a proper ground of a motion for a new trial. If the court has no jurisdiction of the case, a judgment should not be rendered granting a new trial to be had on the merits in that court, which would be the effect of sustaining the motion. We will therefore not pass upon the question sought to be raised on this ground. If the court's want of jurisdiction was of such a character that it could not be waived by anything done by the parties, then the judgment would be void, and could be attacked at any time and at any place by any one whose rights were sought to be affected by it. On the other hand, if the want of jurisdiction was of such a character that the conduct of the parties could waive it, then it has been waived by the defendant's going to trial and submitting to the jurisdiction of the court, and the question cannot be raised for the first time, after verdict, in a motion for a new trial. On the question of jurisdiction, see Stephenson v. Warren, 119 Ga. 504 [46 S. E. 647]."

So it is very clear that in the case of McIntosh v. Patton, supra, this court was not authorized to rule upon the question now presented, though the judgment rendered by the majority of the court in that case, upon the grounds properly before it, was obviously correct, and doubtless the fact that the court was not authorized to adjudicate this question was overlooked. It seems clear to us, from the fact that the General Assembly in the original act confined the jurisdiction of the court at its monthly term to criminal cases only, and thereafter by amendment gave the monthly terms of the court jurisdiction of all civil cases involving an amount less than $200, that one purpose of the amendment was to relieve the quarterly terms of the court of an excess of business therein, and another to effect an economy by reducing the expenses incident to the per diem of jurors, and a third, perhaps, to provide for the more speedy disposition of those civil cases involving only small amounts. It is also apparent that another purpose in the mind of the Legislature was to make the expense of litigation, in cases involving small amounts, less at the monthly terms than at the quarterly terms, in the interest of parties litigant, where the amount involved is less than $200. This intention is indicated by the provision that the costs, in cases where the amount involved is less than $200, shall be one-half the amount allowed clerks and sheriffs for similar services at the quarterly terms; the costs at both terms having been originally the same as the fees allowed in the superior court. It is clear, from the precise language employed in the classification of cases in section 5, that it was the intention of the General Assembly that cases involving less than $200 should be brought only to the monthly terms, for the language used is as follows:

"That the clerk and sheriff of said court shall receive, as compensation for their services rendered, in civil cases returnable to monthly sessions of said city court only, one-half the costs for all services rendered in such cases that they would get in superior court," etc.

If the Legislature had not intended by the amendment of section 1 of the act of 1906 to require all cases involving less than $200 to be returned to the monthly terms of the city court only, they would have said that the clerk and the sheriff should receive only one-half the costs, for all services rendered in civil cases returnable to the monthly session of the city court, that they would get in superior court, or, if they had used exactly the same words which are employed in the amending section, they would have said that "in civil cases, returnable to the monthly sessions of said city court," they shall receive "only one-half the costs for all services rendered," etc. In further support of this view, we may say that it is clearly obvious that the General Assembly intended to make a difference in the costs between cases involving less than $200 and cases where the amount exceeded $200, and yet, if a plaintiff can merely at his option bring a suit upon a note involving $74 to the quarterly term of the court, the provisions as to costs in that case cannot apply, and the plaintiff, if he recovers, could recover full costs, and thereby compel the defendant to pay double the amount of the costs that he would have paid if the plaintiff had pursued his remedy at the monthly term, because in the act there is no provision similar to the statute which, in superior courts, allows only the recovery of justice's court costs, where the amount in suit is within the jurisdiction of a justice's court. We do not think it could have been the intention of the General Assembly, in attempting to alleviate the burdens of debtors owing only small amounts, to leave the execution of this beneficial provision to the option of creditors. It is to be noted that the act provides for 16 terms of the city court of Monroe in each year; and therefore the Legislature very thoroughly understood that in amounts less than $200 there would be no difficulty on the part of any creditors in obtaining a speedy adjudication of his claim against a delinquent debtor, and yet if these small claims were brought to the quarterly terms, which had jurisdiction of civil cases without limit in amount, involving all forms of actions other than those in which the superior court has exclusive jurisdiction, the quarterly terms might be clogged.

The argument is made in the brief that there are not two city courts of Monroe, but only one, and to this we agree; but we see no difficulty in the way of the Legislature's fixing the term or classifying the cases so as to deprive the court of authority, except at the terms designated to exercise all of the jurisdiction conferred upon it by the Legislative enactment. By the same argument it might be contended that a plaintiff having a demand amounting to $10,000 is improperly

debarred from proceeding in the monthly term. It was certainly as much within the power of the Legislature, if it so intended, to prescribe that civil cases involving less than $200 should be returned exclusively for trial at monthly terms of the court, unless a plea was filed and a jury demanded, as it was to declare that the quarterly terms should have exclusive jurisdiction of cases involving amounts exceeding $200. We think this was the Legislative intent, and, for that reason, that the court properly sustained the demurrer.

Judgment affirmed.

BROYLES, J., not presiding.

(16 Ga. App. 91)

## SHIFLETT v. JOHN W. KELLY & CO. (No. 5794.)

(Court of Appeals of Georgia. March 18, 1915.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR ⊂⊃1061—REVIEW—REFUSAL TO GRANT NONSUIT.

An exception to the refusal to grant a nonsuit will not be considered, where a verdict for the plaintiff is complained of in a motion for new trial as not supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4137, 4209–4211; Dec. Dig. ⊂⊃1061.]

2. CORPORATIONS ⊂⊃370—"ULTRA VIRES ACT"—EXCESS OF CHARTER POWERS.

An ultra vires act of a corporation is one in excess of its charter powers. Corporations are granted no rights and clothed with no powers except those which are expressly conferred by law or by their charters, or which arise therefrom by necessary implication.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1511–1518; Dec. Dig. ⊂⊃370.

For other definitions, see Words and Phrases, First and Second Series, Ultra Vires.]

3. INSURANCE ⊂⊃696—FRATERNAL INSURANCE SOCIETY—POWERS—INTOXICATING LIQUORS.

A corporation doing business under a charter as a fraternal insurance society has no power to operate a "locker club," or to contract for the purchase of intoxicating liquors.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1837; Dec. Dig. ⊂⊃696.]

4. CORPORATIONS ⊂⊃40, 56—INSURANCE ⊂⊃693—FRATERNAL BENEFICIARY ASSOCIATION—AMENDMENT TO CHARTER—INTOXICATING LIQUORS.

While a corporation can amend its constitution and by-laws it cannot so amend them as to make an altogether new and different kind of society. So, where a corporation is granted a charter as a fraternal beneficiary association, it has no power to change itself into a "locker club," and to contract for the buying, handling, and dispensing of intoxicating liquors to its members.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 124, 152; Dec. Dig. ⊂⊃40, 56; Insurance, Cent. Dig. § 1833; Dec. Dig. ⊂⊃693.]

5. CLUBS ⊂⊃11—ULTRA VIRES PURCHASE—LIABILITY OF MEMBERS.

Under the foregoing rulings, such a "locker club," having no valid charter, is not a corporation, and consequently any one of its individual members can be held liable for liquors purchased and received by the club.

[Ed. Note.—For other cases, see Clubs, Cent. Dig. § 7; Dec. Dig. ⊂⊃11.]

6. CLUBS ⊂⊃11—ULTRA VIRES PURCHASE—LIABILITY OF MEMBERS.

The plaintiff in error, being a member of the "locker club," and its treasurer and steward, and having himself ordered the liquors—the subject-matter of this suit—which were received at the club, was liable for the purchase price of the liquors; especially when he filed no plea of nonjoinder, naming others who should be sued.

[Ed. Note.—For other cases, see Clubs, Cent. Dig. § 7; Dec. Dig. ⊂⊃11.]

7. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence demanded the verdict directed, and the court did not err in refusing to grant the motion for a new trial.

*(Additional Syllabus by Editorial Staff.)*

8. CORPORATIONS ⊂⊃370—NATURE OF—POWERS.

A "corporation" is a creature of the law, with no authority outside the powers given it by its charter and enumerated therein, and such powers as are necessarily incidental to the execution of those expressly granted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1511–1518; Dec. Dig. ⊂⊃370.

For other definitions, see Words and Phrases, First and Second Series, Corporation.]

Error from City Court, Floyd County; J. H. Reece, Judge.

Action by John W. Kelly & Co. against C. H. Shiflett. Judgment for plaintiff, and defendant brings error. Affirmed.

McHenry & Porter, of Rome, for plaintiff in error. Lipscomb & Willingham and Nathan Harris, all of Rome, for defendant in error.

BROYLES, J. J. W. Kelly & Co., a Tennessee corporation, brought suit in the city court of Floyd county against C. H. Shiflett, doing business under the trade name of the "Cosmopolitan Club," on an open account for liquors, amounting to $390 and interest. The defendant, Shiflett, in his answer, substantially admitted the correctness of the account, but denied individual liability. He failed, however, to plead misjoinder or nonjoinder of parties. Upon the trial he testified that he was a member of the club in question; "that it was a locker club;" that he was its treasurer and steward; that the liquors included in the account sued on were ordered by him; and that he received them at the club through his man in charge of the club premises. He claimed that this "Cosmopolitan Club" was an offspring of the Farmers' Life Confederation, a mutual benefit association, which was given a charter by the judge of the superior court of Fulton county; and that under this charter the "Confederation" had a right to establish and maintain "locker clubs" in connection therewith. This Farmers' Life Confederation, under its charter, and under section 2503 of the Civil Code,

is a fraternal insurance society, and was expressly so recognized by the Supreme Court of this state in Worthy v. Farmers' Life Confederation, 139 Ga. 81, 76 S. E. 856. It was clearly ultra vires of its charter to organize, in connection with its insurance business, a "locker club," and to contract for the buying, handling, and dispensing of intoxicating liquors to its members. In Savannah Ice Co. v. Canal, etc., Co., 12 Ga. App. 818, 79 S. E. 45, this court held as follows:

"(1) The charter of a corporation is a contract between the state and the shareholders, and between the shareholders themselves. The state contracts to permit the exercise of the powers granted in the charter, and not to impair the obligation of any contract made in pursuance thereof. The shareholders engage not to exceed the powers conferred upon them by law, and each stockholder, by accepting the charter, agrees with the others not to divert the assets of the corporation to a purpose foreign to the objects of the organization. As to this matter the law makes no distinction between public and private corporations. (2) Corporations are granted no rights and clothed with no powers, except those which are expressly conferred by law or the charter, or which arise therefrom by necessary implication."

[2-5, 8] In deciding whether a certain contract by a corporation is ultra vires, the rule is that, if the contract is usual and necessary for the business of the corporation, it is not ultra vires; and, where it is unusual and not necessary, it is ultra vires. A corporation is a mere creature of the law, with no authority whatever outside of the powers given it by its charter and enumerated therein, and such powers as are necessarily incidental to the execution of those expressly granted. Dublin Fertilizer Works v. Carter, 6 Ga. App. 835, 65 S. E. 1082. The stockholders in a corporation cannot substitute their will for the legislative or judicial grant of power. It is clear to us that the contracting of a debt for intoxicating liquors was ultra vires of the charter of the Farmers' Life Confederation. It follows that this corporation could not delegate an authority which it did not itself have. The buying, handling, and dispensing of intoxicating liquors were beyond the objects contemplated in its charter; such actions were not necessary or legitimate for the carrying into effect any of the purposes of the charter; and, under this view, any of the individual members of the locker club could have been held liable on its contracts as general promisors or partners. Thurmond v. Cedar Springs Baptist Church, 110 Ga. 816, 36 S. E. 221; Wilkins v. Wardens, etc., 52 Ga. 352. As to third persons, all the members of a partnership are liable, not only to the extent of their interest in the partnership property, but also to the whole extent of their separate property. Civil Code, § 3156.

"A person who assumes to act as agent for a nonexisting or legally incompetent or irresponsible principal renders himself personally liable to the person with whom he deals, unless it is expressly understood either that the agent shall not be held, and the contractee with knowledge of the facts extends credit to the supposed principal, or that the agent's liability shall be limited to a fund held by him for the purpose of his agency." 31 Cyc. 1548, 1549.

"Unincorporated associations, clubs, and committees, are generally held to be such irresponsible principals that persons attempting to contract for them as agents render themselves personally liable." Comfort v. Graham, 87 Iowa, 295, 54 N. W. 242; Thistle v. Jones, 45 Misc. Rep. 215, 92 N. Y. Supp. 113.

One who assumes to act as agent impliedly warrants his authority; but, if there is no principal, then the agent cannot have authority, and therefore he should be held liable for the breach of his implied warranty. Bartholomae v. Kaufman, 16 N. Y. Wkly. Dig. 127.

[1] An exception to the refusal to grant a nonsuit will not be considered where a verdict for the plaintiff is complained of in a motion for a new trial as not supported by the evidence. In such a case, this court will review the sufficiency of the evidence as a whole, in the light of the verdict given or directed, and will not merely consider the sufficiency of the plaintiff's case to withstand the nonsuit at the particular stage at which the motion for a nonsuit was made. Atlantic Coast Line R. Co. v. Blalock, 8 Ga. App. 44 (2), 68 S. E. 743.

[6, 7] The plaintiff in error being practically in charge of this so-called "Cosmopolitan Club," and having testified during the trial that he was treasurer and steward of the club, and that he ordered all the liquors in the account sued on, and that they were received at the club by his agent or employé, he was clearly liable for the same; and, the evidence demanding a verdict against him, it was not error for the court to direct the same.

Judgment affirmed.

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(16 Ga. App. 146)

## WITT v. BAKER. (No. 5795.)

(Court of Appeals of Georgia. March 23, 1915.)

*(Syllabus by the Court.)*

APPEAL AND ERROR ⊜1061—HARMLESS ERROR—DIRECTION OF VERDICT.

There was no substantial error in any of the rulings upon the pleadings, or as to the admissibility of the testimony. Under the ruling in Witt v. Baker, 13 Ga. App. 396, 79 S. E. 243, no issue was properly before the trial court, other than the meaning of the phrase "services rendered previous to this date"; and since, according to the testimony, including that of the defendant himself, this language clearly referred to the services of the plaintiff in procuring the option which he transferred to the defendant, a finding in favor of the plaintiff was demanded, and the direction of the verdict was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4137, 4209–4211; Dec. Dig. ⊜1061.]

Error from City Court of Americus; W. M. Harper, Judge.

Action by J. H. Baker against J. C. Witt.

Judgment for plaintiff, and defendant brings error. Affirmed.

W. W. Dykes, of Americus, for plaintiff in error. Ellis, Webb & Ellis, of Americus, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

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(16 Ga. App. 64)

LEHON v. CITY OF ATLANTA. (No. 5768.)

(Court of Appeals of Georgia. Feb. 18, 1915.)

*(Syllabus by the Court.)*

1. DETECTIVES ⟸3—REGULATION—BUSINESS OF PRIVATE DETECTIVE.

Under the power conferred by the General Assembly upon the city of Atlanta to pass such ordinances for municipal purposes as the municipality may deem proper, provided such ordinances do not conflict with the Constitution and laws of this state or of the United States (Acts 1913, p. 507), the city of Atlanta had the power to subject the business of a private detective or detective agency to police supervision, and to require that no person should carry on this business without being first recommended by the board of police commissioners and after taking the oath of a city detective and giving a bond in the sum of $1,000, as prescribed by the ordinances.

[Ed. Note.—For other cases, see Detectives, Cent. Dig. § 2; Dec. Dig. ⟸3.]

2. LICENSES ⟸7—MUNICIPAL CORPORATIONS ⟸625—SUPERVISION OF BUSINESS OF PRIVATE DETECTIVE—REASONABLENESS OF ORDINANCES.

The ordinances in question, which prescribe that the character and proficiency of any person or agent acting as a private detective in the city of Atlanta shall be approved and certified by the board of police commissioners and the chief of police, is a reasonable exercise of the power conferred by the charter, and the municipal ordinances passed by authority thereof are reasonable regulations in the promotion and preservation of good order within the municipality. The ordinances under which the plaintiff in error was tried are not unreasonable either because they require a license or permit for the carrying on of the business of a private detective, or because the applicant must first be recommended for a license by the board of police commissioners, or because the business of a detective is subjected to police supervision, or because they prescribe a punishment for engaging in the business of a detective unless a license has been obtained, or because they require that the character and proficiency of a private detective shall be approved by the board of police commissioners and the chief of police, and a certificate to that effect be obtained, or because the use or employment by a detective agency of a person or agent without the approval of the board of police commissioners and chief of police may work a forfeiture of the license. All of these ordinances prescribe reasonable regulations in the enforcement of the inherent power of the municipality conferred under the general welfare clause of its charter.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7–15, 19; Dec. Dig. ⟸7; Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. ⟸625.]

3. MUNICIPAL CORPORATIONS ⟸180, 625—SUPERVISION OF BUSINESS OF PRIVATE DETECTIVE—REASONABLENESS OF ORDINANCE.

As a general rule, the power of a municipality to control its police department is inherent and exclusive, and the imposition of regulations by which interference therewith is prevented or prohibited cannot be said to be an unreasonable exercise of municipal power, although by the passage of municipal ordinances having that effect it becomes impracticable for a private person to carry on the business of a private detective. In the case of such a conflict, salus populi suprema est lex.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 449–457, 466, 482, 1378, 1379; Dec. Dig. ⟸180, 625.]

4. CONSTITUTIONAL LAW ⟸238—DETECTIVES ⟸1—MUNICIPAL CORPORATIONS ⟸593—PRIVATE DETECTIVES—"QUASI PEACE OFFICER."

The ordinances under which the plaintiff in error was convicted are not unconstitutional and void for the reason that they are repugnant to paragraph 2 of section 1, of article 1 of the Constitution of this state, which declares that "protection to person and property is the paramount duty of government and shall be impartial and complete," in that they require that before a detective can exercise his activities he disclose his identity to the police and make a public record of his employment, and work under police supervision. Whatever may be the terms or purposes of his employment, a detective is in essence a quasi peace officer, and the relinquishment of the exercise of the right to supervise and regulate the conduct of a detective on the part of a municipality would amount, pro tanto, to the surrender or abrogation of appropriate municipal functions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688–690, 695, 706–708; Dec. Dig. ⟸238; Detectives, Cent. Dig. § 1; Dec. Dig. ⟸1; Municipal Corporations, Cent. Dig. § 1315; Dec. Dig. ⟸593.]

5. CONSTITUTIONAL LAW ⟸275—DUE PROCESS—MUNICIPAL ORDINANCE—SUPERVISION OF PRIVATE DETECTIVE.

Nor are these ordinances unconstitutional because in violation of article 1, § 1, par. 3, of the Constitution of Georgia, which declares that "no person shall be deprived of life, liberty, or property except by due process of law," in that as insisted, a compliance with the requirements of the ordinances would deprive the plaintiff in error of a property right superior to the right of the municipality to pass the ordinances in question in the interest of the public welfare.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 830, 835, 839, 843–846; Dec. Dig. ⟸275.]

6. CONSTITUTIONAL LAW ⟸42, 207, 238, 275—LICENSING OF DETECTIVES—DUE PROCESS—EQUAL PROTECTION—PRIVILEGES AND IMMUNITIES.

The municipal ordinances under which the accused was convicted are not unconstitutional and void for the reason that they are in violation of the fifth amendment or the fourteenth amendment to the Constitution of the United States, in that the plaintiff in error was thereby deprived of a property right without due process of law or deprived of equal protection of the laws; nor does it appear that in the application and enforcement of the said ordinances the plaintiff in error, as a citizen of the state of Louisiana, was denied any privilege or immunity extended to the citizens of the state of Georgia, especially in view of the fact that it appears undisputed in the evidence that he never made application for a license to act as a detective under the municipal ordinances, and therefore that no application upon his part to carry on his business in accordance with the municipal ordinances was refused by the officers of the municipality.

Even if sections 337 and 338 of the Penal Code of 1910 include private detectives within

their provisions (and this is not ruled), the quasi official character of such peace officers renders the importance of the requirement that they be citizens of the state a reasonable exercise of the state's sovereignty within its territorial jurisdiction. If private detectives are not included within the provisions of sections 337 and 338, then the ordinances under review in the present case are not void because they impinge upon the laws of the state, nor because they deprive citizens of another state of the equal protection of the laws; for they contain no requirement that applicants for license as a city detective shall be residents of the state of Georgia. So far as the plaintiff in error is concerned or affected thereby, the municipal ordinances in question are not unconstitutional or void because of the construction given such ordinances in their administration by the officers of the municipality, since he neither filed any application to be licensed as a private detective himself, nor took any step to have his name placed upon the list of the approved employés of the detective agency by which he was employed, and which had been licensed by the municipality, and therefore as to him the ordinances were never construed at all.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40, 625–648, 688–690, 695, 706–708, 830, 835, 839, 843–846; Dec. Dig. ⟸42, 207, 238, 275.]

7. JUDGMENT AND REFUSAL TO SANCTION CERTIORARI APPROVED.

The evidence authorized the judgment of the recorder and the judge of the superior court did not err in refusing to sanction the certiorari.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Dan S. Lehon was convicted of violating an ordinance of the City of Atlanta, and, from a judgment refusing to sanction certiorari, he brings error. Affirmed.

Little, Powell, Hooper & Goldstein, of Atlanta, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

(16 Ga. App. 154)

## LEWIS v. STATE. (No. 6029.)

(Court of Appeals of Georgia. March 23, 1915.)

*(Syllabus by the Court.)*

1. THEORIES SUPPORTED BY EVIDENCE.

The evidence as a whole tended to support two theories, and only two: One, that the defendant shot the deceased in the back without legal justification or excuse, and was therefore guilty of murder; and the other, that he shot solely to protect the life of his sister from the deceased, who had already fired a shotgun at close range at and towards her, and had then unbreeched his gun and was attempting to reload it, apparently with the purpose of immediately firing at her again, and hence that the defendant was fully justified.

2. HOMICIDE ⟸250, 309 — MANSLAUGHTER — INSTRUCTIONS—EVIDENCE.

There is no evidence tending to show that the killing was done in the heat of passion, that there was a mutual intention between the accused and the deceased to engage in combat, or that the defendant fired the fatal shot to prevent the commission by the deceased of apprehended personal violence upon himself or his sister amounting to less than a felony, and therefore the verdict finding the accused guilty of manslaughter was unauthorized by the evidence, and the court should not have instructed the jury as to the law of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515–517, 649, 650, 652–655; Dec. Dig. ⟸250, 309.]

3. EXCEPTIONS.

Otherwise there was no substantial error.

Error from Superior Court, Laurens County; W. W. Larsen, Judge.

Dan Lewis was convicted of crime, and brings error. Reversed.

H. P. Howard and Hal B. Wimberly, both of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

WADE. Judgment reversed.

(16 Ga. App. 123)

## RICE v. STATE. (No. 5917.)

(Court of Appeals of Georgia. March 18, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸511—TESTIMONY OF ACCOMPLICE—CORROBORATING EVIDENCE—REQUISITES.

To warrant a conviction based on the testimony of an accomplice, the corroborating evidence must, independently of his testimony, connect the defendant with the commission of the offense, and tend to show his guilt. Milner v. State, 7 Ga. App. 82, 66 S. E. 230; Smith v. State, 7 Ga. App. 781, 68 S. E. 335; Bishop v. State, 9 Ga. App. 205, 70 S. E. 976.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128–1137; Dec. Dig. ⟸511.]

2. ARSON ⟸27 — BURDEN OF PROOF — PRESUMPTION FROM BURNING.

In cases of alleged arson, where nothing appears but the burning, the law presumes that the fire was the result of accident or providential cause, and the burden of proof is on the prosecution to overcome this legal presumption. Ragland v. State, 2 Ga. App. 492, 58 S. E. 689; West v. State, 6 Ga. App. 105, 64 S. E. 130; Burley v. State, 6 Ga. App. 776, 65 S. E. 816; Williams v. State, 125 Ga. 741, 54 S. E. 661.

[Ed. Note.—For other cases, see Arson, Cent. Dig. § 55; Dec. Dig. ⟸27.]

3. ARSON ⟸37—TITLE OR OCCUPANCY—DEGREE OF PROOF.

"In a trial for arson, the allegation of title or occupancy need not be proved with the same degree of fullness that would be necessary in actions involving title or the right of possession." Morgan v. State, 120 Ga. 499, 502, 48 S. E. 238, 239. The offense of arson is not so much against the property interest in the building as it is against the security of the building, "and an allegation of ownership in an indictment is sustained by proof of occupancy by the alleged owner under a claim of right." Harrell v. State, 121 Ga. 607 (1), 49 S. E. 703.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 71–73; Dec. Dig. ⟸37.]

4. CRIMINAL LAW ⟸741—CORROBORATION OF ACCOMPLICE—QUESTION FOR JURY.

The sufficiency of circumstances proved to corroborate the accomplice is entirely a matter for the jury (Dixon v. State, 7 Ga. App.

604, 67 S. E. 699), provided the circumstances proved, independently of the testimony of the accomplice, lead to the inference that the defendant is guilty, and in some way connect him with the guilty act (Smith v. State, 7 Ga. App. 781, 68 S. E. 335).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1221, 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. ⊂⊃741.]

5. CRIMINAL LAW ⊂⊃511—CORROBORATION OF ACCOMPLICE—SUFFICIENCY.

It is not essential that the testimony in corroboration of an accomplice shall of itself be sufficient to warrant a verdict of guilty, or that the testimony of the accomplice shall be corroborated in every material point; but it is necessary, in addition to the corroboration of the accomplice, that the testimony shall be of itself sufficient to raise an inference that the defendant is guilty. Bishop v. State, 9 Ga. App. 205, 70 S. E. 976.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128–1137; Dec. Dig. ⊂⊃511.]

6. CRIMINAL LAW ⊂⊃789, 1172 — INSTRUCTIONS—REASONABLE DOUBT—HARMLESS ERROR.

The court, in charging the jury on the law as to reasonable doubt, need not explain the meaning of the term "reasonable doubt." Barker v. State, 1 Ga. App. 286, 288, 57 S. E. 989; James v. State, 1 Ga. App. 779, 780, 57 S. E. 959. "It is very seldom that an amplified definition of the term 'reasonable doubt' elucidates the meaning of these simple words." Middleton v. State, 7 Ga. App. 1 (2), 66 S. E. 22. "A general charge that the jury must be convinced of the guilt of the accused 'beyond a reasonable doubt' would be sufficient (Norman v. State, 10 Ga. App. 802, 74 S. E. 428), but amplification which could not mislead the jury or confuse their minds as to the plain meaning of these words is not reversible error." Layton v. State, 15 Ga. App. —, 83 S. E. 431, 433.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1851, 1880, 1904–1922, 1960, 1967; Dec. Dig. ⊂⊃789, 1172.]

7. CRIMINAL LAW ⊂⊃782 — INSTRUCTIONS — EVIDENCE.

It was not incumbent upon the judge to instruct the jury as to precisely what corroborating circumstances would be required by law to prove the guilt of the defendant, but it is preferable that he should not summarize the evidence. His charge on this subject was fair and sufficiently full.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880–1882, 1906, 1907, 1909–1911, 1960, 1966, 1967; Dec. Dig. ⊂⊃782.]

8. CRIMINAL LAW ⊂⊃829 — REFUSAL OF INSTRUCTIONS COVERED.

There was no error in the admission of testimony; the charge of the court as a whole was free from error, and there is no substantial merit in the various exceptions to extracts from the charge. The instructions requested were sufficiently covered by the charge, and the evidence authorized the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⊂⊃829.]

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Jim Rice was convicted of arson, and brings error. Affirmed.

Jim Rice was convicted under an indictment charging him with willfully and maliciously setting fire to and burning "a certain wooden framed building, the same being a barn and storage house, the property of Ed. M. McKenzie," etc. He excepted to the refusal to grant his motion for a new trial.

The evidence discloses that on February 2, 1914, a barn, where live stock was housed and foodstuffs stored, was destroyed by fire. The barn was in the possession of Ed. M. McKenzie, who held bond for title to the property from the Penn Mutual Life Insurance Company; the legal title being vested in that company as security for a loan to McKenzie. Henry McDonald was the foreman who had charge for McKenzie of the place on which the barn was located, and on Sunday night, February 1, 1914, about half past 11 o'clock, he visited the barn before going to bed, and found nothing wrong. Between 12 and 1 o'clock he awoke and discovered that the barn was on fire, and after giving the alarm he got the mules out from the burning structure, and ran out a sow that slept there. There was no fire in the lower part of the barn when McDonald reached it, but the blaze and roaring were above. There was no storm nor any lightning that night, and there was no smoking around the barn during the day before. All of McDonald's family but himself were at church that day. Albert Robinson testified that he had known the defendant about 12 years, and on the Sunday night, when McKenzie's barn was destroyed by fire, after the services were over, he accompanied a girl from church to her home, about three miles away, and after leaving her he returned to his home, coming back by the McKenzie barn and by the house of Henry McDonald, which was not far from the barn; that on his way home he saw Jim Rice coming down the road a long distance ahead of him, observed his peculiar walk, and finally approached within 25 or 30 yards of him, and plainly recognized him not only from his appearance but on account of the clothing he had on, which was the same clothing Rice had worn that day at the church; that the moon was shining brightly, and he knew it was the defendant he saw in the road, because he had known him for about 12 years. "I recognized him that night because I know him; he has a little twisted walk. When he walks he kind of walks like a woman. I could see that twitch in his walk as far as from here across the street. The moon was full, and it was setting in the west at that time of the night." "When I first saw him I was at Uncle Henry's house [referring to the house of McDonald], and he was going into the lot gate [referring to the lot adjacent to the barn that was burned]. I recognized him as being Jim Rice, and I tell the jury it was him." This witness testified that, after seeing Rice go into the lot gate, near McDonald's house, he (the witness) went on to his own home about a quarter of a mile away and went to bed about 12 o'clock, and very soon thereafter he dis-

tinctly heard a noise down at Henry McDonald's and heard people coming down the road talking about the fire.

McKenzie testified that he had had certain trouble with the defendant, and about a week prior to the burning of the barn had said to him:

"I have been trying to be a neighbor to you, but I am getting tired of the way you are acting, and I tell you, if I ever do have any proof to convict you of your devilment, then I don't want you to ask me to have any mercy on you."

He testified further that there was trouble between the defendant and himself because he had castrated a boar shoat belonging to Rice, which frequently came to his lot, and which was on that day found in his pen with some fine Berkshire and Jersey hogs. There was evidence from O. H. Levie and Oscar McKenzie that on Saturday, before the burning of McKenzie's barn, the defendant had applied for and obtained from them the sums of $50 and $15, respectively, which he paid back on the following Monday morning.

Scott Towns testified that he lived on Ed. McKenzie's place, and had known Jim Rice for about three or four years; that the barn described in the indictment was burned on Sunday night about 12 o'clock; that, on Friday before the burning, Rice came to his house and inquired if he wanted to make some money, and, in response to his inquiry as to how the money was to be made, Rice replied that Mr. McKenzie had not been treating him right and was "running over him;" that Mr. McKenzie had cut his hog and promised to give him another, but had not done so, and "he lied." The witness said that the defendant finally told him that night that if the witness would set the barn on fire he would give him $50, or if the witness would go there and watch for the defendant while he applied the fire, he would give him $50; that he said further that he had the money, as he had borrowed some from Mr. Oscar McKenzie, and what was lacking he would borrow on Monday and pay witness; that on Sunday at Piney Grove Church, about 8 o'clock at night, Rice drove to the church and called the witness off to one side; that Rice was "dramming," he was drinking, and gave the witness a drink, and said, "Come on, let's do that," and when the witness replied that he was going to remain at the church until after meeting, but would be on directly, and suggested that if they set fire to the barn the fact would be discovered, Rice replied, "You ain't obliged to tell, and I will pay you all right up;" that Rice got in his buggy and went towards the barn that was afterwards burned, and the witness went into the church and stayed there until they began taking up a collection, and then went home and waited for Rice; that in about 25 or 30 minutes Rice came by in his buggy and told him that as soon as he tied his mule he would be back; that Rice came back soon after and reported that he had tied his mule, and then went across the cotton patch and over into the lot surrounding the barn. The witness did not get over the fence, but Rice went around by the fence and jumped it and went around to a shed and opened it, "and came in and along the passage where there is a stairway up, where you can go up, and he set it afire there," and left without paying the witness anything, and in three or four minutes the fire developed; that, at the time the witness reached the corner of the fence and Rice went around the lot, the witness saw some one in the road, but did not know who it was, and thought whoever it was might have recognized the accused; that Rice then crossed the corner of the cotton patch, in the direction of his home, and he did not see Rice again until the next day, though other people began coming to the fire about 1 o'clock that night, when the alarm commenced.

The evidence showed that dogs followed the track of Towns away from the burning barn to his house, but it does not appear that there was any effort to find Rice's track across the field. After Towns was told that the dogs had tracked him, he stated that Rice had burned the barn, and he had watched for Rice.

Hatcher & Smith, of Macon, and John B. Guerry, of Montezuma, for plaintiff in error.
J. R. Williams, Sol. Gen., of Americus, for the State.

WADE, J. (after stating the facts as above). [1-8] The evidence of Scott Towns, the alleged accomplice of the defendant, established the commission of the crime and directly implicated the defendant therein. Independently, however, of the evidence of the accomplice, there was testimony sufficient to authorize the inference that the barn was feloniously burned, and to directly connect the defendant with the burning. It was shown by testimony, other than that of the accomplice, that the accused, who lived not far distant from the barn, cherished a grudge against the owner thereof; that on the night of the burning, shortly before 12 o'clock, the foreman on the place where the barn was located, who lived not far from the barn, visited and inspected it, and found everything safe and discovered no fire; that there had been no fire and no smoking about the barn during that day, and no other person than the foreman had been there during the entire afternoon before the fire; that, perhaps within a half hour after the foreman had inspected the premises, fire broke out in the barn; that in the interval of time between the inspection by the foreman and the discovery of fire another witness saw the defendant go into the lot surrounding this barn, and plainly recognized him in the bright moonlight; that this witness went directly

to his home, only a quarter of a mile distant, and immediately went to bed, and in a very few minutes thereafter heard the alarm of fire, and discovered that the barn was blazing; that the barn was full of forage and other inflammable material upstairs, and the fire broke out there, where neither the foreman nor any one else had had recent occasion to go; and that there was no storm or lightning during the night, but the elements were calm and the skies clear.

In the case of Johnson v. State, 89 Ga. 107, 14 S. E. 889, the statement of facts discloses that there was "testimony tending to prove his [the defendant's] presence on the premises of his father-in-law, where the burned barn and stockade were situated, on the night of the burning and shortly before the fire was discovered, together with testimony showing that the defendant and his wife had a 'falling out' and separated on the day preceding the burning, she going to her father's plantation with the father's consent, and the defendant cursing and saying she might move, but it would do her no good, because he was going to make their damned hearts ache them before many nights and days, and that he was 'going to kick up much hell in Dougherty.'" There was also testimony for the state in that case to the effect that it was impossible for the burning to have been accidental. On this evidence, the judgment refusing a new trial was affirmed by the Supreme Court.

In Morgan v. State, 120 Ga. 499, 500, 48 S. E. 238, the court said:

"There was evidence to show that the fire could not have originated from accidental causes; that no fire was left in the place where the conflagration began; and that the room had been left securely fastened, with no fire therein when the occupants departed at night."

There, too, the conviction was sustained. It was urged in that case that there was no proof of the corpus delicti, and the conviction depended exclusively and wholly upon a confession uncorroborated by anything showing that the arson had been committed, or that the burning was willful and malicious. The testimony further showed that the defendant had borrowed some oil about midnight on the night of the fire, and that he was seen coming from towards the storehouse where the blaze had begun to appear. In his statement he claimed to have been at home in the country at the time the fire must have originated, and to have come to the fire after he saw the conflagration. Justice Lamar (now of the United States Supreme Court), speaking for the court, said:

"He may have been drunk, as he claimed; but his borrowing the oil, his presence at the fire about the time it was discovered, the qualified threat of the day before, the absence of an explanation of his presence at such an unusual hour and place, were circumstances sufficient to corroborate the confession that he set fire to the building described in the indictment and otherwise shown not to have been accidentally burned."

In this case the defendant in his statement contented himself with denying that he had seen the alleged accomplice on the day fixed by the testimony of the latter, or had had any conversation with him at any time with reference to burning the barn; but, strange to say, there is not in his entire statement a distinct assertion that he did not in fact commit the crime with which he was charged. Nor does it appear therein that he denied his presence at the barn at the time when the testimony of the witness other than the alleged accomplice placed him there, nor did he admit and seek to explain his presence, though his presence there away from his own home, at that hour of the night, where he could scarcely have had any legitimate, ordinary reason to urge for such presence, demanded an explanation. In the face of this damning testimony, he appeared to think it was more necessary for him to convince the jury that he never had trouble with white people, but always looked to them for help and always tried "to stay in a negro's place," rather than to convince them of his innocence of the charge against him.

There was evidence tending to show that the fire could not have been of accidental origin, since there had been no fire or smoking near the barn during the day prior to its destruction or up to the period of time only a few minutes before the flames appeared; the accused was seen at the barn during the interval between the last inspection and the discovery of the fire, and within a negligible time thereafter the flames burst forth; he offered no explanation for his unusual and apparently unnecessary presence after midnight at a time and place where he had no known reason to be, nor did he deny at his trial that he was in fact there; several personal clashes with no inconsiderable friction between himself and the owner of the barn were shown to have occurred within a short time prior to the burning. All this was proved by witnesses other than the accomplice, and the jury were authorized to infer from this testimony alone that the fire was of incendiary origin and that the defendant was connected therewith; and when this is coupled with the testimony of the accomplice, and with other testimony corroborating the statement of the accomplice on certain minor points, there was enough to convince the jury of the guilt of the defendant beyond a reasonable doubt, if they believed the testimony.

The headnotes cover sufficiently the various points raised in the special grounds of the motion for a new trial.

Judgment affirmed.

BROYLES, J., not presiding.

(16 Ga. App. 150)

BOYETT v. STATE. (No. 5873.)

(Court of Appeals of Georgia. March 23, 1915.)

*(Syllabus by the Court.)*

1. SEDUCTION ⟸45 — SEDUCTION UNDER PROMISE OF MARRIAGE—SUFFICIENCY OF EVIDENCE.

The evidence was amply sufficient to warrant a conviction of seduction. The jury was authorized to find that the female was a virtuous unmarried woman at the time she yielded to the embraces of the defendant, and that she was induced to yield by persuasion and promises of marriage. There is no substantial merit in any of the assignments of error, and it appears from the record that the accused had a fair and impartial trial. The judgment overruling the motion for a new trial must therefore be affirmed.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 80–82; Dec. Dig. ⟸45.]

*(Additional Syllabus by Editorial Staff.)*

2. WITNESSES ⟸268—CROSS-EXAMINATION—ATTITUDE OF WITNESS.

Pen. Code 1910, § 1044, giving the right of cross-examination, authorizes a witness for accused to be cross-examined to determine his point of view or attitude as to the gravity of the offense.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. ⟸268.]

3. WITNESSES ⟸309—CROSS-EXAMINATION—REFUSAL TO ANSWER—EFFECT.

Where a witness, offered for the purpose of proving that a female alleged to have been seduced was not virtuous prior to the seduction, declined to answer certain pertinent questions on the ground that so doing would incriminate himself, the whole of his testimony on the same subject should have been ruled out.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1069–1071; Dec. Dig. ⟸309.]

4. CRIMINAL LAW ⟸448—EXAMINATION OF WITNESSES—QUESTION CALLING FOR CONCLUSION—PROSECUTION FOR SEDUCTION.

A question seeking to elicit from a witness whether he knew that the woman alleged to have been seduced had "sexual intercourse with a man" in a certain month and year named was properly excluded, as calling for a conclusion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035–1039, 1041–1043, 1045, 1048–1051; Dec. Dig. ⟸448.]

5. SEDUCTION. ⟸44—EVIDENCE—REBUTTAL.

Where the defendant, in a prosecution for seduction under promise of marriage, denied his guilt and testified that he "never went" but a few times with the female alleged to have been seduced, further testimony of the female as to the courtship between herself and defendant, and his conduct prior to and at the time of the alleged seduction, was admissible in rebuttal.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. § 78; Dec. Dig. ⟸44.]

6. CRIMINAL LAW ⟸720 — ARGUMENT OF COUNSEL—WITNESS—REFUSAL TO TESTIFY.

In a prosecution for seduction under promise of marriage, the court properly refused to allow defendant's counsel to argue to the jury that the act of a witness in claiming his privilege not to testify whether he had sexual intercourse with the woman alleged to have been seduced was a circumstance to show that she was not virtuous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. ⟸720.]

7. CRIMINAL LAW ⟸942 — NEW TRIAL — GROUNDS—TESTIMONY OF PHYSICIAN.

In a prosecution for seduction, the alleged newly discovered testimony of the attending physician that in his opinion the child was an eight months fœtus did not require a new trial, though it tended to refute the mother's testimony as to the date when she was seduced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2316, 2331, 2332; Dec. Dig. ⟸942.]

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Groover Boyett was convicted of seduction, and brings error. Affirmed.

R. A. Hendricks, of Nashville, and E. K. Wilcox, of Valdosta, for plaintiff in error. J. A. Wilkes, Sol. Gen., of Moultrie, for the State.

WADE, J. The defendant was convicted of seduction, and excepts to the overruling of his motion for a new trial, based on the usual general grounds and on several special grounds. Each of the special grounds of the motion for a new trial is hereafter mentioned and discussed in its proper order. The defendant relies on the contention that the evidence as a whole shows that the sexual commerce between the accused and the woman alleged to have been seduced was entirely meretricious, and therefore that the verdict for seduction is not supported by the evidence. The special grounds of the motion for a new trial are hereinafter first discussed, and the general grounds referred to lastly.

[1, 2] 1. The court did not err in allowing the solicitor general to ask, on cross-examination, the question set out in the first special ground of the motion for a new trial. One of the purposes intended to be subserved in the trial of a criminal case by a thorough and sifting cross-examination is to ascertain the existence of any prejudice or bias on the part of the witness for or against the accused, the prosecutor, or any other person connected with the case, or participating in the prosecution or defense, or to determine whether the witness might be biased or prejudiced generally for or against persons accused of the particular crime with the commission of which the defendant is charged. Any questions tending to make clear the point of view or attitude of a witness as to the gravity or unimportance of the offense under investigation, if the same are proper and germane, and tend to elucidate the feelings or bias of the witness, may affect his credibility and should be permitted, since the right of cross-examination should not be abridged. Penal Code, § 1044.

[3, 4] 2. "When a witness, offered for the purpose of proving that a female, who is alleged to have been seduced, was not virtuous prior to the alleged seduction, declined to answer certain pertinent questions, on the ground that so doing would incriminate himself, the whole of his testimony upon the sub-

ject should have been ruled out." Hays v. State (decided February 18, 1915) 84 S. E. 497, and cases there cited. There was no error in the refusal by the court to permit a witness to answer questions seeking to elicit from him that he knew that the woman who claimed to have been seduced had "sexual intercourse with a man" in a certain month and year named. Any conclusion of the witness was incompetent as evidence, and he was properly confined to the statement of such facts as he personally knew, tending to establish that she was not a chaste woman. The witness could have stated that he had seen her in the sexual act at a time and place mentioned by him, and with a man known or unknown to him, and this would have afforded the state an opportunity to elicit all the surrounding facts by cross-examination, and the female an opportunity to specifically deny that she had sexual intercourse at the time and place mentioned, or with the person described or named by the witness. To allow a witness for the defense in a prosecution for seduction to state merely that he knew of his own knowledge that the woman alleged to have been seduced by the defendant had prior to the time of the alleged seduction engaged in sexual intercourse with a man other than the defendant, without stating specifically, as nearly as possible, the time and place, and describing or naming the man with whom she had such intercourse, would make it practically impossible for the female whose chastity is under investigation to successfully refute the charge, and would open the way for unscrupulous evidence in behalf of the defendant. If the witness who testified to acts of unchastity on the part of the woman should decline to name the man who participated with her in such acts, on the ground that he would thereby incriminate himself, his entire testimony should be excluded, under the ruling in the Hays Case, supra; and therefore such a witness cannot be allowed to answer a question that would elicit from him the same damaging testimony, without stating any facts upon which he bases his conclusion, and without naming or describing the man with whom the woman indulged in lascivious conduct or sexual intercourse, and thus evade the exclusion of his testimony.

[5] 3. The court did not err in allowing the female alleged to have been seduced, when recalled as a witness for the state, to testify further concerning the courtship between herself and the defendant, and as to his conduct prior to and at the time of the alleged seduction. The matter was within the sound discretion of the judge, and his discretion does not appear to have been abused. Besides, this evidence tended to rebut the statement of the accused that he was not guilty and had "never had anything to do with her in that way," and "never went with her but a few times," as she testified that he repeatedly declared his love for her and on several occasions used endearing terms to her, and this tended to contradict his statement that he had never had intercourse with her, and showed at least the close intimacy existing between them.

[6] 4. A witness introduced for the defense, who, it was shown, had, for a considerable period prior to the alleged time of the seduction, visited the woman alleged to have been seduced, was asked whether or not he had ever had sexual intercourse with her, and refused to answer, on the ground that his evidence might tend to incriminate himself; and in the motion for a new trial it is contended that the court erred in refusing to allow the defendant's counsel to argue to the jury that this was a circumstance to show that the woman was not virtuous at the time she claimed to have been seduced. In principle the ruling in the Hays Case, supra, covers this exception. If the testimony of a witness should be rejected because he declines to answer in full on the ground that he would thereby incriminate himself, it follows as a necessary conclusion that counsel cannot be permitted to present, by argument to the jury, inferences and deductions based on the refusal of the witness to answer, for such a reason stated by him.

[7] 5. The statement in the alleged newly discovered testimony of the physician who attended the woman who claimed she had been seduced, and delivered her of a child, that "in his opinion, from the size and general development of said child, it was an eight months fœtus," though it would tend to refute the statement of the mother that she was seduced in July, 1913, less than seven months before the child was born dead, would not itself be so conclusive as probably to bring about a different result on another trial, as it only purports to be a mere opinion, which the jury would be at liberty to reject (Griffin v. State, 15 Ga. App. ——, 83 S. E. 891, 895), and therefore this evidence, whether cumulative or not, and without considering the degree of diligence exercised in obtaining it, is not sufficient to warrant a holding that the trial judge abused his discretion in refusing a new trial on that ground.

6. The evidence disclosed that a bona fide engagement to marry existed between the defendant and the girl he was charged with seducing; that he became acquainted with her in March, 1913, and frequently visited her and took her out buggy riding, until they became engaged in the following June; that he continued to visit her and take her out driving practically every Sunday, until he accomplished her ruin in July following; that thereafter he still visited her and had intercourse with her, until the engagement was broken in the following September; that he used endearing terms to the girl after they became engaged, and assured her of his love, and finally persuaded her, relying on his previous promise of marriage, to yield

to his carnal desires. He told her at the time he first had intercourse with her that if she did not do as he desired he would not marry her, but if she did he would. Nevertheless it does not appear from the evidence as a whole, or from the fact that there was a bona fide pre-existing engagement or promise to marry, that the consent of the female was based upon the promise of marriage as a consideration moving her to permit the sexual act, and therefore the transaction was not purely meretricious. Disharoon v. State, 95 Ga. 351, 22 S. E. 698. "The sexual intercourse was accomplished, not so much because of the promise of marriage, but on account of the confidence which had been created by reason of the protestations of affection, antedating the engagement to marry" (Pough v. State, 7 Ga. App. 610, 67 S. E. 695) and following that engagement up to the time of her seduction. "A promise to marry, which a woman believes to be made in good faith," and made as a climax to persistent and ardent wooing, "when the man has fully captured the heart of the woman, and she hearkens to the voice of love, and yields to her lover because she trusts him, implies persuasion of the strongest character." Woodard v. State, 5 Ga. App. 447, 451, 63 S. E. 573, 575. The existence of the engagement to marry would argue that the affections of the woman were involved and that her confidence had been won, and she testified that the defendant repeatedly assured her of his love. "To accomplish sexual intercourse with a virtuous woman, pending a virtuous engagement to marry her, may be seduction, though consent be obtained without other persuasion than that which is implied (considering the past courtship and the present relation of the parties) in proposing the intercourse and repeating the promise of marriage." Wilson v. State, 58 Ga. 329. See also Cherry v. State, 112 Ga. 871, 38 S. E. 341; O'Neill v. State, 85 Ga. 408, 11 S. E. 857; Keller v. State, 102 Ga. 513, 31 S. E. 92.

Judgment affirmed.

BROYLES, J., not presiding.

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(16 Ga. App. 161)

SMITH v. CITY OF ROME. (No. 6123.)

(Court of Appeals of Georgia. March 23, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸636—MUNICIPAL CORPORATIONS ⟸641 — VIOLATION OF ORDINANCE — DELIBERATIONS OF MAYOR AND COUNCIL—PERSONS PRESENT—PRESENCE OF ACCUSED.

Where, on a trial by the mayor and council on appeal, in the case of one who had been convicted by the recorder of the city on the charge of having violated a municipal ordinance, the evidence and the defendant's statement had been received and the hearing of the case concluded, it was not error to exclude the accused from the courtroom during the deliberations of the mayor and council as to the judgment to be rendered. Nor is it sufficient ground for a new trial that the city's attorney, who had conducted the prosecution, and the chief of police, who had aided and advised him in the conduct of the trial, were allowed to remain in the courtroom while the accused was excluded, it appearing that neither of these officers took part in the deliberations of the mayor and council, though the chief of police, at their request, informed them as to the amount of the fine imposed in the recorder's court. If this communication, or the presence of these officers, in the absence of the accused, was an irregularity, it does not appear that it resulted in harm to him.

(a) The right of the accused to be present at his trial does not include the right to be admitted to the consultations of the members of the court with each other while they are deliberating as to the judgment to be rendered.

(b) The mayor and council were sitting as a court, and not as a jury (Flannigan v. City of Rome, 10 Ga. App. 217, 72 S. E. 1099); and the case is not governed by decisions awarding a new trial on account of communication between jurors and others during the deliberations of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1465–1482, 2120; Dec. Dig. ⟸636; Municipal Corporations, Cent. Dig. § 1411; Dec. Dig. ⟸641.]

2. DENIAL OF CERTIORARI.

The judge of the superior court did not err in overruling the certiorari.

Russell, C. J., dissenting.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Herman Smith was convicted of violating a city ordinance, certiorari was overruled by the superior court, and defendant brings error. Affirmed.

John W. Bale and John Camp Davis, both of Rome, for plaintiff in error. Max Meyerhardt, of Rome, for defendant in error.

WADE, J. Judgment affirmed.

RUSSELL, C. J., dissents.

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(16 Ga. App. 161)

CARRAWAY v. STATE. (No. 6067.)

(Court of Appeals of Georgia. March 23, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸1064½ — APPEAL — AMENDMENT TO MOTION FOR NEW TRIAL—TIME FOR OBJECTION.

When it appears from a bill of exceptions that a motion for a new trial was amended, and the amendment to the motion is specified in the bill of exceptions as one of the papers material to a proper consideration of the errors assigned, it is too late, after the certification of the bill of exceptions, to raise the objection that the grounds of the amendment to the motion were not formally approved by the trial judge. Acts 1911, p. 150, § 3.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676, 2887, 2948; Dec. Dig. ⟸1064½.]

2. CRIMINAL LAW ⟸814—INSTRUCTIONS—EVIDENCE.

Neither from the evidence nor from the defendant's statement at the trial does it appear that he assaulted or struck the prosecutor upon

a lot, jurisdiction over which had been ceded to the United States government (though there is testimony to the effect that the prosecutor, after being struck, fell over a wire fence which was the boundary of the lot upon which the United States was having a building erected); consequently the court did not err in refusing a request to charge the jury to the effect that if they were satisfied that the offense was committed on such land, they should acquit the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. ⟸814.]

3. CRIMINAL LAW ⟸919—ARGUMENT OF COUNSEL—REFUSAL OF MISTRIAL.

The fact that the solicitor general, in his argument to the jury, referring to a statement made to the jury by the defendant's counsel, that they had been appointed by the court to defend the accused, replied to the effect that the necessity for the court's having to appoint counsel was perhaps due to the fact that the accused was not industrious or frugal or prompt in the payment of his debts does not require a holding that the trial judge abused his discretion in refusing to order a mistrial, since there was testimony supporting the argument of the solicitor general as to the defendant's abstaining from labor and his failure to pay some of his debts, to which no objection was offered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2197–2201; Dec. Dig. ⟸919.]

4. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The requests for instructions, so far as pertinent, are covered by the charge of the court; the trial was free from any material error; the evidence authorized the verdict; and the discretion of the trial judge in refusing a new trial will not be overruled.

Error from Superior Court, Laurens County; W. W. Larsen, Judge.

Wm. Carraway was convicted of crime, and brings error. Affirmed.

Davis & New, of Dublin, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, for the State.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 168)

## STEPHENS v. STATE. (No. 6205.)

(Court of Appeals of Georgia. March 23, 1915.)

*(Syllabus by the Court.)*

1. CERTIORARI ⟸69—OVERRULING OF PETITION—RIGHT TO RENDER FINAL JUDGMENT.

The decisions of the Supreme Court holding that "it is error for the judge of the superior court, on the hearing of a petition for certiorari, to render a final judgment in a case where there is conflict in the evidence as to material facts in issue, can, in the nature of things, only apply to a case where the petition for certiorari is sustained, and not to one where the petition is overruled." Ford v. Price, 116 Ga. 793 (2), 43 S. E. 69.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 185–194; Dec. Dig. ⟸69.]

2. CERTIORARI ⟸68—DISMISSAL—GROUNDS.

Where in a certiorari there is no other question of law presented than that the verdict rendered by the jury in the county court was without evidence to support it, and it appears that the verdict so rendered is supported by some evidence, it is not error for the judge of the superior court to dismiss the certiorari. Civil Code 1910, § 5201.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 180–182; Dec. Dig. ⟸68.]

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

Proceedings between the State and Sye Stephens. Certiorari dismissed, and Stephens brings error. Affirmed.

J. A. Beazley, of Crawfordville, for plaintiff in error. R. C. Norman, Sol. Gen., of Washington, for the State.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 140)

## McCLELLAN v. RAWLING. (No. 5851.)

(Court of Appeals of Georgia. March 23, 1915.)

*(Syllabus by the Court.)*

1. BILLS AND NOTES ⟸488—ACTION ON PETITION—EXHIBITS.

The provisions of section 5541 of Civil Code 1910 are substantially complied with, when, in a suit against the maker of a large number of promissory notes, a copy of one of the notes is attached to the petition, and it is alleged in the petition that all of the other notes are exactly like it "in form and substance, except as to dates of maturity, which are one month apart in succession."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1584–1586; Dec. Dig. ⟸488.]

2. PLEADING ⟸207, 433—DEFECTS IN PETITION—OBJECTION—WAIVER.

In a suit, when the provisions of section 5541 of Civil Code 1910 as to attaching copies of contracts, obligations to pay, etc., to the petition, are not complied with, the objection should be made in the form of a special demurrer to the petition itself, and, if not so made, the defect is cured by the verdict, and is not a good ground for a new trial. Reed v. Equitable Trust Co., 115 Ga. 781, 42 S. E. 102; Gonackey v. General Accident, etc., Corp., 6 Ga. App. 381, 65 S. E. 53, and cases therein cited.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 511, 512, 1451–1477; Dec. Dig. ⟸207, 433.]

3. PAYMENT ⟸39—APPLICATION—ALLOWANCE OF CLAIM FOR RECOUPMENT—EFFECT.

Where a claim is allowed as a recoupment in a suit on a series of promissory notes (it being stipulated in each note that, if any of them should become due and remain unpaid longer than 60 days after maturity, then all the remaining notes should be considered as due, and a right of action on all would at once exist), it does not ipso facto pay the notes which are in default, so as to prevent a right of action on the whole series of notes, in the absence of an agreement to so apply it, or of a demand that it should be so applied.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 104–114; Dec. Dig. ⟸39.]

Russell, C. J., dissenting.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by William Rawling against Ida B. McClellan. Judgment for plaintiff, and defendant brings error. Affirmed.

Lavender R. Ray, Albert Kemper and J. W. Weaver, all of Atlanta, for plaintiff in error. Etheridge & Etheridge, Bryan & Middlebrooks, and G. W. Parker, all of Atlanta, for defendant in error.

BROYLES, J. On June 18, 1912, Mrs. Ida B. McClellan purchased from William Rawling a dwelling house and lot for $4,000. Mrs. McClellan paid $25 in cash, and gave 92 purchase-money notes, payable monthly (all for $25, except the last, which was for $21). The first note fell due August 1, 1912, and the last was payable March 1, 1920. There was a clause in each note as follows:

"I hereby agree that, if any one of the said notes shall become due and remain unpaid at one time longer than 60 days after maturity, then all the remaining unpaid notes shall be considered as due, and the right of action on all shall at once exist."

Mrs. McClellan paid the first three notes, which fell due August 1st, September 1st, and October 1st, respectively. The note which fell due November 1, 1912, was not paid. On June 17, 1913, Rawling brought suit on all of the other notes, alleging that note No. 4, due November 1, 1912, was unpaid, and had remained unpaid longer than 60 days, and that he had exercised his option to declare the entire series of notes due. On July 7, 1913, Mrs. McClellan filed her answer, in which she made no claim whatever that the house was in an unfinished condition when she bought it and moved into it, or that the plaintiff had verbally agreed to finish it. She made no claim of set-off or recoupment whatever against the plaintiff's suit. On April 16, 1914, she filed an amended answer in which she for the first time set up that the house was in an unfinished condition when she moved in, and that the plaintiff made a verbal agreement with her that he would complete it before the first note fell due; and in this amended answer she sets up a claim for recoupment.

[3] We think it necessary to discuss the third headnote only. Mrs. McClellan claims that the house was in an unfinished condition when she moved in, and that Rawling promised to complete it, and that this promise was never carried out, and that it would require at least $150 to complete the house in the manner that Rawling had promised. This alleged verbal contract, however, according to Mrs. McClellan's own testimony and her amended answer, was made before she signed the written contract for the purchase of the property and gave her purchase-money notes in payment of the same. In this written contract nothing was said about the house being unfinished, or an agreement of Rawling to complete it. Under the law, the former verbal contract, if any, was merged into the later written contract; and when suit was brought on this written contract this alleged verbal agreement, as set up in the amended answer, was a plain attempt to vary the written contract by a parol agreement, and therefore was not legal. The fact that, upon the trial, counsel for Rawling voluntarily agreed to allow Mrs. McClellan a credit of $150 on his claim against her, and at the same time asked the court to direct a verdict for Rawling for the balance of the money due upon the 89 unpaid notes, should not be allowed to have the effect of defeating the plaintiff's suit by allowing this credit of $150 to extinguish all the notes which were in default at the time of the filing of the suit. The plaintiff might be very willing to agree to the one thing, and very unwilling to agree to the other. They are very far from being the same. In her original answer, Mrs. McClellan did not claim the $150 set-off, or any other amount; and it was more than a year after the default of the note due November 1, 1912, that she made this claim in her amended answer. But in neither the original nor the amended answer did she demand that Rawling should credit this claim upon the purchase-money notes which were in default. Neither did she testify that she had ever demanded or requested Rawling to credit this claim upon her notes, nor that she had paid or offered to pay the remaining purchase-money notes. In 1 Wiltsie on Mortgage Foreclosure, 75, § 57, it is said:

"It has been said, and the decision is well-founded in principle, that the existence of a debt due from a mortgagee to a mortgagor, which may be set off against the mortgage, does not ipso facto pay the interest so as to prevent default by which the whole mortgage debt becomes due, in the absence of an agreement to apply it on the mortgage, or of a demand that it should be so applied."

While, of course, the case at bar is not a mortgage foreclosure, we think the principle involved is the same, and that it may well be applied here.

Under our view of the law, there being no other legal result possible, the court did not err in directing a verdict for the full amount sued for, less the $150 recoupment allowed.

Judgment affirmed.

RUSSELL, C. J., dissents.

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(75 W. Va. 676)

## WALTERS v. APPALACHIAN POWER CO.

(Supreme Court of Appeals of West Virginia. Feb. 23, 1915.)

*(Syllabus by the Court.)*

1. TRIAL ⊜127—PRESENTATION OF EVIDENCE—INDEMNITY AGAINST LOSS.

In an action against an electric company for personal injury, caused by its alleged negligence in the maintenance and operation of one of its wires, it is prejudicial error to admit evidence, over defendant's objection, to prove that it carried insurance indemnifying it against loss by accident, for the purpose of establishing negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 275; Dec. Dig. ⊜127.]

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2. NEGLIGENCE ⟸126—EVIDENCE—INDEMNITY — CAUSE OF INJURY — OWNERSHIP OF AGENCY.

Nor is such evidence admissible to prove ownership and control of the particular agency that caused the injury, unless it appears that the contract of indemnity embraces accidents caused by such particular agency.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 245–247; Dec. Dig. ⟸126.]

3. APPEAL AND ERROR ⟸548—PRESENTATION FOR REVIEW—ADMISSION OF EVIDENCE—EXCEPTION.

An exception to the admission of improper evidence, appearing in a general bill of exceptions embodying the evidence and specially pointed out in brief, is sufficient to entitle plaintiff in error to consideration thereof by this court, if it appears that such error was called to the attention of the lower court, by stating it as a ground of a motion for a new trial. An exception thus saved and pointed out need not be embodied in a special bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433–2440; Dec. Dig. ⟸548.]

4. EVIDENCE ⟸143—MATERIALITY TO ISSUES—EXCLUSION.

It is proper to reject evidence having no probative value in the determination of any of the material issues.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 424, 426–428; Dec. Dig. ⟸143.]

5. NEGLIGENCE ⟸136—CONTRIBUTORY NEGLIGENCE — CONFLICTING EVIDENCE — QUESTIONS FOR JURY.

Where the testimony respecting defendant's alleged negligence is conflicting, and the facts and circumstances relied on to establish plaintiff's contributory negligence are such that the minds of reasonable men would not agree thereon, the negligence of both are mixed questions of law and fact for jury determination, and it must determine which is the proximate cause.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. ⟸136.]

6. DAMAGES ⟸158 — VARIANCE — PLEADING AND PROOF.

Proof that plaintiff was injured by some other part of his body coming in contact with a charged electric wire, when he had averred that he was injured by its striking his foot, is an immaterial variation.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441–444; Dec. Dig. ⟸158.]

7. ELECTRICITY ⟸17—NEGLIGENCE—CHARGED TELEPHONE WIRE—HIGHWAYS.

It is negligence for an electric company owning and operating a highly charged electric wire to suffer a broken telephone wire, even though not owned by it, to fall across its electric wire upon the highway, and remain there as a menace to the public for an unreasonable time.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. ⟸17.]

Error to Circuit Court, Mercer County.

Action by W. H. Walters against the Appalachian Power Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

Bernard McClaugherty and French & Easley, all of Bluefield, for plaintiff in error. Greever & Gillespie, of Tazewell, Va., and Sanders & Crockett, of Bluefield, for defendant in error.

WILLIAMS, J. This action grows out of the same act of alleged negligence by which William Morrison received a personal injury and on account of which he sued and recovered a judgment against this defendant, which was recently affirmed by us on writ of error granted to defendant. Morrison was driving a team along a narrow public road, walking beside his horses. As he was going up a hill he stopped to rest his team, and, seeing the end of a broken telephone wire lying across the ditch and extending into the roadway, and thinking it might become entangled in the wheels of his wagon, and supposing it to be otherwise harmless, he stooped and took hold of it to toss it out of the road. It proved to be highly charged with electricity and so overcame him that he was unable to release himself from it. Plaintiff, who was near by, seeing his perilous situation, ran to his assistance, and, in his efforts to get the wire out of Morrison's hand, came in contact with it himself, and received the alleged injury for which he brought this action and recovered a judgment, to which defendant was awarded this writ of error.

[1, 2] The first error assigned is that the court permitted improper testimony to go to the jury over defendant's objection. The testimony of witness D. E. French is specially referred to in brief as improper. Mr. French was counsel for defendant, and was examined as a witness on behalf of plaintiff. He was required to state, over objection, by whom he was employed to defend the case, and replied that he was employed by the Fidelity & Casualty Company of New York City. He was then asked what interest that company had in the suit, and, after his objection to the question was overruled, replied that he had no direct information, and only knew from hearsay; and, on being further asked the following question: "Your information is, or your understanding is, rather, that the Appalachian Power Company carries an insurance policy with that Fidelity & Guaranty Company insuring it against loss by accident. Is that true?"—replied as follows: "That is my information; yes, sir." Many similar questions were asked of him, which he was required to answer over defendant's objections. The ruling of the court, in each instance, was excepted to, and the exceptions are noted in the bill of exceptions embodying the evidence. The testimony was irrelevant and immaterial, and, as we are unable to see clearly that the jury were not prejudiced by it, it is cause for reversal. The fact that defendant carried accident insurance for its protection could shed no light on the issue of negligence. It might tend to show that it had less incentive to be careful than it otherwise would have had. But the question of motive, in a negligence case, is not material; the court and jury are concern-

ed only with the question of fact, whether defendant was negligent, and not with any motive it may have had for not being sufficiently careful. Such evidence has frequently been held by the courts of this country to be improper and to constitute prejudicial error. Virginia-Carolina Chemical Co. v. Knight, 106 Va. 674, 56 S. E. 725; Sawyer v. Shoe Co., 90 Me. 369, 38 Atl. 333; Tremblay v. Harnden, 162 Mass. 383, 38 N. E. 972; and Cosselmon v. Dunfee, 172 N. Y. 507, 65 N. E. 494.' Counsel for plaintiff practically concede in their brief that the evidence is not material on the main issue of negligence, but they insist that it is proper evidence tending to prove the material fact respecting the ownership and control of the electric wire that caused the injury, and, being proper for that purpose, the court did not err in admitting it generally, no request having been made to limit its application to any particular purpose, that it was properly admitted if allowable for any purpose. Defendant denied that it owned or controlled the electric wire at the time and place of injury. This is one of the contested facts in the case, and it is conceded that, if it did not own and control the wire, it is not liable. Hence counsel for plaintiff insist that it was proper to show that the action against defendant is being defended by its insurer, as tending to prove its ownership and control of the wire; that, if it did not own the wire it would not have called upon its insurer to defend the case. This, we think, is a non sequitur. If the evidence had shown that the policy covered accidents growing out of the negligent use of the particular wire in question, then the evidence might have been admissible as tending to prove that defendant owned, operated, and controlled it. But the evidence is that about a year before the accident defendant purchased from the Pocahontas Light & Water Company an electric light and power plant in the town of Pocahontas and the system of wires used in connection therewith for carrying current to its customers for lighting purposes; that the wire causing the injury extended from the power plant to the pumping station, a mile and a half out of the town; that this wire is not especially mentioned in the contract as being either included in, or excluded from, the sale, but that the general terms of the contract are sufficiently comprehensive to include it. The accident policy was not produced, and it does not appear from the testimony of Mr. French whether its terms included accidents growing out of the use of the wire in question. It does not appear what property it included. Clearly, therefore, his testimony was not evidence tending to prove ownership. Granting that, in negligence cases, the fact that defendant carried accident insurance may, under certain circumstances, be shown, as tending to prove the responsibility of the insured for the proper care and safe management of the agency causing the injury, still one of the essential prerequisites to its admission for that purpose is that the policy be proven to apply to the particular agency, the control or ownership of which the insured denies. This is the distinguishing feature of the cases relied on by counsel for plaintiff as authority for the admissibility of such evidence to prove ownership and control by the insured. The evidence in the case at bar does not measure up to the requirement. Counsel cite the following cases, viz.: Shoemaker v. Bryant Lumber & Shingle Mill Co., 27 Wash. 637, 68 Pac. 380; Barg v. Bousfield, 65 Minn. 355, 68 N. W. 45; Perkins v. Rice, 187 Mass. 28, 72 N. E. 323; and Akin v. Lee, 206 N. Y. 20, 99 N. E. 85, Ann. Cas. 1914A, 947.

The Shoemaker Case was a suit by the servant for injury caused by the alleged negligence of the master. An officer and stockholder in the defendant company testified on its behalf, and, for the purpose of showing his interest in the suit, was asked on cross-examination if he would not have to pay his proportion of the judgment if one should be recovered against the company, and, having answered in the affirmative, he was then asked, "Would your company have to pay it?" and answered, "Yes, sir." For the purpose of contradicting him, he was asked this further question:

"Is it not a fact that, if judgment is recovered against this company, some other company will have to pay this judgment?"

That was legitimate cross-examination only for the purpose of testing his credibility, and it is expressly said in the opinion that the evidence was not material on the main issue. Says the court:

"If he should answer the question in the negative, the evidence of interest, as affecting credibility, would be for the jury to consider. If he should answer in the affirmative, as he did in this instance, the inconsistent statements of the witness were proper to go to the jury, as affecting his credibility and the accuracy of his testimony generally."

In the Barg Case defendants were manufacturers of woodenware, and plaintiff, an infant, was employed to work in the establishment by one Scott, who had charge of a certain department of the business, and was told by him to take, from beneath one of the saws, a tub used to catch the scraps and sawdust falling from it, and in attempting to do as he was commanded plaintiff's hand came in contact with the under side of the rapidly revolving saw, and some of his fingers were cut off, and he sued defendants for the injury. One of the questions in the case was whether Scott, who employed plaintiff and put him to work in a place of danger, without properly instructing him, was an agent of defendants, so as to make them liable for his negligence, or whether he took the work by the piece, in the department of which he had charge, in which event he would not be the agent of defendants, but would be himself liable. Defendants claimed that Scott was

an independent contractor, and not their agent. The trial court received evidence showing that defendants held an accident policy indemnifying them from liability "by reason of injury to any employé, including this plaintiff or anybody else that might be in any part of the mill working in the factory," and showing that the insurance company was defending the action. The Supreme Court of Minnesota held the evidence to be admissible, as tending to prove that defendants did not regard Scott as an independent contractor. The relevancy of the evidence in that case is apparent, for it appeared that the accident policy embraced injuries received by any person working in any part of the factory, and necessarily included the plaintiff in that suit, and the jury could very properly infer that the defendants would not have paid for indemnity against damages for which they were not liable. But it does not appear in the case under review that the accident insurance indemnified defendant against damages on account of injury to the plaintiff, or to any other person, occasioned by the particular wire, title to which is in question.

In the Perkins v. Rice case plaintiff sued on account of an injury received while endeavoring to use an elevator maintained in an apartment building occupied by various tenants. Defendants admitted ownership of the building, but denied that they were in control of the elevator at the time of the accident. It became essential for plaintiff to prove that, notwithstanding defendants had leased the apartments, they still retained control of the elevator. On cross-examination of one of the defendants, counsel for plaintiff, for the purpose of proving control of the elevator, offered to show that, shortly before the accident, defendants had procured a policy of indemnity insurance against loss or damages from accident arising in operating the elevator, and that such policy was in force when plaintiff was injured. On objection being made to the proof thus offered, by counsel for defendants, who stated that they still denied any control of the elevator, the trial court excluded the evidence. The Supreme Judicial Court of Massachusetts held it to be reversible error. The same distinguishing features exist between that case and the case at bar that we pointed out as distinguishing the Barg v. Bousfield case. In both of those cases the evidence was held to be admissible, because it was shown that the insurance contract indemnified the defendants against damages by accident arising out of the use of the very thing over which defendant denied they had any control. The evidence in the present case falls far short of that. Says the Massachusetts court:

"The probative force of this evidence was for the jury, and it properly could be argued that the defendants would not have deemed it prudent to secure indemnity insurance on an elevator not within their control, or for the careless management or defective condition of which they could not be held responsible."

The Akin v. Lee case is hardly authority for the proposition for which counsel contends. That was a case growing out of the alleged negligence of defendant's chauffeur in operating an automobile, and a judgment for plaintiff was reversed because the trial court permitted counsel for plaintiff, on cross-examination of defendant, to ask him if he had not told plaintiff that he was insured against such accidents, and required him to answer the question, over objection by his counsel.

[3] But it is insisted that the foregoing assignment is not entitled to consideration, for the reason that it was not embodied in a special bill of exceptions, nor particularly called to the trial court's attention in the motion to set aside the verdict. We have already said that exceptions were noted at the time, and they appear in the transcript of the evidence which is made a part of the record by a general bill of exceptions. The exceptions thus noted are thereby made a part of the record, and our attention is particularly called to them in the brief of counsel for plaintiff in error. The motion for a new trial also states that one of the grounds was the admission of improper evidence, although the objectionable evidence is not therein pointed out; and it is also made one of the assignments in defendant's petition for writ of error. This, under former ruling, is sufficient. The error being particularly called to our attention in the the manner indicated, it was not necessary that the objectionable testimony should have been embodied in a special bill of exceptions, or that it should have been specially pointed out as a ground of defendant's motion to set aside the verdict, in order to entitle it to the benefit of the error in this court. Kay v. Glade Creek & Raleigh R. Co., 47 W. Va. 467, 35 S. E. 973; Fuller v. Margaret Mining Co., 64 W. Va. 437, 63 S. E. 206; and Wright v. Ridgely, 67 W. Va. 319, 67 S. E. 787. Mr. French's testimony was objectionable on the further ground that it was hearsay, and not the best evidence.

[4] Complaint is made that the court erroneously excluded the testimony of George S. Hill. His testimony related to negotiations had between plaintiff and himself, as agent for the defendant company, which resulted in the making of a certain oral agreement for a right of way for an electric line over plaintiff's land. He said plaintiff afterwards broke the agreement, and in order to avoid the delay incident to condemnation proceedings, and because of a slight alteration he found it necessary to make in the location of the line, he was compelled to pay plaintiff a very much larger sum of money for the right of way than had previously been agreed on. This testimony did not have the slightest bearing on the issues involved, and was very properly excluded.

[5] It is also assigned as error that the

court improperly overruled defendant's motion to set aside the verdict, on the ground that it was contrary to the law and the evidence, and is not supported by the evidence. Having reached the conclusion to reverse the judgment and award a new trial for the error already pointed out, we will not discuss the evidence, further than to say that we think there is sufficient evidence to support the finding of the jury, both on the question of defendant's negligence and the question of its ownership and control of the electric wire causing plaintiff's injury. Although there is no direct evidence proving defendant's ownership and control of the wire, the jury could very reasonably infer that it did, from all the evidence bearing on that question. The written contract of its purchase from the Pocahontas Light & Water Company of the power and light plant and lighting system was introduced as evidence. True, it does not mention the particular wire. It was a part of the electric lighting system, and, not being specially excepted, it may well be inferred that it was intended to be and was included under the general terms descriptive of the property purchased.

[6] The allegations in the declaration that plaintiff received the electric shock by reason of the charged telephone wire coming in contact with his foot or ankle does not render objectionable the evidence tending to prove that he may have been injured by its contact with some other part of his body. That would not constitute a material variance between the allegation and the proof. Hanley v. W. Va. C. & P. Ry. Co., 59 W. Va. 419, 53 S. E. 625. The material questions are: (1) Was he injured by means of the wire? (2) Was defendant's negligence the proximate cause thereof? or (3) Was plaintiff himself guilty of contributory negligence? All of these were facts for jury determination. Even though plaintiff knew of the danger, it was for the jury to say whether he was negligent in trying to release Morrison from the wire. If they believed, from the evidence and the circumstances of the case, that he did what an ordinarily prudent man would have done in the premises, then it was their duty to find that he was not guilty of negligence. If he subjected himself knowingly to a grave danger, he did so to save human life. It was a humane and heroic act, and he should not lightly be held guilty of negligence in performing it.

[7] If the defendant owned and controlled the electric wire, and permitted the broken telephone wire to fall across it and remain in that condition, on the public highway, for an unreasonable length of time, it was guilty of negligence, even though it did not own the telephone wire. Morrison v. Appalachian Power Co., 84 S. E. 506, decided at the present term, and cases therein cited.

The giving of plaintiff's instruction No. 1 is assigned as error. It assumes no fact as true, and, we think, fairly submits to the jury the question of defendant's negligence, as well as the question of plaintiff's contributory negligence, both of which in view of the conflicting evidence, were mixed questions of law and fact for their determination.

Another assignment is that the court improperly refused to give defendant's instructions Nos. 1 and 7. This assignment is not well taken. No. 1 was a peremptory instruction to find for the defendant, and, of course, was properly refused. No. 7 would have told the jury that, if they believed from the evidence the wire in question was not owned by defendant, but was owned and controlled by the Pocahontas Light & Water Company or the Pocahontas Consolidated Collieries Company, on May 1, 1912, the day of the accident, they should find for the defendant. This instruction was properly refused, because the same point was practically covered by instructions Nos. 3, 6, and 9, given at request of defendant. The law concerning defendant's theory of the case was fairly and fully presented to the jury by instructions given upon its request, and there appears to be no error in respect to the giving of instructions for plaintiff, or the refusal to give instructions for defendant.

For the error in permitting the testimony of witness French, respecting indemnity insurance carried by defendant, to go to the jury, the judgment will have to be reversed, and a new trial awarded.

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(75 W. Va. 686)

## GRIFFITH v. AMERICAN COAL CO.

(No. 2785.)

(Supreme Court of Appeals of West Virginia. Feb. 23, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ⟸258—INJURY TO SERVANT—COMPLAINT—NEGLIGENCE—EMPLOYMENT OF INFANT.

A count in a declaration for personal injuries based on negligence in employing a boy under fourteen years of age in a coal mine, inhibited by statute, is not bad on demurrer, for failure to allege in terms that such illegal employment was the natural and proximate cause of plaintiff's injuries. It is prima facie negligence to so employ an infant within the prohibited age.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 452–454; Dec. Dig. ⟸258.]

2. EVIDENCE ⟸359—ADMISSIBILITY—X-RAY RADIOGRAPH.

X-ray radiograph or shadow pictures are admissible in evidence when shown to have been made with trustworthy instruments, and properly taken, in connection with the evidence of witnesses expert in the use of such instruments and skilled in making, reading and interpreting such pictures.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1509–1512; Dec. Dig. ⟸359.]

3. DAMAGES ⟸216—PERSONAL INJURIES—INSTRUCTIONS—DECREASED EARNING CAPACITY.

Plaintiff's instruction to the jury, number 1, on the theory of permanent injuries, bodily

pain and suffering endured by him, and likely to be endured, and disfigurement, and on the theory of decreased earning capacity due to such permanent injuries, is not bad for lack of evidence justifying the same, nor as authorizing the jury to include in their verdict damages for decreased earning capacity during plaintiff's minority, said instruction in terms limiting all damages on account of decreased earning capacity to a time after plaintiff shall have reached his majority.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548–555; Dec. Dig. ⟸216.]

4. TRIAL ⟸253 — INSTRUCTIONS — IGNORING ISSUES.

On the trial of such an action an instruction to the jury proposed by defendant, ignoring plaintiff's theory, supported by sufficient evidence, that at the time of his employment and injuries he was an infant under fourteen years, and his employment illegal and negligent, is properly rejected.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. ⟸253.]

5. MASTER AND SERVANT ⟸230—INJURY TO INFANT EMPLOYÉ — CONTRIBUTORY NEGLIGENCE.

To sustain the defense of contributory negligence in such cases, it must be shown not only that the infant employé had capacity to understand and appreciate his instructions and warning against the dangers incident to his unlawful employment, but that he in fact did understand them, and that his supposed negligent act was not such as the statute was intended to provide against, but also that he was possessed of such unusual wisdom and sagacity as to take him out of the class of youths under fourteen years which the statute was intended to protect; and instructions proposed by defendant in this case propounding a different rule of liability were properly rejected.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 412; Dec. Dig. ⟸230.]

6. TRIAL ⟸352—SPECIAL INTERROGATORIES.

So also special interrogatories proposed by defendant in this case, assuming certain facts, but not comprehending all other facts necessary to constitute a complete defense of contributory negligence, were properly denied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840–842, 844, 845; Dec. Dig. ⟸352.]

7. EVIDENCE ⟸355 — DATE OF BIRTH — ACCOUNT BOOKS—TESTIMONY OF PHYSICIAN.

On the trial of such action the account books or other books of a practicing physician or surgeon, containing entries regularly made in due course of business, and who attended the mother at the birth of her child, and the oral evidence of such practitioner verifying such record, are legal and competent evidence to go to the jury on the question of the date of the birth of such infant employé.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1444, 1484–1491; Dec. Dig. ⟸355.]

8. NEW TRIAL ⟸108 — GROUNDS — NEWLY DISCOVERED EVIDENCE.

The discovery of such legal and competent evidence after the trial of this case, considered in connection with other evidence offered on the motion of defendant for a new trial, and considered also in connection with the evidence adduced on the trial, and the proof of due and reasonable diligence on the part of defendant to discover such new evidence, as shown by the record, constituted good ground for setting aside the verdict and awarding defendant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. ⟸108.]

Error to Circuit Court, Mercer County.

Action by Perry Griffith, an infant, etc., against the American Coal Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Stokes & Sale, of Welch, and Lawson Worrell, of Northfork, for plaintiff in error. A. W. Reynolds, of Princeton, and Sanders & Crockett, of Bluefield, for defendant in error.

MILLER, J. Writ of error by plaintiff to the judgment of the circuit court of Mercer County, setting aside the verdict of the jury and awarding defendant a new trial.

The judgment complained of shows defendant's motion was based on numerous grounds, but that the sole ground on which the new trial was awarded was that of newly discovered evidence. In this court defendant relies on all errors assigned. Plaintiff in error challenges the correctness of the judgment based on newly discovered evidence, and insists that the trial court committed no error in its other rulings. We will first consider and dispose of defendant's points of error, and leaving to be considered lastly the ground of newly discovered evidence challenged by plaintiff and relied on for reversal.

First, that the court should have sustained the demurrer to the declaration and to each count thereof. Plaintiff was employed as a trapper in defendant's coal mine. The declaration is in four counts. In brief, the first count charges negligence in the employment of plaintiff, a boy under fourteen years of age, in violation of the statute; the second, that when employed and at the time of his injuries plaintiff was an inexperienced infant, and was negligently placed at a dangerous place of work without proper instructions; the third, that after being so employed as charged in the second count, he was taken from the first place of employment and put at another and more dangerous one without any instructions; and the fourth, that defendant did not use reasonable care and diligence in providing plaintiff with a reasonably safe appliance, namely, a certain door at which he was placed to work.

[1] On this hearing no defects are pointed out in the second, third and fourth counts, and we perceive none. But the sufficiency of the first count, on which alone, it is contended, the verdict could stand, is challenged. It is said that notwithstanding the statute prohibits the employment in a coal mine of a boy under fourteen years of age, such employment is not per se negligence, and that upon the principles of Norman v. Virginia-Pocahontas Coal Co., 68 W. Va. 405, 69 S. E. 857, 31 L. R. A. (N. S.) 504, and Dickinson v. Stuart Colliery Co., 71 W. Va. 325, 76 S. E. 654, 43 L. R. A. (N. S.) 335, it is not sufficient simply to allege employment in violation of the statute; but that it should also be al-

leged and proven that such violation of the statute was the natural and proximate cause of the injury complained of. We think the count good. One substantially like it was approved in Daniel v. Big Sandy Coal & Coke Co., 68 W. Va. 490, 69 S. E. 993. Moreover, this count, among other things, alleges that plaintiff in the due course of his employment was permitted to work in a dangerous and hazardous place, and was struck by a certain door in the mine and as a result was mashed, injured internally and otherwise. While there is no allegation in terms that such illegal employment was the natural and proximate cause of plaintiff's injuries, yet enough is alleged to show that the dangerous character and places of the work were those against which the statute was intended to protect plaintiff, rendering such breach of the statute plainly the proximate cause of his injuries. We must overrule the point of error.

[2] The second point is that the court erred in admitting the X-ray radiograph or shadow picture of plaintiff's body made by Dr. E. T. Brady, May 13, 1914, and in connection therewith his oral evidence as to what the radiograph showed, and particularly his opinion evidence as to the extent of plaintiff's injuries, the basis of such opinion not having been properly laid. It is said that witness knew nothing of the injury except what he could read from the radiograph, and that it was not shown to have been properly taken, and not shown to be correct; that to make either picture or evidence admissible witness' knowledge must be shown, and that the instrument used in making the picture was trustworthy and the picture properly taken. The authorities cited and relied on for the general proposition covered by the objection and for its application to the facts in the case at bar are 1 Wigmore on Evidence, section 795; 22 Am. & Eng. Ency. Law (2d Ed.) 775; Electric Railroad Co. v. Spence, 213 Ill. 220, 72 N. E. 796, 104 Am. St. Rep. 213; Chicago City Ry. Co. v. Smith, 226 Ill. 178, 80 N. E. 716; City of Geneva v. Burnett, 65 Neb. 464, 91 N. W. 275, 58 L. R. A. 287, 101 Am. St. Rep. 628; Carlson v. Benton, 66 Neb. 486, 92 N. W. 600, 1 Ann. Cas. 159.

The evidence of Dr. Brady shows him to be not only a physician of learning and of long and varied experience, but also that he is an expert in the use of X-ray machines, and in the making and interpreting of radiograph or X-ray pictures; and, moreover, that his machine used in making the picture introduced in evidence and interpreted by him was one of the best machines made; that at the time he took the picture the machine was working *satisfactorily*, and that the picture was taken under proper circumstances and conditions of the plaintiff's body to make an accurate picture, and witness swore positively that the picture represented correctly the pelvis and pelvic region of plaintiff's body at the time it was taken, and that in taking the picture the instrument was placed at a proper angle to show the ilium and the portion of the pelvis of plaintiff. He was asked by the court:

"Q. What was the condition of the light, Doctor, at the time? A. I have already stated, Judge, that the light was working perfectly satisfactorily. That means there was no deviation—no change."

True, other expert physicians undertook to interpret the picture differently from Dr. Brady and gave evidence of the external appearances of plaintiff's body, and the physical tests to which they subjected him, tending to contradict Dr. Brady. But these conflicts were all for the jury to weigh and consider in reaching their verdict. We find no error in the rulings of the court on this evidence, and must negative the point.

The third point is that the court misdirected the jury by plaintiff's instructions numbered 1, 2, 3, 4 and 6, and particularly number 1. Respecting number 1, covering, (a) the question of the plaintiff's permanent injury, (b) bodily pain, suffering and mental anguish endured, or that must necessarily be endured in the future as a result of plaintiff's injuries, (c) respecting plaintiff's earning capacity, and in not limiting his recovery on that account to a time subsequent to reaching his majority, and (d) covering the question of any disfigurement of plaintiff's person and injury to his health due to his alleged injuries. The objection to this instruction is that there was no sufficient evidence on which to base such an instruction, and that an infant is not entitled to his earnings during his minority. Citing for the latter proposition, Comer v. Ritter Lumber Co., 59 W. Va. 688, 53 S. E. 906, 6 L. R. A. (N. S.) 552, 8 Ann. Cas. 1105, syl. 2.

[3] We have carefully read and considered the evidence on all these points and cannot agree with counsel that it did not warrant the instruction. We are not passing on the weight and sufficiency of the evidence; but in our opinion it justified the instruction on the question of the permanency of the injury, the bodily pain and suffering endured, and likely to be endured by plaintiff, and his disfigurement. And on the question of plaintiff's earning capacity during his minority the instruction plainly excludes all such earnings. It says that in estimating the damages the jury may consider "whether or not the injury is permanent and will impair the future earning capacity of Perry Griffith *after he becomes of age*." The points made as to instructions numbered 2, 3, 4 and 6, are not urged. We see no error in them, and so we deny the third proposition in its entirety.

[4] The fourth point or proposition urged is, that the court erred in rejecting defendant's instructions numbered 5, 7, 8 and 10. We have examined all these instructions. As did instruction number 1, rejected, in Hona-

ker v. Coal Co., 71 W. Va. 177, 76 S. E. 180, number 5, ignores plaintiff's theory that at the time of his injuries he was under fourteen years of age. His employment was prima facie negligence. This omission renders the instructions bad. Honaker v. Coal Co.; Norman v. Virginia-Pocahontas Coal Co.; Daniel v. Big Sandy Coal & Coke Co., supra; Burke v. Big Sandy Coal & Coke Co., 68 W. Va. 421, 69 S. E. 992. It is not enough to relieve the master from civil liability that an infant employé be instructed and have capacity to understand instructions. It must appear that he did understand, and that the dangers to which the instructions related, and which were responsible for his injuries, were not of the kind against which the statute was intended to protect him, or that he was a youth possessing such unusual or extraordinary wisdom and sagacity as to be competent to fully appreciate and guard against the dangers, and that because of his careful instruction, unusual experience and precocity he did appreciate them, and by his own negligence contributed to his injuries, denying him right of recovery. Such we understand to be the law as enunciated in our decisions.

[5] With respect to defendant's instructions numbered 7 and 8, they both, as does instruction number 5, ignore the requirements that plaintiff must not only have capacity to understand and appreciate his instructions, but that he in fact did understand them, and that his supposed negligent act, absence from his place of duty, in the eighth instruction, was not such act as must have been reasonably anticipated by defendant as the probable consequence of his violation of the statute. Nor do these instructions cover the element noted with respect to the fifth instruction, that the infant servant must be possessed of unusual wisdom and sagacity to take him out of the class of youths under fourteen years of age, which the statute was intended to protect. So we think these instructions were properly rejected.

The tenth instruction was bad because it told the jury plaintiff could not recover on account of the matters pleaded in the first count. Of course if we are right in our conclusions on the demurrer to that count, this instruction was properly rejected.

[6] The fifth point or proposition of counsel is, that the court below erroneously rejected special interrogatories to the jury numbered 2 and 3 as proposed. These interrogatories were intended to cover findings on the facts assumed in defendant's instructions numbered 7 and 8, and which would have been indecisive and not comprehensive of other facts necessary to constitute a complete defense to the action, so we think these interrogatories were properly rejected.

The sixth point or proposition is, that the verdict was excessive, and properly set aside on that ground. We cannot agree with counsel on this proposition, and likewise deny it.

[7] The last or seventh point or proposition is, that the verdict was properly set aside on the ground of newly discovered evidence. This proposition is denied by plaintiff below, plaintiff in error, and is relied upon as ground for reversal, and as already noted, it was the only ground upon which the court sustained defendant's motion to set aside the verdict and grant it a new trial. The evidence referred to and relied upon was that of Dr. John P. Haller, to the effect that on July 10, 1899, he had delivered Mrs. Caleb Griffith, plaintiff's mother, of a male child, at the hour of 5:05 A. M., and in corroboration of this fact he produced and defendant was permitted to introduce in evidence a book of entries, referred to by him as his obstetrical book, in which witness swore he and his assistants entered all cases in obstetrics attended by them. This book shows the entry, in chronological order, of many cases of obstetrics, and Dr. Haller swears positively that he could not possibly be mistaken about the fact that Mrs. Griffith did give birth to a male child on the day and hour recorded in his book. Mrs. Griffith, the mother of plaintiff, had sworn positively on the trial that plaintiff was born July 10, 1900, and made reference to some memorandum book, which she said had been kept by her, and in which she had recorded not only the date of plaintiff's birth, but of herself, husband, and other children, also the day and month in her record is the same as in the record kept by Dr. Haller, as will be noted. The difference is in the year; the doctor's record showing 1899, her record and evidence tending to show the year 1900. If the doctor's record be correct and be the record of the birth of plaintiff, plaintiff was over fourteen years of age at the time of his employment, and of the injury complained of. The actual fact of the date of plaintiff's birth, therefore, is a most important one. Mrs. Griffith's record is shown to have been made in pencil; she does not pretend it was made immediately at the date of plaintiff's birth, but she says it was made soon after he was born. The record of Mrs. Griffith was not made in any Bible. She said she had no Bible in which to make the entry.

The place of plaintiff's birth was first disclosed to defendant, so defendant's witnesses say, by the evidence of Mr. and Mrs. Griffith given on the trial. Defendant proved by witnesses on the trial, and particularly by J. Tracy Walker, superintendent, that at the time of plaintiff's employment, he and his mother and father had represented him to be over fourteen years of age, and that defendant was surprised by their evidence to the contrary given on the trial. And it was proven by the witness Walker, superintendent, who had charge of gathering witnesses and preparing the case for trial, that he had pursued all the avenues of inquiry known to him to ascertain the age of plaintiff, had found witnesses, and had had them summoned to testify to plaintiff's declara-

tions beforehand, that he was fourteen or fifteen years old, and knowing as he said he did that plaintiff and his father and mother, at the time of his employment, had represented him to be over fourteen years of age, he had no idea they would attempt to prove the contrary, or that the case would turn on that question. He admits that he made no inquiry of Mr. and Mrs. Griffith as to the place of plaintiff's birth; that this fact cropped out on their examination at the trial, and that as soon as convenient, after learning the place of his birth, he sent a messenger into the country where plaintiff was born and found Dr. Haller and his record introduced in evidence on defendant's motion for a new trial. Witness says that if it had occurred to him to make inquiry of Mr. and Mrs. Griffith before the trial he felt sure they would not have disclosed any fact or aided him in obtaining evidence for the defense, and that he did not think he could have been reasonably expected to pursue that avenue of inquiry.

[8] It is contended, however, on behalf of plaintiff in error that the evidence on the motion for a new trial was not such as to warrant the court in setting aside the verdict and awarding a new trial. We may say in this connection that there was no evidence offered by plaintiff in error on the motion for a new trial to show that Mrs. Griffith had been delivered of a male child on July 10th, 1899, according to Dr. Haller's record, and also of another male child, the plaintiff, upon July 10, 1900. The contention is and was that the doctor's evidence and record are in error, and it is a concessum that the evidence of the witnesses on both sides of this controversy relate to the birth of the plaintiff, and not some other male child born to Mrs. Griffith.

But it is affirmed that this newly discovered evidence is not competent to set aside the verdict; that though discovered since the trial, due diligence to secure it before verdict is not shown; that though material the evidence is merely cumulative and corroborative; that if introduced it is not such as ought to produce an opposite result on another trial, and that its sole object is to discredit or impeach witnesses on the opposite side. That newly discovered evidence must be competent in the particulars referred to is the well settled law of our decisions. Stewart v. Doak Bros., 58 W. Va. 172, 52 S. E. 95; Goshorn v. Wheeling Mold & Foundry Co., 65 W. Va. 250, 64 S. E. 22; Carder v. Bank, 34 W. Va. 38, 11 S. E. 716; Halstead v. Horton, 38 W. Va. 727, 18 S. E. 953.

We are of opinion, however, that reasonable diligence to procure evidence on the disputed facts was shown. We have no such case presented here as was presented in Jacobs v. Williams, 67 W. Va. 377, 67 S. E. 1113. We are disposed to hold that defendant brought itself reasonably within the rule stated in the sixth point of the syllabus of that case. It is practically conceded that the evidence of Dr. Haller and his record book are very material, and certainly this evidence is not merely cumulative or corroborative of other evidence introduced by defendant. Defendant introduced no evidence of this class or character. Its only evidence on this subject was alleged previous contradictory statements by plaintiff and his parents. Prior to the trial defendant was unable to obtain by the reasonable diligence employed positive record evidence as to the date of the plaintiff's birth. The evidence of Dr. Haller, and his book of entries, shown to have been a book of original entries, constituted under the authorities original and primary evidence. 1 Wigmore on Evidence, section 737, paragraph 2, page 834; Id. section 747; Id. section 749. Such record entries proved by the living entrant, constitutes not only legal evidence, but evidence of a very high class when proven to have been contemporaneous with the transaction and there could have been no motive to misrepresent. 2 Wigmore on Evidence, sections 1526, 1527; Smith v. State (Tex. Cr. App.) 73 S. W. 401; Morrow v. State, 56 Tex. Cr. R. 519, 120 S. W. 491; 1 Elliott on Evidence, section 377. The case of Smith v. State, supra, is directly in point on the admissibility of a physician's record on the question of the date of birth. Quoting from Greenleaf, the court in that case said:

"Where the question was upon the precise day of a person's birth, the account book of the surgeon who attended his mother on that occasion, and in which his professional services and fees were charged, was held admissible in proof of the day of the birth."

And Morrow v. State, supra, sixth point of the syllabus, is directly in point, on the proposition that the other pages of a physician's book and entries therein other than the particular one in question are admissible as bearing on the bona fides of the particular entry in question. So that there can be no doubt, we think, as to the admissibility of Dr. Haller's evidence and his book of entries. True, this evidence is contradictory of plaintiff's witnesses on this question of plaintiff's birth, but all newly discovered evidence warranting a different result on another trial would necessarily be evidence contravening some of the evidence on the side of the prevailing party. The evidence of Dr. Haller is not contradictory in the sense that it ought not to be considered on a motion for a new trial. It is in a material sense sui generis, of its own kind. Defendant's other evidence of prior and conflicting declarations by plaintiff's witnesses, was contradictory in its character, and that class of newly discovered evidence of course would not be received to overthrow a verdict.

Another contention is that the court cannot say that this newly discovered evidence ought to produce a different result on an-

other trial. But we can say, and the court below may have concluded that if on the new trial awarded the jury should disbelieve plaintiff's witnesses, and believe the disinterested evidence of Dr. Haller and his record, it ought to lead to a different result, and that such would likely be the legitimate effect thereof, and that it would be decisive certainly on the question of the negligence alleged in employing a boy under the age of fourteen years, inhibited by the statute.

Another point made against the correctness of the judgment is, that the jury could have reached the same verdict regardless of the question respecting plaintiff's age. Having carefully examined the declaration and each count thereof, and the evidence adduced on the trial, and plaintiff's instructions to the jury, and the emphasis made in pleadings, evidence and instructions, on the proposition that plaintiff was under the age of fourteen, we do not think we can say that the jury would likely have reached the same verdict, on evidence satisfying them that plaintiff was over the age of fourteen years, and on the theory that the defendant had been negligent respecting other duties owed by master to servant.

Nor can we lose sight of the fact in cases of this character that the court when passing upon a motion for a new trial, has seen the witnesses and their demeanor on the trial, and was better advised than an appellate court could be as to the weight and credibility that ought to be accorded to their evidence; nor that under the rules laid down in other cases, it takes a stronger case to reverse a judgment awarding a new trial than one denying it.

For the considerations aforesaid we are of opinion to affirm the judgment.

(76 W. Va. 50)

## YATES v. CROZER COAL & COKE CO.
(No. 2495.)

(Supreme Court of Appeals of West Virginia.
Dec. 8, 1914. On Rehearing,
March 23, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT—⟸260, 261—ACTION FOR INJURIES — SUFFICIENCY OF DECLARATION.
A declaration in an action for personal injuries, sustained by an employé in a coal mine, is not bad for failure to negative certain defensive matters, such as fellow servantcy, assumption of risk, and the like.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 844–854; Dec. Dig. ⟸ 260, 261.]

2. APPEAL AND ERROR ⟸613—BILL OF EXCEPTIONS—CERTIFICATE—SUFFICIENCY.
Where a bill of exceptions is signed by the judge in term time and made part of the record by an order of the court, no certificate by the clerk, as when signed by the judge in vacation, is required. Nor will a mere clerical error, as in a date, self correcting by the record, vitiate such bill of exceptions.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2702–2707; Dec. Dig. ⟸ 613.]

3. APPEAL AND ERROR ⟸1050 — HARMLESS ERROR—ADMISSION OF EVIDENCE.
Though evidence be admitted bearing on an issue not presented by the pleadings, yet if it also bear on another issue presented thereby, its admission will not constitute reversible error. Its application may be limited when requested by instructions to the jury.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. ⟸ 1050.]

4. APPEAL AND ERROR ⟸1058 — HARMLESS ERROR—REJECTION OF EVIDENCE.
Error in rejection of evidence fully cured by the subsequent testimony of the witness admitted will not justify reversal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4204, 4206; Dec. Dig. ⟸ 1058.]

5. MASTER AND SERVANT ⟸293—INJURIES TO SERVANT—SAFE PLACE TO WORK.
An instruction telling the jury to find for plaintiff if the agents of the defendant corporation failed to perform its nonassignable duty to use reasonable care to furnish plaintiff a reasonably safe place to work is not bad for imputing that duty to agents. A corporation can act only by authorized agents in the performance of any duty.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148–1156, 1158–1160; Dec. Dig. ⟸ 293.]

6. DAMAGES ⟸216 — PERSONAL INJURIES — "COMMENSURATE"—"COMPENSATORY."
An instruction authorizing the jury to find for plaintiff damages as they might "*think proper,*" *commensurate* with his injuries, not exceeding the sum sued for, is not bad because of the words "think proper," limited by the words "commensurate with his injuries," for such damages would be compensatory merely, the word "commensurate" as used in such an instruction being the equivalent of the word "compensatory."
[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548–555; Dec. Dig. ⟸ 216.]

7. DAMAGES ⟸132—EXCESSIVE DAMAGES—LOSS OF FOOT.
The verdict of the jury in this case is supported by the evidence, and should not be set aside as excessive, six thousand dollars, for loss of a foot.
[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385, 396; Dec. Dig. ⟸ 132.]

*(Additional Syllabus by Editorial Staff.)*

8. DAMAGES ⟸15, 87—"PUNITIVE DAMAGES" AND "COMPENSATORY DAMAGES" DISTINGUISHED.
"Punitive damages" are damages recoverable only where defendant has been guilty of some reckless indifference to plaintiff's rights, or other wanton and willful neglect of duty. "Compensatory damages" are damages proportionate or equal in measure or extent to plaintiff's injuries.
[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 188–192; Dec. Dig. ⟸ 15, 87.
For other definitions, see Words and Phrases, First and Second Series, Punitive Damages; Compensatory Damages.]

Error to Circuit Court, McDowell County.
Action by W. A. Yates against the Crozer

Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Anderson, Strother & Hughes, of Welch, for plaintiff in error. Stokes & Sale, of Welch, and Lawson Worrell, of Northfork, for defendant in error.

MILLER, J. Action by plaintiff, for personal injuries sustained while employed in operating an electric motor in defendant's coal mine, due to the alleged negligence of defendant in failing to provide a reasonably safe track between the drift mouth and the motor house on the outside of the mine. Plaintiff obtained a verdict and judgment in the court below for six thousand dollars, interest and costs, and defendant has brought that judgment to this court for review on writ of error.

The first point is that the declaration is bad, not for failure to aver affirmatively the relationship of master and servant, and the non-assignable duty of defendant to provide plaintiff a reasonably safe track over which to operate his motor, and the breach of that duty; but for failure to negative certain defensive matters and other matters.

[1] We think the declaration good. It contains averments sufficient to show relationship of master and servant, and of duty of the former to the latter in respect to a reasonably safe place to work, and breaches of that duty. This, in general, is all that is required. Though the alleged negligence relate to employment in operating a coal mine, the charge of negligence to use reasonable care to provide a reasonably safe place to work, a non-assignable duty, is sufficient. If the act of negligence be that of a fellow servant, this is defensive matter, not requiring negative averment. If a non-assignable duty, no matter what agent is responsible for the breach, the master remains liable. The declaration does allege due authority of plaintiff's superior in the premises, directing him in his service.

It was unnecessary to aver ignorance of the dangerous character of the track, or want of means of ascertaining its dangerous character. The servant, in such cases, has the right to assume that the master has performed his duty, unless the danger be so open and apparent, that the servant is bound to see and thereby to assume the risk. But no negative averment is required. This is matter of defense. The averments of the declaration disclose no such knowledge or fact of plain and obvious danger.

Moreover, the master, in general, is bound to know by reasonable and timely inspection and tests, the dangerous character of his plant. Averment of knowledge of the one and ignorance of the other is unnecessary.

Two general legal propositions cover substantially all the grounds of demurrer. One is that a servant assumes the risk incident to his employment, only after the master has performed his duty. Riley v Railway Co., 27 W. Va. 150; Cooper v. Railroad Co., 24 W. Va. 37; Moon's Adm'r v. Richmond, etc., A. R. Co., 78 Va. 745, 49 Am. Rep. 401; Norton Coal Co. v. Murphy, 108 Va. 528, 62 S. E. 268.

The other proposition is that the declaration need not negative assumption of risks and other defenses. Hoffman v. Dickinson, 31 W. Va. 142, 6 S. E. 53; Leach v. Martin, 69 W. Va. 219, 71 S. E. 170; Richmond Granite Co. v. Bailey, 92 Va. 554, 24 S. E. 232.

[2] Preliminary to the consideration of the merits of the case the point is made that there is not in the record a proper bill of exceptions or certificate of the evidence. Two grounds are assigned. First, that the order purporting to make the bill of exceptions a part of the record is not certified to the clerk as provided by the statute. The point is not good. The order was made in court at a regular term, and no certification is required, as upon an order of the judge in vacation. Second, in the caption of the bill of exceptions it is recited that the trial took place on February 19, 1913, while the order of the court showing the issues joined and the empanelling of the jury and trial appears from the record to have all taken place on February 27, 1913, a defect incurable, the orders of a court speaking a verity. We think there is nothing to discredit the bill of exceptions based on these grounds. The parties, the style of the case, the orders of the court, and other marks in the record are quite sufficient to render the bill of exceptions definite and certain, and no such apparent clerical error could be allowed to destroy the identity of the bill of exceptions with the case to which it patently relates.

[3] On the merits, the point is made that as there is no averment of want of knowledge by plaintiff of the defective track or failure to properly instruct, certain evidence of plaintiff to the effect that when employed by the mine foreman, his boss, he gave him no instructions as to what he wanted him to do—what he hired him for, except that one morning he handed him a book of motorman reports, and told him to go get him a motor out of the motor house and go to running a motor; and further to the effect that this mine foreman and his assistant assigned him to his work, and employed and discharged the men, was improperly admitted over objection, no issue being presented on these questions of want of knowledge and failure to instruct. We think the point without force. This evidence was admissible on the question of authority of the mine foreman, whether he had been given any authority outside of his statutory duties as mine foreman, and bore on this question, an important issue before the jury.

Another point made against the admissibility of evidence is, that plaintiff's witness

Pardue, an expert, who put down the track on which plaintiff's injury was sustained, was permitted to state over objection, that the floor and track looked tolerably fair to look at it. The objection is that the question called for an opinion as to the condition of the track. How the track appeared was one of its conditions, affecting the motorman. He was not bound to know its actual condition; but could assume that it was safe unless apparently unsafe.

Another point on the admissibility of the evidence is, that plaintiff's witness Harrison Yates, speaking from a knowledge of the appearances of the track some six weeks prior to the accident, was permitted to say over objection that one occupying the position of motorman and looking along ahead of him over the rails on the floor, with his eyes, could not have discovered anything wrong with the track or the floor. We see no substantial error in admitting this evidence. Of course the surface conditions might have changed in the six weeks; but the evidence of other witnesses, acquainted with the track just before the accident, tends to show no material changes in the surface conditions, sufficient to warn the motorman using the track.

[4] The next point relates to the rejection of certain evidence showing or tending to show that motors were operated over the same track, after the alleged injuries to plaintiff, without accident. Whatever error was committed in the particular instance complained of was fully cured by the evidence of the same witness immediately following as well as by the evidence of other witnesses, showing that motors had been operated over the same track after as before the accident to plaintiff without injury to motormen.

[5] Plaintiff's instruction number one is next complained of. It is said of this instruction, first, that it erroneously tells the jury to find for plaintiff if the agents of the defendant failed to perform the non-assignable duty to use reasonable care to furnish plaintiff a reasonably safe track over which to operate his motor. We see no error in this particular. True the duty is not assignable, in the sense that the master can escape liability for its neglect, but the rule invoked does not preclude a master corporation from delegating the duty to an agent, its only means of performing the duty.

[6, 8] Another objection to this instruction is that it directs the jury to find for plaintiff damages, as they might *think proper, commensurate* with his injuries, not exceeding the sum sued for. It is said the jury could only find compensatory damages, not such sum as they might "think proper," and "commensurate," with his injuries. The words might "think proper" are clearly limited by the word "commensurate" with his injuries, The language of the instruction would not allow the jury to go beyond an amount commensurate with plaintiff's injuries. But it is argued that "commensurate" is not the equivalent of "compensatory," employed in Talbott v. W. Va. C. & P. Ry. Co., 42 W. Va. 560, 26 S. E. 311, and Peters v. Johnson, Jackson & Co., 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909, rendering the instruction erroneous for this reason. "Compensatory" damages are by these cases distinguished from "punitive" damages, recoverable, as a general rule, only where defendant has been guilty of some reckless indifference to plaintiff's rights, or other wanton or willful neglect of duty. As thus distinguished commensurate damages would imply nothing more than compensatory damages, that is, damages proportionate or equal in measure or extent to plaintiff's injuries. An instruction using the word commensurate as the equivalent of the word compensatory was approved in Cheeks v. Virginia Pocahontas Coal Co., 82 S. E. 756. We find no error in this instruction.

Another error assigned is, the rejection of defendant's instruction to return a verdict in its favor. This prayer of defendant was based on the theories, first, that defendant was not shown to have had actual knowledge of the defective condition of the track; second, that the track was for temporary purposes only; third, plaintiff's knowledge or means of knowledge, equal with defendant, of the condition of the track, and fourth, assumption of risk by plaintiff. Respecting the first theory, the evidence does not sustain it. Plaintiff knew that the track was laid over the floor of the old shop; but he had nothing to do with laying the track. Defendant was bound to know, and by reasonable and timely inspection and tests, to continue to know that the track was reasonably safe for the operation of its motors, and plaintiff was entitled to rely on performance by defendant of this duty. Nor does the evidence show plaintiff had knowledge or equal means of knowledge with defendant of the condition of the track, so as to charge him, on the fourth theory, with assumption of risk. According to the weight of the evidence the dangerous condition of the track was not so open and apparent, as to charge plaintiff with notice, and resultant assumption of the risk.

[7] The damages, six thousand dollars, for the loss of a foot may seem large; but on no legal principles are we justified in saying they are excessive, justifying reversal.

We, therefore, affirm the judgment.

### On Rehearing.

Two points are again pressed for reversal: First, that defendant was not negligent; second, that plaintiff assumed the risk.

We have given these points careful consideration. On the first, it is true the master is not an insurer, that his duty is to use reasonable care to furnish his servant a reason-

ably safe place to work. So it is argued that the master in this case could not reasonably have anticipated the injury to plaintiff. It is conceded the track on which plaintiff operated his motor and sustained his injuries was laid on an old shop floor, much decayed, and though thought by some reasonably safe, while repairs were going on, yet of doubtful strength and consistency to operate heavy motors upon, even as a temporary makeshift. Plaintiff testified that one of the boards, a heavy two inch oak plank, eight or nine feet long, loose at the end next to him as he drifted down a slight incline, without power, and upon the track opposite the plank, flew up and protruded into the cab of the motor where he sat, catching his leg and breaking it. If the accident could have happened as this witness swears, it seems to us it was negligence on the part of defendant to suffer its servants to operate heavy motors over the track laid on this old floor. We know that mine motors are necessarily built low, and are operated close to the track, and loose boards on the track would be liable to fly up and come in on the floor of the cab where the motormen are required to sit, and injure them. From the description of the motor operated by plaintiff there was an open space in front of him through which the plank injuring him came into the cab. Much stress is laid on the apparent conflict between Yates' evidence and that of his witness Gravely, another motorman, who was the first one to come to him after the accident. Yates seems to say that the board was then still sticking in his motor. Gravely says, on cross-examination, "there was no plank in the motor at that time." The fact is material of course, as tending to corroborate Yates, and his theory of the accident; but we do not think it is controlling. Evidently there was considerable excitement about the motor at that time. One or the other of those witnesses may have been mistaken. Yates does say that "the motor struck that board in the middle and it sprung that motor back and I got my leg out of there." When this happened the board may have dropped down out of the motor, and though he saw it at that instant, and assumed that it remained in the cab, he may have been mistaken as to the fact of its being in the cab at the instant Gravely got to him. As no other reasonable theory as to how plaintiff could have sustained his injuries was offered, we cannot ignore his evidence, nor could the jury, the triers of the fact, have properly done so. The physical facts shown in evidence do not overcome plaintiff's evidence. No fact and no witness says the accident did not occur just as plaintiff swears it did. One witness, Bowman, who arrived after Gravely, swears the plank was not in the motor when he saw it, that "they had gotten it out." There is a suggestion that there was a hole in the floor of the cab, through which plaintiff may have slipped his foot, and have been injured by his own negligence. Evidently there was no hole in the floor of the cab. Such a machine would not be a safe one. Manifestly the hole or open space through which the plank protruded was that in front of the cab. So we think the jury on the evidence referred to and much other evidence in the case, could have found, as they evidently did, that defendant was negligent.

On the question of assumption of risk, we do not think we can say, from the evidence that plaintiff had such knowledge of the defective track as to put him on notice, and thereby assumed the risk. Defendant would have us believe the track was reasonably safe, and that there were no defects therein to put it on notice. How then can we impute contributory negligence, and assumption of risk to plaintiff? Plaintiff had the right to assume that the track was reasonably safe. He was not called upon to take notice of the condition of the track, unless so apparent that he could not shut his eyes thereto, without assuming the risk of injuries therefrom. The duty of timely inspection and tests to make and keep the track in a reasonably safe condition rested upon defendant. So we must overrule this point also.

We, therefore, remain of the opinion to affirm the judgment, as upon the original hearing.

(117 Va. 230)

## CITY COUNCIL OF ALEXANDRIA v. ALEXANDRIA COUNTY et al.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. MUNICIPAL CORPORATIONS ⟸29—ANNEXATION OF TERRITORY—SANITARY REASONS.
Under Code 1904, § 1014a, permitting the annexation of territory when sanitary reasons demand it, it is no defense to the annexation that the health of the city is then good, as a municipal corporation has a right to take precautionary steps.
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 66–75; Dec. Dig. ⟸29.]

2. CONSTITUTIONAL LAW ⟸70—WISDOM OF LEGISLATION—POWER OF COURT.
The policy of annexation as a public necessity was determined by the Legislature when it enacted Code 1904, § 1014a, and the court can express no opinion as to its wisdom as a matter of public policy.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129–132, 137; Dec. Dig. ⟸70.]

3. MUNICIPAL CORPORATIONS ⟸33—ANNEXATION OF CHARTER OF COUNTY—SUFFICIENCY OF EVIDENCE OF NECESSITY.
Under Code 1904, § 1014a, authorizing the court in city annexation proceedings to annex so much of the territory though it be less than that claimed in the ordinance as the evidence shows necessary, evidence *held* sufficient to show that a portion of the territory claimed in an annexation ordinance was necessary to the needs of the city for sanitary, police, and school purposes, and the like, and hence the court's action in dismissing the proceedings was erroneous.
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 81–97; Dec. Dig. ⟸33.]

4. MUNICIPAL CORPORATIONS ⟸29—ANNEXATION OF CHARTER—NATURE OF PURPOSES.
Under Code 1904, § 1014a, land should be annexed to a city when they are needed for a proper urban purpose as for extension of streets or sewers, gas, or water system, or to supply places for the abode or business of residents, or for the extension of needed police regulations, and when they are valuable by reason of their adaptability for prospective town purposes, but the mere fact that their value is enhanced by reason of their nearness to the corporation, is not ground for annexation, if such value was not enhanced on account of their adaptability to town uses.
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 66–75; Dec. Dig. ⟸29.]

5. MUNICIPAL CORPORATIONS ⟸33—ANNEXATION OF CHARTER—SUFFICIENCY OF ORDINANCE.
Under Code 1904, § 1014a, an ordinance for the annexation of territory to a city is not objectionable if it substantially complies with the statute and sets forth the case of the city with as much fullness and detail as practicable under the statute.
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 81–97; Dec. Dig. ⟸33.]

6. MUNICIPAL CORPORATIONS ⟸29—ANNEXATION OF CHARTER—CONSTITUTIONALITY OF STATUTE.
Code 1904, § 1014a, authorizing the annexation of territory to a city, is not invalid if construed to permit the annexation of parts of two counties which constitute separate "house districts," as against Const. 1902, § 43 (Code 1904, p. ccxviii), providing that the apportionment of the state into house districts adopted by the Legislature was adopted, but that a reapportionment should be made every tenth year, etc., since Const. 1902, § 126 (page ccxlii) also gave the Legislature power of annexation.
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 66–75; Dec. Dig. ⟸29.]

Appeal from Circuit Court, Alexandria County.

Annexation proceedings by the City Council of Alexandria against Alexandria County and others. From a decree for defendants, plaintiff appeals. Reversed.

John M. Johnson, S. G. Brent, and S. P. Fisher, all of Alexandria, for appellant. Crandal Mackey, of Washington, D. C., Montague & Montague, of Richmond, and C. V. Ford and Moore, Barbour, Keith & McCandlish, all of Fairfax, for appellees.

CARDWELL, J. The city council of Alexandria having, as it was advised, complied with all the requirements of clauses 1 and 2 of section 1014a of the Code of 1904, on the 27th day of June, 1912, moved the circuit court of Alexandria county to make an order authorizing and declaring the annexation to the city of certain territory, belonging partly to the county of Alexandria and partly to the county of Fairfax, described in an ordinance of the council of the city, approved December 29, 1911; and, pursuant to the provisions of the statute in such cases made and provided, the Governor of the state duly designated the Honorable Bennett T. Gordon, judge of the Twenty-Ninth judicial circuit, to hear the case and to determine the issues therein.

At the final hearing the issues in the case were all determined in favor of the defendant counties at the cost of the city, to which judgment the city excepted and duly filed its bill of exceptions, which embodies all the evidence introduced in the case.

In the petition for this writ of error, awarded the city of Alexandria, the action of the presiding judge dismissing its motion is alone assigned as error.

Clause 3 of the statute (section 1014a, supra) provides: The court presided over by some judge designated by the Governor, is to hear the case without a jury, upon the evidence introduced in the manner in which evidence is introduced in common-law cases. The court shall ascertain and determine the necessity for or expediency of annexation; whether the terms and conditions are reasonable and fair; and whether fair and just provisions are made for the future management and improvement of the territory annexed. And if the court is satisfied of the necessity for or expediency of such annexation, and that the conditions and provisions are reasonable and fair, it shall enter an order annexing said territory to the city; but

if the court is of opinion that no annexation is necessary or expedient, the motion shall be dismissed. The lines shall be drawn so as to have a reasonably compact body of land, and no land shall be taken which is not adapted to city improvements, unless it is necessarily embraced in said compact body of land or shall be needed in the reasonably near future for development. The court shall take into consideration the development of the city and the loss of revenue to the county.

Clause 1 of the statute provides that, whenever any city or town shall deem it desirable to annex any territory to such city or town, its council shall declare by ordinance that it desires to annex certain territory, and shall describe therein the metes and bounds of the territory proposed to be acquired, and set forth the necessity for or expediency of annexation, and the terms and conditions upon which it desires to annex such territory, as well as the provisions which are made for its future management and improvement.

The ordinance adopted by the council of the city of Alexandria, upon which this proceeding was instituted, is, mutatis mutandis, the same as that adopted by the council of the city of Richmond and proceeded upon in the case of Henrico County v. Richmond City, which came under review in this court. Henrico County v. City of Richmond, 106 Va. 282, 55 S. E. 683, 117 Am. St. Rep. 1001, where the annexation statutes then and now in force in this state were construed and held to be constitutional and valid.

In the case just cited, the opinion of the court by Harrison, J., says:

"Nearly, if not all, of the questions to be determined under the provisions of this act, are questions of fact. The power so much inveighed against in the court to determine the necessity for, or expediency of, annexation, is controlled by the existence of facts and circumstances justifying action. The necessity for, or expediency of, enlargement, is determined by the health of the community, its size, its crowded condition, its past growth, and the need in the reasonably near future for development and expansion. These are matters of fact, and when they so exist as to satisfy the judicial mind of the necessity for or expediency of annexation, then, in accordance with the provisions of the act, the same must be declared. It is manifest that the Legislature, carrying out the provisions of the Constitution, intended, as doubtless did the enactors of the organic law, to require that every annexation should depend upon evidence showing the necessity for, or expediency of, annexation, that the terms proposed are reasonable and fair, and the provisions for the future management of the territory just."

We have been cited to a number of cases decided in other jurisdictions dealing with the rules to govern where a municipal corporation is seeking to annex outlying territory; but these cases, as far as we have been able to examine them, had under review and construction local statutes wholly dissimilar to our statute. So that, as said in this case by the learned judge presiding below, in his written opinion which is a part of the record:

"The present proceeding for annexing territory to a city or town being purely statutory, we must look to our statute, as interpreted by the Supreme Court of Appeals, for guidance in this important matter. Henrico County v. Richmond, etc., 106 Va. page 282, 55 S. E. page 683, 117 Am. St. Rep. 1001."

The learned judge, after a view of the territory proposed by the city of Alexandria to be annexed, and also a view of the physical conditions of the city, its streets, sewers, and surface drainage, reasonably made no effort to analyze the evidence introduced, witness by witness, but did in his written opinion set forth what he conceived to be a fair deduction from the evidence as a whole, concluding, in effect, that no annexation to the city of additional territory was necessary or expedient, the sufficiency of the ordinance of the city pursuant to which this proceeding was instituted as to the terms and conditions or provisions made for the future management and improvement of the territory proposed to be annexed not being discussed; so that the dismissal of the proceeding was rested solely upon the ground that the proof did not show that it was necessary or expedient to annex the territory described in the ordinance, or any part thereof.

The statute (clause 3, supra) provides that if the court or judge shall be of opinion that no annexation is necessary or expedient, the motion to annex shall be dismissed; but it also provides:

"If, however, the court or judge shall be of opinion that the annexation of only a part of such territory is necessary or expedient, or" if it shall be of opinion "that said ordinance does not contain fair and reasonable terms, or if it shall be of opinion that more territory should be annexed than was described in the metes and bounds originally set forth, it shall enter a proper order, embodying what it deems reasonable and fair terms upon which the annexation is to be had, and how much of said territory shall be annexed, and shall direct the annexation of such territory in conformity with the terms and conditions so prescribed. The court shall so draw the lines of annexation as to have a reasonably compact body of land, and shall also see that no land shall be taken into said city which is not adapted to city improvements unless necessarily embraced in said compact body of land, or which the city shall not need in the reasonably near future for development. * * *"

In other words, when the evidence, considered with respect to the health of the community, the city's size, its crowded condition, its past growth, and its present needs, as well as its needs in the reasonably near future, for development and extension, does show that some portion of the land proposed to be annexed to the city should be annexed, it is made the duty of the court to enter a proper order, embodying what it deems reasonable and fair terms upon which the annexation is to be had, and how much of the territory sought to be annexed shall be annexed, and to direct the annexation of such territory in conformity with the terms and conditions

prescribed in the order. Henrico County v. City of Richmond, supra.

In the case at bar we cannot say that the evidence introduced should have been deemed sufficient by the trial judge to have required him to order and direct the annexation of all the territory described in the motion of the city of Alexandria, but are of opinion that the proof in the case clearly shows that it is both necessary and expedient to annex some part of this territory to meet the city's needs now as well as its needs in the reasonably near future. We could not in an opinion of reasonable length analyze the evidence introduced, consisting of a mass of documents and the testimony given by more than 100 witnesses, but will only undertake to state, as far as is deemed necessary, the facts not controverted and what is conceived to be a fair deduction from the evidence as a whole, to which the provisions of our statute, as interpreted by this court in Henrico County v. City of Richmond, supra, are to be applied.

The city of Alexandria was founded in 1748, and its limits, by amended charters, have been several times enlarged, and once (in 1871), for political reasons, diminished to those now existing; so that the land area within the present corporate boundaries is 713 acres—a little more than one square mile. It is bounded on the east by the Potomac river, on the south by Fairfax county, on the west by Fairfax and Alexandria counties, and on the north by the last-named county; so that the city can be extended on but two sides, the north and west, for the reason that the land between the corporation line and Hunting creek, south of the city, is not suitable or desirable for city purposes, and is only included in the territory proposed to be annexed in order that the city might go to the middle of Hunting creek for the purpose of draining the city properly.

The land area desired to be annexed from both counties is, approximately, 1,316 acres, or about 2 square miles; that is, 866 acres from Alexandria county, and 450 acres from Fairfax county, which includes 180 acres covered by the water of Hunting creek.

It is true that the authorities of both the defendant counties, as well as the citizens of the territory proposed to be annexed, and also a considerable number of the citizens of the city, probably 20 per cent., oppose annexation. On the other hand, the ordinance initiating this proceeding is evidence as expressing the opinion of the corporate body upon the necessity for or expediency of annexing the territory, and a large number of the citizens of the city have testified that the proposed annexation is necessary and expedient to meet the needs of the city.

It appears that the land south or southwest and the land north of the city limits has been subdivided, and more than two-thirds of the land west and northwest of the city limits has been subdivided, which subdivisions, viz., Braddock Heights, Cottage Park, Park addition, City's Poorhouse, Harlow's Park, Wheat and Suter's subdivision, Rosemont, George Washington Park, and West End, lying on both sides of the Little River Turnpike, are all included in the territory proposed to be annexed to the city, as well as Hooff's Run, which parallels almost the entire western boundary of the city, and enters the city at the intersection of Duke street and the corporation line. From its mouth to its source, about Eloyd's Lane, which is the proposed northern boundary line for the city, Hooff's Run drains about two-thirds of the land proposed to be annexed, and also that portion of the city west of South Fayette street and west of North Columbus street to the corporation line on the south. It is claimed, and there is evidence to support the claim, that the condition of this run is now a menace to the health, not only of the people in the city, but to the people coming into the city from the roads leading into it and the railroads; that its present condition is bad and will certainly become worse and worse as the sewerage from Rosemont, Union Station, West End, Braddock Heights, Park addition, and George Washington Park empty into it; and that it should be taken in hand and controlled from its source to its mouth at Hunting creek by the city, for the protection, not only of the people of the city, but also the people residing within the territory it drains, and because it is necessary as a part of the drainage system of the city.

It appears from the maps and the evidence before the court that the only roads leading from the city are Patrick street extended south across Hunting creek; Duke street extended, known as Little River Turnpike west of Hooff's Run; King street extended, known as the Alexandria and Leesburg Turnpike from the west line of the corporation; the road leading from West street northwesterly, known as the old Braddock Road, or Mushpot Road; and Washington street extended in a northerly direction from the corporation limits and through to St. Asaph Junction. The main lines of railway from the north to the south pass almost parallel with the west corporation line and across the land proposed to be annexed, having their Union Station and freight depot adjacent to but outside of the city's western boundary line. The trolley line between Alexandria and Washington city extends up King street and across Hooff's Run, and then turning north passes through the subdivisions of Rosemont and Braddock Heights, and is used by the people of Cottage Park and Harlow's Park as well. Travel to and from the city is principally over the Leesburg Turnpike, Little River Turnpike, the Hunting Creek Road, and the Washington Road.

It is urged by the city as absolutely necessary that more roads should be opened leading into and connecting with the streets

of the city, and that Cameron, Queen, Pendleton, Madison, and Montgomery streets can and should be extended to pass under the railroad into the territory sought to be annexed, and that Princess and Oronoco streets can and should be extended into this territory, crossing the railroad at grade; while Princess street should be extended to the diagonal road, for the convenience of reaching the passenger and freight depots located just across the diagonal road.

So much as to the location and conditions of the territory proposed to be annexed to the city. Now as to the conditions in the city and its needs now and in the reasonably near future:

As observed, the land area within the present corporate boundaries is 713 acres, a little more than one square mile. Five trunk lines of railway converge at the city, and two or more of them occupy streets of the city for a considerable distance and unite just north of the city limits. There are about 30 miles of streets in the city, equal in area to 37 per cent. of the whole area in the city, leaving 63 per cent. for building purposes, of which a considerable percentage, considering the dimensions of the entire area, is unsuited and practically worthless as sites for either residences or business plants. The blocks or squares of the city contain from the center lines of the streets three acres, leaving for building purposes two acres in each block. The streets are 66 feet wide from building line to building line, except two of the principal ones, and these two are 100 feet; the length of a square from the center of streets running north and south being about 415 feet, and the length thereof from the center of the streets running east and west is about 310 feet. Steam railroads, with their depots and yards, occupying more than five miles of the streets of the city, render useless for residential purposes about 50 blocks in the city, and but 3 of the streets occupied by railroad tracks are built up on both sides; the buildings consisting of small dwellings. Considering its present, as well as past, environments, it appears from the evidence that the city has a fairly good sewerage system, but which greatly needs to be improved and extended beyond the present corporate limits. More than one-half of the area of the city is now drained by sewers, and, when other sewers under construction are completed, about three-fourths of the city will be sewered. It appears that practically the only outlet that the city now has for its sewerage is to the east and into the Potomac river, which is by no means sufficient for the needs of the western half of the city and that of the territory lying adjacent thereto, upon which there are quite a number of dwellings and business establishments, which should have sewerage outlet for the protection of the health of the people of that locality as well as those residing or doing business in the city. The sewerage from the western portion of the city and the outlying adjacent sections, including the Union Station and freight depot, must necessarily be emptied into Hunting creek, and in order to reach that destination it is absolutely necessary that the city have control of certain intervening territory which is within the boundaries of the land sought to be annexed in this proceeding from the county of Fairfax. The people in Rosemont, Braddock Heights, Cottage Park, Park addition, in Alexandria county, and West End in Fairfax county, market, shop, and transact their business in the city of Alexandria, and many of them are employed in the city. They attend the churches, places of amusement, participate in the social life of the city, and are, practically, as closely connected with the city life as are the people residing within the city's boundaries. They use its streets, electricity, gas, water, and telephones are furnished from the city; being without police or fire protection, the police department and the fire department of the city have always responded to calls for assistance from these outlying sections. In other words, the people in these outside localities enjoy in a large degree many of the benefits of the city without having to bear any of its burdens, a large portion if not a majority of them having moved from the city of Alexandria within the past 20 years.

The contention that Alexandria is the most compactly built up city in the state is clearly sustained by the evidence in the record. Many of the principal streets, a mile or more long, are practically built up. King street, one of if not the principal street, for its whole length from the river to the corporation line, on both sides, with the exception of two or three vacant lots, between West street and the western boundary, is built up without even an alley leading into it; and the former dwelling houses thereon, from Washington street westwardly, are gradually being changed into shops. This statement as to the condition of King street indicates very clearly, we think, the unusually compact way in which the available grounds in the city have been built up. There are comparatively few vacant lots in the city suitable even for modest or cheap dwellings, and but little land available for manufacturing or other business enterprises; there is no available ground within the city limits for a park for the people of the city or a playground for the children; there was no ground upon which to erect the Union Station and the freight depot of the two railroads paralleling the western boundary line of the city, and hence both are located beyond the city limits, in the territory of Fairfax county proposed to be annexed; and there was no available ground within the city for its high school building with necessary grounds attached, and the school board had to purchase for that purpose a lot of land, most of which is in Alexandria county and within the territory pro-

posed to be annexed from that county. It further appears that the trustees of the Alexandria Hospital Association, in which the citizens of Alexandria city are greatly interested, have not been able to secure a suitable site within the city on which to erect a hospital building. There are few, if any, vacant dwelling houses for rent, while there is a great demand for small dwellings from people who wish to live in the city, and one of the causes for the demand for such houses is the fact that the city has become a great railroad center, where converge five trunk lines, having their transfer yards just beyond the city limits, with more than 2,000 employés, very many of whom make desirable citizens. A large number of these employés, having for some time sought homes in the city of Alexandria and being unable to secure them, were forced to become residents of Washington, D. C., or of Rosemont, Potomac, Braddock Heights, and other subdivisions of the land proposed to be annexed to the city. A number of the residents of the city, upon being unable to procure within the corporate limits sites on which to erect dwelling houses, have located outside of the city and within the territory sought to be annexed. Improvements are going on in the city; but for the past few years, as it appears, such improvements have consisted chiefly of pulling down old buildings and erecting better ones on the sites, which of course benefits the city, but by no means to the extent that would be derived from the erection of new buildings on sites not heretofore built on, if such there were.

While it appears that the health of the city is comparatively good, there can be no question that the density of the population, the crowded and congested conditions shown to exist therein, as well as the conditions existing in the territory adjacent to the city and proposed to be annexed, imperil the health of not only the city but the citizens residing or conducting business adjacent thereto. A city of the size of Alexandria must necessarily have a park or parks of sufficient size and other grounds for recreation and diversion, and it clearly appears that there are no available spaces within the city for either. So that, the claim made in this case that the condition of Alexandria, with respect to the density of its population and the crowded way in which the land available for dwellings has been built up, is worse than that of any city of its size, not only in Virginia, but perhaps in the United States, is well founded.

[1] It is not a sufficient defense to the demand of the city, that its corporate limits be extended for sanitary reasons, to point to the fact that the health of its citizens is and has been for some years good. A municipality has the right, and it is its duty, to take such precautionary steps as may reasonably be deemed necessary to secure to its population continued good health. Notwithstanding the fact that the city of Alexandria, by reason of its location, was more severely devastated and crippled during the Civil War than any other city in the state, finding itself at the close of that war of four years' duration indebted to an amount exceeding a million dollars, contributed to works of internal improvement and totally lost, the present financial status of the city compares favorably with that of the other cities of its size in the state. The city began in 1873 to pay off the principal of its debt, and there is now left outstanding about one-half of it, or about three-fourths of a million dollars, and this has been accomplished without increasing the assessment of property or advancing the rate of taxation thereon; in fact, the latter has been decreased from $2 to $1.80 per hundred. The annual expenditures of all departments of the city government and for public improvements amount to nearly $100,000 per annum, and in addition about $300,000 has been spent during the past 10 years for street improvements, sewers, curbing, and paving streets; so that, in the words of some of the witnesses residing in the city, who testified in this case against annexation, the improvements in the past 10 years have been "marked," "wonderful," "remarkable."

The evidence warrants, also, the claim made by the city that its prosperity is indicated, not only in the change of the character of its business houses and homes, as they have been greatly improved, but by the enlargement of all lines of business; that bank deposits have doubled in the last few years; that the surplus money of the city's people has been invested to a large extent outside of the city, and most of it in the development of Alexandria county, especially that part of it proposed to be annexed; and that, in fact, the subdivisions of Rosemont, Braddock Heights, Park addition, and Cottage Park have been built up in a large degree by the surplus capital of the city of Alexandria. Not only is the city's ground upon which its high school is, or is to be, located and constructed outside of the corporation's boundaries and in the territory sought to be annexed, but as also are its reservoir, poorhouse, and cemetery.

The proof in this case shows that Alexandria city has an organized and equipped fire department that will, as to its efficiency, compare most favorably with that of any other city of the same size, and that its police force and regulations are ample and efficient; while the territory the city proposes to annex has absolutely no police protection, not a single officer in either Fairfax county or Alexandria county resides within said territory, and the present police department of Alexandria city has been furnishing the only police protection that the residents of that territory have had for some years. The present gas works of the city, the evidence shows, are sufficient to supply double the

quantity of gas now being consumed, and gas mains are now laid through the subdivision of Rosemont, and a large number of people residing there are consumers of gas furnished by the city.

From the land area in the city of a little over one square mile there is to be deducted about 190 acres not available for urban uses, which leaves the city with only a little over 500 acres upon which its citizens are to reside and its business of all classes is to be conducted, with little or no area upon which to locate and erect manufacturing plants or additional factories or like industries. The United States census shows that in 1910 Alexandria city had a population of 15,329, 72⅛ per cent. white and 27⅞ per cent. colored, and its land area given at one square mile, so that its density of population is 15,329 per square mile, which is greater than any city in the state. Such a density of population is one of the strongest reasons that can be given for the extension of the city's limits, for, as a matter of common knowledge, to compel 15,329 people to live and conduct their business on one square mile of territory is not only a hardship but dangerous to their health, and militates greatly against their comfort as well as their welfare generally. In these circumstances, it is not to be considered unusual or out of the ordinary course that many of the citizens of Alexandria who might have desired to continue to live and transact their business in the city, to relieve their situation, built houses and conducted their business on the outside of the city in the subdivisions of the land adjacent to the corporation's boundary.

[2] The policy of annexation, it was said by this court in Henrico County v. Richmond City, supra, as a public necessity, was determined by the Legislature when it enacted this statute (supra) providing for its accomplishment when certain conditions were shown to exist. The court is called upon by the statute to express no opinion as to its wisdom as a matter of public policy. It has only to determine, upon the evidence adduced, the rights of the opposing parties in the particular case before it—whether, upon the facts and circumstances established by the evidence, the city is entitled to any extension at all, and, if any, how much, and the terms and conditions upon which such extension shall be granted.

[3] Our examination and consideration of the evidence in this case brings us readily to the conclusion that the circuit court should not have dismissed this proceeding, but should have adjudged and ordered therein that there be annexed to the city of Alexandria so much of the territory sought to be annexed as is necessary to include within the city's limits its high school with the necessary grounds attached thereto, its reservoir, and cemetery, the national cemetery, the roadbed and tracks of the Southern and the Washington Southern Railroads, from the point where they enter the city's boundary on the north to Hunting creek on the south, including the Union Station, freight depot, and other buildings or lands of the said railroads, if any, adjacent to their Union Station and freight depot; also, the lands west and northwest of the city's present boundary, known as Wheat and Suter's subdivision, Rosemont, Shooters' Hill, and West End, lying on both sides of the Little River Turnpike; and also all lands, structures, and streams that will be embraced within the city's boundaries by an extension of its northern boundary line westwardly to a point from which a line may be run southwardly and above the fork of Hooff's Run near the Braddock Road as shown upon the map of Alexandria county with the record in this case, to Janney's Lane or Road, thence southwardly and by the most practicable route to the center of Hunting creek, thence with the middle of the main channel of Hunting creek to its entrance into the Potomac river, and thence up the west line of the Potomac river to the point of the beginning of the present boundary line between the city and Fairfax county—all of the territory embraced within the lines indicated to become annexed to and form a part of the territory possessed and controlled by the city, upon the terms and conditions set forth in the ordinance adopted by the city council upon which this proceeding is founded.

The extension of the limits of the city, as indicated, and annexing to its present area the additional territory within the extended limits, is, as it appears to us, both necessary and expedient, and violates none of the established rules of law applicable in such cases, but would be entirely within both the letter and spirit of those rules as laid down and followed uniformly in the adjudicated cases and sanctioned by the law writers.

In Kansas City v. Stegmiller, 151 Mo. 189, 52 S. W. 723, it was held that land which is necessary to the city for drainage and police purposes may be included.

Land on which depots are located may be taken in. Collins v. Crittenden, 70 S. W. 183, 24 Ky. Law Rep. 899. And land necessary for the protection of the health of the city may be included, and extension of the city must be considered as a whole, and land necessary to foster and encourage the growth and prosperity of the city may be included. Forbes v. Meridian, 86 Miss. 243, 38 South. 676; Catterlin v. Frankfort, 87 Ind. 45; Yancey v. Fairview, 66 S. W. 636, 23 Ky. Law Rep. 2087; Fredonia v. Rice, 115 Ky. 443, 73 S. W. 1125; Wahoo v. Tharp, 45 Neb. 563, 63 N. W. 840; Vestal v. Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778.

In the last-cited case the railroad depot near the municipality was located in the territory sought to be annexed, and the court held that it was proper to annex the depot for the reason that the inhabitants were dependent on it for shipping their freight, pas-

senger travel, and mail; that there was no sidewalk from the boundary of the municipality to the depot; that one was necessary; and that failure to annex would retard prosperity, etc. That case is only distinguishable from this by the lone fact that the street and other approaches to the Union Station at Alexandria are well paved; the cost of same, without the city, having been defrayed by private subscription and the county authorities. This fact is not sufficient, as it appears to us, to control in the consideration of the cogent reasons alleged and proved why this Union Station should be within the corporate limits, control, and police regulation of the city of Alexandria. See, also, Bridge Co. v. Pt. Pleasant, 32 W. Va. 328, 9 S. E. 231.

[4] Among the rules governing in proceedings to annex outlying territory to a municipality, stated in 1 McQuillin on Mun. Corp. 618, 619, are the following which are in point here:

"(4) Lands should be annexed when they are needed for any proper urban purpose, as for the extension of streets or sewers, gas or water system or to supply places for the abode or business of residents, or for the extension of needed police regulation; and (5) when they are valuable by reason of their adaptability for prospective town purposes. But the mere fact that their value is enhanced by reason of their nearness to the corporation would not give ground for their annexation, if it did not appear that such value was enhanced on account of their adaptability to town uses."

On page 624 this learned author says:

"The limits of a city cannot be extended to take in undivided lands merely for the purpose of increasing the city's revenue; but the mere question of the nature of revenue which a municipality may receive from territory sought to be annexed is no criterion by which to determine the reasonableness of the extension."

And on page 625 it is said:

"The fact that the territory will be subject to an additional or municipal tax is no reason why it should not be annexed to a municipality, where it will receive benefits in the way of reduced insurance rates, police protection, etc. So the fact that territory annexed to a municipal corporation will be subject to taxation to pay a pre-existing debt of the municipality is no objection to its annexation; and the fact that parts of territory annexed to a municipal corporation are low and marshy does not render the annexation unreasonable."

See, also, Wade v. Richmond City, 18 Grat. (59 Va.) 583.

In this case neither of the defendant counties have a bonded indebtedness, and the annexation to the city of Alexandria of the territory we have outlined to be taken, partly from one and partly from the other of said counties, will not reduce the annual revenue that either is now receiving but little more, if any, than 5 per cent. thereof.

Invoking rule 8 (79 S. E. vi) of this court, the defendant counties assign as cross-error the action of the circuit court in overruling their motion to quash the notice and ordinance of the city asking for annexation, and also the demurrer to the said notice and ordinance.

The first question presented on these cross-assignments of error is whether or not the ordinance complies with the requirements of the statute that the terms and conditions upon which the city proposes to annex prescribed territory, as well as the provisions which are made for its future management and improvements, shall be set forth. It is contended that the ordinance in question wholly fails to comply with the latter requirement of the statute, in that it does not set forth any terms and conditions of annexation or provisions made for the future management and improvement of the territory to be annexed.

[5] This contention is without merit. As we have observed, the ordinance is, mutatis mutandis, the same as that of the council of the city of Richmond which came under review in Henrico County v. Richmond City, supra, and clearly the sufficiency of the ordinance was a jurisdictional question which the court necessarily had to consider and determine affirmatively in that case before it could, as it did, affirm the judgment of the circuit court annexing certain territory of Henrico county to the city of Richmond. In the opinion of the court it is said:

"We are further of opinion that the objection to the ordinance is untenable. The ordinance of the city of Richmond, which is the foundation of this proceeding, substantially complies with the statute, and sets forth the case of the city with as much fullness and detail as was practicable under the circumstances."

[6] The contention made under the second assignment of cross-error is to the effect that, to construe the act in question as authorizing the annexation of a portion of the counties of Fairfax and Alexandria to the city of Alexandria, and which constitute or are included in separate "house districts," would be a violation of the provision of section 43 of the Constitution of Virginia (Code 1904, p. ccxviii), which is as follows:

"The apportionment of the state into senatorial and house districts, made by the acts of the General Assembly, approved April the second, nineteen hundred and two, is hereby adopted; but a reapportionment may be made in the year nineteen hundred and six, and shall be made in the year nineteen hundred and twelve, and every tenth year thereafter."

This contention is also without merit. The Constitution, § 126 (Code 1904, p. ccxlii), requires that the General Assembly shall provide by general laws for the extension and contraction from time to time of the corporate limits of cities and towns, and that no special act for that purpose shall be valid. Pursuant to this constitutional provision, the General Assembly enacted the statute, supra, conferring upon the circuit courts of the state the authority, within prescribed limitations, to extend or contract the corporate limits of cities and towns, and the enactors of our organic law must necessarily have understood and contemplated that the annexation of territory from a county to a city and vice versa would, in many if not

every case, take into the city or county limits more or less inhabitants of the territory annexed and operate upon their municipal relations. Here, as in the act construed in Wade v. Richmond City, supra, the statute authorizing the circuit courts to order and declare annexation of additional territory to a municipality, or from a city to a county, is silent as to the right of voting and of representation pertaining under the Constitution to the inhabitants of the annexed territory. In the first-named case it was an agreed fact that there were 14,000 inhabitants of the territory annexed to the city from Henrico county, and a small area of territory taken from the city and annexed to the county, having presumably some inhabitants, and the court with respect to the political status and rights of the inhabitants of the territory annexed said:

"They were left where the condition placed them; there was no necessity to indicate by law, upon such an event, where the people were to vote, or how they were to be represented. The Constitution was the only rule upon that head. * * * True, their municipal government was changed; citizens of Henrico county ceased to be such, and became citizens of Richmond to that end alone, and vice versa; but constitutional limits still remained for the exercise of constitutional rights, and the enjoyment of constitutional privileges."

In the case in judgment we are of opinion that the order of the circuit court appealed from should be reversed, and the cause remanded to that court to be further proceeded with in accordance with the views hereinbefore expressed; and as the appellant, the city of Alexandria, is the party substantially prevailing in this court, judgment for its costs in the proceeding will be awarded it against the defendant counties, to be borne by those counties in equal portions.

Reversed.

KEITH, P., absent.

NOTE.—This case was argued and submitted before Judge KELLY'S term began.

(117 Va. 433)

## YOUNG v. HOLLAND et al.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. TRUSTS ⟸17, 18—EXPRESS TRUSTS—PAROL DECLARATION.

At common law, and before the English statute of frauds, an express trust in land could be created by parol, but the declaration must be unequivocal and explicit and established by clear and convincing testimony.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 15-24; Dec. Dig. ⟸17, 18.]

2. TRUSTS ⟸81—RESULTING TRUSTS—CONVEYANCE TO DAUGHTER BY DIRECTION OF PURCHASER.

Where a purchaser of real estate paying the price directed the vendors to convey the same by deed absolute in form to a daughter, which was done, there was no resulting trust in favor of the purchaser.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 115-118; Dec. Dig. ⟸81.]

3. TRUSTS ⟸43—EXPRESS TRUSTS—ORAL DECLARATION.

Under the statute of frauds (Code 1904, § 2840), providing that no action shall be brought to charge any person on any contract for the sale of real estate or for the lease thereof for more than one year, unless in writing, but omitting sections 7 and 8 of the English statute of frauds, making all declarations of trusts invalid unless in writing, an express trust to collect and apply the rents of real estate may be proved by parol.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 62-65; Dec. Dig. ⟸43.]

4. TRUSTS ⟸43—PAROL EVIDENCE—CONTRADICTING WRITTEN INSTRUMENTS.

Oral declaration of trust binding a grantee in a deed absolute in form to collect the rents for the grantor, being lawful and enforceable, is not within the rule forbidding parol evidence to vary, contradict, add to, or explain a written instrument.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 62-65; Dec. Dig. ⟸43.]

Appeal from Circuit Court, Accomac County.

Suit by Mrs. Mary E. Young against Hannah W. Holland and another. From a decree of dismissal, plaintiff appeals. Reversed.

Wescott & Turlington, of Accomac, and Henley, Anderson & Hall, of Richmond, for appellant. John S. Parsons, of Accomac, and Stewart K. Powell, of Onancock, for appellees.

KEITH, P. The bill filed by Mrs. Young shows that in May, 1910, she purchased from George W. Milliner a certain parcel of land situated in the county of Accomac, and that on the 30th of January, 1911, she purchased from Wesley T. Melson a certain house and lot in said county, for both of which purchases she paid cash, but requested the vendors, Milliner and Melson, to convey the same to Hannah W. Holland by deed of bargain and sale, which was accordingly done. The bill further alleges that it was distinctly understood at the time of the purchase and before the conveyance of either of the parcels of land that the said Hannah W. Holland was to collect the rents and profits arising from the house and lot of land and pay the same to Mary E. Young during her natural life, all of which was agreed to by Mrs. Holland; that Mrs. Holland took each of said parcels of land impressed with, and subject to, this trust, and with the express promise to collect the rents and profits and pay them to Mrs. Young during her lifetime. Mrs. Holland, it is alleged, was the favored daughter of the plaintiff, for whom she entertained great affection, and in whom she had implicit confidence; that Mrs. Holland has collected the rents from the land thus conveyed to her, but has declined to account to the plaintiff for them, and contends that the deeds to her are absolute on their face, and that the rents and profits are hers, notwithstanding the oral agreement above set

out to collect the rents and profits and pay them over to the plaintiff as long as she lived.

To this bill Mrs. Holland and her husband were made parties defendant, and to it they demurred, which demurrer the court sustained, and dismissed the bill, and the case is before us upon an appeal awarded by one of the judges of this court.

The deeds which were filed as exhibits with the bill are absolute on their face, and the question presented for decision is: Can an express trust in real estate be created in this state by a parol agreement?

This question has been answered in the affirmative in Walraven v. Lock, 2 Pat. & H. 547, to which we shall again refer; but in Sprinkle v. Hayworth, 26 Grat. (67 Va.) 384, it was found unnecessary to answer the question; in Borst v. Nalle, 28 Grat. (69 Va.) 423, it was again found unnecessary to determine the question, and no opinion was expressed upon it; in Jesser v. Armentrout, 100 Va. 673, 674, 42 S. E. 682, the court found it unnecessary to discuss the controverted question as to whether a trust in lands may be created by parol declaration, and said, "We prefer to leave that question where it was placed * * * in Sprinkle v. Hayworth, supra, and Borst v. Nalle, supra;" while in Garrett v. Rutherford, 108 Va. 481, 62 S. E. 390, which is the latest expression upon the subject, it is said, "The question is an open one in this state whether an express trust affecting real estate is valid unless in writing."

These cases are adverted to, not because they throw any special light upon the subject, but as showing that this court has not in terms accepted the authority of Walraven v. Lock, supra, while it has been in no sense overruled, and that the question, which is one of great interest and importance, is an open one so far as this court is concerned.

[1] It seems that at the common law, before the passage of the statute of frauds (29 Car. II), an express trust in lands could be created by parol; but, as was said in Kline v. Kline, 103 Va. 267, 48 S. E. 882, the declaration should be unequivocal and explicit, and established by clear and convincing testimony.

By the English statute of frauds it is expressly provided, in the seventh section, that:

"All declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

And by the eighth section it is declared that:

"Where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding."

Those two sections have never been adopted in this state, and their absence has been frequently animadverted upon by this court.

[2] In Bank of United States v. Carrington, 7 Leigh (34 Va.) 566, it was held that:

"Where land is purchased and paid for by one person, and the conveyance is taken to another, the law will imply a trust for the benefit of the former; and such purchase and payment may be proved by parol evidence."

In the case before us the land was purchased and paid for by Mrs. Young, and the conveyance was taken to her daughter, and, if that had been all, there would have been a resulting trust; but two circumstances prevented the application of that principle. In the first place, Mrs. Young is the mother of Mrs. Holland; and, in the second place, by express direction she caused the deed to be made to Mrs. Holland.

In Dyer v. Dyer, 1 Lead. Cas. in Eq. (W. & T.) 266, it is said:

"Where there is an express trust declared, though but by parol, there can be no resulting trust; for resulting trusts, though saved by the statute of frauds, are only saved and left as they were before the act; and a bare declaration by parol, before the act, would prevent any resulting trust. * * * As to purchases made in the names of children, or of persons equally favored, it may be laid down as a general rule that, where a purchase is made by a parent in the name of a child, there will prima facie be no resulting trust for the parent, but, on the contrary, a presumption arises that an advancement was intended. * * * The presumption also arises in favor of any person with regard to whom the person advancing the money has placed himself in loco parentis. Thus in Beckford v. Beckford, Lofft, 490, an illegitimate son, in Ebrand v. Dancer, 2 Ch. Ca. 26, a grandchild, and in Currant v. Jago, 1 Coll. 261, the nephew of a wife, were held entitled to property purchased in their names, from the presumption of advancement being intended."

[3] There can in this case, therefore, be no resulting trust, and the whole case rests upon the validity of an oral declaration of trust as set out in the bill. As such a declaration of trust was valid at common law, and as the seventh and eighth sections of the English statute of frauds have not been enacted in this state, the question at once arises whether our statute, as it stands, is broad enough to cover the case.

In Sprinkle v. Hayworth, supra, referring to the omission from our statute of the seventh and eighth sections of the English statute of frauds, Judge Moncure says:

"We do not mean to admit, however, that there is any difference in effect between the English statute of frauds and ours arising from the omission in the latter of the seventh and eighth sections of the former. That is a question which is unnecessary, and not intended to be discussed in this case."

To the same effect see Borst v. Nalle, supra.

In 2 Minor's Inst. (4th Ed.) p. 847, it is said that:

"Whether contracts touching trusts in lands are within our statute has not been adjudged, but it would seem that little doubt can exist that they are."

If they be within our statute of frauds, then it must be by force of the sixth clause of section 2840, which says that:

"No action shall be brought in any of the following cases: * * * Sixth. To charge any person * * * upon any contract for the sale of real estate, or for the lease thereof for more than a year; unless * * * it be in writing."

Discussing this phase of the subject, Judge Brockenbrough, in Bank of United States v. Carrington, supra, uses the following language:

"I think, then, that this is a case in which the rule as it is understood in England will strictly apply. The purchaser of the land having paid the money, the trust results to him by operation of law, although the conveyance was made to another. Nor do I think that either the words or spirit of our statute of frauds will exclude parol evidence in a case like this. The act says: 'No action shall be brought upon any contract for the sale of lands, or the making any lease thereof for a longer term than one year, unless the promise or agreement, etc., or some memorandum or note thereof, shall be in writing.' There is no pretense of any contract of sale or lease between Richard Adams and John Adams. The deed shows a sale between Marx and Richard Adams, and John Adams, who is not named in the deed, but who has been in possession ever since the sale, and has laid out large sums of money on the land, asks to be allowed to prove by witnesses, not that there was any contract of sale between Richard and himself, but that Richard holds under that deed merely as his trustee. The fourth section of the English statute uses broader terms than ours. It forbids an action 'on any contract or sale of lands, or any interest in or concerning them,' without writing. These words are omitted in our act; yet their insertion in the English statute was not deemed sufficient to include declarations of trust, which would have been provable by parol testimony, but for the seventh and eighth sections before mentioned."

Now, in our statute, not only have we not enacted the seventh and eighth sections, but so much of the fourth section as forbids an action on a contract or sale of "any interest in or concerning them" is also omitted, although, as Judge Brockenbrough points out, their insertion in the English statute was not deemed sufficient to include declarations of trust which would have been provable by parol testimony, but for the seventh and eighth sections before mentioned.

In Bank of U. S. v. Carrington the contention was also made that, because our statute had not adopted the eighth section, which excepts from its operation resulting trusts, that trusts of every description were within our statute; but the court, going as far in the direction of the maintenance of trusts by parol as the case before them required, maintained the trust resulting by operation of law, but without saying one word to indicate it as their opinion that express trusts stood upon any different plane. A careful consideration of the several opinions in Bank v. Carrington leaves little doubt that the court was at that time of opinion that all trusts, whether arising from an express declaration or by implication of law remained in this state as at the common law prior to the passage of the act of 29 Car. II, known as the statute of frauds.

In the case of Walraven v. Lock, supra, Judge Nash, in the course of his opinion, says:

"In the case of an absolute deed upon its face, it has been frequently decided that parol evidence may be received to prove that the instrument was in truth a mortgage, and this is upon the principle that it is competent to prove by parol testimony the express or agreed conditions upon which the legal title was acquired [citing numerous cases]. And in the case of the Bank of the U. S. v. Carrington, 7 Leigh, 566, the question was expressly decided, by a unanimous court, that it was competent to receive parol proof of facts to establish an implied or resulting trust, and that the statute of frauds and perjuries in Virginia did not apply to cases of implied trust; and, in delivering their opinions, three of the judges proceed to point out the difference between the English and the Virginia statutes, and very strongly intimate that the statute of frauds in Virginia has no application to either express or implied trusts. Judge Carr in that case says the English statute 'differs from ours with respect to trusts in this, that by their seventh section it is enacted that all declarations or creations of trusts, etc., of any lands, etc., shall be manifested and proved by some writing, etc. To which section there is a proviso that, where any conveyance shall be made of lands, etc., by which a trust or confidence shall or may arise or result by implication or construction of law, etc., such trust, etc., shall be of like force and effect as if this statute had not been made; whereas by our statute the whole subject is omitted. We have neither the enacting clause nor the proviso which that clause rendered necessary.'"

And Judge Thompson, in the same case, referring to the case of Bank of U. S. v. Carrington, supra, said:

"The judges there advert to the difference between the English statute and our own, both in its provisions and phraseology, and show that, whilst the English statute of frauds embraces express trusts, it in express terms excludes the resulting and implied trusts from its operation, and that our statute, embracing neither, excludes both. And it is obviously to that difference between the Virginia statute and the original statute of frauds that they refer the decision of the cases in which it was held competent by parol to convert absolute bills of sale and deeds for land into mortgages or conditional sales. These cases are not only cited with approbation, but the grounds of the decisions more fully and better stated than in the cases themselves."

In Hancock v. Talley, reported in 7 Va. Law Reg. at page 34, the special Court of Appeals had this subject under consideration, and in the course of the unanimous opinion of the court, delivered by Judge Wingfield, the following language is used:

"The provisions of the seventh and eighth sections of the English statute of frauds never were enacted by our Legislature, and were never in force in Virginia; and the law here in relation to declarations of trust is, and always has been, the same that it was in England before the statute. The four judges who sat in the case of Bank of the United States v. Car-

rington et al., in the separate opinions delivered by each of them, all concurred that the law here, in this respect, had always been the same as it was before the statute of frauds, and that consequently a verbal declaration of a trust might be set up by parol proof; and we know that it is now, and always has been, the constant practice of the courts of equity, throughout the entire state, to set up and enforce by proof (express) declarations of trusts not in writing, and to ingraft them on deeds absolute on their face. A familiar instance is that of showing by parol that a deed absolute on its face was, by a verbal agreement, intended to be a mortgage. This, I suppose, has been done by every court in the state having chancery jurisdiction, while the right to do so has never been questioned. Ross v. Norvell, 1 Wash. 14 [1 Am. Dec. 422]; Robertson v. Campbell, 2 Call, 421, and Owen v. Sharp, 12 Leigh, 427."

In Browne on the Statute of Frauds, § 80, the case of Chiles v. Woodson, 2 Bibb (Ky.) 71, is cited, where land had been conveyed by one party to another in trust for the grantor, and upon an agreement that the grantee should reconvey to any one to whom the grantor might afterwards sell, and the court treated the transaction as a contract for land, and, there being no written evidence of the arrangement, denied relief in equity on the ground of the statute:

"Here was apparently a clear case of trust, to which the court applied the section which in terms extends to mere contracts for the purchase or sale of land. In Virginia, on the other hand, where the statute stands in the same way, the seventh section being omitted, and the fourth retained, it has been said (in a case, however, where the point was not directly presented) that the latter would not apply to a trust created verbally, which would accordingly be good in that state; and the court based its opinion on the simple fact of the Legislature's omission of the trust section and retention of the other, as conclusive of its design to allow a trust to be proved without writing; adverting also to the circumstance that in England it was thought necessary to enact the seventh section, expressly providing for trusts, although the fourth section of the statute of Charles contained larger language than the corresponding section of the Virginia statute."

This subject has been before many of the courts and the line of demarcation between their conclusions seems in large measure to turn upon the introduction or omission of the seventh and eighth sections of the English statute. In those states in which those sections appear, express trusts are within its operation, and cannot be proved by parol; while in quite a number of the states where the seventh and eighth sections have not been adopted oral declarations of trust are maintained. We shall content ourselves with more reference to them without discussion. Gardner v. Randell, 70 Tex. 453, 7 S. W. 781; James v. Fulcrod, 5 Tex. 512, 55 Am. Dec. 743; Woodfin v. Marks, 104 Tenn. 512, 58 S. W. 227; Olcott v. Bynum, 17 Wall. 44, 21 L. Ed. 570; Sykes v. Boone, 132 N. C. 199, 43 S. E. 645, 95 Am. St. Rep. 619; Taylor v. Wahab, 154 N. C. 219, 70 S. E. 173; Fleming v. Donahoe, 5 Ohio, 255.

[4] Counsel for appellees have argued with great force that to maintain the express trust by parol evidence would violate that principle of law, nowhere more closely adhered to than in this state, that parol evidence cannot be admitted to vary, contradict, add to, or explain the terms of a written agreement. If at the common law an express declaration of trust such as is here sought to be established was lawful, and if by the statute of frauds as adopted in this state the common law was not in this respect altered, then such an express declaration remains lawful. In the nature of things an oral declaration can only be established by oral evidence, and we do not think that the position can be maintained that an oral declaration of trust is sanctioned by our law, and the only possible mode of proof is to be excluded; in other words, we cannot maintain a right and exclude the only mode of proof by which that right can be established.

We have been unable to escape these conclusions: That at common law such an express declaration of trust as is here presented was lawful and could be enforced; that by the English statute of frauds such an express trust is prohibited; that no such express prohibition is found in our statute, the seventh and eighth sections of the English statute not having been adopted by us; that the case before us does not present a contract for the sale of real estate or for the lease thereof, and is not within the sixth clause of our statute; that, being valid at common law, and the common law not having been changed by statute, such an express declaration of trust can still be enforced in this state; and that an oral declaration of trust, being lawful and enforceable, and being in the nature of things only provable by oral evidence, does not come within the operation of the rule forbidding the admission of parol evidence to vary, contradict, add to, or explain the terms of a written instrument. For these reasons, the decree of the circuit court will be reversed.

Reversed.

NOTE.—This case was argued and submitted before Judge KELLY'S term began.

(117 Va. 413)

## VIRGINIA RY. & POWER CO. v. SMITH.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. MUNICIPAL CORPORATIONS ⇐705—USE OF STREETS — NEGLIGENCE — WAGONS HAVING RIGHT OF WAY.

The driver of defendant's repair wagon, which under an ordinance had the right of way on sounding its gong, requiring other vehicles aware of its approach to stop on the extreme right of the street, while hurrying to repair a fallen trolley wire, and while continuously sounding the gong, observed the danger of a collision with an automobile on the right side of the street, and applied the brakes and slowed down the speed of his horses, and would have averted the collision but for the fact that the tire of a wheel of the wagon caught on the street car rail and the wheel slipped or skidded, causing the front wheel of the wagon to swing toward the car and strike plaintiff. *Held* that there was no actionable negligence on the part of the driver, but an accident for which the defendant was not liable in damages.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515–1517; Dec. Dig. ⇐705.]

2. NEGLIGENCE ⇐4—"ORDINARY CARE."

"Ordinary care" and its lack must largely depend on circumstances surrounding the particular transaction, and generally greater danger calls for the exercise of greater care to avoid it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 6; Dec. Dig. ⇐4.

For other definitions, see Words and Phrases, First and Second Series, Ordinary Care.]

3. NEGLIGENCE ⇐121—OPERATION—PERSONAL INJURY—PRESUMPTION AND BURDEN OF PROOF.

In an action to recover damages for personal injuries, negligence will not be presumed, but the burden rests upon plaintiff to prove it affirmatively and by a preponderance of the evidence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217–220, 224–228, 271; Dec. Dig. ⇐121.]

Error to Law and Chancery Court of City of Norfolk.

Action by Herbert L. Smith against the Virginia Railway & Power Company. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

H. W. Anderson and A. D. Christian, both of Richmond, and W. H. Venable, of Norfolk, for plaintiff in error. Willcox, Cooke & Willcox, of Norfolk, for defendant in error.

WHITTLE, J. This writ of error brings under review a judgment in behalf of the defendant in error, Smith, against the plaintiff in error, the Virginia Railway & Power Company, for a personal injury alleged to have been caused by the defendant's negligence.

The accident occurred on the west side of Granby street between Eleventh and Tenth streets in the city of Norfolk. The defendant is a public service corporation, and owns and operates an electric street railway system and power and lighting plants in Norfolk, the wires and fixtures of which are strung along the streets. The trolley wires, especially, carry a heavy voltage, and, being uninsulated, are known as "live wires." Occasionally these wires break and fall on the streets, and to minimize the danger likely to result from such accidents to the traveling public, the company maintains wagons of massive structure, weighing about 3,000 pounds, known as "repair wagons," which, upon notification, are hurried to the place of accident to repair the broken wire. These repair wagons are regarded by the city authorities of such consequence as contributing factors to the safety of the public that they are classed along with vehicles connected with the fire and police departments and ambulances, and next to them, by express ordinance, are given the right of way on the streets of the city over all other vehicles when sounding the gong. The ordinance furthermore prescribes that:

"The driver of every other vehicle * * * upon becoming aware of the approach of any of said vehicles, shall immediately withdraw to the extreme right of the street, come to a full stop and remain in a stationary position until all such vehicles have passed."

[1] In the interest of life and property the prompt performance of the duties imposed upon those in charge of these vehicles is imperative, hence they are given the right of way to speed to their destinations without "let or hindrance," and if, perchance, in discharging these quasi public functions, a collision occurs and injury results to an individual, without negligence on the part of the driver, no liability attaches to the owner of the vehicle.

The material facts and circumstances out of which the accident in question arose are these: The defendant owns a double track street railway line in Granby street. The street runs north and south, and is 32 feet wide from curb to curb, and the space between the west rail and curb is 8 feet. On the morning of the accident, Dickerson crossed the street in his automobile from a garage on the east side, and passing over both car tracks came to a stop 2½ feet from the west curb, leaving the other side of the machine only a short distance from the west rail. The plaintiff was in the habit of riding down town from that point with Dickerson, who on the instant occasion signaled and called to him to ride with him. The plaintiff, who testified that he is "very deaf," left the sidewalk coming around the car from the rear and going alongside of it to the front, so that he could occupy the front seat with Dickerson and converse with him. He was standing just outside the west rail with his left foot on the running board of the automobile in the act of mounting to the front seat when the collision presently to be described occurred, and his right leg was caught between the front wheel of the defendant's repair wagon and the machine and broken below the knee.

A trolley wire had fallen at the intersection of Washington avenue and Monticello street,

and the repair wagon in response to an emergency call, was speeding to the point of danger when the collision happened. The wagon entered Granby street several squares away from the place of accident and proceeded southward on the right-hand side of the street with the left-hand wheels between the rails of the south-bound track and the right-hand wheels between the tracks and the west curb. The horses were going at a gallop, and the gong was continuously sounding. These conditions continued as the wagon came to Eleventh street (about a block away) when the driver discovered that in following his present course he could not clear the automobile, and that a collision was imminent. Thereupon, he applied the brakes and slowed down the speed of the horses, and attempted to avert the accident by turning out to the left across the car tracks, and in that way he would have passed in safety (according to the opinion of an eyewitness for the plaintiff, a liveryman, who testified to the point) but for the fact that the steel tire of the right rear wheel of the wagon caught on the street car rail and slipped or skidded until the wheel interlocked with the rear end of the mud guard of the automobile, which caused the front wheels of the wagon to swing toward the car, producing the impact which caused the injury.

It thus appears that at the time of the accident the defendant was discharging a duty to the public in a lawful manner, and when danger of collision with the automobile was discovered, its servants took timely measures, under the circumstances, to avoid it, and were only prevented from clearing the automobile by the unforeseen emergency of the skidding of the wheel on the rail of the street car track.

"No one is responsible for unforeseen injuries caused in the proper prosecution of a lawful business. In such case the loss rests where it falls." 1 Shear. & Red. Law of Neg. (6th Ed.) § 16a.

[2] What is ordinary care and its lack must largely depend on circumstances surrounding the particular transaction. Speaking generally, greater danger calls for the exercise of greater vigilance to avoid it. Nevertheless decisions in analogous cases (e. g., fire department cases) show that drivers of vehicles owing a duty to the public must, in the discharge of that duty, take risks that would be inexcusable in a private citizen pursuing his own private business.

Thus, in Warren v. Mendenhall, 77 Minn. 145, at pages 151, 152, 79 N. W. 661, at page 663, it is said:

"It is often the duty of a fireman, when attending a fire or responding to a fire alarm, to act, regardless of a considerable degree of danger to himself. To hesitate or stop at every slight indication of danger might often be a dastardly failure of duty on his part. His duties are of a public character, and in cities of a considerable size these duties are exceedingly important. On many occasions, his instant and fearless action is imperatively necessary to prevent widespread disaster, the loss of property, or the loss of life, or both; and, when he is called, he seldom knows the urgency of the occasion until he arrives upon the ground. * * * Of course, such a fireman must use ordinary care. Ordinary care is care commensurate with the occasion; and, when the dangers are great, it may be a very high degree of care. * * * But the fire department is a well known public institution. As its vehicles rush along the street, and the gongs are sounded fast and furiously, it is customary for every one else to be alert to give these vehicles the right of way, and this custom grows out of imperative necessity."

So, in Magee v. West End, etc., Co., 151 Mass. 240, 242, 23 N. E. 1102, in discussing the degree of care required of a member of the fire department in a similar case, the court said:

"He could not be expected to use the same degree of care as might properly be required of one who had no such duty to perform as he had. Considering his duty and the exigency of the occasion, we cannot say that he was not in the exercise of due care."

See, also, Hanlon v. Milwaukee, etc., Co., 118 Wis. 210, 95 N. W. 100, and Chicago City Ry. Co. v. McDonough, 125 Ill. App. 223.

[3] In Steele v. Colonial Coal & Coke Co., 115 Va. 385, the court at page 388, 79 S. E. 346, at page 347, observes:

"The general doctrine is fundamental that, in an action to recover damages for personal injuries, negligence will not be presumed, but the burden rests upon the plaintiff to prove it affirmatively and by a preponderance of the evidence. This rule is nowhere more strongly stated, or more steadfastly adhered to, than in the decisions of this court."

Numerous cases are cited for the proposition.

We are of the opinion that the evidence fails to establish actionable negligence, but makes out a case of inevitable accident for which the defendant is not answerable in damages. This conclusion renders it unnecessary to notice other assignments of error, which could not affect the result.

The judgment must be reversed and the case remanded for a new trial.

Reversed.

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(117 Va. 253)

## BAYLY et al. v. CURLETTE et al.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. WILLS ⇐506—CONSTRUCTION—"HEIRS."

In a devise to the grandchildren of testatrix, "the present heirs and those that may hereafter be of my son," the word "heirs" is obviously used as synonymous with children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1090–1099; Dec. Dig. ⇐506.

For other definitions, see Words and Phrases, First and Second Series, Heirs.]

2. JUDGMENT ⇐719—CONCLUSIVENESS—MATTERS CONCLUDED—CONDUCT OF TRUST.

A testatrix devised her property, consisting of her home place and other real and personal estate, to the children of her son, share and share alike, appointed the son trustee to manage the property for them so long as he should live, and provided that, in the event of his

death, the property should remain undivided until the youngest child became 21; the court to appoint a trustee. After the death of the testatrix, four of the seven children of her son filed a bill charging him with mismanagement of the estate, and asked his removal as trustee. The court found the charges of mismanagement not true, and retained him as trustee, but provided in the decree that upon certain conditions the prayer might be renewed and the trustee removed. Thereafter the trustee continued in possession of the property until all of his children had died, four of them without issue, so that the trustee inherited their shares. The children of two of the others filed a bill to have their interests under the will determined and for an accounting by the trustee. *Held*, that the former decree was not conclusive on the present issues, since the conditions calling for the relief asked by the complainants had arisen since that decree was entered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1249, 1250; Dec. Dig. ⟸719.]

3. WILLS ⟸684—CONSTRUCTION—RIGHTS OF DEVISEES—TRUST ESTATE.

While the division of the trust estate must be postponed until the death of the trustee to await the possible contingency of other children being born to him, the rights of the heirs of the other children are fixed, subject only to open up and let in after-born children, and they are entitled to their share of the income from the trust estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1614–1628; Dec. Dig. ⟸684.]

4. WILLS ⟸684—CONSTRUCTION—RIGHTS OF DEVISEES—INCOME FROM TRUST—DISTRIBUTION.

Though the original beneficiaries were to enjoy the estate, in a sense, jointly, prior to its distribution, the income therefrom was not to be distributed among them according to the discretion of the trustee, but share and share alike.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1614–1628; Dec. Dig. ⟸684.]

Appeal from Circuit Court, Fauquier County.

Suit by H. Clay Bayly, Sr., and others against B. Elliott Curlette and others, for the construction of a will and an accounting by a trustee. Decree for the defendants, and plaintiffs appeal. Reversed.

Keith & Richards, of Warrenton, for appellants. Lucien Keith and Wm. Horgan, both of Warrenton, and John S. Barbour, of Fairfax, for appellees.

WHITTLE, J. Susan Qualls Curlette died in the year 1879, leaving a will, the provisions of which, so far as pertinent to this controversy, are as follows:

"I give and devise to my grandchildren the present heirs and those that may hereafter be of my son Benjamin Elliott Curlette of Warrenton, Fauquier county, state of Virginia, my farm on which I now live called Waverly—containing by survey 239¼ acres, to them the said heirs of B. Elliott Curlette. I also devise and bequeath all the rest and residue of my estate both real and personal to the above said heirs for their education and maintenance to share and share alike and I hereby appoint my son B. Elliott Curlette, trustee to manage for the above said heirs. I also appoint my son B. Elliott Curlette my executor to take in charge all my property both real and personal, and manage it according to his best judgment for his heirs so long as he may live and in the event of his death the property is to remain undivided until the youngest child shall be 21 years old—the court to appoint a suitable trustee to fill B. Elliott Curlette's place. I also devise and bequeath to the above named children of B. Elliott Curlette my share of undivided lands in the state of Missouri. * * * I do hereby appoint my son B. Elliott Curlette trustee to take in charge my Missouri lands to be equally divided between the heirs as above of the said B. Elliott Curlette. * * *"

[1] It is obvious that the testatrix uses the word "heirs" in her will as synonymous with children, and that the references therein to the heirs of B. Elliott Curlette are to his children.

Upon the death of his mother, B. Elliott Curlette probated the will, and, having qualified as executor and trustee, took possession of the estate. His seven children, the beneficiaries under the will, dwelt with him on the home farm, "Waverly," until the year 1889. At that time four of the children became dissatisfied with his demeanor toward them and his management of the estate, and filed a bill in equity in the circuit court of Fauquier county, charging the trustee with gross abuse of the trust imposed upon him by the will and mismanagement of the property, and praying for his removal as trustee. At the hearing of the cause, the honorable James Keith, at that time judge of the circuit court but now and for many years the president of this court, made substantially the following findings: (1) That the trustee had executed his trust with respect to the care and management of the trust property with reasonable discretion and fidelity. (2) But that his relations with the beneficiaries under the will were not satisfactory. That his conduct in that regard, due to his frequently being under the influence of liquor, had been rude and disagreeable to his children, and had introduced discord into the family. Yet when sober that he was pleasant and sociable. That part of the family adhered to him, while others desired his removal. His honor then observes:

"In this state of affairs my opinion is, and I shall direct a decree to be entered to this effect: First, that the members of the family who have seen fit and proper to leave the trust estate and seek homes elsewhere be invited to return; second, that the injunction be dissolved and the receiver discharged; third, that the trustee * * * be restored to the discharge of his duties as trustee under his mother's will; fourth, that continued intemperance, tending to disturb the family relations intended to be secured by the will of his mother, and rendering the trust estate neither comfortable nor agreeable as a safe place of abode to the cestuis que trustent, will be treated by the court as a sufficient ground for his removal and for the appointment of a trustee in his place and stead; and, to this end, that, fifth, this cause be placed on the suspended docket, with leave to any party to apply for further relief upon the principles hereinbefore announced."

And it was so decreed.

From the date of that decree to the present time, the trustee has continued in possession of the trust property, for most of the

time in the sole occupancy thereof, and enjoying the beneficial use of the estate. In the meantime, all the cestuis que trustent have died—four out of the seven childless and intestate—and their shares in the trust estate have passed, under the statute of descents and distributions, to their father, B. Elliott Curlette. H. Clay Bayly, Sr., married two of the daughters, both of whom died, leaving children. In the year 1913, Bayly and his children filed their bill in the present case against B. Elliott Curlette, the trustee, and the widow and children of William S. Curlette, deceased, who was one of the beneficiaries under the will. The bill charges that none of the plaintiffs has received any part of the shares of their parents in the trust estate, and prays that the will be construed, and that their interests in the property be ascertained. It likewise prays for an accounting by the trustee, showing the corpus of the estate, and the income in his hands derived therefrom, and the shares of the plaintiffs therein, and for other relief.

From a decree of the circuit court sustaining the plea of the defendant B. Elliott Curlette that the rights of all parties in respect to all of the property which passed under the will of Susan Qualls Curlette had been adjudicated in the former suit of Curlette v. Curlette, except the Missouri property, and denying the relief prayed for, this appeal was allowed.

[2] We are of opinion that the issues involved in the present case were neither within the pleadings nor evidence in the original suit. Indeed, the facts and circumstances upon which these issues are founded had no existence at that time, but have subsequently arisen. Hence, from the nature of things, the matters here involved could not then have been brought forward for adjudication. It is true that it is matter of public interest that there shall be an end to litigation, but that consideration cannot be allowed to deprive a litigant of opportunity to submit his cause to a competent tribunal for hearing and judgment. In the former suit all the conditions were present which existed at the date of testatrix's will and at the time of her death. The trustee and all his children were then living, and the home "Waverly," intended as an abode for the children, was intact. In these circumstances, the chancellor (bearing in mind the dominant purpose of the testatrix to keep the family together) endeavored to effectuate that object by directing a decree, the tendency of which was to compose the differences between the children and their father and trustee. There was no intimation by the court, however, that the will conferred any property rights in the trust estate upon B. Elliott Curlette, or that his powers in relation thereto differed in any respect or degree from those of any other trustee that might be appointed under the will to succeed him.

It is quite clear that the court was of opinion that the trustee was removable for mismanagement of the property, or for misbehavior in his intercourse with the children; yet, upon the evidence, that the charge of maladministration with regard to the property had not been sustained. While on the second charge, the trustee (who had been removed) was restored to office with the admonition that continued intemperance on his part, or such other misconduct as would tend to disturb the family relations or render the abode secured to the children by the will of their grandmother uncomfortable or unsafe, would be considered sufficient ground for his permanent removal.

[3] The present case, as we have seen, presents a wholly different situation. The cestuis que trustent have all died, and the father has acquired by inheritance the shares of four of the children in the estate. Title to the shares of the remaining children, upon their death, devolved upon their children, who are the present owners. Subject to the remote possibility of the birth of a future child to B. Elliott Curlette, the objects of the trust have ended. Nevertheless, under the will, the division of the principal of the estate must be postponed during the lifetime of B. Elliott Curlette to await that possible contingency. The right of the present claimants to the shares of their respective parents is fixed, subject only to open up and let in any other children which may be born to B. Elliott Curlette.

[4] Though the appellants have no right, under the will, to occupy the ancestral home as a place of abode, the income from two-sevenths of the entire trust estate belongs to them and not to the trustee, and they have the present right to demand an accounting by the trustee for their proportion of such income, at least, from the date of the death of his last child, which occurred in the year 1910. Though it is true that the original beneficiaries were entitled to enjoy the estate, in a sense, jointly, the will did not create a blended trust in the property, the income from which was to be disbursed among them according to the discretion of the trustee, as in Nickell v. Handly, 10 Grat. (51 Va.) 336, and that class of cases, but they were to take "share and share alike"; and the Missouri lands were also "to be equally divided between them." So that, in that respect, the rights of the present claimants are controlled by the case of Baldwin's Ex'x v. Baldwin, 76 Va. 345.

For the foregoing reasons, the decree under review must be reversed and annulled, and the case remanded for further proceedings to be had therein not in conflict with the views expressed in this opinion.

Reversed.

NOTE.—This case argued before Judge KELLY'S term began.

(117 Va. 269)

## CITY GAS CO. OF NORFOLK v. WEBB.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. APPEAL AND ERROR ⇐362—PETITION FOR WRIT OF ERROR—SUFFICIENCY—GROUNDS.

The defense of contributory negligence cannot be relied on on writ of error, where it was not mentioned in the petition for the writ.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1960, 1961, 3282–3284; Dec. Dig. ⇐362.]

2. GAS ⇐19—INJURY FROM EXPLOSION—CONTRIBUTORY NEGLIGENCE.

One who lit a match near a manhole in which gas had been allowed to collect, thereby causing an explosion, was not contributorily negligent, though he knew that gas was escaping somewhere in the vicinity, but did not know that it was in the manhole, and at the time he struck the match he could not, because of the direction of the wind, smell the gas.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 15; Dec. Dig. ⇐19.]

3. GAS ⇐18 — INJURY FROM EXPLOSION — PROXIMATE CAUSE.

The negligence of a gas company in permitting gas to leak into a manhole was the proximate cause of injury to one who ignited the gas by striking a match near the manhole in order to find the valve of a water pipe, even though the particular accident could not have been anticipated, since it should have been reasonably anticipated that some injury might result from the presence of the gas, in view of the frequency with which lights are struck in such a place.

[Ed. Note.—For other cases, see Gas, Dec. Dig. ⇐18.]

4. GAS ⇐17—INJURY FROM EXPLOSION—DEGREE OF CARE.

Illuminating gas is highly dangerous and explosive, and a gas company is bound to use all reasonable diligence to prevent an escape which may result in an explosion.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 14; Dec. Dig. ⇐17.]

Error to Law and Chancery Court of City of Norfolk.

Action by Lewis W. Webb against the City Gas Company of Norfolk. Judgment for plaintiff, and defendant brings error. Affirmed.

W. H. Taylor, of Norfolk, and H. W. Anderson and A. D. Christian, both of Richmond, for plaintiff in error. Bowden & Heard, of Norfolk, for defendant in error.

HARRISON, J. This action was brought by Lewis W. Webb to recover of the City Gas Company of Norfolk damages for personal injuries alleged to have been sustained by the plaintiff in consequence of the negligence of the defendant company. The trial resulted in a verdict and judgment for $900 in favor of the plaintiff, which we are asked to review and reverse.

Treating the case as on a demurrer to the evidence, the following salient facts are established: That on account of a leak in a pipe of the gas company which ran through the manhole of a sewer located at a street corner in a suburb of the city of Norfolk a large quantity of the company's illuminating gas escaped and accumulated in this sewer manhole; that on the night of the accident the plaintiff, while trying to locate the valve of a water pipe, supposed to be in the vicinity, for the purpose of turning into his home water which a workman inadvertently left cut off during the day, struck a match on or near the iron plate over the manhole, in order to facilitate his search for the water valve, with the result that there was immediately a violent explosion, the iron cover was blown into the air, and the plaintiff seriously burned by the flame which shot into the air from the manhole. The iron cover had a finger hole near the edge thereof, through which the gas was doubtless flowing when the match was struck. It is established that the leak in the pipe which filled this manhole with gas had existed for several months, and the proper representatives of the company were repeatedly given actual notice of the defect, and had abundant opportunity to remedy the trouble. The negligence of the company is clearly shown and is not denied.

[1, 2] In oral argument at the bar of this court, the defendant company insists that the plaintiff was not entitled to recover because of his contributory negligence in lighting a match over a manhole into which gas was escaping. The defense of contributory negligence is not mentioned in the petition for a writ of error, as it should have been if it was to be relied on in this court. But apart from this omission, we are of opinion that the evidence fails to show that the plaintiff was guilty of contributory negligence. It is true that he knew in a general way that gas had been escaping in that vicinity, and was one of those who had called the attention of the company to the fact, but he did not know that the leak was in the manhole or where it was; and on the night of the accident, because of the direction of the wind, he smelt no gas at all.

[3] The sole ground urged in the petition for the writ of error in support of the contention that the defendant company is not liable in this case is, that the gas which was negligently allowed to escape and fill the manhole was not the proximate cause of the plaintiff's injury; that such an accident could not have been foreseen by the company as a probable and natural result of its negligence in allowing gas to escape into the manhole; and therefore that no liability rests upon the company to compensate the plaintiff for his injuries.

This position cannot be sustained. It is not necessary, to render the defendant liable, that it should have been able to foresee the precise manner in which the accident happened. It is enough if injury to another was reasonably to be apprehended as a result of the negligent conduct.

As said by this court in Standard Oil Co.

v. Wakefield, 102 Va. 824, 47 S. E. 830, 66 L. R. A. 792:

"The test is * * * in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise."

In Pulaski Gas Light Company v. McClintock, 97 Ark. 576, 134 S. W. 1189, 32 L. R. A. (N. S.) 825—an asphyxiation case—the court in its discussion of proximate cause said that "it is not necessary that the particular injury should have been foreseen," and quoted from the Iowa case of Foster v. Chicago, etc., Co., 127 Iowa, 90, 102 N. W. 424, 4 Ann. Cas. 150, as follows:

"Doubtless the particular situation might not have been foreseen, but this was not essential to making out a charge of negligence. Accidents, as they occur, are seldom foreshadowed; otherwise many would be avoided. If the act or omission is of itself negligent and likely to result in injury to others, then the person guilty thereof is liable for the natural consequences which occurred, whether he might have foreseen it or not. In other words, if the act or omission is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting therefrom, although he might not have foreseen the particular injury which did happen."

[4] It is a matter of common knowledge that illuminating gas is a highly dangerous and explosive fluid, and that when it comes in contact with fire instant explosion is the result. Persons dealing with it are therefore bound, at all events, to use all reasonable diligence to prevent an escape which may have such results.

A company which manufactures gas and conducts it in pipes throughout a city or town is bound to exercise vigilance to prevent injury to third parties from the dangerous qualities of the gas. The certainty of explosion if the gas was allowed to accumulate in a manhole and to come in contact with fire, and the well-known fact that people do, in the daytime and at night, light matches on the street corners would seem to be sufficient to create in the mind of a reasonably prudent person the apprehension that injury might result to others from allowing gas to accumulate in a manhole on a street corner. While the exact circumstances of the accident could not be foreseen, it is clear that it was, in its results, the natural and probable consequence of the wrongful act of the company in failing to stop the leak in its gas pipe.

We are of opinion that there was clearly no intervening cause in this case, and that the defendant's negligence was the direct and proximate cause of the injury complained of. Standard Oil Company v. Wakefield, supra; City of Richmond v. Gay, 103 Va. 321, 49 S. E. 482.

In the last-named case it is said that:

"In order to excuse the defendant's negligence this intervening cause must be either a superseding or responsible cause. To be a superseding cause, whether intelligent or not, it must so entirely supersede the operation of the defendant's negligence that it alone, without the defendant's contributing negligence thereto in the slightest degree, produces the injury. To be a responsible cause, it must be the culpable act of a human being who is legally responsible for his act."

The judgment complained of is without prejudice to the defendant company, and must be affirmed.

Affirmed.

(117 Va. 342)

## NORFOLK SOUTHERN R. CO. v. WHITE'S ADM'X.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. NEGLIGENCE ⟸83—LAST CLEAR CHANCE—APPLICABILITY OF DOCTRINE.

The doctrine of last clear chance does not apply to a case where the negligence of both plaintiff and defendant are simultaneous and concurrent, and, before it can apply, it must appear that defendant, on discovering plaintiff's peril, or by the exercise of ordinary care ought to have discovered it, negligently failed to do something which he had a clear chance to do to avoid injury to plaintiff.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. ⟸83.]

2. RAILROADS ⟸390—INJURIES TO PERSONS ON TRACK—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

Where a pedestrian, walking in a place of safety between tracks, voluntarily entered on a track without looking for an approaching engine within a short distance of him, and the engine ran over him, there could be no recovery under the doctrine of last clear chance, because the negligence of the pedestrian and of the railroad company were so closely connected in point of time as not to afford the trainmen a plain opportunity to avoid the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1324, 1325; Dec. Dig. ⟸390.]

Error to Circuit Court of City of Norfolk.

Action by the administratrix of Hiram White, deceased, against the Norfolk Southern Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

James G. Martin, of Norfolk, for plaintiff in error. W. H. Venable, of Norfolk, for defendant in error.

KEITH, P. This action was brought by the administratrix of Hiram White to recover from the defendant, the Norfolk Southern Railroad Company, damages for his death, which it is alleged was caused by the negligence of the defendant company. There was a verdict and judgment for the plaintiff, which we are asked to review upon several assignments of error, all of which, we think, are plainly without merit and need not be further discussed, except the fourth, which is to the overruling of the defendant's motion for a new trial, and to the refusal of the court to set aside the verdict as contrary to the law and the evidence.

The facts are that the plaintiff's intestate

was walking along the pathway between two tracks of the defendant company. An engine which had stopped at a water tank to take on a supply of water was moving down the track in the same direction in which White was walking. Suddenly he was seen to leave the path, step upon the track upon which the engine was moving, where he seemed to stumble and fall, and the engine passed over and killed him.

[1] The right of the defendant in error to recover rests upon the doctrine of the last clear chance. It is claimed that after the engineer and fireman operating the engine saw, or by the exercise of proper diligence could have seen, the deceased and have prevented the accident, they negligently failed to do so.

The proof upon the subject comes from a single witness, who says that he saw White when he stepped from the path upon the track; that he thinks the engine was then about 20 feet distant from him; that it was moving very slowly and could have been stopped within four or five feet. Upon cross-examination he states that he cannot speak with certainty as to the distance; that White was between him and the engine and in a line with it; and that therefore he cannot undertake to state with accuracy how far the engine was off when White stepped upon the track, but he thinks it was about 20 or 30 feet.

If the minds, nerves, and muscles of men were so accurately co-ordinated that there could be instantaneous action to meet an emergency, there would perhaps be merit in this case; but as men are actually constituted, in order that the doctrine of the last clear chance may apply, "it must appear that in contemplation of the entire situation, after the danger of the plaintiff became known to the defendant, or ought to have been discovered by him by the exercise of ordinary care, he negligently failed to do something which he had a clear chance to do to avoid the accident. But the doctrine can have no application to a case where the negligence of both plaintiff and defendant is simultaneous and concurrent." Real Estate, etc., Co. v. Gwyn, 113 Va. 337, 74 S. E. 208.

[2] White was walking in a place of safety. If the engineer or fireman of the engine had actually seen him on the path, he was not in a position of peril that called for action upon their part. He voluntarily left a position of safety and walked upon the track, when, if he had looked, as it was his duty to do, he could plainly have seen the engine approaching within a short distance of him. It is not a case for the application of the doctrine of the last clear chance, because the act of negligence upon the part of White, and that upon the part of the railroad company, if negligence there were upon its part, are so closely connected in point of time as not to have afforded the employés of the railroad company a plain opportunity to avoid inflicting the injury for which this suit is brought. The record presents, at most, a case of concurrent negligence, for which there can be no recovery. Real Estate, etc., Co. v. Gwyn, supra; Roanoke Ry. & Elec. Co. v. Carroll, 112 Va. 598, 72 S. E. 125.

We are of opinion that the judgment should be reversed, the verdict of the jury set aside, and the case remanded for a new trial in accordance with the views herein expressed.

Reversed.

CALDWELL, J., absent.

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(117 Va. 345)

## PATTERSON et al. v. OVERBEY et al.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. EVIDENCE ⟸450—PAROL EVIDENCE—AMBIGUITY—DESCRIPTION IN DEED.

A description in a deed, "beginning at Fall creek bridge, in North Danville, Va., on C. street, thence down Fall creek, S. 7½° W. 526 feet, S. 9½° W. 376 feet, S. 12° E. 73 feet, which point is 40 feet from the center of R. & D. R. R. main track," was not ambiguous, and should have been interpreted by the court without the aid of extraneous evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082, 2084; Dec. Dig. ⟸450.]

2. BOUNDARIES ⟸3 — CONFLICTING ELEMENTS — CONTROL OF NATURAL MONUMENTS OVER COURSES AND DISTANCES.

Where a boundary was described as "beginning at Fall creek bridge, in North Danville, Va., on C. street, thence down Fall creek, S. 7½° W. 526 feet, S. 9½° W. 376 feet, S. 12° E. 73 feet, which point is 40 feet from the center of R. & D. R. R. main track," it fell within the rule that, when a boundary is described as running along a stream, it is to be construed as following the stream, though the calls from point to point for monuments, with courses and distances, may vary from the course of the stream; it being a natural monument controlling the courses and distances, and it being presumed that the parties never intended to leave a narrow strip between the stream and the boundary line.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3–41; Dec. Dig. ⟸3.]

Appeal from Circuit Court of City of Danville.

Action by W. D. Overbey and another against Chalmers Patterson and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Malcolm K. Harris and Eugene Withers, both of Danville, for appellants. William Leigh, of Danville, for appellees.

WHITTLE, J. It appears from the decree under review that this case was heard and disposed of by the circuit court upon the bill, exhibits, and answers, with general replications thereto, and the depositions of witnesses.

The material facts are these: Both appellants and appellees claim title to their lands from a common source. Mrs. Sallie E. Shep-

herd, the grandmother of appellees, who held as devisees under her will, and whose land at the point in controversy is bounded on the west by Fall creek. The appellants, on the other hand, claim mediately under a deed dated August 21, 1890, from Mrs. Shepherd and her trustee to Waring and others, to land lying on the opposite side of the creek from appellants. That deed was drawn in accordance with a contemporaneous plat and survey of the land made by John A. Herndon, which was part of the deed and recorded therewith. The fact is not controverted that appellants own the land west of Fall creek below Fall creek bridge and extending to a point 40 feet from the center of the Richmond & Danville Railroad main track (now the Southern Railway), and fronting on a street parallel to the creek. But the question in controversy is: Does this land extend back to Fall creek, or is there a narrow strip of land intervening between the back line and the creek?

The trial court, over the objection of appellants, having admitted parol evidence intended to support the latter theory, entered the decree under review, sustaining the contention of appellees and declaring that appellants had no interest in the bed of Fall creek, "except for a strip running down said creek from said bridge at Corbin street on the west side thereof, for a distance of about 190 feet. * * *" That result was attained by taking the center of the bridge over Fall creek at Corbin street as the correct starting point, and running the dividing line "according to the calls in the deed," allowance being made for variation of the needle, "* * * without regard to the meanderings of Fall creek." Consequently, the defendants were enjoined from taking sand from the bed of the creek or from exercising any rights therein (except for the distance of 190 feet below the bridge, as before indicated). The defendants were furthermore enjoined from maintaining the obstructions or dam placed by them in the creek, and an account of the sand and its value hauled therefrom by the defendants was ordered.

[1, 2] The only boundary line involved in this controversy with which the circuit court had to deal, and which this court is now called on to construe, is the following, in the deed from Shepherd to Waring and others:

"Beginning at Fall creek bridge, in North Danville, Va., on Corbin street, thence down Fall creek, S. 7½° W. 526 feet, S. 9½° W. 376 feet, S. 12° E. 73 feet, which point is 40 feet from the center of R. & D. R. R. main track."

There is no ambiguity about this boundary line, and it was the province of the court to have construed it without the aid of extraneous evidence.

In French v. Bankhead, 11 Gratt. (52 Va.) 136, Allen, P., in delivering the opinion of the court, at page 155, observes:

"In the case of Starr v. Child, 20 Wend. [N. Y.] 149, the deed called for a line to the Genesee river, and thence northwardly along the shore of said river to Buffalo street. The court held that there was no necessity for looking to extrinsic circumstances, for that the deed on its face invested the grantee with a fee simple to the bank of the river. The judge, in giving the opinion, remarks 'that the cases show, what it is difficult for the human mind to resist, that the parties never meant to leave a narrow strip between the land and the river, merely because some stake or tree, or even all the stakes or trees, of the line, stand at a slight distance from the river. The expression of an intent to run the line along the stream reaches a distinct natural monument which overcomes the others.' So in the case of McCullock's Lessee v. Aten, 2 Ohio, 234, it is said 'that the fact that the marked corner called for stands four rods from the water does not create any ambiguity in the terms, down the creek with the several meanders thereof, * * * and must control a call for corner trees on the bank.'"

It was also held in that case that it is "a universal rule that the actual boundary, whether natural or artificial, shall control repugnant course and distance," and that the original survey was the foundation of the patent, that it was of record, and of equal dignity to the patent, and could be read to supply omissions or to correct mistakes therein.

So, in Brown v. Huger, 21 How. 305, 16 L. Ed. 125, it was held that:

"Where a survey and patent call for a boundary to run down a river to its point of junction with another, thence up that other, the rivers are obviously intended as the boundaries, and courses must be disregarded; * * *" and, "in ascertaining the boundaries of surveys or patents, the universal rule is that, whenever natural or permanent objects are embraced in the calls of either, these have absolute control, and both course and distance must yield to their influence."

The court approves a citation from Angell on Water Courses that the words "thence up or down," or "with the river," import that the line is to follow the river according to its meanderings and turnings, and in case of nonnavigable streams it carries the line to the thread or center.

The decisions of this court fully sustain that doctrine, and the latest pronouncement on the subject will be found in Providence Forge, etc., Club v. Miller Mfg. Co., 83 S. E. 1047.

In 1 Minor on Real Property, § 60, the learned author says:

"Thus, when a boundary of land conveyed is described as running along and near a stream, though it may call from point to point for monuments or marked objects, with courses and distances indicated, yet the presumption is that the boundary is to follow the meanderings of the stream; for it is difficult to conceive that the parties should have deliberately intended to prefer as a boundary the invisible course and distance to the visible and always obvious water line, and at least as hard to believe that they intended to leave a narrow strip of ground between the water and the imaginary boundary line, which would be of no use to the grantor, and likely to be a source of great annoyance to the grantee if it does not belong to him. Such a conclusion can only be sustained by the clearest evidence of a purpose so improbable.

"In case of a grant of land bounded on a private stream, the land on both sides of which

is owned by the grantor, the grant carries with it a title to half of the bed of the stream, unless a contrary intent is manifest from the grant or conveyance itself. And of course the same result would ordinarily follow where the grantor owns only one bank of a private stream."

The text is sustained by citation to numerous decisions of this and other courts and to text-writers of high authority.

Upon these considerations, we are of opinion that the circuit court erred in locating the dividing line between the lands of appellants and appellees along the western bank of Fall creek, so as to leave a narrow strip of ground between that line and the creek, and also in holding that appellants have no right, title, or interest in the bed of the stream. The court ought to have established the thread of Fall creek as the true location of the boundary line between the lands of the parties.

It follows that the dividing line, thus fixed, must control the rights of the parties with respect to the ownership of sand in the bed of the creek, and such as may have been removed therefrom. But the decree appealed from is approved, in so far as it directs the removal of the breakwater erected by appellants in the bed of the stream.

The decree must therefore be reversed, with the exception indicated, and the case will be remanded for further proceedings to be had therein not inconsistent with this opinion.

Reversed.

(117 Va. 306)

## EASTERN TRANSP. CO. v. JOHNSON.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. MASTER AND SERVANT ⟸258—INJURIES TO SERVANT—DECLARATION—SUFFICIENCY.

The declaration averred that plaintiff, before putting on his diving suit, requested those standing by on the tug, including the master and engineer, to make the engine secure, so that he could safely remove a hawser caught in the propeller; that to disentangle the propeller without having the engine blocked would be dangerous, but that, notwithstanding this knowledge and request, defendant failed to block the engine, although assuring plaintiff it had been done. *Held*, that the complaint charged the negligence of the defendant owner of the vessel.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816–836; Dec. Dig. ⟸ 258.]

2. MASTER AND SERVANT ⟸101, 102—INJURIES TO SERVANT—DUTY OF CARE.

A master is bound only to use ordinary care to provide reasonably safe tools and appliances; the standard of ordinary care being ascertainable by the general usages of the business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178–184, 192; Dec. Dig. ⟸ 101, 102.]

Error to Circuit Court of City of Norfolk.

Action by John A. Johnson against the Eastern Transportation Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

John W. Oast, Jr., of Norfolk, and Robert Biggs, of Baltimore, Md., for plaintiff in error. Riddleberger & Roper, of Norfolk, for defendant in error.

KEITH, P. The Eastern Transportation Company was the owner of a certain steam tug which operated in and about the harbor of Norfolk. The propeller of the tug, on June 7, 1913, became entangled in a hawser or some other foreign matter, which prevented it from revolving, and thereupon the transportation company employed John A. Johnson, a marine diver, to disentangle the propeller from the hawser or other obstruction. He entered upon the discharge of the duty he had assumed, and found it necessary to cut the hawser, and as soon as that was done the propeller suddenly revolved, striking the plaintiff and inflicting upon him injuries for which he sues.

His contention is that the transportation company owed him the duty to furnish him with a reasonably safe place in which to perform his duty; that it negligently failed to exercise such reasonable care as the law requires; and that, as a result of the negligence, he received the injuries for which he sued.

The case was submitted to a jury, which found a verdict against the defendant, and the case is before us upon a petition assigning numerous errors in the progress of the trial, which we are now called upon to review.

[1] The first assignment of error is to the action of the court in overruling the defendant's demurrer to the declaration, upon the ground that it appears upon the face of the declaration that the injuries sustained by the plaintiff, if any, were due to the negligent act of a fellow servant.

In this view we cannot concur. It is true that the plaintiff avers that before putting on his diving suit he requested those who were standing by on the tug, among whom were the master and the engineer, to make the engine secure, so that he might proceed with safety to perform the work for which he had been engaged; that to repair or disentangle the propeller without having first had the engine secured or blocked would be a work of the greatest risk and danger, in that, when the propeller had been freed from the obstructing matter, it would revolve very suddenly, all of which was known to the defendant; that notwithstanding this knowledge the defendant negligently, carelessly, and in reckless disregard of the safety of the plaintiff ordered the plaintiff to proceed in and about the work for which he had been employed, assuring him that the engine had been blocked, when in point of fact, as the defendant well knew, it had not been blocked.

We think it is plain that the negligence charged is against the defendant. When it comes to the proof upon this point, it may be that it will be made to appear that it was the negligent act of a fellow servant, and not of the company, that produced the injury; but upon the demurrer we are of opinion that the declaration is sufficient.

In the progress of the trial several exceptions were taken to the introduction of testimony, in none of which is there any merit, unless it be in permitting proof by the plaintiff of the various modes by which the condition of the engine could have been rendered safe, when the question to be investigated and determined by the jury was whether or not the mode adopted by the defendant was a compliance with its duty to use ordinary care to provide a reasonably safe place and reasonably safe appliances with which to perform the service contracted for. It may be that this was error, and it can be guarded against upon a future trial, as the case must be reversed upon another ground.

[2] The only instruction to the granting of which any exception was taken is one given at the instance of the plaintiff, which is as follows:

"The court instructs the jury that it was the duty of the owners of said tug to use all ordinary care to provide and maintain its machinery and appliances in a safe condition for the plaintiff to work upon, and not to expose him to risks beyond those risks in contemplation at the time of the contract of service, and the plaintiff had the right to presume that these duties had been performed; and for injury to him, resulting from a breach of its duty, the defendant company is liable in damages. And if the jury believe from the evidence in this case that the breach of this duty of the defendant was the approximate cause of the injuries to John A. Johnson, the plaintiff, while in the employ of the said defendant company, then the said company is liable in damages for any injuries suffered by him"—citing Va. Portland Cement Co. v. Luck, 103 Va. 428, 49 S. E. 577, as authority for the instruction.

We observe, in the first place, that the instruction does not follow that given in the case cited, where the court instructed the jury that it was the duty of the defendant to use all reasonable care to provide and maintain suitable structures, instrumentalities, machinery, and appliances, whereas the instruction before us required it to use ordinary care to provide and maintain its machinery and appliances in a safe condition.

This whole subject has recently been examined in Southern Ry. Co. v. Childrey, 113 Va. 376, 74 S. E. 221. In that case the court instructed the jury that it was the duty of the defendant to exercise ordinary care to provide for the plaintiff sound and safe brakes and appliances with which to operate; and this court, reviewing a great number of authorities, held that this instruction required a higher duty of the railroad company than the law imposes; that the true measure of the master's duty is to use ordinary care to provide reasonably safe tools and appliances; and that the ordinary care required on his part is ascertained by the general usages of the business.

For the error in this instruction, and without passing upon the evidence in the case, which may be different at another trial, the case must be reversed and remanded, to be further proceeded with in accordance with the views herein expressed.

Reversed.

NOTE.—This case was argued and submitted before Judge KELLY'S term began.

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(117 Va. 396)

## SAUNDERS v. SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. APPEAL AND ERROR ⟸1002 — REVIEW — VERDICT.

Where the evidence was such that reasonable men might differ, the verdict is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. ⟸ 1002.]

2. TRIAL ⟸154—DEMURRER TO EVIDENCE—SPECIFICATION OF ERRORS.

Under Acts 1912, c. 42, providing that in all suits or motions, when the evidence is concluded, the party tendering a demurrer to the evidence shall state in writing specifically the grounds of demurrer relied on and the demurree shall not be forced to join unless the grounds are stated, the failure of a demurrant to state the grounds of his demurrer to the evidence deprives the court of jurisdiction to consider it, notwithstanding the grounds were few in number and were understood by the demurree.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 851, 853; Dec. Dig. ⟸154.]

Error to Circuit Court, Mecklenburg County.

Action by C. H. Saunders against the Southern Railway Company. After verdict for plaintiff, subject to the action of the court on defendant's demurrer to the evidence, the demurrer was sustained, and plaintiff brings error. Reversed.

John A. Lamb and S. A. Anderson, both of Richmond, for plaintiff in error. Munford, Hunton, Williams & Anderson, of Richmond, for defendant in error.

HARRISON, J. This writ of error brings under review a judgment of the circuit court of Mecklenburg county, sustaining a demurrer of the defendant company to the plaintiff's evidence; the jury having rendered a verdict in favor of the plaintiff for $3,500, subject to the action of the court upon such demurrer.

[1] Upon the merits of the case, we are of opinion, after a careful consideration of the evidence, that both the negligence of the defendant and the contributory negligence of the plaintiff were questions about which reasonably fair-minded men might differ. The

jury might have found for the plaintiff upon both of these questions, and, if they might have so found, then, under our established rules, the court must so find on the defendant's demurrer to the evidence. Bass v. Norfolk Ry., etc., Co., 100 Va. 1, 40 S. E. 100; Fisher's Adm'r v. C. & O. Ry. Co., 104 Va. 635, 52 S. E. 373, 2 L. R. A. (N. S.) 954; Wood's Adm'r v. Southern Ry. Co., 104 Va. 650, 52 S. E. 371.

[2] But, in addition to the foregoing view, the case is plainly against the defendant company upon the ground earnestly insisted upon by the plaintiff in error, viz., that the defendant wholly failed to specifically state in writing the grounds of demurrer relied on as expressly required to do by the statute. Acts 1912, p. 75. The defendant company does not deny that its demurrer to the evidence in the present case was simply the general demurrer under the old practice, but seeks to justify and excuse its failure to comply with the plain mandate of the statute upon the ground that there were but two grounds of demurrer relied on which were well known to and understood by the plaintiff, who therefore suffered no prejudice or disadvantage whatsoever in consequence of its failure to state the grounds of its demurrer in writing.

This question was before this court in the recent case of McMenamin v. Southern Ry. Co., 115 Va. 822, 80 S. E. 596. The statute here relied on was there construed, and it was held that, in accordance with its terms, the party tendering a demurrer to the evidence must state, in writing, specifically the grounds of demurrer relied on; the court saying that:

"The demurrant knows, or ought to know before demurring, in what respect the demurree has failed in his proof, and there is no more hardship in requiring him to specifically state it than there is in requiring a party demurring to a declaration to state specifically his grounds of demurrer. One is a demurrer to his adversary's pleading, and the other to his adversary's proof. In both cases the Legislature, it is clear, intended that the grounds of demurrer must be stated with reasonable certainty, and that no other grounds than those so stated should be considered."

The defendant company relies upon the cases of Bonos v. Ferries Co., 113 Va. 495, 75 S. E. 126, and Newberry v. Watts, 82 S. E. 703, in support of its contention that the spirit of the statute requiring a demurrer to the evidence to be specifically stated in writing was complied with, because there were but two grounds of demurrer which were known to the plaintiff, who was therefore not prejudiced by its failure to state such grounds in writing.

The two cases mentioned can be readily distinguished from the case at bar. In each there was but one ground of demurrer to the evidence relied on, which was apparent upon the face of the respective proceedings, whereas, in the present case, there were two grounds of demurrer relied on, and it is by no means clear that the plaintiff was not prejudiced by the failure to state such grounds in writing.

We do not, however, rest our conclusion in the present case upon the distinction pointed out between it and the two cases mentioned. On the contrary, we are of opinion, after a careful and mature consideration of the statute (Acts 1912, p. 75), that the question arising under it is one involving the jurisdiction of the court, and that it is wholly immaterial whether there is one or more grounds of demurrer relied on, or whether the plaintiff has been prejudiced by the failure of the demurrant to state the grounds of demurrer in writing. The language of the statute is too plain to admit of doubt or to call for interpretation. So far as necessary to be quoted, it is as follows:

"In all suits or motions hereafter, when the evidence is concluded before the court and jury, the party tendering the demurrer to evidence shall state in writing specifically the grounds of demurrer relied on, and the demurree shall not be forced to join in the said demurrer until the specific grounds upon which the demurrant relies are stated in writing; nor shall any grounds of demurrer not thus specifically stated be considered."

The clear and explicit terms are that, in all suits or motions hereafter, the party tendering the demurrer to evidence shall state, in writing, specifically the grounds of demurrer relied on, and that no grounds of demurrer shall be considered, unless they be thus specifically stated. These statutory provisions are mandatory and preclude the idea of jurisdiction to consider a demurrer to evidence, unless the grounds of such demurrer are specifically stated in writing. The statute is a wise one that should be upheld and enforced as it is written. Its salutary purpose would be defeated and the statute practically abrogated if it were permissible to modify it by ingrafting exceptions upon it. So far as the cases of Bonos v. Ferries Co., supra, and Newberry v. Watts, supra, may be in conflict with the construction herein placed upon the statute in question, they are not approved.

The grounds of the demurrer to the evidence filed by the defendant company not having been specifically stated in writing, as required by statute, we are of opinion that the court was without jurisdiction to consider the same. For these reasons the judgment complained of will be reversed, and this court will enter judgment, as the trial court should have done, in favor of the plaintiff, for the sum ascertained by the verdict of the jury.

Reversed.

NOTE.—This case was argued and submitted before Judge KELLY'S term began.

(117 Va. 299)

## DUGGINS et al. v. WOODSON et al.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. CURTESY ⟸5 — ESTATE — RIGHT TO CURTESY.

Where a wife died leaving a child surviving, her husband was entitled to curtesy in her landed estate.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. §§ 11–15; Dec. Dig. ⟸5.]

2. PARTITION ⟸9—PARTITION AGREEMENT—CONSTRUCTION.

Where a husband, who was entitled to a life estate in his wife's undivided interest in a tract of land, with the other heirs entitled to the property in fee, entered into an agreement providing for division of the land into equal parts and that he should have one of the parts, the agreement did not confer upon the husband an estate in fee.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 26–32; Dec. Dig. ⟸9.]

3. EJECTMENT ⟸86—BURDEN OF PROOF.

In ejectment, defendant, husband of a deceased daughter of plaintiffs' ancestor, and succeeding to a life estate by virtue of birth of a child, has the burden of establishing title by inheritance from the child, and, there being an entire absence of evidence as to such right, a judgment in his favor must be reversed.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238–245; Dec. Dig. ⟸86.]

4. ADVERSE POSSESSION ⟸48 — RUNNING OF STATUTE—LIFE TENANT.

A life tenant, as a tenant by the curtesy, cannot hold adversely to the remaindermen; hence those succeeding him in possession cannot tack their adverse holding to the life tenant's holding.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 213–224; Dec. Dig. ⟸48.]

5. LIMITATION OF ACTIONS ⟸44—ACCRUAL OF RIGHT—TITLE TO REAL PROPERTY.

Where defendants' predecessor acquired possession as a tenant by curtesy, limitations do not begin to run against the remaindermen and in favor of defendants until their possession has become notoriously tortious and adverse.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 220–230, 232; Dec. Dig. ⟸44.]

Error to Circuit Court, Goochland County.

Ejectment by D. T. Duggins and others against Isham R. Woodson and others. There was a judgment for defendants, and plaintiffs bring error. Reversed.

Smith & Smith and A. G. Collins, all of Richmond, for plaintiffs in error. W. D. Cardwell, of Richmond, for defendants in error.

HARRISON, J. [1, 2] It appeared upon the trial of this action of ejectment that John W. Ford died seised and possessed of a tract of land in Goochland county containing 346 acres, and left surviving him certain heirs at law. It further appears that M. R. Woodson married two of the daughters of John W. Ford, the first of whom died without issue, and the second died leaving a child that survived its mother but a few months. The birth of this child entitled M. R. Woodson to a life estate in the undivided interest of the child's mother in the tract of land left by her father. Thus matters stood when the heirs at law of John W. Ford, deceased, entered into the following agreement:

"We, the undersigned, children and heirs at law of John W. Ford (deceased) and all being of lawful age, do hereby constitute and appoint Dr. Robert G. Parrish, J. V. Bowles, Henry John H. Johnson, Wm. R. Johnson and Benj. B. Pleasants to act as commissioners to divide the real estate of which the said John W. Ford died seised and possessed lying in Goochland county containing by survey 346 acres, into five equal parts having regard to quality as well as quantity; and shall give unto Mrs. Ann E. Carden her choice of the said lots; and that John T. Ford shall have the second choice of the said lots and that Granville Duggins and S. E. Duggins shall have the third choice of the said lots and that John Folstead and Pattie R., his wife, shall have the fourth choice in the said lots, and that M. R. Woodson shall have the remaining lot. And we bind ourselves individually and collectively to stand to and abide by the said division, as if made by commissioners appointed by the county court of Goochland county.

"Given under our hands and seals this 20th day of November, 1883.

| | |
|---|---|
| "Ann E. Carden. | [Seal.] |
| "John T. Ford, | |
| "By J. V. Bowles. | [Seal.] |
| "G. T. Duggins. | [Seal.] |
| "S. E. Duggins. | [Seal.] |
| "J. A. Folstead. | [Seal.] |
| "Pattie R. Folstead. | [Seal.] |
| "M. R. Woodson. | [Seal.]" |

The division of the land contemplated by this agreement was made November 22, 1883, by the commissioners named therein; one of the lots containing 109¼ acres being assigned to M. R. Woodson.

The plaintiffs in this ejectment suit are the heirs at law of John W. Ford, who died seised of the land in controversy. The defendants are the heirs at law of M. R. Woodson, by a third marriage, and have no interest in the land in question as heirs of John W. Ford, deceased. The record shows that at the time of the partition in November, 1883, the tract of 109¼ acres which was assigned to M. R. Woodson, in right of his deceased wife, was unimproved, uncultivated, and unfenced, and that until his death in 1896 it was rented by him to the husband of one of the heirs of John W. Ford, in consideration of the payment by the tenant of the taxes accruing thereon.

It is manifest that this case proceeded in the lower court upon the theory entertained by the defendants and adopted by the court that their father, M. R. Woodson, took, under the partition agreement mentioned, a fee-simple interest in the 109¼ acres of land which was allotted to him by the commissioners named in such agreement. To give this paper the construction here contended for would be to extend its operation and effect far beyond any just rule of interpretation. The whole scope and object of the agreement was to bring about a partition of the land of John W. Ford among his heirs, and this

was its only legal effect. No deeds were made between the parties. The only interest that M. R. Woodson had in the land of John W. Ford at the time the agreement in question was made was in right of his wife. He had a life estate, as tenant by the curtesy, in his deceased wife's undivided share of the land inherited by herself and others from their father. This share was ascertained, by the proceeding employed to make the partition, to be 109¼ acres, and when it was allotted to M. R. Woodson he had exactly the same interest in it that he had before it was set apart for his use and enjoyment, namely, a life estate. The heirs owed him nothing, and it is not pretended that he had any claim against them except such as he claimed in right of his wife, and it would be unreasonable to suppose that they intended to grant him something that did not belong to him. Bolling v. Teel, 76 Va. 487; Yancey v. Radford, 86 Va. 638, 10 S. E. 972. In the light of what has been said and the authorities cited, it is clear that the circuit court erred in refusing to instruct the jury, at the request of the plaintiffs, that, under the agreement of November 20, 1883, and the partition made in pursuance thereof, M. R. Woodson took only a life estate in the 109¼ acres of land in controversy; and that the defendants derived no title thereto under or by virtue of the interest taken by their father under such agreement. And further the court erred in giving for the defendants, over the protest of the plaintiffs, an instruction telling the jury that the agreement purported on its face to grant to M. R. Woodson a fee-simple title to the 109¼ acres of land, and that the burden of proof was on the plaintiff to show that a less estate was intended to be conveyed.

[3] It was suggested in the oral argument before this court that M. R. Woodson had inherited the land in controversy from his child, who had inherited the same from its grandfather; the mother having died before her father. It is sufficient to say that there is not a word of evidence in the record tending to sustain this claim. On the contrary, the record completely negatives any such pretension. If there was foundation for the contention, the burden rested upon the defendants to establish the fact, and yet they have not introduced a word of evidence upon this or any other question in the case.

[4, 5] It is further contended by the defendants that they and those under whom they claim have acquired title to the land in controversy by adverse possession for the statutory period.

It is clear from the facts already adverted to that M. R. Woodson, who lived until 1896, did not and could not hold adversely to the heirs of John W. Ford, who were the remaindermen at the expiration of his life estate, which we have seen was the only estate he had in the land. The possession of a tenant for life, as such, cannot be adverse to the remainderman or reversioner, because the right of action of the remainderman or reversioner does not accrue until the death of the tenant for life. It has been so held as to life tenants in right of dower and by the curtesy. Ruling Case law, vol. 1, p. 743; Hannon v. Hounihan, 85 Va. 429, 12 S. E. 157.

It follows from what has been said that the circuit court erred in refusing to instruct the jury, at the request of the plaintiffs, that the defendants could not tack their holding of the land in question onto the holding of M. R. Woodson or his tenants, in order to make out an adverse holding for the statutory period.

As to the character of proof necessary to sustain a claim of adverse possession in a case like this, the law is clearly stated by Judge Buchanan in Hulvey v. Hulvey, 92 Va. 186, 23 S. E. 234, as follows:

"In questions of adverse possession a higher degree of proof is required in those cases in which the possession was begun in privity with the opposing claimant than in cases where no such relation existed. Where possession is originally taken and held in subserviency to, or in privity with, the title of the adverse claimant, a clear, positive, and continued disclaimer and disavowal of the title, and an assertion of an adverse right brought home to the adverse claimant, are indispensable before any foundation can be laid for the operation of the statute of limitations. If this were not so, the greatest injustice might be done. Without such knowledge, the adverse claimant has the right to rely upon the fiduciary relations under which the possession was originally taken and held.

"In such cases the statute of limitations does not begin to run until the possession, before consistent with the title of the adverse claimant, becomes tortious and wrongful by the disloyal acts of the party in possession, which must be so open, notorious, and continued as will fully and clearly show the changed character of his possession, and knowledge of such change on the part of the adverse claimant. 2 Minor's Inst. (4th Ed.); Zeller's Lessee v. Eckert, 4 How. 289 [11 L. Ed. 979]; Stonestreet v. Doyle, 75 Va. 856 [40 Am. Rep. 731]; Pillow v. Southwest Virginia Imp. Co., 92 Va. 144 [23 S. E. 32, 53 Am. St. Rep. 804]; Newell on Ejectment, p. 767.

"The record shows that the widow and her son, John Hulvey, have been in exclusive possession of the land since the death of John Hulvey, Sr., taking the issues and profits, which were insufficient to support the widow, paying the taxes, keeping up the fences, and getting timber for the fencing and for firewood therefrom. These acts are not sufficient in themselves to show that their holding was adverse. Lagorio v. Dozier, 91 Va. 492 [22 S. E. 239]; 1 Washburn on Real Prop. 566, 567 (3d Ed.)."

These observations apply with much force to the facts of the case before us, where the possession was originally taken and held by M. R. Woodson in privity with the title of the adverse claimants.

As this case must, for the errors already pointed out, go back for another trial, we deem it unnecessary to deal further with the instructions, some of which are admitted to be erroneous, and others are wholly inapplicable to the facts shown in the present record. Nor would it be proper to comment

upon the evidence relied on as showing adversary possession in the defendants.

The judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with the views herein expressed.

Reversed.

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(117 Va. 311)

## HAWKINS & BUFORD et al. v. EDWARDS et al.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. FRAUD ⟸65—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for deceit, where plaintiffs alleged that defendants misrepresented to them the date of maturity of a mortgage against the property, the physical condition of the improvements, and the rental value of the property, and it appeared that the misrepresentation as to the maturity of the mortgage was inadvertently made, and that defendants offered to correct it by carrying the mortgage without cost to plaintiffs until the date represented by them, an instruction that if one represented as true what he knew to be false, under such circumstances as to induce a reasonable man to believe it to be true, and it was intended to be acted on and was acted on, the persons acting thereon were entitled to such damages as they sustained thereby, if abstractly correct, was inapplicable and misleading, since under it the jury could award damages for the misrepresentation as to the maturity of the mortgage, though in fact no damage was thereby suffered.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 72–74; Dec. Dig. ⟸65.]

2. TRIAL ⟸234—INSTRUCTIONS—DIRECTION OF VERDICT—OMISSION OF ELEMENT.

An instruction which undertakes to state facts upon which plaintiffs could recover, but does not embrace all the elements necessary to support a recovery, is erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534–538, 566; Dec. Dig. ⟸234.]

3. FRAUD ⟸4—MISREPRESENTATIONS—LIABILITY—INTENT.

One who made a misrepresentation without fraudulent design, and who offered to correct it, so that no damage could arise therefrom, could not be held liable for any damages because of such misrepresentation.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 2; Dec. Dig. ⟸4.]

4. TRIAL ⟸253—INSTRUCTIONS—INDEPENDENT INQUIRY.

An instruction purporting to state facts essential to a recovery of damages for fraud, which makes no reference to the rule that one who makes an independent inquiry as to facts misrepresented cannot recover for the misrepresentation, though there is evidence tending to show such inquiry by plaintiffs, is erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. ⟸253.]

5. APPEAL AND ERROR ⟸882—INVITED ERROR — INSTRUCTIONS — EVIDENCE ADMITTED WITHOUT OBJECTION.

Where defendants, in an action for fraud, permitted evidence of misrepresentations, not alleged in the declaration, to be admitted without objection, they could not object to an instruction which did not limit the recovery to the misrepresentations declared on.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591–3610; Dec. Dig. ⟸882.]

Error to Circuit Court, Henrico County.

Action by T. N. Edwards and another against Hawkins & Buford and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded for new trial.

Leake & Buford and C. V. Meredith, all of Richmond, for plaintiffs in error. David Meade White and S. A. Anderson, both of Richmond, for defendants in error.

HARRISON, J. This action at law, commonly called an action of deceit, grows out of the sale of a certain lot of land, with four houses thereon, situated on Goddin and Cabell streets, in the city of Richmond. The plaintiffs, T. N. Edwards and H. T. Simpson, allege that they were induced to buy this lot and its improvements by reason of certain false and fraudulent representations concerning the same made by the defendants, O. A. Hawkins and W. E. Buford, real estate agents, and their employé, J. P. Mulliken, from whom they bought the property; that but for such misrepresentations they would not have made the purchase, and would not have suffered the loss for which they now ask to be compensated in damages.

There was a verdict and judgment for $1,152 in the circuit court, in favor of the plaintiffs, which this writ of error brings under review.

The several assignments of error direct our attention to a consideration of the question whether or not the case was fairly submitted to the jury; the defendants contending that they were greatly prejudiced by the action of the circuit court in this respect.

It appears that the material allegations of false and fraudulent representations, and those really relied on by the plaintiffs, were: (1) That the date of the maturity of the mortgage note which was upon the property, and which was to be assumed by the purchasers as part of the purchase price, was misrepresented; (2) that the physical condition of the improvements upon the property was misrepresented to them; and (3) that the rental value of the property was misrepresented to them.

[1] Over the protest of the defendants, the court gave on behalf of the plaintiffs the following instruction:

"The court instructs the jury that if a man represents as true that which he knows to be false, and makes the representation in such a way or under such circumstances as to induce a reasonable man to believe that it is true, and is meant to be acted on, and the person to whom the representation has been made, believing it to be true, acts upon the faith of it, and by so acting sustains damages, there is fraud to support an action of deceit at law. The jury are further instructed that if they believe from the evidence that the defendants, with knowledge of its falsity, made one or more misrepresentations of material fact, in such a way as would induce a reasonable man to believe them, to T. N. Edwards, and by him narrated to the other

plaintiff (Simpson), and they believed the same true and acted upon the same, then the plaintiffs are entitled to such damages as you may believe from the evidence they have sustained thereby, not to exceed the amount claimed in their declaration."

This instruction may correctly state an abstract proposition of law; but, in view of the facts of this case, it was inapplicable and misleading. Instructions should state the law applicable to the particular facts which the evidence in the case tends to prove, and not mere abstract propositions of law. N. & W. Ry. Co. v. Bell, 104 Va. 836, 52 S. E. 700. It is error to give an instruction which, though not erroneous, is inapplicable and misleading. Pettyjohn v. Nat. Ex. Bk., 101 Va. 111, 118, 43 S. E. 203.

[2] The instruction under consideration undertakes to state a case upon which the plaintiff could recover, which statement does not embrace all the elements necessary to support a verdict. This form of instruction is contrary to the settled law in this state. Pocahontas Collieries Co. v. Hairston, 83 S. E. 1041.

With respect to the allegation that the defendants misrepresented the due date of the mortgage, it is admitted that the time of maturity was stated to be January 12, 1913, instead of July 12, 1913; but it clearly appears that this was an inadvertent and innocent mistake, from which the plaintiffs could have suffered no damage if they had accepted the offer, promptly made by the defendants as soon as their attention was called to the mistake, to carry the mortgage note, without cost to the plaintiffs, until July 12, 1913, the day they had represented it to be due. The testimony is clear that this offer was made and declined, although the defendants had made all necessary arrangements to take over the mortgage note and carry the same to the day mentioned. Under these circumstances, the plaintiffs suffered no damage growing out of this alleged misrepresentation and yet under the instruction, which wholly omits any reference to these facts, the jury were authorized to base their finding upon this alleged misrepresentation, with respect to the due date of the note. If they had disbelieved every other allegation of misrepresentation, yet knowing that the wrong due date had been given, and believing that the plaintiffs had acted on that misrepresentation in buying the property, they were required by the instruction to give damages, even though it was apparent that no damage had been suffered by reason of such misrepresentation.

[3] The theory of the instruction seems to be that, because a misrepresentation may have aided in inducing a party to contract, he who makes the misrepresentation is, at law, to be held responsible for loss of any kind suffered as a consequence of the purchase, although not the result of a misrepresentation. This is not the law. Where, as in this case, there was no fraudulent design in making the misrepresentation, and the party stood ready to correct it, so that no damage could arise therefrom, the purchasers cannot take advantage of such a representation to recover damages, for none accrued as a consequence of the assertion.

In the case of Trammell v. Ashworth, 99 Va. 646, 39 S. E. 593, the vendor designated the point to which a lot of 55 feet in width would reach—a matter, under the circumstances of the case, of material consequence to the purchaser. The line fell in fact two feet short of that point. In the suit it was sought to rescind the sale upon the ground of fraudulent misrepresentation; and this court, recognizing the fact that the vendor, when the shortage was discovered by the purchaser, had subsequently allowed her two additional feet of land, held that such subsequent act prevented the purchaser from taking advantage of the representation, which was untrue at the time it was made, although the investment turned out to be an unfortunate one. She had not been injured by the representation.

By its instruction the court should have limited the damages, if any, to such as flowed from the falsity of a representation, especially in view of the fact that, in this case, several distinct and independent representations were in issue, from one of which, at least, no damage could, under the circumstances, have arisen.

[4] As to the alleged misrepresentations with respect to the physical condition of the property and as to its rental value, the evidence tends strongly to show that Edwards, one of the joint purchasers, who was acting for himself and his copurchaser, prior to the sale, personally and carefully inspected the property, and also investigated its rental value by personal interviews with the tenants. If this inspection of the premises and inquiry as to the rental value was made prior to the purchase, then those representations, though made, would have ceased to be the foundation for a verdict in favor of the plaintiffs, as soon as the examination and inquiry were proven to the satisfaction of the jury. Tramwell v. Ashworth, supra; West End Co. v. Claiborne, 97 Va. 734–751, 34 S. E. 900, 906.

In the case last cited the rule is thus stated:

"If after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it; such claim would simply be untrue."

Yet the instruction, which purports to state a complete case, ignores the important facts adverted to, and the rule controlling them makes no reference to either, thereby depriving the defendants of the right to have their case considered and passed upon by the jury. The jury should have been told in this in-

struction that they could not base a verdict upon the alleged misrepresentation as to the maturing of the mortgage note, as the plaintiffs admitted that the defendants had offered to carry the debt until it was due; and that they could not base a verdict upon the allegation either as to the physical condition or rental value of the property, if they believed that the plaintiff Edwards made the examination and inquiry which the evidence tends to show that he did.

[5] The contention is further made that the instruction under consideration is erroneous because it fails to restrict the misrepresentations of material fact upon which the jury might render a verdict to one of the misrepresentations alleged in the declaration.

If this objection had been made in the lower court, it would have been proper to have restricted the evidence in the manner suggested; but the evidence in this case seems to have been admitted without objection, and the trial to have proceeded upon the tacit admission that the evidence, now objected to, was proper. Under such circumstances, the objection cannot be made here a ground of reversal.

In a very recent case this court says:

"The general rule is that the failure to object or otherwise raise the question of the admissibility of evidence on the trial is a waiver of all objections thereto. * * * If a litigant sits by and permits evidence to go to the jury which the court, if it had been objected to, would have excluded, the jury have the right, and it is their duty, to consider it along with all the evidence and give it such weight as they think it is entitled to. They may or may not believe it; but, so far as they do or do not, their judgment is not controlled by rules of law." Newberry v. Watts, 116 Va. 730, 82 S. E. 703.

This question is, however, hardly likely to arise on another trial.

For the errors to the prejudice of the defendants which have already been pointed out, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with the views herein expressed.

Reversed.

NOTE.—This case was argued and submitted before Judge KELLY'S term began.

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(117 Va. 401)

## SECURITY LIFE INS. CO. OF AMERICA v. DILLARD.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. INSURANCE ⟹445—LIFE INSURANCE—SUICIDE OF INSURED—EFFECT.

Suicide of insured while sane defeats a recovery on the policy by the beneficiary, his wife, whether the suicide was or was not in contemplation of, or in any way dealt with by, the parties as a risk covered by the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1152–1158; Dec. Dig. ⟹445.]

2. INSURANCE ⟹445—LIFE INSURANCE—SUICIDE AS A DEFENSE—PLEADING.

The defense of suicide of insured while sane is based on public policy, and cannot be waived intentionally or unintentionally by stipulations or defects in pleadings.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1152–1158; Dec. Dig. ⟹445.]

3. INSURANCE ⟹446—LIFE INSURANCE—SUICIDE AS A DEFENSE—EVIDENCE.

Where insurer, when sued on a life policy, proved the suicide of insured while sane, the beneficiary could prove that insured was insane when committing suicide, and thereby defeat the defense of suicide.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1159–1161; Dec. Dig. ⟹446.]

Error to Circuit Court of City of Lynchburg.

Action by Mrs. Gertrude Dillard against the Security Life Insurance Company of America. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Coleman, Easley & Coleman and Caskie & Caskie, all of Lynchburg, and F. W. Bull, of Chicago, Ill., for plaintiff in error. Ambrey E. Strode, of Amherst, and Harrison & Long, of Lynchburg, for defendant in error.

KELLY, J. Mrs. Gertrude Dillard brought suit against the Security Life Insurance Company of America in the circuit court of the city of Lynchburg, upon an insurance policy issued on the life of her husband, and recovered a judgment which is now before us for review.

The proceeding was by motion, and the only pleading on the part of the defendant was a statement of its grounds of defense, which will be hereinafter briefly noticed.

[1] A number of questions are presented by the record, all of which were argued orally and in the briefs, but in our view of the case the controlling question arises out of the fact that the insured committed suicide.

It seems to be conceded, and from the record it is clear, that the insured while sane took his own life on the night of the very last day on which, without a further payment of premium, his policy could, in the most liberal interpretation of its terms, have been considered in force.

At the conclusion of the evidence the defendant requested a number of instructions, including the following:

"The court further instructs the jury that even if the policy on which this action is founded had not lapsed at the time of the death of the insured, but was then in force, nevertheless, if the jury believe from the evidence that the death of the insured was the result of suicide or self-destruction, they must find for the defendant."

The trial court refused to give this instruction, and its refusal is the basis of one of the defendant's exceptions.

We are aware that the question thus arising is one upon which the authorities are not in unison, but we are of opinion that upon the soundest considerations of public

policy there ought not to be, and under the principles and authorities already adopted and indorsed by this court there cannot be, any recovery upon the case as made out in the record before us.

In Plunkett v. Supreme Conclave, 105 Va. 648, 55 S. E. 11, the president of the court, delivering the opinion, said:

"The case presented to us upon the pleadings is that of a sane man who takes his own life. In other words, as was said in Burt v. Union Cent. L. Ins. Co., 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216: Do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?

"In Amicable Soc. v. Bolland, 4 Bligh N. R. 194, decided by the House of Lords, the Lord Chancellor said:

" 'It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money year by year upon condition that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy?

" 'Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes, namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim?'

"In Burt v. Union Cent. L. Ins. Co., supra, it is held, upon grounds of public policy, that a policy of life insurance does not insure against the legal execution of the insured for crime, even though he may in fact have been innocent, and therefore unjustly convicted and executed.

"And in Ritter v. Mutual L. Ins. Co., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693, Mr. Justice Harlan, delivering the opinion, said: 'There is another consideration supporting the contention that death intentionally caused by the act of the assured when in sound mind—the policy being silent as to suicide—is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract, the tendency of which is to endanger the public interests, or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment. If, therefore, a policy—taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators, or assigns—expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted. Is the case any different in principle if such policy is silent as to suicide, and the event insured against—the death of the assured—is brought about by his willful, deliberate act when in sound mind?' "

The view approved by the opinion just referred to in the Plunkett Case, and in the authorities cited therein, has been reiterated and emphasized by the Supreme Court of the United States in the comparatively recent case of Northwestern Life Ins. Co. v. McCue, 223 U. S. 246, 32 Sup. Ct. 221, 56 L. Ed. 419, 38 L. R. A. (N. S.) 57. In that case Mr. Justice McKenna, delivering the unanimous opinion of the court, after reviewing with approval the case of Burt v. Union Cent. L. Ins. Co., supra, and Ritter v. Mutual L. Ins. Co., supra, says:

"These cases must be accepted as expressing the views of this court as to the public policy which must determine the validity of insurance policies, and which they cannot transcend, even by express declaration, much less be held to transcend by omission or implication"

—and further, on page 249 of 223 U. S., on page 223 of 32 Sup. Ct. (56 L. Ed. 419, 38 L. R. A. [N. S.] 57):

"The question before us, and the only question, is: What rights did McCue's estate and children get by his policy? And we are brought back to the simple dispute as to whether the policy covers death by the hand of the law. This court has pronounced on that dispute, and its ruling must prevail in the federal courts of Virginia, in which state the contract was made. and it is consonant with the ruling in the state courts."

The opinion then proceeds to cite the case of Plunkett v. Supreme Conclave, as showing that the Supreme Court of Appeals of Virginia had expressly approved the considerations of public policy expressed in the Burt Case and the Ritter Case, and other cases of that character.

There are authorities holding that when the policy is payable, not to the estate of the insured, but to his wife or other expressly designated beneficiary, the rule announced in the Ritter Case and others of like kind does not apply; but the principle of this distinction is rejected, and we think properly so, in the McCue Case in the following language:

"One other contention of respondents remains to be noticed. It is contended that if the McCue estate cannot recover, the innocent parties, his children, will be admitted as claimants. To this contention we repeat what we have said above: The policy is the measure of the rights of everybody under it; and, as it does not cover death by the law, there cannot be recovery either by McCue's estate or by his children."

It is contended by the defendant that the original policy, properly construed, as well as the terms of a certain application for reinstatement, made less than a year before the death of the insured, contained stipulations against self-destruction which defeat the recovery. The plaintiff, on the other hand, denies that she was bound by the application for reinstatement, and contends that the original policy, though containing a provision against self-destruction, limited that provision to one year from the issuance of the policy, and claims therefore that the provision against self-destruction had no other effect than to show that suicide was one of the risks contemplated by the parties at the time the policy was issued.

We have not deemed it necessary or per-

tinent to go into a discussion of these contentions, for the patent reason that under the authorities which we have already cited the result must be the same, whether suicide was or was not in contemplation of, or in any manner dealt with, by the parties as a risk covered by the policy.

Counsel for plaintiff rely upon the case of Knights of Pythias v. Weller, 93 Va. 605, 25 S. E. 891, as supporting their contention that suicide, when shown to have been in contemplation as a risk, cannot be availed of as a defense. In that case the judgment was reversed and the cause remanded for a new trial upon a specific ground, namely, that the trial court erred in refusing to sustain the defendant's motion to strike out the plaintiff's evidence because there was a variance between the allegations and the proof, and it is manifest from the opinion that the question of public policy was not considered by the court.

[2] In the brief of counsel for the plaintiff it is said that:

"In the grounds of defense filed by the defendant in the court below the question of public policy involved in the defense of suicide was not raised, but as there stated this defense was rested upon the alleged agreement of the insured that self-destruction was not a risk assumed, made in the original application."

This is true, but the fact of suicide was proved and the question of public policy was necessarily raised by the instruction hereinbefore set out, as well as by the motion to set aside the verdict. Our decision of this case rests entirely upon the considerations of public policy above adverted to and fully discussed in the foregoing authorities. These considerations have to do, not with the interests of the parties litigant, but with the public weal, and they overreach, in a case shown by the record to call for their exercise, all mere formal rules of procedure. They can no more be waived, either intentionally or unintentionally, by stipulations or defects in the pleadings than by provisions or omissions in the contract in litigation. As was said by Mr. Justice Field, in Oscanyan v. W. R. Arms Co., 103 U. S. 261, 26 L. Ed. 539, referring to a case in which a recovery was forbidden by morality and public policy:

"The objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice."

[3] If it should be suggested (as, however, it has not been) that the plaintiff relied on the grounds of defense, and, feeling confident that the construction of the policy contended for by defendant could not be upheld, introduced no proof in rebuttal of the evidence of suicide, the answer to any such suggestion is: First, that the proof of suicide in the record, which was not objected to, seems absolutely conclusive; and, second, that this cause will be, as it must be under our practice, remanded for a new trial. At such new trial, if the plaintiff shall be advised to avail herself of one, she will have the opportunity of combatting the claim, so well established by the evidence in the present record, that the insured while sane took his own life.

The policy in this case was issued in 1905. There are indications in the record that for some time the insured had been having difficulty in meeting the premiums. The last premium falling due before his death was unpaid, but the evidence shows that he felt assured that he was entitled to a certain number of days of grace. It was on the night of the last day of grace, as he construed his policy, that he ended his life. We do not overlook the pathetic and appealing aspect which the case assumes if we indulge the natural presumption that he finally committed the act of self-destruction in order to secure a provision for his family. But the very fact that he probably took this false view of the trusteeship which he held in his own life, and of his duty to his family and to the public, illustrates the importance of establishing a known and settled public policy which will discourage this course of conduct on the part of others who might be similarly disposed.

It follows from what has been said that the circuit court erred in refusing the instruction above set out, and in declining to set aside the verdict of the jury. The judgment complained of will therefore be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

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(117 Va. 336)

## RIVERSIDE & DAN RIVER COTTON MILLS, Inc., v. WAUGH.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

WATERS AND WATER COURSES ⊜179—INJURIES TO FLOODED LANDS—EVIDENCE—SIMILAR FACTS AND CONDITIONS.

In an action against the owner of a dam for injuries by flood to plaintiff's land lying a short distance below the dam, occurring at the time of an unusual freshet, it was error to refuse to allow defendant to introduce evidence as to the effect of the freshet on other lands of similar condition, situation, and cultivation on the same stream, some above and some below the dam.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 244–250, 256–259, 263, 264; Dec. Dig. ⊜179.]

Error to Circuit Court, Pittsylvania County.

Action by L. T. Waugh against the Riverside & Dan River Cotton Mills, Incorporated. From a judgment for plaintiff, defendant brings error. Reversed and remanded for new trial.

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Malcolm K. Harris and William Leigh, both of Danville, for plaintiff in error. B. H. Custer, of Danville, and Geo. T. Rison, of Chatham, for defendant in error.

KELLY, J. This was an action of trespass on the case brought to recover damages alleged to have resulted to a tract of land in Pittsylvania county by reason of the negligent construction and maintenance of a power house, dam, and auxiliary structures (hereinafter, for convenience, referred to merely as the dam), in and across Dan river. There was a judgment for the plaintiff, which is now under review.

The facts, so far as they need to be stated for the purposes of this opinion, are as follows: The Dan River Power & Manufacturing Company, a Virginia corporation, constructed the dam, and afterwards, in the year 1909, that company and the Riverside Cotton Mills, another Virginia corporation, were merged into the Riverside & Dan River Cotton Mills, Inc., the plaintiff in error here, whereupon the dam became, and has remained, the property of the last-named corporation. The defendant in error, L. T. Waugh, subsequent to the erection of the dam, purchased a tract of land situate about three-fifths of a mile below, on the north side of Dan river. The damage sought to be recovered in this action resulted to the land at the time of an unusual but not altogether unprecedented freshet in Dan river, occurring in March, 1912. We will hereinafter refer to Mr. Waugh as the plaintiff and to the company now owning the dam as the defendant.

The declaration alleges that, on the occasion of the freshet aforesaid, the dam deflected and diverted the water and caused it to rush with great force and violence upon and over the plaintiff's land, thereby washing away the soil and otherwise damaging it to such extent as to utterly destroy its value. The contention of the plaintiff is, not that all the water in time of such a freshet would, in the absence of the dam, have continued in the natural bed of the stream without overflowing the land, but is, as stated in the brief of plaintiff's counsel, that the dam, by reason of "its shape combined with the other structures, caused the water to be turned upon the plaintiff's bottoms with greater volume, weight, and velocity." The defendant, on the other hand, does not deny that the water did the damage complained of, but contends that the land had recently been plowed and brought to a high state of cultivation, thereby rendering it more liable to damage from overflow; that the land had always been, by reason of its topography, peculiarly subject to overflow in time of high water; that trees and underbrush formerly growing on the said land, and on land between it and the dam, had been cut and removed by the plaintiff and by others not connected with the defendant, thus depriving the land of some of its previous protection against damage by overflow; that the freshet of March, 1912, rose with unusual rapidity and to an extraordinary height; and that these conditions, and not the defendant's dam, caused the damage to the land.

The first assignment of error is to the action of the trial court in refusing to allow the defendant to introduce testimony to show the effect of the same freshet on other lands of similar condition and similar situation on the same stream. Some of these other lands were above and some below the dam. Three witnesses were offered upon this point, with a view, as set out in the bills of exception:

"First, to show by the effect of the current of the river upon the lands at the same time, said lands being similarly situated to those of the plaintiff, that the current was unusually swift and that the water was unusually high, and that the flood was unusual and extraordinary; second, to prove that low grounds in a state of high cultivation would be washed and damaged by the water overflowing them; third, to show that land similarly situated and under similar conditions to the plaintiff's but so distant therefrom that the structures of the defendant could not be claimed to have affected the current of the river, were overflowed by the same stream, upon the same day, and that these lands were left in a similar condition."

We think this testimony should have been admitted. It tended to support the defendant's theory that the damage to the land would have resulted regardless of the existence of the dam, and was clearly admissible under well settled rules of evidence.

There was testimony (whether in conflict with plaintiff's evidence in any or all respects is not material to the question under consideration) tending to show that the topographic condition of the land on both sides of Dan river for some distance above and below the dam was of the same general character, with river hills or bluffs on the south side, and a depression or valley, called by one of the witnesses "a kind of second bed of the river," on the north side between the north bank and the hills or higher lands lying off still further to the north; that this depression extended through and embraced that part of plaintiff's land which was most seriously damaged; that prior to the construction of the dam the water always ran down through this depression in time of freshet; that previous freshets had not greatly damaged the land because it was not in a state of cultivation and because it was protected by timber and undergrowth; that after the dam was built the plaintiff and others not connected with the defendant had cut and removed much of the timber and undergrowth on and above the plaintiff's land, thus depriving it of the protection aforesaid; that the plaintiff had put his land in such a state of cultivation as to make it peculiarly liable to wash; that he had cultivated it without damage for several years after the erection of the dam; and that the freshet of March, 1912, came with unusual rapidity and rose to an unusual height. This is only a

partial recital of the evidence which tended to support the defendant's theory, but it is sufficient to show the relevancy of the evidence which the court excluded. The whole case turned upon the effect of the dam on the water that swept down the river in the freshet of March, 1912. Having produced to the jury evidence of the tendency above recited, defendant was offering, in further support of its theory, to show that other land similarly situated, except as to the dam, and in similar condition, on the same stream, was similarly affected on the same day by the same freshet. This evidence was competent and material and should have been admitted. As will appear later, the similarity of situation and condition was sufficiently averred when the evidence was offered.

The general rule governing the admissibility of evidence of the character here under consideration is thus stated by Prof. Wigmore:

"The general logical requirement is, then, that when a thing's capacity or tendency to produce an effect of a given sort is to be evidenced by instances of the same effect found attending the same thing elsewhere, these other instances have probative value—i. e., are relevant—to show such a tendency or capacity only if the conditions or circumstances in the other instances are similar to those in the case in hand.

"But this similarity need not be precise in every detail. It need include only those circumstances or conditions which might conceivably have some influence in affecting the result in question. * * * The similarity that is required is, in short, a similarity in essential circumstances, or, as it is usually expressed, a substantial similarity, i. e., a similarity in such circumstances or conditions as might supposably affect the result in question." 1 Wigmore on Evidence, § 442, p. 522.

The same rule is stated in Jones on Evidence, as follows:

"When the evidence is capable of being presented as tending to prove the claim of the party, it does not belong to the collateral class and should be received. When the issue was raised whether a given effect has been produced or can be produced by the cause alleged, the courts have frequently admitted evidence apparently collateral when the facts presented such points of similarity as to afford reasonable data for the conclusion; for example, evidence has been received that other property than that in question, similarly situated and not too remote, has been damaged by the escape of smoke, or gas, or dust, or by the flow of water, or by other causes where the circumstances are such as tend to show that the same cause has or has not produced a similar result in the case on trial." 1 Jones, Com. on Ev. § 164, p. 831.

In the case of Evans v. Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 30 L. R. A. 651, 51 Am. St. Rep. 681, the plaintiff sought to recover damages alleged to have been done to his shade trees by the leakage of gas from the mains of the defendant, and was permitted at the trial to testify as to the condition of trees on the street beyond his place after the construction of the gas line. The appellate court, in reviewing the action of the trial court, said:

"We have no doubt of the admissibility of the evidence. The issue turned upon the question of whether the escaping gas would account for the injury to the plaintiff's trees, and any evidence showing or tending to show that trees in the immediate vicinity were similarly and simultaneously affected was competent."

See, also, Taylor v. Baltimore & Ohio Railroad Co., 33 W. Va. 39, 10 S. E. 29, 34; Shores v. Southern Ry. Co., 72 S. C. 244, 51 S. E. 700, 702.

The case on trial was one in which the issue had to be determined, to some extent, from circumstances and inferences. The clear weight of the evidence, if not the whole of it, was to the effect that the water during the freshet of March, 1912, would have covered the plaintiff's land if there had been no dam there. Was the effect on the land different from what it would have been without the dam? This was the real issue. The defendant claimed that the effect would have been the same in the absence of the dam. This was its defense. In the nature of the case, direct evidence alone could neither establish the plaintiff's claim on the one hand, nor rebut it on the other. The case in this respect is one of which it may well be said, as Mr. Justice Shiras said in Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118:

"Where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be."

In the first volume of Jones' Commentaries on Evidence, § 178, p. 893, the author, discussing the exception to the general rule against collateral facts as competent evidence, adopts the language of the opinion in Stevenson v. Stewart, 11 Pa. 307, and says:

"The competency of a collateral fact to be used as the basis of a legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough, if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth."

See, also, Grubb v. Burford, 98 Va. 553, 558, 37 S. E. 4; Holmes v. Goldsmith, supra.

We are of opinion therefore that the circuit court erred in excluding, as complained of in bills of exception 3, 4, and 6, the testimony of the witnesses Prichett, Murphy, and Fitzgerald.

The admission of the evidence now being considered would not be, as claimed for the plaintiff, in conflict with, but entirely consistent with, the ruling of this court in Ellis v. Harris, 32 Grat. (73 Va.) 688. In that case evidence to show the effect of backwater from a dam in a different stream and in a different locality from that involved in the action on trial was excluded, upon the grounds: (1) That the witness offered was not an expert; and (2) that the facts to which he proposed to testify were irrelevant, affecting, as Judge Moncure pointed out, "only certain mill dams and streams in Albemarle, and not the mill dam and stream in Louisa and Orange involved in this case." In the present case the bills of exception

show that one of the three witnesses offered by the defendant qualified as an expert, and that all of them possessed the requisite familiarity with the facts and conditions about which they proposed to testify; and these facts and conditions affected lands in the same general locality, on the same stream, of similar situation, and in similar condition, and they pertained to the effect upon those lands of the same freshet in which the plaintiff's lands were damaged.

Undoubtedly the discretion of the trial court is entitled to much consideration when evidence of collateral occurrences has been excluded on the ground that it is lacking in the elements of substantial similarity, or that its introduction would lead to distinctly collateral issues. 1 Jones on Evidence, § 164; 1 Wigmore on Evidence, § 444. In the present case, however, the trial court did not exclude the evidence on these grounds, but in effect decided against the general admissibility of this class of evidence, cutting the defendant off entirely and declining to allow it to introduce any proof on this line, regardless of the question of similarity in the condition and situation of the land. This we think was reviewable error. See 1 Wigmore on Ev. § 16.

Counsel for the plaintiff insist that no evidence was offered and no assurance given that the physical conditions affecting the Waugh land and the other lands in question were the same. It may be conceded that the foundation for the testimony under discussion, and the avowals as to what the defendant expected to show by it, would not appear to an entirely satisfactory degree if we were confined to the report of the evidence in defendant's bill of exceptions No. 5 (taken to save a different point), which purports to set forth all of the evidence actually taken; but there are three other bills of exceptions, taken for the specific purpose, distinctly dealing with the testimony which was excluded, and in these bills of exception the court certifies the exact purposes for which the evidence was offered. Upon the whole record, there can be no doubt that the defendant was proposing to show by this testimony the effect of the freshet of March, 1912, upon lands situated and conditioned in all substantial respects like the plaintiff's land, and that the trial court so understood it.

A further very insistent and rather novel contention on the part of the plaintiff is that, even if the defendant had explicitly offered to show that the physical conditions affecting the Waugh land and the other lands to which the proposed testimony referred were the same, it would have been impossible for defendant to make the offer good and prove that they were the same, because "the very things complained of as causing the injury were absent in one case and present in the other." The statement of this contention carries its own refutation and at the same time emphasizes the materiality of the evidence which was rejected. The effect of the dam was the exact point at issue, and its absence in the one case and its presence in the other, with all other conditions and results the same, was the precise circumstance that gave the proposed testimony its probative value.

Two other grounds of error were assigned, namely, misdirection of the court to the jury, and refusal to set aside the verdict as contrary to the law and the evidence; but these assignments do not call for any extended discussion. It is sufficient to say that the instructions in question dealt with familiar and well-settled principles, and were, we think, correct. If upon another trial the evidence should be substantially the same as on the former and should also embrace the testimony formerly excluded and dealt with in this opinion, the instructions as given by the court on the former trial will fairly submit the case to the jury. As the case must go back for another trial, we do not express any opinion here as to the weight or sufficiency of the evidence as it appears in the record now before us.

The judgment will be reversed, and the cause remanded for a new trial.

Reversed.

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(117 Va. 318)

## LUCY et al. v. KELLY.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. PARTITION ⟸73—ORDER OF SALE—DETERMINATION OF INTERESTS OF PARTIES.

Where, in a suit for partition of real estate, one half of which had been devised to testator's widow in fee and the other half for life, with remainder to his heirs at law, all the parties in interest were present, an order directing a sale was not objectionable as premature because the shares of each of the parties had not been ascertained; there being no dispute as to the interests of the parties.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 196–208; Dec. Dig. ⟸73.]

2. PARTITION ⟸79—REPORT OF COMMISSIONERS—ORDER OF COURT.

A report of commissioners in partition that after an examination they fixed the value of one tract at a specified sum and the value of another tract at another sum, and that the first tract should be assigned to a party, and that the other tract should be sold and a specified sum paid to the party as her share, conformed to the decree appointing the commissioners to proceed to go on the lands and divide the tracts having regard to quality and quantity and assign a part to the party, and if a division was impracticable, to report the facts and the value of each tract.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 224, 225; Dec. Dig. ⟸79.]

3. PARTITION ⟸79—REPORT OF COMMISSIONERS—SALE.

A report of commissioners in partition, advising a sale on the ground that a partition cannot be had for reasons stated, must, in the absence of evidence to the contrary, be taken

as sustaining their conclusion, so that the court may confirm the report and order a sale.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 224, 225; Dec. Dig. ⊂⊃79.]

4. PARTITION ⊂⊃111 — SALE — PARTITION IN KIND.

The court, in partition of two tracts of land, may award a tract to a party and order a sale of the other tract and give the party a part of the price to make up any inequality resulting to her in partition in kind.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 401–418; Dec. Dig. ⊂⊃111.]

5. PARTITION ⊂⊃12 — PERSONS ENTITLED TO SUE.

Under Code 1904, § 2568, providing that any person who before partition or sale was lessee shall hold the same of him to whom the land is allotted or sold under the lease, an owner of the fee of an undivided half interest and of the other half for life with remainder to third persons may, notwithstanding a lease for a term, maintain partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 38–51; Dec. Dig. ⊂⊃12.]

6. PARTITION ⊂⊃32 — PERSONS ENTITLED TO SUE.

Where testator gave to his wife half of his property in fee and the other half for life, with remainder to his heirs, the wife could maintain partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 83–86; Dec. Dig. ⊂⊃32.]

7. PARTITION ⊂⊃74—RIGHTS OF INFANTS.

In partition suit, the rights of infants and adults are governed by like principles.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 209; Dec. Dig. ⊂⊃74.]

8. PARTITION ⊂⊃111—SALE—DISPOSITION OF PROCEEDS.

Where in partition commissioners fixed the value of a tract which should be sold, but which was sold for a less sum, the court must apportion the loss between the parties entitled to the proceeds in the proportion of their interests.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 401–418; Dec. Dig. ⊂⊃111.]

Appeal from Circuit Court, Brunswick County.

Suit by Indiana M. Kelly against J. H. Lucy and others, for partition. From a decree granting relief, defendants appeal. Affirmed.

Buford, Lewis & Peterson, of Lawrenceville, for appellants. Turnbull & Turnbull, of Lawrenceville, for appellee.

KELLY, J. The will of John S. Kelly gave to his wife, Indiana M. Kelly, one half of all his real and personal estate, "as her absolute property," and the other half for and during her natural life, with remainder to his heirs and distributees in accordance with the provisions of the statute of descents and distributions. The real estate consisted of two separate tracts, one known as the home tract, estimated to contain 345 acres, and the other known as the Vaden tract, estimated to contain 481 acres.

This suit, which was brought by the widow against the heirs of John S. Kelly, involves, so far as we are concerned with it, a partition of the aforesaid lands. The bill prays for partition in kind, if the lands be susceptible of that sort of partition, and, if not, then for a sale and proper division and disposition of the proceeds.

The decrees complained of resulted in an assignment of the home tract to Mrs. Kelly in fee a sale of the Vaden tract and an allotment to her of a part of the proceeds as her own money to make up her one-half absolute interest in the real estate; and the decrees contemplate further proceedings not as yet had, under which she will be secured a life estate or its equivalent in the balance of the purchase price of the Vaden tract, with remainder to the heirs. The other facts, so far as necessary to an understanding of the questions arising on this appeal, will appear as we proceed.

[1] The first error assigned is that the decree in the cause directing a sale of a portion of the real estate was premature and erroneous. The argument here made is that the shares of each of the parties to the suit should have been ascertained before any sale was ordered, and that a failure to have this done tended to sacrifice the property by discouraging bids which the parties would probably have made if they had known in advance what their interests were. A number of authorities were cited to support this contention, most of them, typified by Cole v. McRae, 6 Rand. (27 Va.) 644, and Horton v. Bond, 28 Grat. (69 Va.) 815, dealing merely with the well-established principle that a sale is premature if made before the liens on the property to be sold are ascertained and the order of their priority established. This principle is not involved in the present case. The will fixed the interests of the parties, namely, one half in fee to the widow and the other half to her for life, with the remainder to the heirs according to the statute of descents. The bill sets out in full the names of all the heirs and makes them parties defendant. There is no dispute as to the title or the interest of any party to the suit. Hence it is clear that the case of Stevens v. McCormick, 90 Va. 735, 19 S. E. 742, so strongly relied upon by counsel for appellants, which holds that a sale for partition is premature if made before the parties know how they stand with reference to the estate, has no application here. In that case there was a dispute as to the interests of the parties which the lower court reserved, and, with that question open, ordered a sale, which was held to be error. The distinction between the two cases is manifest.

[2] The second and fourth assignments of error may be considered together. They embody, in substance, three propositions: First, that the report does not properly respond to the directions of the decree of reference: second, that from the record it does not satisfactorily appear that both tracts may not

be partitioned as a whole and divided in kind; and, third, that the assignment to Mrs. Kelly of the home tract, and a sale of the Vaden tract and payment of part of the proceeds to her, is a violation of the provisions of section 2564 of the Code, as that section is construed by this court in Jackson v. Jackson, 110 Va. 393, 69 S. E. 721.

Neither of these propositions can be sustained.

The pertinent directions of the decree appointing the commissioners were:

"That the commissioners do proceed to go upon the lands, taking with them a competent surveyor if necessary, and lay off and divide the said two tracts of land, having regard to quality and quantity, and assign one half thereof to Indiana M. Kelly, to be held in fee simple, and the other half to her to be held by her for life: but if the said commissioners should find it impracticable to so divide the said land and should be of the opinion that the interest of all parties would be more promoted by a sale, they are to report the facts upon which their opinion is based to the court, and also what, in their opinion, is the fee-simple value of each of said tracts."

[3] In response to this decree the commissioners reported that, after a careful examination of the lands they fixed the value of the home tract at $4,312.50, and of the Vaden tract at $9,620, a total of $13,932.50; that, therefore, they were required by the decree to assign Mrs. Kelly in fee simple land of the value of $6,966.25; that they assigned the home tract, valued as above, to Mrs. Kelly, leaving her entitled to land of the value of $2,653.75 from the Vaden tract; that they undertook to assign the same to her, but came to the conclusion that this could not be done with justice to her and to the other parties interested, and therefore reported that it was best for all parties to sell the Vaden tract, pay Mrs. Kelly $2,653.75 out of the proceeds, and invest the residue for her benefit for life. The report then proceeds to enumerate the reasons, based upon facts stated by them, which led the commissioners to their conclusions. These reasons or reported facts need not be repeated here. It may be conceded that they are not entirely convincing in the absence of any actual knowledge of the lands; but, supplemented by the actual view and examination on the part of the commissioners who were the representatives of the court, they must, in the absence of evidence to the contrary, be taken as sustaining the conclusions reached in the report. This report was filed on October 28, 1913, and not confirmed until March 3, 1914; but the appellants did not offer any proof whatever to negative the findings of the commissioners, or to support the assertion that partition could be made in kind. The court followed the usual practice in partition suits; the report of the commissioners was, in all substantial respects, a compliance with the decree, and its findings, especially in the absence of evidence to the contrary, must be sustained. See McClanahan v. Hockman, 96 Va. 392, 31 S. E. 516, in which this court said:

"Nor is the report of the commissioners defective for failure to place a valuation in money upon the lands, or any portion of them; nor will the court presume that partition of the respective tracts could have been made separately, but, in the absence of evidence to the contrary will presume that the conclusions reached by the commissioners, and by them reported to the court, are true, and sufficient to warrant a decree in accordance with them."

[4] Nor do we think the report and decree confirming the same are in conflict with the decision in Jackson v. Jackson, supra. The estates of the parties and the action of the trial court in the case cited were quite different from those in the case on trial. The case cited merely held that, in a per capita partition among members of a class springing from a common stock, it would be violation of the statute to allot a part and sell a part of the land, unless the part allotted, and likewise the proceeds of the part sold, should be divided among all those entitled to share in the estate partitioned. There is nothing in the decision in that case which conflicts with the principles upon which the circuit court proceeded in the case here, and this would seem clear from the more recent interpretation of the statute in Dennis v. Dennis, 116 Va. 619, 82 S. E. 696.

In the present case the circuit court followed, in principle at least, a common and long-established practice in partition suits, and compensated Mrs. Kelly in money for an inequality resulting to her in a partition in kind. Martin v. Martin, 95 Va. 26, 27 S. E. 810; 2 Minor on Real Prop. § 963; 2 Minor's Inst. 489.

[5] The next assignment of error is that:

"The complainant, Indiana M. Kelly, has only a reversion of that portion of the real estate known as the Vaden tract, and is therefore incompetent to maintain a suit for partition thereof."

This assignment rests upon the fact that at the time of the institution of this suit the Vaden tract was under a lease from Mrs. Kelly to one Richard Johnson, dated July 22, 1911, to take effect January 1, 1912, and to continue for a period of five years. Johnson appears to have been in possession, holding the Vaden tract under this lease from Mrs. Kelly. Numerous authorities are cited to sustain this contention, but we do not think they are in point. The whole subject of partition in Virginia is regulated by statute, and therefore, even if the authorities relied upon to sustain this assignment would otherwise be applicable, as we think they are not, the statute (Code, § 2568) is conclusive of this question. The statute is as follows:

"Any person who, before the partition or sale, was lessee of any of the lands divided or sold, shall hold the same of him to whom such land is allotted or sold on the same terms on which by his lease he held it before the partition."

See, also, Phillips v. Dulany, 114 Va. 681, 77 S. E. 449; Mounts v. Mounts, 61 W. Va.

178, 56 S. E. 358; Willard v. Willard, 145 U. S. 121, 12 Sup. Ct. 818, 36 L. Ed. 644. The lease in question in no wise affected the rights of the complainant to bring the suit.

[6] It is further contended that the decrees complained of were erroneous because Mrs. Kelly owns the fee simple in a moiety of the estate and a life estate with remainder over in the other moiety, and therefore has no right to maintain a suit for partition.

If this contention should be upheld, it would produce a result which could hardly have been contemplated by John S. Kelly in his attempt to make a substantial provision for his widow, for her life estate in one moiety would very seriously hamper her fee-simple ownership in the other moiety. Counsel for appellants concede, however, that the contention here made by them is in conflict with the case of Otley v. McAlpine, 2 Grat. (43 Va.) 340, but insist that the latter ought not to be regarded as conclusive authority. Without entering upon a discussion of this question, we are of opinion that the court did not err in holding that the complainant was entitled to maintain the suit. This is the settled rule in Virginia. 2 Minor's Inst. 484; 2 Minor's Real Prop. § 958; Carneal v. Lynch, 91 Va. 114, 20 S. E. 959, 50 Am. St. Rep. 819; Otley v. McAlpine, 2 Grat. (43 Va.) 340.

[7] Appellants claim that the commissioners were studious of the interests of Mrs. Kelly and paid small regard to the rights of the other parties interested. We fail to see any evidence of unfairness in the report of the commissioners, and no evidence thereof is offered by the defendants. In fact, of the 40 or more heirs of John S. Kelly interested in this suit, only a small proportion of them, both in number and interest, appear in the record as making any complaint. Of those complaining only one is an adult, the others being infants and defending by guardian ad litem, and the adult defendant appears to have precipitated this suit by a previous one which he brought, one of the objects of which was to restrain Mrs. Kelly from cutting timber on either of the tracts. It may be proper to state in passing that in a partition suit the rights of infants and adults are governed by like principles. Litton v. Flanary, 116 Va. 710, 82 S. E. 692.

[8] We are therefore of opinion upon the whole case that there was no error in the decrees complained of in so far as they resulted in the allotment to Mrs. Kelly of the home tract, the sale of the Vaden tract, and the provision for making up her one-half interest in fee by a payment to her from the proceeds of the Vaden tract. We do think, however, that the decree of May 22, 1914, should be amended in one respect. The commissioners appointed to partition the land fixed the value of the home tract at $4,312.50, and of the Vaden tract at $9,620. The Vaden tract actually sold for $9,200, which was $420 less than the estimate made by the commissioners, but the court nevertheless proceeded to allow Mrs. Kelly the full amount which the commissioners in their report and upon their previous estimate showed would be necessary to equalize her in the partition. We are of opinion that the court should have divided this deficiency between Mrs. Kelly and the remaindermen, and that therefore the decree in her favor should have been for the sum of $2,443.75, and we will accordingly amend the decree in this respect, and as thus amended it will be affirmed.

Affirmed.

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(117 Va. 289)

## CURTIS v. HIDEN et al.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. CURTESY ⟸12—SALE UNDER ORDER OF COURT—SUFFICIENCY OF BILL.

A bill by one who had purchased the life estate of a tenant by curtesy in a certain tract of land, which alleged that the land was valuable chiefly for its timber, most of which was of a proper size then to be cut, and would diminish in value if not cut, that it should be given proper care and the smaller trees cut therefrom so as to give the others a chance to grow, that the income from the land was not sufficient to pay the taxes, and that the remaindermen were amply able to protect their interest in the tract, if sold, by purchasing the same at the sale, does not show any equitable ground for sale of the tract by the court; since the complainant voluntarily purchased it, knowing that he would not thereby acquire any interest in the timber other than such as was necessary for domestic and agricultural purposes connected with the use of the land.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. §§ 43–64; Dec. Dig. ⟸12.]

2. CONSTITUTIONAL LAW ⟸106, 249—CURTESY ⟸12—SALE UNDER ORDER OF COURT—STATUTES—CONSTITUTIONALITY.

Pollard's Code, § 2436a, providing that, when real estate is held by a party as tenant by curtesy or in dower, whether the remainder be vested or contingent, and whether the remaindermen be infants or adults, the court can decree a sale of the real estate and invest the proceeds if the bill of the tenant by curtesy or dower shall set forth facts which, in his or her opinion, would justify the sale, and the court shall be of the opinion that the interest of all parties will be promoted thereby, if construed to confer upon the tenant by curtesy or in dower the right to demand a sale of the real estate where all the parties are sui juris and the estate is vested, is unconstitutional, as an unwarranted interference with the rights of property, and as denying the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 186, 212, 238–245, 252–257, 259, 710; Dec. Dig. ⟸106, 249; Curtesy, Cent. Dig. §§ 43–64; Dec. Dig. ⟸12.]

Appeal from Circuit Court, Warwick County.

Suit by Simon R. Curtis against P. W. Hiden and another for the sale of certain property in which complainant owned a life estate by curtesy, and the defendants the remainder. Decree for the defendants on demurrer, and plaintiff appeals. Affirmed.

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Lett & Massie, of Newport News, and O. D. Batchelor, of New York City, for appellant. S. O. Bland, of Newport News, and J. G. Hiden, of Culpeper, for appellees.

KEITH, P. The appellant, Curtis, filed his bill in the circuit court of Warwick county, in which he shows that Mrs. Virginia R. Chewning, in her lifetime, was seised in fee of certain tracts of land, containing by estimate 215 acres; that she had been twice married, and by her second husband, who survived her, she had one child, which is still living; that by her will she devised the land to the children of her first marriage, subject to the life estate by curtesy of her surviving husband, H. M. Chewning; that the complainant, Curtis, by deed dated June 2, 1902, bought of Chewning his life estate in said tracts of land, and has been, and now is, in possession of them; that by deed dated July 1, 1910, the devisees under the will of Virginia R. Chewning conveyed their interest in remainder to R. E. Richardson and P. W. Hiden; that Chewning, whose grantee is entitled to the possession and usufruct of the land during his lifetime, is now 55 years old, and his expectancy is therefore 17 years; that all the land of which he is life tenant, except about 15 acres, is grown up in timber, mostly old field pines, ranging from saplings to trees of from 12 to 20 inches in diameter; that this timber constitutes the chief value of the land; that the timber is peculiarly valuable for piling, and is now of proper size and ready to be cut as such; that it will depreciate in value if allowed to stand and grow during the expectancy of Chewning, when it will be above the proper size for piling; that the smaller trees retard the growth of the timber where they are too thick, and should be thinned out, and those cut down sold for cordwood; that the growing timber needs scientific cultivation and modern methods of forestry applied to it, which can best be done by one owning the fee-simple estate in possession; that piling of the character of that growing upon these lands is now in great demand along the seaboard, and will bring more if sold now than later on; that by a sale now the interests of all parties will be promoted. The plaintiff further represents that, although he has been in possession of the property for over 11 years, and keeping and preserving the same from trespass or depredation by others, and has neither cut, nor permitted to be cut, any timber thereon, and has paid the taxes thereon, the only rental or other income which he has been able to derive therefrom is from $6 to $12 per annum for the small piece of cleared land, which amount is less than one-fourth of what the taxes amount to; that the taxes have been largely increased by reason of the increased value of the timber, and is now a burden which complainant is compelled to bear, without sufficient revenue therefrom to pay the same. The complainant further avers that the remaindermen, Hiden and Richardson, are both engaged in the pile, wood, and lumber business, and are men of large means, and, if the said property should be sold, they are amply able to purchase it, and in fact their interests will be promoted by owning it, so as to be able to cut and market the timber to the best advantage; that if, on the other hand, it brings more than they are willing to pay, they, as such remaindermen, will get the benefit thereof. Wherefore, the premises considered, the complainant, being remediless save in a court of equity, to which jurisdiction over this subject-matter has been expressly given by statute, files this bill of complaint, and prays that the said P. W. Hiden and R. E. Richardson may be made parties defendant thereto, and required to answer the same, and that all further and general relief may be granted as the nature of his case may require.

To this bill the defendants, Hiden and Richardson, filed their demurrer, which the circuit court sustained, and dismissed the bill, and the case is before us upon an appeal awarded by one of the judges of this court.

The only ground of demurrer which we shall consider is:

"That the act under which these proceedings are sought to be had, to wit, section 2436a, Pollard's Code of Virginia 1904, in so far as it seeks to authorize the sale of lands, the remainder in which belongs to adults under no disabilities, without the consent of such adults, is unconstitutional and void."

We shall not consider the power of the courts to sell lands held by joint tenants, tenants in common, or coparceners, for the purpose of partition, where partition in kind cannot be had, nor the power of courts to sell lands held in trust, nor of the state, as parens patriæ, to authorize the sale of contingent remainders. We shall confine ourselves to the precise question presented by the bill of a plaintiff owning a life estate coming into court and asking the sale of the estate held in remainder, where neither plaintiff nor defendants is under any disability whatsoever, where there is no obscurity or difficulty as to the title, but a naked case of an absolute legal title to the life estate in the plaintiff and a vested remainder in fee in the defendants, who are sui juris, and are opposed to the sale.

[1] There are but two grounds assigned in the bill for invoking the jurisdiction of a court of equity. The first is that the plaintiff, who is a voluntary purchaser from the tenant by curtesy of the life estate, which he now holds, has found the investment unprofitable. He bought with his eyes open. The property is to-day, or was at the date of filing the bill, in the same condition in which he purchased it. The fact that he has made a bad bargain constitutes no ground for the interposition of a court.

The contention of the plaintiff that the timber on the land should be cut and sold

as piling or cordwood, and that scientific cultivation of the timber would inure to the interest of the defendants, is without merit, for the plaintiff has no interest in the standing timber, and cannot use or enjoy it except in the limited degree permitted by law to life tenants for agricultural and domestic purposes connected with the use of the premises. "The right thus incident to every estate for life, unless otherwise stipulated, does not warrant the selling of wood or timber by the tenant, nor the commission of any needless destruction in the premises." 2 Minor's Inst. (3d Ed.) 100.

[2] There is nothing in the bill, therefore, to call into exercise any of the equitable sources of jurisdiction to sell land, and the right of the appellant, if it exists, must depend solely upon section 2436a of Pollard's Code, which provides that:

"When real estate is held by a party as tenant by the curtesy, or in dower, whether the remainder be vested or contingent, and whether the remaindermen be infants or adults, it shall be lawful for the circuit and corporation courts, or such court having jurisdiction of the subject-matter, upon a bill filed by the party holding such estate by curtesy or in dower, in which bill all persons directly or contingently interested shall be made defendants, to decree a sale of such real estate, or any part thereof, and to invest the proceeds of sale under the decree of the court for the use and benefit of the party so holding the estate subject to the rights of the remainderman: Provided, however, that the bill of the plaintiff shall set forth the facts which, in his or her opinion, would justify the sale of the said real estate, and shall be verified by the affidavit of the party, and provided the court shall be of opinion that the interests of all parties will be promoted by such sale and shall so certify in the decree."

This question has never been before this court, but has been passed on by the courts of other states.

In Gossom v. McFerran, 79 Ky. 236, it was held that section 491 of the Civil Code, in so far as it authorized the sale of real estate upon the petition of the life tenant, in opposition to the wishes of the owner of the fee, where the latter is not laboring under the disability of infancy, or of unsound mind, was unconstitutional, and that so long as the citizen is under no legal disability to act for himself in the management of his property he is protected by the Constitution from interference on the part of the state. The facts in that case were that a dowress in a house and lot sold and conveyed her interest to another. The house was subsequently destroyed by fire, and the life tenant, being unable to rent the lot in its unimproved state, instituted an action under the statute against those who were the owners of the fee in remainder, seeking a sale and reinvestment under the direction of the court. The remaindermen objected to the sale of their interest in the land, and from a decree directing the sale and reinvestment appealed. The Court of Appeals reversed the judgment of the lower court and remanded the cause, with directions to dismiss the petition, saying:

"The only question we will consider is whether section 491 of the Civil Code, in so far as it authorizes the sale of the property of an adult, not under the disability of infancy, and not of unsound mind, is unconstitutional. After a careful consideration and full investigation, we have concluded that the section referred to, and to the extent indicated, is unconstitutional. It operates, in effect, to take the property of one individual and transfer it to another, when neither is under such disability as to require the guardianship of the courts. Where any of the citizens are incapacitated to act for themselves, it becomes the duty of the state to protect their interests, and it is upon this idea and for this reason that jurisdiction has been conferred upon the courts to sell and reinvest the proceeds of property belonging to such persons when, in the judgment of the court, it is to their interest. The court acts and consents for them because they cannot act or consent for themselves. But so long as the citizen is under no legal disability to act for himself in the management of his property he is protected by the Constitution from interference on the part of the state, whether that interference comes directly by legislative act, operating immediately upon the property, or intermediately through the courts. There may be cases of tenancy in common, or even of joint tenancy, where the courts can be authorized to sell the property so held, and one of the joint tenants or tenants in common, who is sui juris, refuses, without reason, to sell. * * * In all such cases, where sales have been sanctioned, there was a joint ownership in fee, and a joint right of possession—conditions not existing in this case. In addition to these cases, it has been held that when the interest is not vested, but contingent, a sale might be had without the consent of the contingent remainderman."

That case is identical in principle with the one before us. There is no joint ownership in this case; there is no community of interest whatever. The appellant is the absolute owner of the life estate; the appellees are the absolute owners of the remainder. None of them are under disability, and the life tenant may sell his interest whenever he sees fit, provided he can find a purchaser.

In Lantz v. Massie, 7 Va. Law Reg. 544, Prof. Lile, of the University of Virginia, has an instructive note, which deals with the power of the Legislature to authorize the courts, at the suit of a life tenant, to sell vested remainders in real or personal estate, whether the remaindermen be infants or adults. The case of Gossom v. McFerran, supra, is reviewed by him, along with other authorities, and he considers "the reasoning of this case is conclusive of the iniquity of the act, so far as it authorizes the sale of vested remainders, where the vested remaindermen are adults and of sound mind."

In Powers v. Bergen, 6 N. Y. 366, it is held that the Legislature, except in cases of necessity arising from infancy, insanity, or other incompetency of those in whose behalf it acts, has no power to authorize by special act the sale of private property for other than public use, without the consent of the owner, the court saying:

"The Legislature can only exercise such powers as have been delegated to it. * * * The power of making contracts for the sale and disposition of private property for individual owners has not been delegated to the Legislature,

or to others through or by any agency conferred on them for such purpose by the Legislature. * * * The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred."

In 3 Washburn on Real Property (2d Ed.) § 5, a. p. 539, it is said:

"In attempting to define the cases in which a Legislature may, by special act, change the ownership of land, or authorize one man to transfer the interest of another in lands, there are certain principles which may be regarded as elemental, which will serve as tests to be applied to the questions as they arise, and in the first place the power to do this does not depend upon its being by general law or special act. In the first place, where the act is based upon the assumption or exercise of judicial power, it is void, since Legislatures are prohibited from the exercise of such powers. In the next place, a legislative act cannot authorize the property of a citizen to be taken from him, through the instrumentality of a sale, or otherwise, so long as he is under no legal disability to manage his own affairs, where the effect is not to convert it to the use of the government, but to transfer it from the original owner to a third person."

In Ervine's Appeal, 4 Harris (16 Pa.) 256, 55 Am. Dec. 499, the case was as follows: The testator directed that after the decease of his wife, his executors should rent out his lands, and out of the proceeds his son Daniel should be supported; that none of his real estate should be sold during the life of his son, but that he be supported out of the same; and further provided that after the death of his son Daniel, then his real estate should be sold, and all his children receive share and share alike. After the death of the widow an act was passed, at the instance of Daniel, providing that on his application the orphans' court should make an order appointing a trustee to make sale of the said real estate, and to invest the proceeds under the direction of the court, so that the interest thereof shall secure to him that support during his natural life which the will intended him to receive out of the produce of the said real estate, provided that such sale shall be approved by the court; and providing, further, that the annual interest only of the proceeds of sale be paid to Daniel or his trustee, and the principal sum be invested, subject to all the provisions of the will. It was held that, the other parties in interest being of full age, under no disability, and objecting to the sale, the court below was right in refusing to direct it; that the Legislature does not possess the constitutional power, in such a case, to direct a sale against the consent of the other parties in interest who were of full age and under no disability, within the time during which the sale was forbidden by the testator; and that the act in this case was unconstitutional because of its repugnancy to that provision of the state Constitution which declares that no person shall be deprived of his life, liberty, or property unless by the judgment of his peers or the law of the land. See Palairet's Appeal, 67 Pa. 497, 5 Am. Rep. 450.

In Kneass' Appeal, 31 Pa. 87, it was held that an act of assembly authorizing executors to sell the real estate of one not sui juris, and to invest the proceeds upon the trusts declared in the will of the testator, on giving security for the faithful application of the fund, is a constitutional exercise of legislative power; and a purchaser will be compelled to take a title under such an act. But the Legislatures have no power to authorize the sale of the property of parties sui juris, and seised of a vested estate in the premises, against their consent.

In Hegarty's Appeal, 75 Pa. 503, it is held that the Legislature cannot, against the consent of parties sui juris, seised of a vested estate, authorize the sale of their real estate. See Gilpin and Wife v. Williams et al., 25 Ohio St. 283.

Upon the whole case, we are of opinion that, if the statute is to be construed as conferring a right upon the life tenant by curtesy, or in dower, to demand and require a sale of the real estate in which he or she is interested where all the parties are sui juris and the estate is vested, then the statute is unconstitutional as an unwarrantable interference with rights of property and as denying the equal protection of the laws; that, if the statute is to be regarded as merely conferring the power upon the courts to order a sale where the facts set forth "would justify the sale of real estate," to follow the language of the statute, then the bill before us, in our judgment, makes no such case, and sets forth no facts which would justify the court in ordering the sale; and therefore, in either aspect, the judgment of the circuit court sustaining the demurrer to the bill was right, and should be affirmed.

Affirmed.

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(117 Va. 356)

## PILCHER v. PILCHER.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. WILLS ⇐133 — VALIDITY — "SIGNATURE."

Under Code 1904, § 2514, declaring that no will shall be valid unless it be in writing and signed by the testator or by some other person in his presence in such a manner as to make it manifest that the name is intended as a signature, and, unless it be wholly written by the testator, the signature shall be acknowledged in the presence of at least two competent witnesses who shall subscribe the will in the presence of the testator, a holograph will, intended as such, which was signed only with the testator's initials, is valid, the statute not describing what shall be a "signature" and the term ordinarily meaning a sign, stamp, or mark impressed as by a seal, or the name of any person written in his own hand, signifying that the writing preceding it accords with his own wishes or intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 342–344; Dec. Dig. ⇐133.

For other definitions, see Words and Phrases, First and Second Series, Sign.]

2. WITNESSES ⊂⊃193—COMPETENCY—COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

A wife is, despite Code 1904, § 3346a, cl. 3, prohibiting a wife from testifying as to confidential communications by her husband, competent in a suit to establish his will to testify as to statements made by her husband, where they were made in the presence of a third person.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 740, 741; Dec. Dig. ⊂⊃193.]

3. WILLS ⊂⊃179—VALIDITY.

That a testator after preparing one holograph will wrote out another, which made the same disposition of his property, but did not sign it, does not affect the validity of the first.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 456, 457; Dec. Dig. ⊂⊃179.]

Error to Chancery Court of Richmond.

Proceeding by Mrs. Alice McCabe Pilcher for the probate of an instrument as the will of Edwin M. Pilcher, deceased, opposed by John M. Pilcher. The will was admitted to probate, and contestant brings error. Affirmed.

I shall make use of the clear and accurate outline of the occurrences in this case found in the brief of counsel for the defendant in error as furnishing a sufficient presentation of the material facts. It is as follows:

"Edwin M. Pilcher died in the city of Richmond, Va., on the 16th day of January, 1913, at the home of his sister, Mrs. Worsham, at the age of 46 years, after an illness of about six months, from an affection of the heart, known as endocarditis, leaving surviving him his widow, the appellee, and his father, the Rev. John M. Pilcher, his sole heir at law and next of kin. He had been a member of the bar of that city for about 20 years, and, for some years preceding his death, was a commissioner in chancery of the chancery court of the city of Richmond. He was regarded as an accurate and careful lawyer, and experienced in the drawing of legal papers.

"For seven years prior to his last illness he had been engaged to be married to the lady who is now his widow, who lived in Wheeling, W. Va., but their marriage had been postponed from time to time because her mother's health was bad, and she was the only daughter at home. Early in December, 1912, when Mr. Pilcher's condition had become very serious, his fiancée came to Richmond and they decided to be married at once, so that she might remain with him and help nurse him. They were accordingly married in his sick chamber on December 10, 1912, at the home of his sister, Mrs. Worsham.

"On December 15, 1912, Mrs. Pilcher's sister, Mrs. Belle K. Woods, came to Richmond and stayed with Mrs. Pilcher for about a week. On December 17th or 18th, while Mrs. Woods was alone with Mr. Pilcher in his sick chamber, he told her that he wished to make his will, and requested her to get him a piece of paper for that purpose. She was making some objection to his undertaking to write his will then, when Mrs. Pilcher entered the room, took her seat beside his bed, and proceeded to finish in pencil a letter to her mother, which she had already partly written in ink. Mr. Pilcher then said to his wife, 'I am going to make my will,' and asked her for a piece of paper. She, too, tried to dissuade him, but he reached over and took from Mrs. Pilcher her pencil, her uncompleted letter, and the book, or magazine, upon which she was writing, and, resting the book, or magazine, against his knee wrote with the pencil, upon the back of the sheet on which Mrs. Pilcher had already written part of her letter in ink, the following words:

"'I give to my wife, Alice McCabe Pilcher, all of my property, real and personal. E. M. P.'

"He then tore off that part of the paper on which these words were written and, holding it up, said, 'Girls, this is my will. I have left Allie everything I have.' Mrs. Woods commented on the brevity of the document, and he replied, 'The shorter, the better.' Mrs. Woods then commented on the use of his initials, and he replied: 'Why, that is as good a will as any man can make; that will hold in any court, almost a mark will go, Belle.' He then said to Mrs. Woods: 'I want you to preserve this. That is my will. I have left everything to Alice. I want you to see that she takes care of it.' Mrs. Pilcher then placed the paper in a book or magazine in which she was pressing some violets, and Mrs. Woods did not see it again until it was found in Mr. Pilcher's bag in February, 1914, although Mr. Pilcher within the next day or two asked her where the paper was.

"On Christmas day, 1912, a friend came to see Mr. Pilcher while he was taking his bath, and, in hurriedly removing the basin, Mrs. Pilcher knocked off the table the magazine containing this paper, and the paper fell into the water. Mr. Pilcher made an effort to rescue it, but Mrs. Pilcher picked it up and, in the effort to dry it, the writing was blurred. Mrs. Pilcher does not remember what became of the paper after that, although she does remember looking for it. She says that she did not see it again until it was found 14 months afterwards under the circumstances to be hereinafter narrated.

"After this paper fell into the water, although it does not appear exactly when, at the request of Mr. Pilcher, Mrs. Pilcher brought to his bedside a package of his private papers, which he had expressed the wish to have preserved, and left them with him, and it was in that package that the will was subsequently found.

"On December 26, 1912, Mr. Pilcher wrote in pencil a formal holograph will, leaving all of his property to his wife, and appointing her as executrix thereof, but affixed to this paper neither his name nor initials. On cross-examination, Mrs. Pilcher stated that she knew why he wrote this paper, and that she did not think that he considered it as a will, but upon objection of counsel for contestant, she was not permitted to testify as to why it was written. This paper of December 26th was laid aside by Mrs. Pilcher, and was found after Mr. Pilcher's death in the drawer of the dresser in her room.

"Mr. Pilcher died on January 16, 1913, and Judge Daniel Grinnan, who was then a practicing attorney and had, for many years, been a warm personal friend of Mr. Pilcher, took charge of, and undertook for Mrs. Pilcher, the management of his affairs and estate, as she, because of her mental distress and agitation, was in no condition to do so. The paper dated December 26, 1912, above referred to, was found in Mrs. Pilcher's dresser and turned over to Judge Grinnan. The fact that this paper was not signed escaped the attention of all of the family, and even of Judge Grinnan, who, on January 23, 1913, accompanied Mrs. Pilcher and Mrs. Woods to the chancery court of the city of Richmond for the purpose of having said paper admitted to probate as Mr. Pilcher's will. Upon reaching the court the paper was shown to the presiding judge, who called Judge Grinnan's attention to the absence of any signature. Thereupon Judge Grinnan abandoned the idea of offering the paper for probate and, instead, immediately moved on behalf of Mrs. Pilcher for her qualification as administratrix, and she at once qualified as such, although on account of a mistake in her name in the bond it was necessary for her to sign another bond on January 24th. In qualifying as administratrix, the clerk administered to her the formal oath to

the effect that as far as she knew or believed Mr. Pilcher left no will. A few days later Mrs. Pilcher returned with her sister to her old home in Wheeling, W. Va.

"Several weeks thereafter, in the latter part of February, 1913, Mrs. Pilcher was reminded by her sister, Mrs. Woods, of the will executed by Mr. Pilcher on December 17 or 18, 1912, and she at once wrote to Judge Grinnan telling him that such a paper had been drawn by Mr. Pilcher, and Judge Grinnan replied urging her to make a search for it, and to let him know if she found it.

"At that time her mother was very ill, requiring the constant attention of Mrs. Pilcher, her sister, and two trained nurses, and this condition remained unaltered until her mother died in October, 1913. In accordance, however, with Judge Grinnan's advice, Mrs. Pilcher and her sister then made such search for the will as their mother's condition permitted, but without success.

"After her mother's death in October, 1913, it was determined to break up the family home in Wheeling, and in February, 1914, while preparing to move, Mrs. Pilcher and Mrs. Woods came across a satchel of Mr. Pilcher's, which Mrs. Pilcher had carried from Richmond after his death, and in which they found a bundle of his private papers which he valued very highly, the same bundle which Mrs. Pilcher had handed to him at his request some time after Christmas day, 1912. In sorting over this bundle of papers they found an envelope upon which was written in the handwriting of Mr. Pilcher, but unsigned, this indorsement, 'My will, keep.' The envelope contained the paper which had been written by Mr. Pilcher on December 17 or 18, 1912, together with memoranda of certain personal directions to Mrs. Pilcher. At that time Mrs. Pilcher had no reason to think that there would be any contest over the validity of the paper as Mr. Pilcher's will, she attached no special value to the envelope, and, therefore, did not preserve it.

"Mrs. Pilcher at once showed the will to her father's attorney in Wheeling, who advised her to take it in person to Richmond. She was then quite sick and unable to leave home, but as soon as her physician would allow her to travel, which was in the early spring, she brought the will to Richmond, where it was offered for probate on April 10, 1914.

"After notice to the Rev. John M. Pilcher, the father, sole heir and next of kin of E. M. Pilcher, deceased, as provided by law, and upon an issue of devisavit vel non, both parties waiving a jury, the court heard the evidence, and admitted the said paper to probate as the will of E. M. Pilcher by order entered on the 9th day of June, 1914, from which order this appeal has been taken."

George Bryan, of Richmond, for plaintiff in error. John B. Minor, of Richmond, for defendant in error.

WHITTLE, J. (after stating the facts as above). Stripped of immaterialities, the dominant question presented by this record for our decision is the validity of a holograph will, at the end of which the writer, to authenticate the paper, has attached his initials by way of signature, instead of his full name. At the outset it is conceded that the precise question is of first impression in this jurisdiction, though affirmative precedent for the proposition is not lacking elsewhere. The circumstance is stressed by counsel for plaintiff in error that in McBride v. McBride, 26 Grat. (67 Va.) 476, Judge Staples, who delivered the opinion of the court, expressed doubt whether signing a holograph will with the initials of the testator's name constituted a sufficient signing. In that case, McBride had caused the draft of a will to be prepared by his attorney, with the terms of which he had expressed his approval, but postponed its execution until he could secure two particular persons to act as subscribing witnesses. A few days later he wrote a letter to his brother in Texas, informing him of his domestic troubles, and assigning reasons for wishing to disinherit a certain child. After directing his brother to burn the letter, he concluded as follows: "I don't know where to direct this letter, and don't like much to send it on uncertainties, and will not sign it. You know who it is from if you get ———," and signed the letter, "J.," an initial of his Christian name. Two months after reading the draft of the proposed will, McBride was accidentally killed, not having executed the paper. The court held that the letter was not a testamentary paper, either alone or as connected with the draft of the will.

It is obvious that no other conclusion could have been reached on those facts. The proposed will was never signed, and the fact that McBride did not intend the initial "J." as a signing of the letter conclusively appears on its face. He directed his brother to burn the letter, and expressly declared that he would not sign it, and did not wish to be identified with the paper in any way. The learned judge, in discussing the question of signing by "initials," at page 487 of 26 Grat., observes:

"In determining whether this letter constitutes a valid testamentary act, there is one other view which ought not to be omitted. It has been held in England that a will is valid if signed with the initials of the testator's name, or even his mark without any signature. It must be borne in mind, however, that under the English statute every will, even though written wholly by the testator, must be attested by witnesses. When, therefore, in England, an initial is used only, the attestation of the witnesses very clearly indicates that the testator designed that this form of signature should be a signing. Under our statute, an autograph will is valid without witnesses. Whether we can recognize an initial as sufficient, to the same extent as the English courts, may not be so clear. Upon that question we express no opinion. Its decision is not necessary for any of the purposes of this case."

The dictum of a lawyer of Judge Staples' acknowledged ability and learning is entitled to, and certainly would receive from this court, most respectful consideration. But Judge Staples not only expressed no opinion on the question, but explicitly declined to do so on the ground that it was not necessary for any of the purposes of that case. He does, however, refer to the fact that it is held in England "that a will is valid if signed with the initials of a testator's name, or even his mark without any signature." He also calls attention to the fact that the English statute requires attesting witnesses to holograph wills as well as others, and makes the suggestion that it may be the attestation of

the subscribing witnesses that gives assurance that the use of initials was designed as a signature. But the English cases holding the initials of the testator to be a sufficient signature are not confined to instances where the names of attesting witnesses are written in full. The cases go further and hold that the signature of the testator by initials is sufficient, when the attesting witnesses also sign by initials.

Thus, in Goods of Blewett (1880), 5 Law Rep. Prob. Div. p. 116, the court said:

"The only question then, is whether the signature and subscription by initials only are sufficient. A mark is sufficient though the testator can write. Baker v. Dening, 8 Ad. & E. 94. Initials, if intended to represent the name, must be equally good. The language of the Lord Chancellor in Hindermarsh v. Charlton, 8 H. L. C. 160, at page 167, seems equally applicable to the testator's signature as to the witnesses' subscription: 'I will lay down this as my notion of the law, that to make a valid subscription of a witness there must either be the name or some mark which is intended to represent the name;' and Lord Chelmsford says: 'The subscription must mean such a signature as is descriptive of the witness, whether by mark or by initials, or by writing the name in full.'"

So, in Margary and Layard v. Robinson (1886), 12 Law Reports, Prob. Div. p. 8, where the signature of the testator was by mark and that of the attesting witnesses by initials, it was held that the signature of the testator and the subscription of the witnesses were sufficient.

Having noticed what is required by the English statute of wills, and the construction placed upon it by the courts of that country, let us turn now to our own statute, the correct interpretation of which, at last, must control the case in judgment.

[1] Va. Code 1904, § 2514, reads as follows:

"No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

It will be observed that the statute makes no distinction in the character of the signature, or what constitutes a sufficient signature, between holograph and attested wills. It gives precisely the same force and effect to the former that it accords to the latter. By force of the statute one is made the equivalent of the other, though the manner of proving the two kinds of instruments is different; nevertheless, each possesses the same authenticity.

Now, all the authorities, English and American (including the quære in McBride v. McBride) agree, *that if this will had been attested, it would have been well signed under the English statute. Therefore, being holograph, it must follow that it is well signed under the Virginia statute, since that statute does not require attestation in such case.*

Nor does the Virginia statute define what shall constitute a "signature," but only prescribes that the will shall be signed "in such manner as to make it manifest that the name is intended as a signature."

Webster's New International Dictionary defines "signature" to be:

"A sign, stamp, or mark impressed, as by a seal. * * *" Also: "The name of any person, written in his own hand, to signify that the writing which precedes accords with his own wishes or intentions; a sign manual; an autograph."

The Standard Dictionary defines it to be:

"The name of a person, or something representing his name, written, stamped, or inscribed by himself, or by deputy. * * *"

No dictionary, so far as we are advised, restricts the meaning of "signature" to a written name; therefore, according to these definitions, what constitutes a signature must largely depend upon the circumstances of each particular case, though in all cases the intent is a vital factor. Whatever symbol is employed, it must appear that it "is intended as a signature."

Although, as remarked, there is no decision of this court directly in point, authority in this country is abundant for the proposition that the use of his initials by a testator animo signandi is a sufficient signing of his name.

The discussion of the subject in Knox's Appeal (1889), 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798, is instructive. In that case a letter, testamentary in character, in the handwriting of the deceased and signed by her with her Christian name only, was held to be a valid will. And the court was of opinion that a will signed by the testator with his initials made a stronger case for upholding the instrument. It quotes with approval from Browne on the Statute of Frauds, § 362, as follows:

"In cases where the initials only of the party are signed, it is quite clear that, with the aid of parol evidence which is admitted to apply to them, the signature is to be held valid."

In 1 Jarman on Wills (6th Am. Ed.) 106-108, it is said:

"It has been decided that a mark is sufficient, notwithstanding the testator is able to write, and though his name does not appear on the face of the will. A mark being sufficient, of course the initials of the testator's name would also suffice."

The leading text-writers speak with one voice on the subject. Jarman on Wills, supra; Page on Wills, § 172; Schouler on Wills (3d Ed.) § 303; 1 Redfield on the Law of Wills (3d Ed.) pp. 203, 205; Rood on Wills, §§ 254, 255.

That testator's signature by a mark is sufficient is well settled by the Virginia authorities. Smith v. Jones, 6 Rand. (27 Va.) 36; Clarke v. Dunnavant, 10 Leigh, (37 Va.) 14; Rosser v. Franklin, 6 Grat. (47 Va.) 1, 52 Am. Dec. 97; 3 Lomax's Dig. (2d Ed.) pp. 38, 70;

2 Minor on Real Property, § 1252; Long's Notes on the Law of Wills (1910), p. 17.

Adverting for a moment to the facts: We have before us a paper which, though exceedingly brief, is distinctly testamentary in character and terms, and by which the disposition of the property, in the circumstances, was a natural one. Testator was a lawyer in full possession of his mental faculties, and there is no question that the paper was wholly written by him, and signed with his initials at the appropriate place for his signature, the end of the instrument. Immediately before the paper was written, testator said to his wife and her sister, Mrs. Woods: "I am going to make my will," and after it was written, holding the paper up, he said: "Girls, this is my will. I have left Allie everything I have." In response to Mrs. Woods' comment on the brevity of the document, he remarked, "The shorter, the better." When she called attention to the use of his initials, he replied: "Why, that is as good a will as any man can make; that will hold in any court, almost a mark will go, Belle." He then said to Mrs. Woods: "I want you to preserve this. That is my will. I have left everything to Alice. I want you to see that she takes care of it." This evidence, and it is uncontradicted, plainly establishes testamentary intent and that the initials were used animo signandi.

The decisions of this court hold that the position of the signature at the end of the will furnishes sufficient internal evidence of finality or completion of intent. Ramsey v. Ramsey, 13 Grat. (54 Va.) 664, 70 Am. Dec. 438; Roy v. Roy, 16 Grat. 418, 419, 84 Am. Dec. 696; McBride v. McBride, 26 Grat. (67 Va.) 476, 487; Dinning v. Dinning, 102 Va. 467, 469, 470, 46 S. E. 473.

We entertain no doubt, either from the standpoint of reason or authority, that the writing in controversy was executed in substantial compliance with the statute, and, as the chancery court held, is the true last will and testament of Edwin Pilcher, deceased.

[2] There are two other subordinate assignments of error which may be briefly noticed.

(1) The first involves the ruling of the trial court on the admissibility of certain testimony of Mrs. Pilcher, under section 3346a, cl. (3), of the Code. The observations on that point by his honor, Judge Beverley T. Crump, who presided at the trial below, show a correct conception of the restrictive features of the statute. He sedulously safeguarded the admission of such communications between husband and wife as the statute was intended to protect, and confined the examination of the wife strictly to matters with respect to which she was clearly a competent witness. The communications to the admission of which exception was taken were made in the presence of a third person, and in no just sense were either confidential or privileged.

[3] (2) We attach no significance to the circumstance that some ten days after the first will was executed Mr. Pilcher prepared the draft of a more formal will. Admittedly he did not sign it, and the paper indicates no change of purpose on his part, since by the last paper, as by the first, he leaves all his property to his wife. Besides, Mrs. Pilcher, in response to the question on cross-examination, "* * * Can you tell the court what induced Mr. Pilcher to write the paper of December 26th, if he considered the first paper his will?" answered: "I do not think he considered this last paper he wrote as a will. He told me—" Mr. Bryan (the propounder of the question): "I object." Witness: "I do know what induced him to do it." But, at that point, an objection was again interposed and sustained by the court.

It thus appears that the information was at hand, but was excluded on technical grounds. Whatever may have been the intention of the testator, however, in writing the second paper, it was never signed by him and could not have had the effect of revoking his will.

Upon the whole case, we are of opinion that the sentence of the chancery court is plainly right and must be affirmed.

Affirmed.

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(117 Va. 274)

## CRAWLEY v. GLAZE et al.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. DEEDS ⇐⇒68—INVALIDITY—MENTAL INCAPACITY OF GRANTOR.

A grantor, not possessing mental capacity to execute a deed, may sue to set it aside as against the objection that the conveyance was made with design to defraud real estate agents out of commission claimed by them.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 149–155; Dec. Dig. ⇐⇒68.]

2. FRAUDULENT CONVEYANCES ⇐⇒172—MENTAL INCAPACITY OF GRANTOR.

Where a grantee induced a mentally incompetent grantor to execute a deed, and as a part of the plan fraudulently represented to the grantor the danger of suits against him for real estate commissions, the grantee could not defeat a suit to set aside the deed on the ground that it was executed to defraud agents out of commissions.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 523–529, 542; Dec. Dig. ⇐⇒172.]

3. APPEAL AND ERROR ⇐⇒174—OBJECTIONS NOT RAISED IN TRIAL COURT—CAPACITY OF PARTIES.

An objection to a suit by grantors to set aside a deed on the ground of mental incapacity to maintain the suit, not presented in the trial court, cannot be raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1093, 1094, 1121–1132; Dec. Dig. ⇐⇒174.]

4. APPEAL AND ERROR ⇐⇒231 — OBJECTIONS TO COMPETENCY—TIME TO RAISE.

An objection to a suit by grantors to set aside a deed on the ground of their incapacity to maintain the suit, not raised until after the taking of the evidence, is unavailable on appeal,

unless the objection was specifically made, and the record on appeal so affirmatively shows.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. ⟸ 231.]

5. DEEDS ⟸211 — INVALIDITY — INCAPACITY OF GRANTOR—FRAUD—UNDUE INFLUENCE.

Evidence *held* to sustain a finding that grantors were mentally incompetent to execute a deed, and were induced to execute it by fraud and undue influence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–647; Dec. Dig. ⟸211.]

6. VENDOR AND PURCHASER ⟸228 — BONA FIDE PURCHASER—NOTICE.

A purchaser from a grantee, who obtained by fraud and undue influence a deed from grantors mentally incapable to make a contract, is not a bona fide purchaser, where he knew of the condition of one of the grantors, and knew that no consideration had been paid for the deed, and had been informed by a third person that he regarded the transaction as fraudulent and he cannot claim anything under the deed, nor restitution from the grantors.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495–501; Dec. Dig. ⟸228.]

7. DEEDS ⟸75—FRAUD—RATIFICATION.

Where a suit was brought by grantors to set aside a deed very shortly after the grantee had made a deed to a third person, who was chargeable with knowledge of the facts, and was brought promptly after one of the grantors, rendered incompetent by reason of intoxication, realized what had happened, the third person could not defeat the action on the ground of the grantor's ratification of the transaction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 206–208; Dec. Dig. ⟸75.]

Appeal from Chancery Court of Richmond.

Action by Elvina E. Glaze and another against V. M. Sutton and K. T. Crawley. From a decree for complainants, defendant Crawley appeals. Affirmed.

S. A. Anderson, Boulware & Wallace, and W. M. Justis, Jr., all of Richmond, for plaintiff. David Meade White and Daniel Grinnan, both of Richmond, for defendants.

KELLY, J. Elvina E. Glaze and Humphrey Glaze, her husband, instituted this suit in the chancery court of the city of Richmond to cancel and annul two deeds, one thereof made by them to V. M. Sutton, and the other made by V. M. Sutton and her husband, J. M. Sutton, to K. T. Crawley. There was a decree in favor of the complainants, and K. T. Crawley brings this appeal.

The record, owing to the length of the pleadings and the mass of evidence taken in the cause, is very large, but all the questions of law and fact necessary to a correct determination of the controversy, as we see it, will sufficiently appear in the course of this opinion.

The action of the chancery court in overruling the demurrer to the bill is made the basis of the first assignment of error. The record does not disclose the grounds of demurrer relied upon at the hearing of the cause, but from the petition for appeal, adopted as the appellant's brief, it appears that two objections are now urged to the sufficiency of the bill.

[1] The first objection is that the bill shows on its face "that the plaintiffs, at the time they executed the deed to V. M. Sutton, did so with the express intention and design of defrauding certain real estate agents out of commissions which were claimed by said agents," and that therefore the bill fails to state a case for relief. In support of this contention we are referred to the case of Harris v. Harris, 23 Grat. (64 Va.) 737, and other decisions of this court, ending with Nunnally v. Stokes, 116 Va. 472, 82 S. E. 79, in which this court, in suits to annul conveyances, has recognized and applied the familiar maxim, "Nemo allegans suam turpitudinem audiendus est."

No rule is better settled in our law than the one here invoked, but it cannot be applied to the case in hand, as will clearly appear from the allegations of the bill considered in the light of the following statement by Judge Buchanan in Nunnally v. Stokes, supra:

"While the bill charges that the appellant was mentally inferior to her grantee, Stokes, *it is not alleged, nor is it pretended, that she did not have sufficient capacity to make a valid contract.* It is well settled that where both parties are legally capable of making contracts, although one may be much superior in mental capacity to the other, that circumstance does not take the case out of the general rule, *unless it appears that some advantage was taken* or undue influence exerted to obtain the conveyance." (Italics ours.)

See, also, Tatum v. Tatum, 101 Va. 77, 43 S. E. 184; Smith v. Elliott, 1 Pat. & H. 307.

[2] As will conclusively appear in connection with the second ground of demurrer, the complainants in this case substantially allege the existence of the very elements which were wanting to warrant relief in the Nunnally Case, namely, their lack of sufficient capacity to make a contract, and the exercise over them of an undue advantage and influence to obtain the conveyance. Moreover, the bill charges that the false and fraudulent representations of J. M. Sutton as to the danger of suits to collect commissions were part and parcel of the general plan and scheme of fraud by which Sutton himself procured the conveyance.

[3] There is no merit in this objection to the bill, and we pass to a consideration of the second and only remaining ground of demurrer, which is, as stated in the petition for appeal:

"That, according to the allegations of the plaintiffs' bill, the suit could not possibly have been maintained by the parties plaintiff, for the reason that, if the allegations therein set forth are true, the plaintiff Elvina E. Glaze was manifestly incapable of maintaining a suit in her own proper person."

It will be observed, as above stated, that the construction thus placed by appellant upon the charges in the bill completely answers the first ground of demurrer, and renders wholly inapplicable to this case the general rule laid down in Nunnally v. Stokes, supra, and other cases of that type.

It is equally clear, we think, that the demurrer cannot be sustained upon this second ground. The record does not disclose, and counsel for the contending parties are not agreed, whether this defense was made in the lower court. If the question was not raised there, it is of too technical a nature to receive serious consideration when raised for the first time on appeal. Bird's Committee v. Bird, 21 Grat. (62 Va.) 715; Cole's Committee v. Cole, 28 Grat. (69 Va.) 365. See, also, Richmond Ry. & Elec. Co. v. Bowles, 92 Va. 738, 24 S. E. 388; Jackson v. Counts, 106 Va. 7, 54 S. E. 870.

The demurrer, whatever may have been the grounds urged in the lower court, appears not to have been argued until after the taking of the evidence was completed. We cannot say whether the objection for want of proper parties was or was not raised at all, but there is a presumption in favor of the correctness of the decree appealed from, and the burden is on the appellant to satisfy us that the decree contains reversible error. Smith v. Alderson, 116 Va. 986, 83 S. E. 373; Johnson v. Michaux, 110 Va. 595, 66 S. E. 823. This rule of decision would seem to apply with peculiar force to a question involving, as does the one now being considered, the merest matter of form —the intervention of a nominal party as a next friend (there being no committee), who would have been merely "a shadow," as expressed by the president of this court in Richmond Ry., etc., Co. v. Bowles, supra, and whose nominal presence or absence it is now manifest could not possibly have helped or hurt the rights of any party at any stage of this cause.

[4] Without deciding whether there would have been any merit in the point, if it had been raised at the late stage in the proceedings at which the demurrer was argued, we have no hesitancy in holding that, if the appellant intended to rely upon this objection to the bill as a ground of reversal in this court, he should have made the objection in the lower court in such a manner as that it would specifically and affirmatively appear in the record.

[5] Coming now to a consideration of the remaining assignments of error, which challenge the correctness of the decree complained of in its findings against the appellant on the real merits of the case, we cannot, within the reasonable limits of any written opinion, attempt a complete and detailed discussion of the charges and countercharges of the parties and the evidence respectively introduced in support thereof, set out in a record containing over 700 printed pages, but must, in the main, be content to state merely our conclusions, arrived at after a patient and careful consideration of the entire record. A discussion, even thus limited, will of necessity be rather a lengthy one.

As we see this controversy, a correct solution of it depends upon the view to be taken of the deed dated September 28, 1909, from E. E. Glaze and Humphrey Glaze to V. M. Sutton; for, as we shall see, Crawley occupies no higher position, from a legal and equitable standpoint, than Sutton acquired by this deed.

With reference to this deed, the learned judge who pronounced the decree complained of said in the course of the written opinion which he filed with the record:

"All must admit that, if this suit had for its object the setting aside and canceling of the deed from Glazes to V. M. Sutton, the passing of a decree canceling the said deed would be proper."

In this statement we fully concur. It seems to us impossible to follow the events and circumstances leading up to and surrounding the making of this conveyance, as disclosed by the record, without becoming fully convinced that this conveyance was the result of ignorance and imbecility on the part of the Glazes and of deliberate imposition and fraud on the part of J. M. Sutton. We are further of opinion that K. T. Crawley is, to say the least of it, chargeable with constructive notice of this fraud.

The transaction belongs to that class which is so well described by Judge Staples in Parr v. Saunders, 11 S. E. 981, as follows:

"A transaction may, of itself and by itself, furnish the most satisfactory proof of fraud, so conclusive as to outweigh the answer of the defendants, and even the evidence of witnesses. The circumstances attending and following a transaction are often of such character as to leave not even a shadow of doubt as to the real object and motive of the parties engaged in it. * * * Experience attests that in a majority of cases fraud can only be established by circumstances. The motives and intentions of the parties can only be judged of by their action, and the nature and character of the transaction in which they are engaged. These often furnish more conclusive evidence than the most direct testimony."

See, also, Jones v. McGruder, 87 Va. 360, 12 S. E. 792; Hazlewood v. Forrer, 94 Va. 703, 27 S. E. 507; Fitzgerald v. Frankel, 109 Va. 607, 64 S. E. 941.

As usual in cases of this character, there is much conflict in the evidence; but we are satisfied that the weight of the evidence warrants the following statement: Humphrey Glaze was mentally weak, addicted to drink, and an easy victim in the hands of such a man as J. M. Sutton. Elvina E. Glaze's mind was seriously impaired as the result of illness, and she was not competent to protect or understand her own interests. She was the owner of the farm in question. In August or September, 1909, her husband, acting for her, listed it for sale with the Rudd Realty Company, of Richmond, and J. B. Martin, an associate of that concern, took charge of the proposed sale for the Glazes. The L. W. Wells Realty Company, at that time operating in Richmond, had as an associate the said J. M. Sutton, who appears in the record to have been so thoroughly dishonest and unscrupulous in character and in

methods that any person of average intelligence, upon anything like an intimate association with him, could scarcely have failed to discover that he possessed these characteristics. At this same time a firm called the Taggart-Frayser Company was doing a real estate business in Washington, D. C., and had control of the property in that city which figures in this case. The Wells Company represented the Taggart-Frayser Company in Richmond. The said J. B. Martin, associate of the Rudd Company, had a conversation with the said J. M. Sutton, associate of the Wells Company, looking to an exchange of the Glaze farm for income-bearing property. Sutton suggested what he called an apartment house in Washington, giving Martin a description of it, and Martin in turn took this description up with Humphrey Glaze, who was favorably impressed with it, and thereupon L. W. Wells and J. M. Sutton took Glaze to Washington to see the property. On that trip (and afterwards) the property was represented to Glaze by Sutton and others, speaking for Taggart-Frayser Company, as being very valuable. Its purchase, if it was worth what they represented, would have netted Glaze and wife much more than they were asking for their farm. Glaze thereupon signed an agreement, as agent for his wife, for the exchange of the properties. Glaze drank whisky and beer rather freely with Sutton on this trip, and continued to do so to the end of the negotiations. Upon their return from Washington, Sutton (who from that time to the conclusion of the transaction seems to have had Glaze completely under his control) busied himself to procure the signature of Mrs. Glaze to this contract. Mrs. Glaze was not in a mental condition at that time to understand what she was doing, and Sutton could not well have failed to perceive that this was true. Thereafter, with Sutton still a conspicuous figure, Glaze and wife went to the office of Rudd & Co. and signed the deeds necessary to carry out the exchange. Miss Fleming, a friend of Mrs. Glaze, who was present, as she says, because Mrs. Glaze did not know what she was doing, had an understanding with Rudd & Co. not to deliver the deeds until they were satisfied that $5,000 could be borrowed on the Washington property, the availability of this property for a $5,000 loan having apparently been at that time fixed upon as a test of its minimum value. When the Taggart-Frayser Company presented the deeds for the Washington property to perfect the exchange, they were informed of the conditions upon which the Glaze deeds had been left with Rudd & Co., and the understanding reached at that time seems to have been that the matter would remain in statu quo until Rudd & Co. could be satisfied upon this point. Shortly after this understanding was reached, to wit, on the 28th of September, 1909, without the knowledge of Rudd & Co., J. M. Sutton obtained a deed from Elvina E. Glaze and Humphrey Glaze for the farm, reciting a consideration of $6,500, none of which, as a matter of fact, was paid. The first intimation Rudd & Co. had of such a deed came to them from the Daily Record, showing that the deed had been executed and recorded.

It is charged in the bill, and we think it is established by the evidence, that after Rudd & Co. refused to give up the exchange deeds, J. M. Sutton wrongfully, falsely, and fraudulently represented to the Glazes that the Taggart-Frayser Company was going to sue them for not carrying out the contract of exchange; that Rudd & Co. were about to sue them for commissions; that they would lose all their property, unless they did something without delay to save it; that Sutton succeeded in making complainants believe that this danger was a real one, and by this means, and by false claims of friendship, and by the free and frequent use of whisky with Humphrey Glaze, all with the purpose of defrauding the Glazes, gained the confidence of the complainants, and persuaded them that it would be best for them to convey their property to him, cautioning Glaze to say nothing about the conveyance. In the meantime, on the 16th day of September, 1909, by a written contract which was signed by Taggart-Frayser Company, L. W. Wells, agent, J. M. Sutton, and Kenner T. Crawley, and witnessed by A. R. Anglea, the Taggart-Frayser Company agreed to convey the farm in question to Kenner T. Crawley in consideration of $3,630, to be paid one-third cash and the balance in one and two years, and Crawley at that time paid, as shown by the contract, $105 as a cash guaranty for the sale of the property, "the said A. R. Anglea to hold $100 until said deed is acknowledged correct by Kenner T. Crawley's attorney." In other words, Taggart-Frayser Company, Wells, and Sutton were by this contract arranging with Crawley and Anglea to sell to Crawley for $3,630 the property which Taggart-Frayser Company was trying to get from the Glazes in exchange for Washington property which they had repeatedly told the Glazes was worth several times that sum. The Glazes knew nothing whatever about this contract. A. R. Anglea, mentioned in the agreement, was an acquaintance of Crawley who had previously had other real estate transactions with him. The attorney for Crawley, referred to in the agreement, was P. A. L. Smith, who attempted to represent the Glazes in one phase of this complex and ramified transaction, and to represent Crawley in another, and whose connection with the matter is, we think, fairly summarized in the opinion of the judge of the chancery court as follows:

"P. A. L. Smith was at least indiscreet in serving two clients in the same transaction at a time when the interests of each required free, independent, and conflicting duties. It is true, when Smith found out that the Glazes were about to lose all their property, he probably did

all he could to regain their property for them. His loyalty to Crawley, who had been his client before the Glazes were, and who was his client in the examination of the title to the property in dispute, and for whose security in the title he showed great interest, evidently so biased his judgment that as between Glaze and Crawley he was not an impartial and free adviser."

[6] On October 7, 1909, J. M. Sutton and wife conveyed the farm to K. T. Crawley for an expressed consideration of $3,630, one-third of which, according to the recital in the deed, was to be paid "in cash, and the balance in one and two yearly installments, evidenced by negotiable notes and secured by deed of trust." On the same day Crawley executed to C. H. Sutton (in no way related to J. M. Sutton) a deed of trust on the farm to secure one note for $1,696, payable one year after its date. Crawley seems to have paid to Sutton the amount of the cash payment recited in said deed, and assumed a mortgage of $1,000 on the farm, and claims that the note secured by the deed of trust was made for $200 more than the balance of the purchase money, because he needed about that amount to use in improvements on the farm, had exhausted his cash, and it was expected that the note would be at once discounted through C. H. Sutton, the trustee. At any rate, he and some representative of Taggart-Frayser Company had the note in their possession and were trying to get the cash on it after the deed from the Suttons to him had been made. The note was in J. M. Sutton's hands when this suit was brought. The trustee, who had no sort of connection with these negotiations with the Glazes, seems to have at one time told Crawley that he would arrange for the discount of this note; but he subsequently declined to handle it, as he explained to Crawley, because he had heard that the transaction was not straight.

Crawley lays much stress upon the fact that Humphrey Glaze was present when Sutton delivered the deed for the farm and got the cash and note. Beyond a doubt Glaze was there. In fact, he had been in Sutton's company, not to say his custody, practically all the time for some days. He was a pitiful figure in the scenes presented when these papers were passed. He had been drinking with Sutton that day, and for several days, part of the time to excess, and even when sober he was weak and gullible. It may be well in this connection to note the others who were there. P. A. L. Smith was there, undertaking to act for Glaze, and yet, as shown in Judge Moncure's opinion, supra, and in the actual occurrences at the time, more interested for Crawley, and he was not in a position, however good his intentions may have been, to fairly and safely advise Glaze, and permitted a transaction to be consummated which he now says he knows was a mistake, and which we think an unbiased judgment on his part would never have permitted.

Mr. Davidson was there with a personal interest in the result, and says that Glaze was "intelligent." The bias of this witness is clear upon a view of the whole of his deposition. Mr. Ryan, whose only connection with the matter was to represent M. Davidson, and who is in no way involved otherwise, was there. His testimony is to the effect that Glaze seemed to him "intelligent" and "not different from his normal condition"; but, so far as the main transaction was concerned, Mr. Ryan says that he had already become "exceedingly suspicious" of it, from what he had observed in talking with Sutton and Wells. Crawley was there. He had already been warned as to the fraudulent character of the deed from the Glazes to Sutton; but he was buying the farm as a speculation, and was proceeding to complete his purchase at a figure which he was bound to know could not net the Glazes over half the consideration recited in their deed to Sutton, upon which nothing had been paid. Sutton was there, and got the cash and the note. Humphrey Glaze got nothing, and Elvina Glaze, the owner of the property, was not there, and had never even heard of the sale to Crawley.

Under these circumstances, we cannot think that the presence of Humphrey Glaze does more than to emphasize the extent to which he and his wife were imposed upon and defrauded. They at no time got any of the money. Sutton received that, and he and Wells divided it; and while it does not so appear in the record it was conceded at the argument of this case that since the trial of the case in the lower court both Sutton and Wells had left the state and taken the money with them. The note was finally turned over by Sutton to P. A. L. Smith, and by him filed in this cause, and was ordered canceled by the decree of the lower court.

In the negotiations which led to the conveyance to Crawley, Sutton, the chief actor, says that he was "working under the instructions of Wells, Smith, and Anglea, and people interested in the business." In the light of the facts disclosed by the record, we would attach very little weight to the unsupported statements of Sutton, but we think the record shows that, if not working under their instructions, he was certainly in very close touch with the parties he named, and with the Taggart-Frayser Company.

Not to further prolong this discussion, we are of opinion that the deed from Glaze and wife to Sutton was clearly fraudulent, and that Crawley must be charged with knowledge of the fraud. As Judge Moncure, of the chancery court, says in dealing with the information which Crawley had:

"It was quite enough to put him on inquiry, and proper inquiry would have disclosed to him all the fraud charged and shown in this record, which should have prevented him from further proceedings in the purchase."

While he disclaims all knowledge of the fraud, he admits that he knew that no con-

sideration had been paid for the deed from the Glazes to Sutton, and that the witness Schroetter had told him that he regarded the transaction as fraudulent. There is other direct evidence to the same effect, and a significant, if not a conclusive, circumstance against him, is that he had great difficulty in remembering whether C. H. Sutton informed him of the probable fraud *before* or *after* he got his own deed from V. M. Sutton. If his own course had been clear, he should have been able to say instantly that this information came after he closed the trade. We think it clear that, if Crawley did not have actual knowledge of the fraud, he and his attorney, Smith, both knew enough to put him on notice, and, this being true, he can claim nothing under the conveyance, and his claim that he should at least be given a lien on the land for the cash paid by him to Sutton must be denied. He does not occupy the position of an innocent purchaser in any sense or to any extent, but his position is rather that of a participant in Sutton's fraud and breach of trust. Upon familiar and well-settled equitable principles, he cannot claim any restitution from the Glazes. See Jackson v. Counts, 106 Va. 10, 11, 54 S. E. 870; Barksdale v. Finney, 14 Grat. (55 Va.) 338, 348, 349.

In his answer and in his deposition Crawley emphasizes the fact that he told Glaze at the time that if the Washington deal did not go through, and Glaze should want the property back, he (Crawley) would reconvey it upon a return of the consideration. This offer was unusual, and not according to the ordinary course of business between strangers, and does not appear to us to help his standing, but rather, under the circumstances, to create a further suspicion against him.

[7] It is contended on behalf of Crawley that the Glazes, after they learned of the fraud which had been perpetrated upon them by Sutton, waived the fraud and ratified the transaction by attempting to recover from Sutton the money which Crawley had paid for the farm, and by asking permission of Crawley to remain on the farm for a short period of time; but we do not think the record as a whole bears out this contention. The suit was brought in a very short time after the deed was made to Crawley, and was instituted promptly after it appears that Glaze sobered up and was brought to anything of a realization of what had happened. It is well settled that, before a ratification of a transaction of this kind can be binding, it must be made with full knowledge of the rights intended to be waived; and the fact that the person defrauded has waived his rights and has intended to waive them must plainly appear. Fitzgerald v. Frankel, 109 Va. 610, 64 S. E. 941.

With reference to the contention that the property was sold to Crawley for an adequate price, we think the evidence justifies the conclusion, expressed in the opinion of Judge Moncure, that the property was worth considerably more than the consideration expressed in the Crawley deed; and in addition to this fact it appears very clearly that Crawley and his attorney knew, or ought to have known, that Sutton was claiming and would certainly appropriate something like one-half of the cash payment on account of expenses and advances which he said he had incurred and made on behalf of Glaze in connection with this sale. This would have reduced the net proceeds to Glaze to a grossly inadequate price.

The decree of the chancery court was plainly right, and must be affirmed.

Affirmed.

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(117 Va. 370)

## RICKS et al. v. SCOTT et al.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. EASEMENTS ⟸18—WAY OF NECESSITY—IMPLIED GRANT.

Where an owner of two adjoining farms having a cart path leading from one to the other, and thence to a public road, sells one of them, no mention being made of the cart path, there was no implied grant of the right of way as of necessity where there is in existence another road leading from the sold farm to the same road, but in a different direction, which the grantee had the unqualified right to use.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50–55; Dec. Dig. ⟸18.]

2. EASEMENTS ⟸36—ADVERSE USER—EVIDENCE.

Evidence *held* insufficient to show that a purchaser of a farm adjoining the grantor's farm or his privies used it or laid claim to a right of way over a cart path leading through the grantor's farm to a public road so as to give any rights as against a bona fide purchaser of the grantor's.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88–93; Dec. Dig. ⟸36.]

3. EASEMENTS ⟸20—TRANSFER OF PROPERTY—BONA FIDE PURCHASER.

Where no private right of way or other easement is reserved in the deed itself, and the purchaser has no notice of any claim by third persons of a right of way over the land, he takes the land free from any claim therefor either from the grantor or those claiming under him.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 59, 60; Dec. Dig. ⟸20.]

Appeal from Circuit Court, Southampton County.

Suit by Joseph E. Scott and others against W. A. Ricks and others. From a judgment for complainants, defendants appeal. Reversed.

J. Hoge Ricks and Cutchins & Cutchins, all of Richmond, for appellants. R. E. L. Watkins, of Franklin, and Peatross & Savage, of Norfolk, for appellees.

CARDWELL, J. This appeal is from two decrees entered in a suit in equity instituted

by appellee Joseph E. Scott to enjoin appellants from obstructing appellee Scott, or those claiming under him, in the use and enjoyment of a certain passageway or road leading, as is alleged, from a certain farm owned by said appellee, known as the Munford farm, through an adjoining farm, now owned by one of the appellants, and known as the Pretlow farm, to a public road.

It appears that prior to January 1, 1904, Mrs. Deborah R. Pretlow, widow of John Pretlow, deceased, was the owner of two tracts of land, lying side by side, and known, respectively, as the "Pretlow farm" and the "Munford farm," each containing several hundred acres of land. Upon each farm there was a dwelling house and other buildings usually found upon such farms. For years prior to his death the residence and place of abode of John Pretlow and that of his widow after his death was upon the Pretlow farm, the northern boundary of which was the "Franklin public road," the mansion house on the Pretlow farm being near this road, while the Munford farm lay to the south or the southwest of the Pretlow farm, and Mrs. Pretlow, as did her husband, managed, used, and operated the two farms as a single plantation, cultivating portions thereof with hired hands, and renting other portions to tenants, some of whom resided on the plantation, while others lived elsewhere and came thither to tend their crops.

At the time mentioned, and long prior, there was a road called in this record the "Demus Williams road," leading out eastwardly from the southeastern side of the Munford farm through the land of one Nicodemus Williams, and down the dividing line between the lands of E. J. Joyner and Thomas White to the Franklin public road. Continuing westwardly across the Munford farm and through the lands of one W. J. Barham, the "Demus Williams road" extended to Barham's mill and the public road to Courtland, called the "Courtland road." This "Demus Williams road" had been in existence and use, according to the evidence, since a time when "the memory of man runneth not to the contrary"; one of the witnesses 64 years of age saying that it had been there and in use "ever since he knew anything," and "looks like long before." This road appears to have been used for many years in common by the tenants, occupants, and owners of the Munford farm, and by other persons who wished to go to Barham's mill, or to the "Courtland road." Some years ago, however, a new road was cut through from the Franklin road to the Courtland road, and the Barham's mill road ceased to be used as theretofore; but thereafter, and in recent years, the tenants, occupants, and owners of the Munford farm, who, it seems, found it necessary to do so, have made a general and continuous use of said "Demus Williams road." There was during the time mentioned a "cart path," or plantation road, running southwardly from the barnyard of the Pretlow farm into and across the Munford farm, and connecting with the road to Barham's mill. In traveling over this cart path northwardly from the Munford farm, by passing through said barnyard and close by the Pretlow dwelling house, and out through the front lawn gate, the Franklin road was reached, at a point about one or one and a quarter miles farther from the town of Franklin than the point where the "Demus Williams road" intersects the Franklin road. This "cart path," it is conceded, is "just an ordinary cart path through the farms," and was used primarily as a plantation road, but, as was usual in such cases, Mr. Pretlow in his lifetime, and Mrs. Pretlow after she became the owner of the two farms, solely as a matter of courtesy, or in a neighborly spirit, permitted their neighbors to use it, but, as also clearly appears from the evidence in this cause, whenever this privilege was abused the farm gates across this road were locked, and for a time passing thereover through the Pretlow farm to the public road was prohibited.

By deed dated January 1, 1904, and duly recorded, Deborah R. Pretlow, widow of John Pretlow, deceased, conveyed to appellee Joseph E. Scott, the complainant in this cause, the Munford farm, describing the same by metes and bounds, but making no mention of conveyance of the right of way now claimed by Scott, from the Munford farm along said cart path out to the Franklin road. By deed of even date with that just mentioned, said Scott conveyed the Munford farm to Ricks and Watkins, trustees, in trust to secure the payment of eight certain notes, evidencing a part of the purchase price for said property, which notes, as stated in the bill in this cause, had all been paid except the two last maturing, aggregating in principal the sum of $587.50.

On February 5, 1907, Scott conveyed the Munford farm, subject to the lien of the above-mentioned deed of trust, and other property, to P. R. Camp, trustee, in trust to secure to P. D. Camp the payment of the sum of $2,960.40, which deed expressly states that the conveyance of the Munford farm is made "subject to a prior deed of trust in favor of Deborah R. Pretlow," and provides that, in the event of the sale of the Munford farm by said trustee, "out of the proceeds of sale the said trustee shall pay: (1) Expenses of the trust; (2) the amount then remaining unpaid on the debt secured by the prior deed of trust in favor of Deborah R. Pretlow; (3) the balance then remaining unpaid * * * on the bonds secured to P. D. Camp by this deed; and (4) the remaining of the purchase price, if any, he shall pay to the said J. E. Scott."

Upon the death of Mrs. Pretlow some time in the year 1907, the Pretlow farm, as well as all of the residue of her estate, after the payment of several specific bequests, became

the property of her heirs at law, who are the defendants to this suit and appellants here. In December, 1907, the devisees of Mrs. Pretlow offered the Petlow farm for sale at public auction at which sale Elizabeth R. White became the purchaser, and still owns and occupies the farm.

It further appears that from January, 1904, until January, 1911, said Joseph E. Scott, the purchaser of the Munford farm from Mrs. Pretlow, had been in possession of and cultivating it, while living just opposite the point where the "Demus Williams road" enters the Franklin road, and that in going to and from the Munford farm he used this "Demus Williams road" almost exclusively, as testified to by two witnesses who lived by the side of this road and near to said Scott's place of residence. During this period of time Scott laid no claim to any supposed right of way over the Pretlow farm, nor did he often use the cart path across it, concerning which he states, when testifying in this case: "I did seldom use it myself." In fact, instead of claiming and using a right of way over and along said cart path, he (Scott) on several distinct occasions built fences across it at the point where it crossed the dividing line between the Munford and Pretlow farms, thus preventing any passing that way through the two farms. It further appears that P. D. Camp, "agent" for Scott, in January, 1911, was endeavoring to negotiate a sale of the Munford farm, and one M. C. Blythe, who lived at a point known as Williams Crossroads, across the Pretlow farm from the Munford place, and for whom the "Demus Williams road" was very much out of the way and inconvenient, agreed to purchase the Munford farm, "provided a right of way could be secured for him across the Pretlow farm."

P. D. Camp, testifying in this case, says:

"Mr. Joe Scott authorized me to sell the farm if I could find a purchaser for it, and Mr. Blythe had made an offer for the farm if we could get a right of way through the Pretlow farm. * * *"

And again:

"I had an offer for the Munford farm of $4,450, provided the party that made this offer could get through the Pretlow farm, and under no other conditions would he buy the farm, except to give him that right of way through the Pretlow farm. * * *"

And again says the witness:

"As stated just now, Mr. Blythe said he would give $4,450 for the farm upon the condition that he should have a right of way out to the road through the Pretlow farm, and under no other conditions."

On the 9th or 10th of January, 1911, when W. A. Ricks, representing the devisees of Mrs. Pretlow, went to P. D. Camp "to see if he would take up one of the notes drawn by Mr. Scott, as he had been doing before," Camp insisted that a right of way across the Pretlow farm be secured for him, or rather for Mr. Blythe, and stated that the note which was then due would not be paid unless such a right of way was secured. Upon being told by Dr. Ricks that he had no right to give a right of way through the Pretlow farm, as the farm had been sold to his sister, Mrs. White, who then owned it, Camp refused to pay the note.

While recognizing no right on the part of Scott or Camp to an easement of a right of way across the Pretlow farm, but anxious to settle, if possible, without a lawsuit the controversy then for the first time made concerning such an easement, appellants, other than Mrs. White, did what they could to assist Scott in his efforts to secure the desired right of way from Mrs. White across her property, but, failing in these efforts, and although believing that the owner, tenants, and occupants of the Munford farm had an undisputed right of way over the "Demus Williams road" to the Franklin public road, and although this right had never been questioned until then by Scott and Camp, in order that all questions concerning this right of way might be settled once and for all time, W. A. Ricks, on July 8, 1911, procured and had duly recorded a deed executed by Thomas P. White, E. J. Joyner, and Nicodemus Williams and their wives, in which the grantors did "give, grant, and confirm unto W. A. Ricks and all other persons, a free and unobstructed right of way of the same width as the one now in use, over and along the old roadway now leading from the county road to the tract of land known as the 'Munford farm,' which was purchased by Joseph E. Scott from Deborah R. Pretlow on the 1st day of January, 1904. Said roadway is located in Franklin magisterial district of Southampton county, Va., and runs across the lands of Nicodemus Williams and between the farms of Thomas P. White and E. J. Joyner to the county road leading from Franklin to 'Uggal' or Williams Crossroads."

The grantors in this conveyance, as plainly appears, were the only persons who could have raised a valid objection to the free and unobstructed use of the "Demus Williams road" by the owners, tenants, or occupants of the Munford farm, and which had been so used, as already stated, for very many years prior to this conveyance; the use whereof never having been before called in question.

In August, 1911, default having been made in the payment of the debt due P. D. Camp and secured by the second deed of trust above mentioned, P. R. Camp, the trustee therein named, sold the Munford farm at public auction, P. D. Camp becoming the purchaser thereof at the price of $4,000, and the farm was conveyed to him by the trustee. The purchase money from this sale—viz., $4,000—appears to have been sufficient to pay the costs of executing the trust, the balance due on the debt secured by the prior deed of trust in favor of Mrs. Pretlow ($587),

with interest, and also the debt secured by the second deed to P. D. Camp, but it does not appear that P. R. Camp, trustee, has ever settled any account as such, nor did he pay the balance of the debt secured to Mrs. Pretlow. Default having been made in the payment of said balance due on the debt secured to Mrs. Pretlow, John D. Abbitt was substituted as trustee in said deed securing the same, in the place and stead of Ricks and Watkins, the trustees therein named, who declined to execute the trust, and, being required so to do by the holder of the notes evidencing the balance due on said debt, Abbitt, trustee, advertised the Munford farm for sale at public auction; whereupon said Joseph E. Scott instituted this suit, alleging in his bill that at the time of the conveyance of the Munford farm to him there was a cart path across the Pretlow farm, which was reasonably necessary for the proper enjoyment of said Munford farm, and passed with said farm as an appurtenance thereof; that the exercise of said right of way by the "tenants, owners, and occupants" of said Munford farm has been obstructed by Elizabeth R. White (the present owner of the Pretlow farm), and their right thereto denied; that a sale of said Munford farm while this question concerning its appurtenances is undecided would result in the farm's being sold at a sacrifice, etc.; the prayer of the bill being that Abbitt, trustee as aforesaid, be enjoined from selling the Munford farm until the question of the right of the tenants, owners, and occupants to the alleged easement appurtenant thereto could be determined; that said cart path and right of way across the Pretlow farm may be decreed to have passed to complainant by the deed from said Deborah R. Pretlow, as an incident and appurtenant of the property thereby conveyed, etc.

A preliminary injunction was awarded in accordance with the prayer of the bill, and the defendants (appellants here) in due course demurred to the bill, and answered the same both by an original and an amended answer, asking, for reasons stated, that the answer be treated as a cross-bill, and denying that the cart path in question was appurtenant to the Munford farm; denying that it was the intention of Deborah R. Pretlow to grant to complainant Scott any right in this cart path through the Pretlow farm, or that it through the last-named farm was at all necessary for the proper enjoyment of the Munford farm; and alleging that at the time of said conveyance to the said Scott there was, and still is, a well-defined road and right of way ("Demus Williams road") from the southeastern side of the Munford farm to the public road, which road is all the outlet that was or is needed for the convenient use of the Munford farm, etc.

P. D. Camp appeared by counsel at the October, 1912, term of the trial court, and was permitted, over the objection of the defendants, to file his petition and to become a plaintiff in the cause, and praying the relief asked in the bill filed by Scott. On the same day that the petition by Camp was filed and he was admitted as a party plaintiff, the cause was argued by counsel before Hon. Jesse F. West, who was sitting for Hon. J. L. McLemore, judge of the circuit court of Southampton county and thereupon the judge presiding, of his own motion, entered a decree reciting that the court, being of opinion that complainants were entitled to a right of way across the Pretlow farm, appointed commissioners to locate such a right of way; but, the parties to this controversy being unwilling to abide by that ruling of the court, the final decree in the cause was entered, by which the court adjudged and decreed, as a matter of fact:

"That the road or path mentioned or described in the bill of complaint across the farm, known as the Pretlow farm, from the farm known as the Munford farm, to the public road, was used by the owner of the two said farms, when the two said farms were owned by the same owner as one heritage, for the use and convenience of the tenants, owners, and occupants of the farm known as the Munford farm, and that the said road or right of way was and is clearly marked, open, obvious, notorious, and visible, and had been established and used for a long number of years, to wit, more than 30 years prior to the sale of the Munford farm to the complainant herein Jos. E. Scott, and that the said road or right of way was and is reasonably necessary for the convenient use and enjoyment of the Munford farm; that at the time of the sale of the Munford farm to the complainant Jos. E. Scott the said Munford farm was entirely surrounded by the land of the grantor in the deed to the said Jos. E. Scott or by the land of third parties, and that there was no way of getting from the said Munford farm to the public road except across the land of the grantor of the said Jos. E. Scott, who was the predecessor in title of the defendants herein, or across the land of strangers."

The rulings of the court in not sustaining appellants' demurrer to the bill and in admitting P. D. Camp as a party plaintiff in the cause are assigned as error in the petition for this appeal, but that relating to the ruling on the demurrer was waived in the oral argument here, and, in our view of the case, it need only be considered upon its merits.

The case upon its facts is wholly dissimilar to that line of cases to which belong Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165, Scott v. Moore, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749, Oney v. W. B. Vista L. Co., 104 Va. 580, 52 S. E. 343, 2 L. R. A. (N. S.) 832, 113 Am. St. Rep. 1066, and Muse v. Gish, 114 Va. 90, 75 S. E. 764, so much relied on by counsel for appellees.

[1] In section 103, vol. 1, Minor on Real Prop., the rules of law peculiarly applicable to the facts of this case are clearly set out and the authorities to sustain the text cited. The learned author says:

"Easements are sometimes implied upon a grant of land, because without them the prop-

erty granted could not be used by the grantee, or could not be used for the purpose for which it was granted. Such easements are said to arise by necessity, that is, by a necessary inference, since otherwise the whole grant would be nugatory. * * *

"In the case of ways by necessity, it is the intention of the parties that is sought to be inferred from the uselessness of the land to the grantee (unless such right of way is implied). Whether degrees of usefulness may be admitted as a ground in determining this intention is a question upon which the courts are divided. Upon principle, it would seem that, if there already be another mode of access to the land, though much less convenient, or more expensive to develop, the reason for the inference of a grant of a way by necessity ceases."

Appellants in this case say in their answers, prayed to be treated as a cross-bill (to which appellees have filed no answer) or replication, and introduce evidence to support the statement that the cart path in question was not at all necessary for the "proper enjoyment" of the Munford farm; that there was at the time of the conveyance of that farm to appellee Scott, and still is, a well-defined road and legal right of way out from the southeastern side of the farm, which said road is all the outlet that was or is needed for the convenient use and enjoyment of said Munford farm; that the said road is a much nearer route to the town of Franklin (the local market and center of trade) than the cart path for which appellees are now contending, and it has been used by the tenants, occupants, and owners of the Munford farm for a great many years, to wit, for over 70 years; and that appellee Scott had used exclusively since purchasing the Munford farm this right of way or road extending eastwardly from said farm through lands of Nicodemus Williams and between the farms of E. J. Joyner and Thos. B. White to the Franklin road, and has never until recently made any attempt to use the said cart path through the Pretlow farm, but, on the contrary, soon after purchasing the Munford farm in 1904, he (Scott) obstructed and barricaded said cart path at the point where it crossed the line between the two farms, and these obstructions were from time to time renewed. These facts are not denied by Scott, nor is any evidence introduced to contradict him. On the other hand, the testimony for appellees, as well as that for appellants, fully sustains the contention of the latter that this road, the "Demus Williams road," has been used by the owners, tenants, and occupants of the Munford farm since a time when the "mind of man runneth not to the contrary."

It is true that the evidence shows that this "Demus Williams road" has been neglected, so that to put it in good order for general use would be somewhat expensive, but the owners of the lands over or along which it runs have testified in this case, and neither denied the right of owners, tenants, and occupants of the Munford farm to use said road, and both expressly stated that it had been used by persons going to or from the Munford farm for more than 30 years. Appellee Scott, as we have seen, admits that during the 7 years he owned the Munford farm he seldom used the cart path in question, and used the "Demus Williams road" constantly and almost exclusively in going to and from the Munford farm. The deed of Mrs. Pretlow to him, as we have also seen, is silent, as also are the deeds of trust executed by him to trustees to secure purchase money for the farm and borrowed money, as to this cart path or any other passage way through the Pretlow farm to the public road. He was present when the Pretlow farm was sold at public auction in 1907 for partition, and when the same was purchased by appellant Mrs. White without any notice whatever of a claim of an easement over the farm for the benefit of the Munford farm, and yet he remained silent as to any claim he was making or intended to make to such an easement. To go still further into the evidence, it is proven by numerous witnesses, those for appellees as well as those for appellants, and admitted, though reluctantly, by appellee Scott himself, that soon after he purchased the Munford farm he built a rail fence across the old cart path or plantation road at the point where it crosses the line between the two farms; that afterwards one of the tenants on the Munford farm and one of those on the Pretlow farm, without his knowledge or consent, built a gate in the rail fence at that point for their own personal convenience; that later, after this gate had been broken down, he (Scott) again built across this road or cart path at the point mentioned another fence—"this time a wire fence, something that could not so readily be taken down." Scott, while testifying, speaks lightly of this fence, referring to it as a frail affair, that only remained for a few months; but C. W. Darden testifies that when he wished to pass through that way during the Christmas season, 1909, he had to go lower down the line to a place where a portion of the old rail fence still stood and take down that rail fence in order to pass from the Munford farm to the Pretlow farm.

The negotiations of Scott leading up to his purchase of the Pretlow farm were conducted on behalf of Mrs. Pretlow by her brother, W. A. Ricks, who, when testifying in this case, was asked:

"Q. Was there ever an intention on your part to grant Mr. Scott a right of way through the Pretlow farm? A. No, sir; not by word or gesture."

Scott, when testifying for himself, was asked:

"Q. Mr. Scott, have you ever talked with Mr. Ricks since the time you bought this farm—I mean the Munford farm—about a right of way from the Munford farm to the public road? A. No; I never have."

P. D. Camp, having testified as to some agreement between him and Scott, to the effect that the latter still had some interest

in the Munford farm, was asked as to how this controversy as to this alleged right of way first arose, and he answered:

"Mr. Joe Scott had authorized me to sell the farm, if I could find a purchaser for it, and Mr. Blythe had made an offer for the farm if we could get a right of way through the Pretlow farm, that is, leading from the Munford farm through the Pretlow farm along the line of the old right of way up to the public road, that is, coming up from the Munford farm through the Pretlow farm to the back side of the barnyard, and through the barnyard to the right of the dwelling house on the Pretlow farm, and out the avenue in front of the house to the road, and I asked Mr. Ricks if he could do that. He said it was not in his power to do that, as he had sold the farm to his sister, Mrs. White, and therefore the right was in her."

Again the witness said:

"As I stated just now, Mr. Blythe said he would give $4,450 for the farm upon the condition that he should have a right of way out to the road through the Pretlow farm, and under no other condition."

[2] It thus appears that appellees, nor either of them, never entertained an idea that they had of right such an easement or right of way out from the Munford farm over and through the Pretlow farm to the public road, as they are asserting in this suit, or asserted such right until they found a purchaser for the Munford farm willing to give a higher price for it with such a right of way out to the public road than he would give without it or buy at all. It is inconceivable, upon the facts in the case, that Mrs. Pretlow or her husband, in the use they made or permitted of this cart way or plantation road, ever intended to establish it as an outlet to the public road that would pass to a grantee of the Munford farm as a necessary easement or appurtenance thereto.

As we have seen, the easement asserted by appellees was neither apparent, continuous, nor reasonably necessary to the enjoyment of the Munford farm at the time it was conveyed to appellee Scott by Mrs. Pretlow in January, 1904, or during the seven years that he owned and cultivated it, and during which time the Pretlow farm passed into the hands and ownership of appellant Mrs. White, a bona fide purchaser thereof for value, and who was without knowledge of the easement over the property which appellees never asserted prior to this suit. The user of the cart path through the Pretlow farm, up to the conveyance of the Munford farm to appellee Scott, was chiefly, if not solely, as a plantation road, and the subsequent actions of Scott himself all tend to negative any intention on the part of Mrs. Pretlow or expectation on his part that a right of way across the Pretlow farm should pass as an appurtenance of the Munford farm.

[3] "Where no private right of way or other easement is reserved in the deed itself, and the purchaser has no notice of any claim by third persons of a right of way over the land, he takes the land free from any claim therefor, either from the grantor or those claiming under him." Deacon v. Doyle, 75 Va. 258; Minor on Real Prop. vol. 1, p. 117.

In the case here, not only is it proven that appellee Scott was present when the Pretlow farm was sold at public auction and purchased by appellant, Mrs. White, but that there was no notice to any prospective purchaser of the claim he is now making, or any one else, to the use and enjoyment of an easement over the farm; the sale being made without any reservation whatsoever, and no mention made of such an easement, either in the advertisement at the time of the sale or in the deed conveying the property.

To put upon the Pretlow farm the onerous burden of such an easement or passageway as appellees are contending for is not, as we view the case, warranted by the facts proven.

For the foregoing reason, the decrees appealed from are reversed and annulled, and this court will enter the decree which the circuit court should have entered, dissolving the injunction awarded in the cause and dismissing the bill filed therein by appellee Scott, with costs to appellants.

Reversed.

KEITH, P., absent.

NOTE.—This case was argued before Judge KELLY'S term began.

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(117 Va. 327)

## NORFOLK SOUTHERN R. CO. v. CROCKER.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. RAILROADS ⟸394—ACTION FOR PERSONAL INJURIES — DECLARATION — LAST CLEAR CHANCE.

A declaration, alleging that plaintiff had been riding as passenger on defendant's freight train, and that when it stopped to shift cars he left the train, with the conductor's knowledge; that, while waiting while the engine was shifting cars, the conductor called him to the track to show him a broken car; that while he was examining it, and while defendant's servants in charge of the train, had they exercised ordinary care, could have seen him and his dangerous position in time to avoid injury, they negligently switched a car against the car so as to start it and injure plaintiff; that the conductor negligently failed to warn him of the engine's approach in time for him to avoid injury, but that the trainmen saw him in time to have avoided injury by exercise of ordinary care—stated a cause of action within the rule of the last clear chance.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1331–1338; Dec. Dig. ⟸394.]

2. NEGLIGENCE ⟸88 — "LAST CLEAR CHANCE."

The "last clear chance" rule is a qualification of the rule that contributory negligence bars a recovery, and the principle is that, although the plaintiff negligently exposes himself to peril, and that, although his negligence continues until the accident happens, he may recover if the defendant, with knowledge of his danger and reason to suppose that he may not

save himself, may avoid the injury by exercise of ordinary care, and fails to do so.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. ⊂⊃83.

For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

3. Railroads ⊂⊃390—Injury to Person on Track—Concurring Negligence.

Where it is the duty of one upon a railroad track to keep a lookout for approaching trains, and the duty of trainmen to exercise reasonable care to discover the presence of a person on the track, and if in the exercise of such care a person would be discovered, and he is injured, and nothing else is shown, the case is one of "concurring negligence," as distinguished from the last clear chance, and there can be no recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1324, 1325; Dec. Dig. ⊂⊃390.]

4. Pleading ⊂⊃193, 317—Bill of Particulars.

In action against railroad for an injury on its track defendant, if wishing and entitled to a more specific statement than the declaration contained as to the plaintiff's position at the time of injury, had a remedy by a motion for a bill of particulars, as expressly prescribed by Code 1904, § 3249, but no remedy by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428–435, 437–443, 954–962; Dec. Dig. ⊂⊃193, 317.]

5. Railroads ⊂⊃401—Action for Personal Injury — Instructions — Last Clear Chance.

In an action against a railroad for personal injury, an instruction that if defendant's train was in charge of a conductor, and that plaintiff, up to the happening of the accident, was on the track, engaged in a conversation with the conductor and in examining a car, to which his attention had been directed by the conductor, and was paying no attention to danger from approaching cars, and took no steps to secure his own safety, and if the conductor saw his danger and by ordinary care might have stopped the engine or warned plaintiff so as to prevent the accident, and failed to do so; that plaintiff's negligence was not the direct cause of the injury—was not objectionable as submitting the last clear chance rule in a case where plaintiff was in full possession of his faculties and his negligence continued up to the moment of the accident, and there was nothing to warn defendant that plaintiff was oblivious of his danger.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1382–1390; Dec. Dig. ⊂⊃401.]

6. Trial ⊂⊃251—Instruction—Conformity to Issue.

In such action, where the negligence alleged and shown by the evidence was that of the conductor in charge of the train, an instruction that there could be no recovery by plaintiff unless he proved that defendant's servants "in charge of its engine" saw him in apparent danger, not in full possession of his faculties, and might, by ordinary care, have avoided the injury, or if plaintiff failed to save himself by exercise of reasonable care, was properly refused, as involving the negligence of those "in charge of the engine," instead of the negligence of the conductor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587–595; Dec. Dig. ⊂⊃251.]

7. Negligence ⊂⊃83—Last Clear Chance.

The doctrine of the last clear chance may apply in cases in which the injured party is not in possession of his faculties.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. ⊂⊃83.]

8. Trial ⊂⊃253—Instruction Ignoring Issues.

In action against a railroad for personal injury while on its track, an instruction that a railroad track was itself a danger signal, and that if plaintiff by listening and keeping a lookout might have avoided injury, and his failure to do so contributed thereto, he could not recover, was properly refused, as ignoring the rule of last clear chance.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. ⊂⊃253.]

9. Railroads ⊂⊃398—Action for Injuries—Sufficiency of Evidence.

In an action against a railroad for personal injury while on its track looking at a broken freight car, resulting from the switching of cars against it so as to move it, evidence *held* to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1356, 1358–1363; Dec. Dig. ⊂⊃398.]

10. Trial ⊂⊃243 — Conflicting Instructions.

In such action, an instruction that the jury could not find for plaintiff unless he proved that defendant's servants "in charge of its engine" saw him in apparent danger when his attention was distracted, and might, by ordinary care, have prevented the injury, was not in conflict with an instruction for plaintiff that, if plaintiff was on the track examining a broken car and conversing with the conductor in charge of the train and was paying no attention to danger from moving cars, and that if the conductor saw his danger in time to have avoided it in the exercise of reasonable care, he might recover regardless of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. ⊂⊃243.]

11. Appeal and Error ⊂⊃882—Party Entitled to Alleged Error.

A party who has invited error by an instruction, given without objection from the adverse party, and who might have had an advantage therefrom if the verdict had conformed thereto, cannot complain because the jury did not follow it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591–3610; Dec. Dig. ⊂⊃882.]

12. Railroads ⊂⊃390 — Negligence—Trespasser—Last Clear Chance.

Under the doctrine of last clear chance, it is a railroad's duty to avoid injury to one on the track, whether he is a trespasser or an invitee.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1324, 1325; Dec. Dig. ⊂⊃390.]

13. Damages ⊂⊃132—Excessive Damages—Loss of Leg.

A verdict for $18,000 for the loss of a leg, causing intense and long-continued suffering, and medical and other expenses amounting to $3,000 or more, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385, 396; Dec. Dig. ⊂⊃132.]

Error to Circuit Court of City of Norfolk.

Action by James E. Crocker against the Norfolk Southern Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jas. G. Martin, of Norfolk, for plaintiff in error. Jeffries & Jeffries, of Norfolk, and Jas. H. Corbitt, of Suffolk, for defendant in error.

KELLY, J. James E. Crocker brought an action in the circuit court of the city of Norfolk against the Norfolk Southern Railroad Company to recover damages for personal injuries, and doctors' bills and other expenses incidental thereto, alleged to have resulted from the negligence of the defendant company. Upon the trial of the cause there was a verdict and judgment for the plaintiff in the sum of $18,000, and to that judgment this writ of error was awarded.

We will consider the assignments of error in the order in which they are presented by the plaintiff in error.

1. It is contended that the court erred in overruling the demurrer to the declaration.

There were two counts, the first of which, after alleging that the plaintiff had been riding as a passenger on one of the defendant's freight trains which had stopped at a station called Corapeake, and was engaged in shifting some cars, and that the plaintiff, with the knowledge and consent of the conductor, had left the train and was standing at the station waiting for the train to again start for its destination, proceeds as follows:

"And the said plaintiff says that a portion of said train was standing upon the defendant's railroad track in front of said station, while the engine was engaged in shifting cars as aforesaid, and while so standing at that place, the conductor in charge thereof called the plaintiff from where he was standing at said station to the said train standing upon the track as aforesaid, for the purpose of showing him, the plaintiff, a certain broken part of one of the defendant's cars, which was then a part of said train, and standing upon its track as aforesaid.

"And the plaintiff says that while in the presence of the said conductor he was upon the said track, examining the said car, and after its servants in charge of said train saw, or by the exercise of ordinary care could have seen him, the plaintiff, and the dangerous position in which he then and there was, in time to have avoided injuring him, by the use of ordinary care, it, the said defendant, carelessly, negligently, and recklessly ran and propelled its engine and other cars, then being propelled by said engine, upon and against the portion of the said train which was standing on said track as aforesaid, at the time the plaintiff was examining the said car as hereinbefore detailed, by means whereof the said train was driven with great force and violence upon, against, and over the plaintiff," etc.

The second count is the same as the first, except that it charges the negligence of the defendant in somewhat different terms, as follows:

"And the said plaintiff says that while in the presence of the said conductor he was upon the said track, examining the said car, the said conductor who had charge of the said train and the movement of said engine and cars, although he saw and knew the position in which the plaintiff then and there was, and knew, or should have known, the movement of the said engine and cars, carelessly and negligently failed to notify or warn the plaintiff of the fact that the said engine was approaching the portion of the said train which the plaintiff was then examining, as aforesaid, and was about to strike and move the same, in time for him to reach a place of safety and avoid being injured thereby, and after its servants in charge of said train saw, or by the exercise of ordinary care could have seen him, the plaintiff, and the dangerous position in which he then and there was, in time to have avoided injuring him, by the use of ordinary care, it, the said defendant, carelessly, negligently, and recklessly ran and propelled its engine and other cars, then being propelled by said engine, upon and against the portion of the said train which was standing on said track, as aforesaid, at the time the plaintiff was examining the said car as hereinbefore detailed, by means whereof the said train was driven with great force and violence upon and against the plaintiff," etc.

[1] The demurrer is to each count of the declaration, but the same objections are urged to each, and these objections are: That under the foregoing allegations the plaintiff was a mere trespasser on the track, there out of curiosity; that there is no averment of darkness, or of any obstruction to plaintiff's view, or of anything to show that he was not in full possession of his faculties and able to take care of himself, or of anything in his appearance or conduct to put defendant's servants on notice or make them suspect that he was not looking out for himself. It is argued, therefore, that the declaration shows on the part of the plaintiff a concurring negligence of such a character as to preclude any right of recovery under what is commonly known as the rule of the "last clear chance," being the rule upon which the plaintiff relies to sustain the judgment under review.

[2] We do not think this argument is sound. The rule in question, which has frequently been applied to cases in which the plaintiff's negligence has continued to the very moment of the injury, is a qualification of the general rule that contributory negligence bars a recovery, and the principle is that, although the plaintiff has been negligent in exposing himself to peril, and although his negligence may have continued until the accident happened, he may nevertheless recover if the defendant, after knowing of his danger and having reason to suppose that he may not save himself, could have avoided the injury by the exercise of ordinary care, and failed to do so. This principle has been adopted by practically all the courts of last resort, both in England and in this country, and has been repeatedly indorsed by this court; some of the recent Virginia decisions containing a very full discussion of the subject and an extended review of the authorities. C. & O. Ry. Co. v. Corbin, 110 Va. 700, 67 S. E. 179; Southern Ry. Co. v. Bailey, 110 Va. 833, 67 S. E. 365, 27 L. R. A. (N. S.) 379; C. & O. Ry. Co. v. Shipp, 111 Va. 377, 69 S. E. 925. See, also, 1 Shear. & Red. on Neg. (6th Ed.), sec. 99; 2 Thompson on Neg. sec. 1737; 8 Thompson on Neg. (White's Supp.) sec. 1737.

[3] The distinction between a typical case of "concurring negligence" and one of "last clear chance" is pointed out by Judge Keith, after a full discussion of the authorities, in Southern Ry. Co. v. Bailey, supra, as follows:

"If it be the duty of a person upon the track of a railway to keep a constant lookout for ap-

proaching trains (and of this there can be no question), and if it be the duty of the servants of the company in control of the train to exercise reasonable care to discover the presence of a person upon the track, and if in the exercise of such reasonable care the presence of such person would be discovered, and the person on the track is injured and there be no other fact proved, then it is apparent that the case stated would be one of mutual and concurring negligence, and there can be no recovery. The duty was equal, and each is equally guilty of its breach. If, however, it appears that those in control of a train, in the discharge of their admitted duty to keep a reasonable outlook, discover, or should have discovered, a person upon the track, and there be superadded any fact or circumstance, brought home to their knowledge, sufficient to put a reasonable man upon his guard, that the person upon the track pays no heed to his danger and will take no step to secure his own safety, then the situation changes, and the negligence of the person injured becomes the remote cause or mere condition of the accident, and the negligence of the railroad company the proximate cause, and there may be a recovery."

[4] The "superadded fact or circumstance" in the present case, brought home to the knowledge of the conductor, as disclosed by the declaration, was that the plaintiff, who was on the track at the conductor's invitation and in his immediate presence was engaged in examining the car which the conductor had called him to see. The natural interpretation of the language of both counts in the declaration makes it clear that the purpose of the pleader was to charge that, by reason of plaintiff's preoccupation in examining the part of the car which the conductor had said was broken and had called him to see, the plaintiff was unmindful of his peril. If the defendant wished to secure, and if he was entitled to, a more specific statement then the declaration contained of the manner in which the plaintiff was making the examination and of his exact situation at the time, then his remedy was not by demurrer, but by a motion for a bill of particulars under section 3249 of the Code.

The demurrer was not good, and there was no error in overruling it.

2. The second assignment of error is to the action of the court in giving to the jury the two instructions asked for by the plaintiff.

[5] The first of these instructions, designated in the record as instruction A, is as follows:

"The court instructs the jury that if they believe from the evidence that the defendant's train by which the plaintiff was injured was in charge of the conductor, who had the direction and control of its operation and movements, and that a short time before, and up to the happening of the accident complained of, the plaintiff was upon the track of the defendant with his mind occupied in a conversation with the said conductor and in examining one of its cars, which was standing on the said track and to which his attention had been directed by said conductor, and that he was paying no heed to his danger from the approaching engine by which the said train was being operated, and showed by his conduct that he was oblivious to his impending danger and would take no steps to secure his own safety, and if the jury further believe from the evidence that while he was so engaged, the said conductor was immediately by his side and saw this in time to have, by the exercise of ordinary care, either stopped said engine or warned the plaintiff of its approach in time to prevent said accident, and failed to do so, and that under those circumstances the plaintiff was injured as alleged in the declaration, then the negligence of the plaintiff, if any, in being on the track and in failing to look for the approaching train was not the proximate or direct cause of the accident, but a remote cause, and they should find for the plaintiff, whether he was guilty of such negligence or not."

The discussion of the first assignment of error leaves little to be said under this one. The chief objection urged to the instruction is that it submitted the rule of the last clear chance to the jury in a case where the plaintiff was in the full possession of his faculties, where his own negligence continued up to the moment of the accident, and where there was no evidence of anything in his actions or conduct to show the defendant's servants that he was oblivious of his danger, and would not take care of himself. In the light of the authorities cited in our discussion of the demurrer, and in the light of the evidence which was before the jury, and to which we shall hereafter more fully refer, we are of opinion that this objection to the instruction is not good.

A further objection made to it is that it conflicts with instruction 4, given for the defendant; but the objection cannot be sustained, as will appear later on in this opinion when we come to deal with said instruction 4 in another connection.

The only other instruction given for the plaintiff relates to the measure of damages. There is a formal objection to it, but the objection seems not to be insisted upon. The instruction is clearly correct, and has, in substance, been so often approved by this court that we do not deem it necessary to quote it here.

[6] The refusal of the trial court to give certain instructions asked for by the defendant is also assigned as error. These instructions are designated in the record as 4a, 5a, and 4aa, respectively. That one which is known as 4a seems not to be especially insisted upon; moreover, in so far as it could have been considered proper in any respect, it is embraced in the other two instructions, which were likewise refused. It will only be necessary, therefore, to consider the two instructions designated as 5a and 4aa, the first of which was as follows:

"5a. The court instructs the jury that they cannot, under their oaths, find for the plaintiff unless they believe from the evidence that he has proved by a preponderance of the evidence that defendant's servants in charge of its engine saw him in apparent danger, not in the possession of his faculties, and thereafter had a clear opportunity and time, by ordinary care, to stop the engine before it caused the accident; and even then they cannot find for the plaintiff if they believe from the evidence he could have saved himself by using reasonable care on his part."

[7] This instruction was properly refused. Its language indicates a purpose to tell the jury that they cannot find for the plaintiff unless they believe that the defendant's servants *in charge of the engine* were responsible for the injury. The negligence charged in the declaration and shown by the evidence was on the part of *the conductor in charge of the train.* The negligence of the conductor was clearly shown, and it is equally plain that there was no negligence on the part of the engineer and fireman, who did not see the plaintiff, and who acted under the conductor's signals and orders. It would therefore have been manifestly improper to tell the jury that unless they believed that the engineer and fireman saw his danger and could have saved him, they could not find for the plaintiff. If it be said that the words "servants in charge of the engine" were not intended to mean the engineer and fireman, the vice is not removed, because the care and caution on the part of these two employés and their entire freedom from responsibility for the accident were brought out conspicuously in the evidence for the defendant, and the instruction could hardly have failed to mislead the jury into the belief that the language was intended to refer to the engineer and fireman, whether it was actually so intended or not. Furthermore, this instruction would have told the jury that they must not find for the plaintiff unless they believed from the evidence that the servants of the defendant saw the plaintiff "not in the possession of his faculties." This, as we have seen, was not a correct statement of the law. The doctrine of the last clear chance is frequently applied in cases in which the injured party is not in the possession of his faculties, but these cases are merely illustrative of the doctrine, and are not the only cases in which the doctrine applies.

[8] Instruction 4aa was as follows:

"The court instructs the jury that a railroad track is itself a plain danger signal, and a person on or close thereto must listen and keep a sharp lookout both ways for his own protection; and if the jury believe from the evidence that by listening and keeping such lookout, James E. Crocker could have saved himself, and his failure so to do was one of the causes contributing to the accident, they must find for the defendant."

Passing by the question, which might be an interesting one, whether "a railroad track is itself a plain danger signal" to a man who is on the track examining a stationary car at the invitation and in the presence of the conductor in charge of the car and of any movement of it, we are of opinion that this instruction is erroneous because it undertakes, without qualification, to tell the jury, in effect, that they must find for the defendant if the plaintiff could, by keeping a lookout, have saved himself. It is not denied that the plaintiff could have saved himself by keeping a lookout, but this fact does not necessarily bar his recovery. Shipp and Corbin, and many others who have been allowed to recover, could have saved themselves by keeping a lookout. See C. & O. Ry. Co. v. Corbin, C. & O. Ry. Co. v. Shipp, and other authorities cited supra. The trouble with this instruction is that it ignores the plaintiff's contention and the plaintiff's evidence that he was engrossed in the examination of the drawhead on the car, that he was unconscious of his danger, and that the conductor saw and knew these facts. In other words, the instruction ignores the rule of the last clear chance as applicable to this case, and was properly rejected.

4. The fourth and last assignment of error is based upon the action of the court in overruling the defendant's motion for a new trial.

[9] There was evidence upon which the jury might have found, and upon which, therefore, we must find, the following facts: The plaintiff, James E. Crocker, was a passenger on the defendant's freight train en route from Suffolk, Va., to either Corapeake or Savage, N. C., depending upon whether a party met him at one or the other of these places. This party did not meet him at Corapeake, and at that point the plaintiff got off the passenger car, went to a store, got a cigar, and came back to the station. The engine, meantime, had been engaged in shifting some cars between the main track and a side track. When the train first arrived at the station it left several flat cars on the main track, with the south end of these cars about opposite and in front of the station, and the engine and balance of the train proceeded to the switch and ran in on the side track. This side track was parallel to the main track and extended along between the main track and the depot for some 400 feet or more each way from the depot, with a switch at each end connecting it with the main track. While the engine was on the side track, back some 400 feet north of the depot, the conductor, Bailey, who was in charge of the train and personally directing the movement of the engine when the accident happened, called Crocker from where he was standing near the depot to the south end of the cars standing, as aforesaid, on the main line, in order to show him a defective drawhead which the conductor said had caused him several hours' delay on the day before. Thereupon Crocker went over and across the side track to the end of the cars on the main track to look at the drawhead. When he started he saw the engine on the side track near the switch, something over 400 feet from where he was standing. He and the conductor went to the opposite end of the car from where the engine and switch were, and the conductor stood with one hand on the end of the car pointing out the drawhead, while Crocker stood at first with one foot on the rail and then stepped between the rails to examine the part of the car to

which the conductor was directing his attention. The car was nearly as high as Crocker's shoulder. A reasonable inference is that at the time of the accident he was stooping or leaning forward, for he put his hand on the drawhead when he got between the rails, and he would have most naturally been in a stooping or bending posture to do this and to make the examination; moreover, the engineer and fireman both testified that they were on the engine looking ahead, that they saw the conductor and others at and near the car, but did not see any one on the track at the end of the cars. If Crocker had been standing erect where he could see the approaching engine (as is contended by the defendant) he would have been seen by those on the engine who were looking directly towards him. While Crocker was thus situated and preoccupied, the conductor signaled the engineman ahead to couple the engine with the north end of the cars, and caused the coupling to be made without any notice or warning to Crocker, and without any effort to save him. When the coupling was made, the cars in front of the engine were driven forward, and Crocker was knocked down and his leg was crushed and broken.

There is some conflict in the evidence, notably in the case of the conductor's assertion that he at no time saw Crocker on the track; but there was abundant evidence to warrant the foregoing statement, viewing the evidence as upon a demurrer. If we were concerned with the weight of the evidence, it would not be too much to say that the clear preponderance of it shows that Crocker was on the track in front of the cars, with his attention fixed upon the drawhead, and that the conductor, who was immediately at his side, and who had interested him in the drawhead, saw and knew his position, and then gave the signal for the coupling without paying any further attention to him. The engine came down the main line from the switch very slowly. Crocker was on the track between the rails, according to the testimony, from a minute to a minute and a half. There was ample time to stop the engine or to call Crocker from his place of danger. The conductor made no attempt to do either of these things, but permitted the engine to come right on upon his own signals until the injury was done. He evidently did not think about what he was doing, and there is no reason to suppose that his negligence, though so palpable, was willful or intentional. But we need not speculate as to why he neglected his duty to the plaintiff. The fact remains that he did do it, and the defendant is liable for the consequences.

It is true that the whole occurrence covered a very short space of time, but this is true in most cases of accidental injuries, and lapse of time, provided it be appreciable, is not usually material. If in this case the engine had been coming back for a distance of 1,000 feet, instead of 400 feet, and if the plaintiff had been on the track examining the drawhead for two or three minutes, instead of a minute, or a minute and a half, with the conductor right by him and fully aware of his position, and all the while responsible for the movement of the engine, the liability of the defendant would be so patent that it would admit of no argument. Is there any difference in principle between the case as thus supposed and the case as it is? Manifestly not; and we think there was no error in overruling the motion for a new trial in so far as the motion was based upon the alleged want of evidence to support it.

[10] But it is said that the verdict was wrong because it was incompatible with instruction 4 given for the defendant, which was as follows:

"The court instructs the jury that they cannot, under their oaths, find for the plaintiff, unless they believe from the evidence that he has proved by a preponderance of the evidence that defendant's servants in charge of its engine saw him in apparent danger, with his attention distracted, and thereafter had a clear opportunity and time by ordinary care to stop the engine before it caused the accident."

If the words "servants in charge of its engine" in this instruction refer to the conductor who had charge of the train and of the movements of the engine, then the jury did not disregard the instruction because, as already shown, the conductor did see the plaintiff under the very conditions mentioned in the instruction, and had the opportunity to prevent the injury exactly as specified therein. Under this construction of the language of the instruction, it is not in conflict with plaintiff's instruction A, and the verdict of the jury was in keeping with both.

[11] If, however, as is contended in the defendant's argument in the petition, the words "servants in charge of its engine" refer only to the engineer and fireman, the jury did disregard this instruction and followed the plaintiff's instruction A, but it is difficult to see how the defendant can be heard to complain of this. The instruction, if it means what it appears to say and what the petition says it means, was erroneous, as we have seen in discussing, under the second assignment of error, instruction 5a which was refused. But the error was invited by the defendant. Having secured this instruction, without objection from the plaintiff, the defendant might have had an advantage if the verdict of the jury had been in conformity with it, but it cannot complain because the jury did not follow it. R. & D. R. Co. v. Medley, 75 Va. 499, 503, 40 Am. Rep. 734; Collins v. George, 102 Va. 509, 518, 46 S. E. 684.

[12] We have dealt with this case, as the circuit court evidently did, upon the assumption that the conductor had no authority as a representative of the company to invite plaintiff on the track, and that he was there as a trespasser. In the brief for plaintiff it is claimed that he was an invitee. The

question is not material. Under the facts of this case the duty of the defendant to avoid injuring him was the same whether he was a trespasser or an invitee.

[13] Finally, we are asked to say that the verdict was excessive. It was a large verdict, but we find nothing in the record to warrant us in disturbing it on this account. The plaintiff lost a leg by the accident, suffered from it intensely and for a long time, and incurred by reason of it medical and other expenses to the amount of $3,000 or more. Upon the considerations and for the reasons stated by Judge Harrison in Southern Ry. Co. v. Smith, 107 Va. 553, 560, 59 South. 372, we are unable to hold that the verdict should be set aside as excessive.

The judgment of the circuit court must be affirmed.

Affirmed.

CARDWELL, J., absent.

(168 N. C. 321)

## NORRIS v. DURFEY. (No. 250.)

(Supreme Court of North Carolina. Feb. 24, 1915.)

TAXATION ⟸865—INHERITANCE TAX—STATUTE—CONSTRUCTION.

The Inheritance Tax Law (Pub. Laws 1909, c. 438) § 6, levying a tax upon all real and personal property of whatever kind passing by will or by the intestate laws of the state from any person who may die seised or possessed of the same while a resident of the state, etc., imposes a tax upon real and personal property alike, giving to each devisee and legatee an exemption of $2,000.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1680; Dec. Dig. ⟸865.]

Walker and Hoke, JJ., dissenting.

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by the State, on the relation of H. E. Norris, Solicitor, against Cary K. Durfey. Judgment for defendant, and plaintiff appeals. Reversed.

This is a civil action to recover the inheritance tax imposed by law upon the estate of Florence P. Tucker, who died leaving a last will and testament, in the city of Raleigh, on the 11th of December, 1909. Her estate consisted of both real and personal property. The most of her estate was bequeathed to her executors in trust for her children, the legatees under the will. It is admitted that the real estate exceeds in value the sum of $250,000, and that the personal estate exceeds in value the sum of $450,000. The case was heard upon the facts agreed, and the court adjudged that under the law the real estate, of which Mrs. Tucker was seised and possessed at the time of her death, was not subject to the inheritance tax.

H. E. Norris and Manning & Kitchin, all of Raleigh, for appellant. Pace & Boushall, of Raleigh, for appellee.

BROWN, J. The only question presented is whether or not the inheritance tax section of the revenue law of 1909 imposes a tax upon real estate. Public Laws of 1909, pp. 656, 657. The first inheritance tax law of 1903 imposes no tax upon real estate, but upon personal property only. The constitutionality of that act, as well as many points growing out of it, were passed on by this court in Re Morris' Estate, 138 N. C. 260, 50 S. E. 682. The succeeding acts of 1905 (chapter 588), 1907 (chapter 256), and 1909 are exactly alike and read as follows:

"From and after the passage of this act, all real and personal property of whatever kind and nature which shall pass by will or by the intestate laws of this state * * * shall be and hereby is made subject to a tax for the benefit of the state, as follows, that is to say: Where the whole amount of said legacy or distributive share of personal property shall exceed in value $2,000, * * * the tax shall be," etc.

It is contended that the Legislature, in using the words comprising the last two lines above quoted, whilst manifesting an intention to subject landed property to the inheritance tax, failed to do so, and levied the tax only upon legacies or distributive shares of personal property exceeding in value $2,000.

It is elementary law in the construction of all statutes, applicable alike to revenue laws and all other species of legislation, that the statute should be given liberal and reasonable interpretation with a view to effectuate the intention of the Legislature. In re Matter of Stewart, 131 N. Y. 274, 30 N. E. 184, 14 L. R. A. 836; Ross on Inheritance Taxation, § 35.

Mr. Ross says that:

"It is gratifying to note that, whatever the courts may have said on this question, they have in fact generally given inheritance tax statutes liberal construction in favor of the government by subjecting to taxation every transfer of property that could be reasonably brought within the purview of the law." 27 A. & E. p. 340.

The Court of Appeals of New York has said:

"It was undoubtedly the intent of the Legislature that the statutes under consideration should be liberally construed, to the end of taxing the transfer of all property which fairly and reasonably could be regarded as subject to the same, and this court has unequivocally placed itself upon record in favor of construing the statute in the light of such intent." Estate of Gordon, 186 N. Y. 471, 79 N. E. 722, 10 L. R. A. (N. S.) 1089.

It does not require any argument to prove that it was the manifest purpose of the General Assembly to tax real estate, as well as personal property. Every word in the statute is pregnant with meaning and indicates with unerring certainty that such was the intention of the lawmakers.

The contention that there are no operative words in the statute, which in effect levies tax upon real estate, cannot be sustained.

The very language of the act is, as hereinbefore quoted, that:

"From and after its passage all real and personal property of whatever kind, etc., shall be and hereby is made subject to a tax for the benefit of the state."

Then the act goes on to levy the tax, prescribe the degrees of consanguinity, when and how it shall be levied and collected.

The language relied upon by the defendant, namely, "where the whole amount of said legacy or distributive share of personal property shall exceed in value $2,000, etc.," is nothing more or less than exemption of that much of the estate from taxation, and those words do not in any way destroy the force and effect of the statute in its declared purpose to levy the same tax upon land. This section was in the personal property act of 1903 (chapter 247), and its validity was passed on and the act construed in Re Morris' Estate, supra.

The language of the act is not a mere declaration of intention or a recital of a purpose to tax real estate, but it is the enactment itself, by actual imposition of the tax, namely, "shall be and hereby is made subject to a tax." This plain declaration of the Legislature should not be defeated by subsequent words, unless they are clear, plain, and emphatic.

In reference to the contention that, although the intent to tax real estate is manifest, the Legislature failed to provide the machinery for its taxation, 27 A. & E. 840, very pertinently says:

"But where a particular subject is within the scope of the statute, and exemption from taxation is claimed on the ground that the Legislature has not provided proper machinery for accomplishing the legislative purpose in the particular instance, a liberal rather than a strict construction shall be applied; and if by fair and reasonable construction of its provisions the purpose of the statute can be carried out, that interpretation ought to be given to effectuate the legislative intent."

The exemption clause that we have quoted from, contained in the act of 1909, is in the same words as the exemption clause in the act of 1903, yet the latter act undertook to tax personal property only. Practically the same law was re-enacted in 1905, 1907, and 1909 in almost the same language with the words "all real and personal property" inserted. No change whatever was made in the exemption clause. The wording of the exemption clause in the act of 1903 is the same as the acts of 1905, 1907, and 1909. The effect of this would be, if any, not to displace the tax on real property, but to exempt only personal property, as the exemption clause is not effective in levying the tax but only in exempting estates not exceeding $2,000 in value from its provision.

Inasmuch as the operative words of the statute, imposing the inheritance tax upon real property, precedes this exempting clause, we fail to see how it is possible for the language of the latter to be construed as a repeal of the former.

It is not necessary that the exemption clause should contain any words making the tax effective. That is done by the preceding words of the statute. It is not necessary for us to hold, and we do not place so narrow a construction on the exemption clause as to declare, that only personal property comes within its terms. It is true that the words "legacy" and "distributive shares" technically are understood to apply to personal property, but it is evident that the word "legacy" is not used in its technical and narrow sense in this statute. It is plainly the intent of the Legislature to create an exemption of $2,000 in favor of the heirs, devisees, legatees, or distributees.

There is an analogy between the intent of the Legislature and the intent of a testator. Sometimes in wills the words "distributive share" and the word "legacy" have been construed to embrace land, when such was the manifest purpose of the testator. The words "residuary legatee" will, when necessary to effect the testator's intention, be construed to mean "residuary devisee." In Jones v. Myatt, 153 N. C. 225, 69 S. E. 135, this court held that the words "distributive share" could be enlarged to embrace a share in real estate, and that the word "legacy" would be enlarged, when necessary to carry out the purposes of the will, to include land. Gardner on Wills, p. 403. So in Hope v. Taylor, 1 Burrows, 268, Lord Mansfield held that the word "legacy," used in a will, extended to and embraced land. Foil v. Newsome, 138 N. C. 115, 50 S. E. 597, 3 Ann. Cas. 417.

It is contended that the administrative officers of the state, the state treasurer, and Attorney General have interpreted this statute so as to exempt real estate. The construction placed by a department of the government is only prima facie correct, and is not binding on the courts. The opinions of such officers are treated with respect, but are only persuasive. They are given authority to construe the statutes because they have to be construed frequently without delay and before the courts can pass on them.

We are of opinion, upon the facts agreed, that the real and personal estate of the testatrix is liable for the inheritance tax, subject to a total exemption of $2,000 in favor of each devisee or legatee, and that the same should be assessed and determined by a commissioner appointed in accordance with the statute. Shaw v. Bridgers, 161 N. C. 247, 76 S. E. 827.

Error.

WALKER and HOKE, JJ., dissent.

(169 N. C. 309)

STATE v. BRIDGERS. (No. 204.)

(Supreme Court of North Carolina. March 17, 1915.)

WEAPONS ⟸9—CARRYING CONCEALED WEAPONS—"ON HIS OWN PREMISES."

The overseer or superintendent of the carding room of the cotton mills, which was only one floor of the mills, was not "on his own premises," within the meaning of the exception in Revisal 1905, § 3708, forbidding the carrying of weapons.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 8; Dec. Dig. ⟸9.]

Appeal from Superior Court, Lenoir County; Peebles, Judge.

I. W. Bridgers was convicted for carrying a concealed weapon off his own premises, and appeals. No error.

Rouse & Land, of Kinston, for appellant. The Attorney General, for the State.

CLARK, C. J. The defendant was indicted for carrying a concealed weapon (a pistol) off his own premises. Rev. § 3708. The only question raised is whether the defendant, who was overseer or superintendent of the carding room of the cotton mills, was "on his own premises," within the meaning of the statute.

In State v. Perry, 120 N. C. 580, 26 S. E. 915, 1008, it was held that the superintendent of a turnpike company is not, when on such turnpike, within the exception, although he was in absolute control of all the property of the company. The court said:

"The use of the words 'on his own premises' and being 'not on his own land' shows an intention to restrict the right to carry concealed weapons to those who are in the privacy of their own premises, where they are not likely to be thrown in contact with the public nor tempted on a sudden quarrel to use, to the detriment of others, the great advantage a concealed weapon gives to one who unexpectedly pulls it out upon his defenseless neighbor."

And the court further said:

"The statute clearly does not contemplate that in the crowded cars and thoroughfares the corporation officials shall have leave to carry concealed weapons about their persons, while all other citizens traveling thereon dare not do the same, under fear of criminal punishment."

State v. Terry, 93 N. C. 585, 53 Am. Rep. 472, and State v. Deyton, 119 N. C. 880, 26 S. E. 159, hold that an employé who carries a concealed weapon on the premises of his employer is indictable. In State v. Terry it was held that it is not necessary that the legal title to the land should be in the defendant, when he is in charge thereof as a tenant or as an overseer, acting as to the control of the land in the lieu and stead of the owner.

In State v. Anderson, 129 N. C. 521, 39 S. E. 824, it was held that a private night watchman, while on duty upon the premises he is employed to watch, is not liable, under the statute. He is there in lieu of the owner of the premises, and is carrying out the duty of protecting the premises just as the owner could have done in person. That case holds that there is no conflict between State v. Terry and State v. Perry, both above quoted.

It is not necessary, in this case, to determine whether a superintendent of the mill, who is in sole charge thereof, would have the right to carry a concealed weapon, for this defendant merely had charge of one floor of the mill, the carding room, and was overseer thereof. To hold that one occupying that position was "on his own premises," within the meaning of the statute, would bring within the exception many persons in the same factory who might be overseers in different departments. The statute was intended to except only the owner, or the person who exercised dominion in his stead. Only such person could be said to be "on his own premises."

Rarely can an official of a corporation, unless a watchman, be said to be "on his own premises," within this statute, for he does not stand in the shoes of the owner for this purpose. Certainly neither the superintendent or conductor of a street car line, nor the superintendent or conductor of a railroad, would be authorized, unless commissioned as a policeman under the statute, to carry a concealed weapon. The fact that the defendant here concealed the pistol in his pocket in expectation of trouble with an employé shows that he proposed to take advantage of the concealment. As said in State v. Perry, supra, this exception was intended for the owner in the privacy of his own property, and not to give any one an advantage over others with whom he is expecting a difficulty. It is because the advantage given by such concealment is a temptation to use the weapon that the statute forbids such concealment to others than the owner "on his own premises," except certain persons "when acting in the discharge of their official duties."

No error.

(168 N. C. 409)

SUMMERLIN et al. v. MORRISEY. (No. 210.)

(Supreme Court of North Carolina. March 17, 1915.)

APPEAL AND ERROR ⟸150—PERSONS ENTITLED TO APPEAL—"PARTY TO THE ACTION."

A commissioner appointed to make a deed is not a "party to the action," and, having no personal interest in the subject of it, cannot appeal from an order of the court requiring him to correct his deed, and his attempted appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934–946; Dec. Dig. ⟸150.

For other definitions, see Words and Phrases, Second Series, Party to Suit or Proceeding.]

Appeal from Superior Court, Duplin County; Peebles, Judge.

Action by Benjamin Summerlin and others

against D. G. Morrisey. From an order requiring Henry L. Stephens and another, as commissioners, to correct their deed to certain lands under decree of the court, Stephens appeals. Appeal dismissed.

Stevens & Beasley, of Warsaw, for appellant. Henry A. Grady and Henry E. Faison, both of Clinton, and H. D. Williams, of Kenansville, for appellees.

BROWN, J. This is a motion to dismiss the appeal of Henry L. Stephens, commissioner. It appears from the record in this cause that it is an action brought to sell certain lands for the payment of a debt. At November term, 1888, W. R. Allen and H. E. Faison were appointed commissioners to make the sale. At February term, 1889, the appellant, Henry L. Stephens, was substituted by decree in the place of H. E. Faison. At January term, 1915, the cause came on to be heard before his honor, Judge Peebles, upon a motion to correct the deed made by the commissioners to D. G. Morrisey, the purchaser. Upon said hearing his honor found as a fact:

"That the deed from H. L. Stephens and W. R. Allen, commissioners, to D. G. Morrisey, does not convey the entire tract of land, as described in their report and plat thereto attached, in that one of the lines is left out of the said deed."

The court decreed that the said Allen and Stephens, commissioners, be directed to execute a deed in fee in accordance with the descriptions contained in their report and plat. Commissioner Allen makes no objection to the said decree. One of the commissioners, Henry L. Stephens, excepts to the said judgment and appeals to this court.

We are of opinion that the appeal should be dismissed. The commissioner is not a party to this action, and has no personal interest whatever in the subject of it. It is his duty to obey, and not to review, judgments of the court appointing him. No judgment has been rendered against him, and if the court has made a mistake, as the appellant contends, that is a matter for the parties to correct by appeal, if they are inclined to do so, and it is not a matter for the commissioner. Loven v. Parson, 127 N. C. 301, 37 S. E. 271; Blount v. Simmons, 118 N. C. 9, 23 S. E. 923. While these authorities are not on all fours with this case, the principles laid down therein are inconsistent with the idea that a person, who is not a party to the action and not affected in any way personally by the judgment of the court, can cause its judgments to be reviewed.

The case cited by the appellant from West Virginia, Ruhl v. Ruhl, 24 W. Va. 279, is a direct authority against the appellant's position. In that case it is held that:

"A special commissioner in a chancery cause or a receiver of the court is simply an officer of the court, and as such he has no right to intermeddle in questions affecting the rights of the parties or the disposition of the property * * * in his hands. His holding is the holding of the court, and he cannot interfere in the litigation or ask for the revision of any order or decree affecting the rights * * * of the parties; but when his own accounts or his personal rights are affected, he has the same means of redress that any other party so affected would have."

See Blair v. Core, 20 W. Va. 265; In re Colvin, 3 Md. Ch. D. 303; Hinckley v. Railroad Co., 94 U. S. 467, 24 L. Ed. 166; Hovey v. McDonald, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888.

The appeal is dismissed, at the cost of the appellant, Henry L. Stephens.

Dismissed.

ALLEN, J., did not sit upon the hearing of this appeal.

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(168 N. C. 417)

## In re BROWN et al. (No. 110.)

(Supreme Court of North Carolina. March 17, 1915.)

1. CONTEMPT ⇐30 — INHERENT POWER OF COURTS.

The power to punish for contempt is inherent in any court engaged in administering justice as a governmental function.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 91, 93, 94; Dec. Dig. ⇐30.]

2. CONTEMPT ⇐30—POWER TO PUNISH FOR CONTEMPT—REGULATION BY LEGISLATURE.

In the higher courts established and existent under constitutional provisions, and in matters essential to the proper and efficient exercise of their jurisdiction, the power to punish for contempt may not be destroyed or sensibly impaired by legislative enactment, but in mere matters of procedure, and in courts below the Supreme Court, the power may to some extent be regulated by legislation.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 91, 93, 94; Dec. Dig. ⇐30.]

3. JURY ⇐21—RIGHT TO JURY TRIAL—CONTEMPT.

In the case of both direct and constructive contempts, the trial is properly had by the court without the intervention of a jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 134–142; Dec. Dig. ⇐21.]

4. CONTEMPT ⇐44 — JURISDICTION — COURT HAVING JURISDICTION.

In the case of both direct and constructive contempts, the trial is usually had by the court against which the offense has been committed.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 128–130; Dec. Dig. ⇐44.]

5. CONTEMPT ⇐8 — DEFAMATORY PUBLICATION CONCERNING JUDGE.

Under Revisal 1905, § 939, providing that any person guilty of any of the acts therein specified, including the publication of grossly inaccurate reports of the proceedings in any court about any trial or other matter pending before the court, made with intent to misrepresent or bring into contempt such court, may be punished for contempt, that the several acts, neglects, etc., therein specified shall be the only acts, neglects, etc., which shall be the subject of contempt of court, and that if there be any parts of the common law in force recognizing other acts, neglects, etc., besides those specified, they are thereby repealed and annulled, the power to punish as for contempt the publication of grossly inaccurate reports is restricted to re-

ports of a trial or matter still pending, and there is no power to punish summarily for defamatory reports and criticisms about a matter that is passed and no longer exists; and, while a grossly indecent and scurrilous publication about a judge in reference to his official conduct, made and circulated in the community where he is holding court, might create conditions justifying the exercise of such power, where court had adjourned and all matters referred to concerning the official conduct of the judge had terminated, the publication of a defamatory article reflecting on the conduct of a judge as an individual and in reference to his manner and methods as judge could not be punished as a contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 14; Dec. Dig. ⟸8.]

6. CONTEMPT ⟸44 — JURISDICTION—CHANGE OF VENUE.

The N. county circuit court presided over by the judge who shortly before had held a term of the W. circuit court, had jurisdiction of a proceeding to punish, as a contempt, the publication of a defamatory article concerning the judge and his conduct in presiding over such court, as this was a question of venue, and ordinarily a change of venue is not allowed in such proceedings.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 128–130; Dec. Dig. ⟸44.]

7. CONTEMPT ⟸61—HEARING—REFERENCE.

In a contempt proceeding, it was not error to refuse to order a reference, as, even though Revisal 1905, § 875, providing that when any party intends to make or oppose a motion and it shall be necessary for him to have the affidavit of any person who shall have refused to make it, the court may appoint a referee to take the affidavit or deposition of such person, applied, the matter was in the discretion of the presiding judge.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 188–194, 196; Dec. Dig. ⟸61.]

Appeal from Superior Court, Northampton County; Peebles, Judge.

Contempt proceedings against Charles A. Brown and another. From a judgment adjudging defendants guilty of contempt, they appeal. Reversed, and judgment entered for defendants.

From the facts in evidence, it appeared that, shortly after the adjournment of May term of Wayne superior court, the same having been held by Judge Peebles, assigned to hold the courts of the Fourth judicial district, in which said county is situate, the defendants, editors and proprietors of the "Weekly Record," a newspaper published weekly in the city of Goldsboro, N. C., published an editorial article in said paper, severely reflecting on the conduct of Judge Peebles, both as an individual and in reference to his manner and methods as judge in presiding over said court. It appeared also that several copies of the paper had been circulated in the county of Northampton where Judge Peebles resided and where the hearing was had.

On the return day, defendants, having first moved for a reference under section 875 of the Revisal, and to dismiss the proceedings for want of jurisdiction, both of which motions were overruled, answered the rule, disavowing an intent to misrepresent or bring the court into contempt or disrepute; alleged that the article was written in good faith and on information believed to be reliable, etc. An affidavit of Mr. G. A. Norwood was also offered, tending to support some of the charges as written.

There were several affidavits from attorneys practicing in the courts of the county and district and elsewhere and from others, in support of the rule and tending to show that Judge Peebles was a humane man, a capable, upright, and learned judge, and that nothing improper or unseemly occurred in the conduct of that or any other court presided over by him.

The character and contents of the publication can be sufficiently determined by the findings of fact made by the judge at the hearing and were embodied in the judgment as follows:

"The court finds the following facts:

"(1) That the statement published in the Goldsboro Record of June 6, 1914, that R. B. Peebles frequently went to sleep on the bench and woke up suddenly and played hell, was false and without foundation in fact.

"(2) That the statement in the said issue that R. B. Peebles was so full of whisky that he went into the solicitor's room for his own room, is absolutely false and without foundation in fact; that the said judge had not touched a drop of intoxicating liquor within 5½ hours previous to that time; that it is true that the said judge went to the solicitor's room, which said room was opposite his own room, and lay down to rest at about 6 o'clock in the evening; that the said judge went to the solicitor's room for the purpose of resting himself for the reason that the solicitor had inadvertently locked the door to the judge's room and had kept the key in his pocket, and that at the time when said judge returned to the hotel from the courthouse the solicitor was not present in the hotel, and the said judge went to the solicitor's room to rest purposely, because of the fact that the solicitor had the key to his own room, and he could not gain an entrance into his own room until the return of the solicitor with the key to the door thereof.

"(3) That the statement that said Judge R. B. Peebles, published in said issue, played set back, or pitch, at night, and while playing said set back or pitch, took a drink every ten minutes, and got very drunk, was false and without foundation in fact.

"(4) That the publication in said paper, of said issue, that Judge Peebles is unfit to occupy the high and responsible position of judge of the superior court of North Carolina is absolutely false and without foundation in fact.

"(5) That the statements contained in an editorial published in said paper of June 27, 1914, reiterating all of said charges and statements, except the charge that Judge Peebles went to sleep upon the bench and woke up suddenly and played hell, were all false and without foundation in fact.

"(6) That each one of the false statements contained in the editorials of the said Goldsboro Record, of the issue of June 6, 1914, were made with the intent to defame, degrade, and injure the reputation of said judge, R. B. Peebles.

"(7) That all of said charges contained in said issue of said paper on June 27, 1914, in an editorial, were false and each charge made in said editorial was made with the intent to defame, degrade, and injure the reputation of said judge, R. B. Peebles.

"(8) That the court finds from the facts that said issues of said Goldsboro Record, of June 6, and June 27, 1914, containing the said editorials mentioned above, were both circulated and read in Northampton county. I find this fact from inspection of the issues of said paper."

And, upon such findings, the court adjudged respondents to be in contempt, and sentenced them each to pay a fine of $250 and to be imprisoned in the common jail of Northampton county for 30 days.

Defendants excepted and appealed, assigning several errors in the proceedings and judgment.

W. S. O'B. Robinson & Son and M. H. Allen, all of Goldsboro, and W. F. Taylor, of Faison, for appellants. Peebles & Harris, of Jackson, and W. H. S. Burgwyn, of Woodland, for appellee.

HOKE, J. [1-4] At common law, the power of courts of record of general jurisdiction to punish for contempt and, in certain instances, by summary procedure, has existed time out of mind, as said by Judge Blackstone, "as far as the annals of the law extend." It is a power inherent in any court engaged in administering justice as a governmental function and, in the higher courts, established and existent under constitutional provision and in matters essential to the proper and efficient exercise of their jurisdiction, it may not be destroyed or sensibly impaired by legislative enactment. Ex parte McCown, 139 N. C. 95, 51 S. E. 957, 2 L. R. A. (N. S.) 603; In re Gorham, 129 N. C. 481, 40 S. E. 311, and concurring opinion of Clark, J., 129 N. C. page 489, 40 S. E. page 314; In re Deaton, 105 N. C. 59, 11 S. E. 244; Scott v. Fishblate, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696. While it is understood with us that, in mere matters of procedure, and in courts below the Supreme Court, which comes under the influence of a special constitutional provision, the question presented may be to some extent regulated by legislation, it is also held that, both as to direct and constructive contempts, the trial is properly had by the court without the intervention of the jury, and usually by the court against which the offense has been committed. In re Deaton, supra; Baker v. Cordon, 86 N. C. 116, 41 Am. Rep. 448; Herndon v. Ins. Co., 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547; Horton v. Green, 104 N. C. 400, 10 S. E. 470. The power in question is conferred to enable a court to command respect and obedience and it would go far to weaken and, in case of direct contempt, would well-nigh destroy it if the occasion of its present exercise would have to be referred for decision to some other tribunal or agency.

[5] In reference to this procedure by contempt, it was very generally if not universally recognized as the proper method of maintaining order in the courts and of enforcing obedience to their decrees and mandates and, in case of constructive contempt, often arising from false and defamatory publications concerning court trials and proceedings, the power was not infrequently exercised, and this, in earlier times, whether these trials were pending or had terminated. This last position has, however, been very much modified and, owing, in a great measure, to a different, and to our minds a truer, concept of the nature and extent of this power, and, in part no doubt, to the unusual method of procedure, which, in its practical application, usually required that a judge, keenly and, at times, vitally interested in the result, was called to consider and determine the questions involved, many of the courts of this country have long held it for law that the right to punish for constructive contempt by reason of false and defamatory publications concerning proceedings in court should be properly confined to such publications about a trial or proceedings still pending, that it was only because and when such publications were calculated to obstruct or unduly interfere with the due administration of justice that such a power could be properly exercised, and that it was only when and to the extent that the judge was presently engaged in dispensing the state's justice that he could be considered as embodying in himself the majesty of the state's law and authorizing him to enforce obedience and respect to the courts and to his official acts, but, after a court had ended and a trial had finally terminated, if false, defamatory, or scurrilous publications were made concerning his official or personal conduct, this became a personal matter and he must seek redress by the ordinary methods and brings his cause before an impartial tribunal.

In this position, the doctrine of contempt by "scandalizing the court"—a term used, I believe, by Lord Hardwicke, and without reference to its effect or tendency to obstruct or interfere with the administration of justice, has no place, and the same will be found approved, substantially as stated, in many well-considered decisions of the state courts of this country, as In re Hart, 104 Minn. 88, 116 N. W. 212, 17 L. R. A. (N. S.) 585, 15 Ann. Cas. 197, Storey v. People, 79 Ill. 45, 22 Am. Rep. 158, Cheadle v. State, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199, Percival v. State, 45 Neb. 741, 64 N. W. 221, 50 Am. St. Rep. 568, Ex parte Green, 46 Tex. Cr. R. 576, 81 S. W. 723, 66 L. R. A. 727, 108 Am. St. Rep. 1035, and State v. Anderson, 40 Iowa, 207, and many others could be cited—is in accord with the rule prevailing in the federal court, both by statute and precedent (Patterson v. Colorado, 205 U. S. 454, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689; 1 U. S. Comp. Statutes, § 725), and as a practical proposition obtained in England in 1899 and for a long period prior to that date (McLeod v. St. Albans [1899] Appeal Cases, 549–561). In that case, my Lord Morris, while asserting the existence

of the power as described and stated by Lord Hardwicke, in delivering the judgment, said further:

"Committals for contempt of court are ordinarily in cases where some contempt ex facie of the court has been committed, or for comments on cases pending in the courts. However, there can be no doubt that there is a third head of contempt of court by the publication of scandalous matter of the court itself. Lord Hardwicke so lays down without doubt in the case of In re Read and Huggonson. He says: 'One kind of contempt is scandalizing the court itself.' The power summarily to commit for contempt of court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information. Committal for contempt of court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence, when a trial has taken place and the case is over, the judge or the jury are given over to criticism.

"It is a summary process, and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases. Committals for contempt of court by scandalizing the court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

True, in the next year, this power was exerted in England in the case of Reg. v. Gray, 2 L. R. Q. B. Div. 1900, p. 36, though it may be noted that, in delivering judgment, Lord Russell referred to the fact that the article in question, containing scurrilous abuse of the judge and in reference to his conduct as judge while sitting under the queen's commission, "was published in a newspaper and circulated in the town where he was still holding court."

There are courts in this country, of eminent ability and learning, which still adhere to the earlier position, a notable case being that of State ex inf. Crow, Atty. Gen., v. Shepherd, 177 Mo. 255, 76 S. W. 79, 99 Am. St. Rep. 624, a case very fully commented on in Thomas on Constructive Contempt. And Burdett v. Commonwealth, 103 Va. 838, 48 S. E. 878, 68 L. R. A. 251, 106 Am. St. Rep. 916, and State v. Morrill, 16 Ark. 384, and other decisions are to like purport. And in North Carolina, this doctrine in reference to constructive contempt was undefined and altogether uncertain until 1870–71, when the Legislature, having its attention called to the subject by the case of Ex parte Moore, then recently decided by the Supreme Court, 63 N. C. 397, passed an act (chapter 216, Laws 1870–71) amending our statute on contempt (chapter 177, Laws 1868–69), and which, after reciting that doubts existed as to the extent of the power of the court in the premises and that it was "due, alike to judicial authority and the freedom of the citizen, that all offenses, and especially those for which summary punishments without trial by jury may be imposed by the courts, should be distinctly known, and the nature and extent of their punishment defined and prescribed by law," added to section 7 of the former law, "The publication of grossly inaccurate reports of the proceedings of any Court," the words "about any trial or other matter then pending before said court, made with intent to misrepresent or bring into contempt the said court." The amending statute, among other things, then declared that the several acts, neglects, omissions of duty, malfeasances, misfeasances, and nonfeasances, specified in the former law as amended, were the only acts, etc., that should be the subject of contempt of court and that, if there were any parts of the common law then in force which recognized any other acts, etc., besides those specified, the same were repealed and annulled.

This statute, appearing in Revisal 1905, c. 17, § 939 et seq., has been several times approved in its principal features by decisions of this court, beginning with Ex parte Schenck, 65 N. C. 353, In re Walker, 82 N. C. 95, In re Patterson, etc., 99 N. C. 407, 6 S. E. 643, and many other cases. And, so far as we can now see, as construed and interpreted in the cases cited and others, notably Ex parte McCown, supra; In re Deaton; Scott v. Fishblate et al., it recognizes as valid every power that can rightfully be considered as essential to the respect and dignity of the courts and the due and orderly administration of justice therein. The act, in different sections and in comprehensive language, purports to confer on the court the power to punish summarily or on notice any and all disorderly behavior tending to interrupt its proceedings or to impair the respect due to its authority—any such conduct before its referees or juries, while engaged in official duties; any breach of the peace, noise, or other disturbance directly tending to interrupt its proceedings; disobedience of or resistance to its lawful decrees, orders, or processes; contumacious or unlawful refusal of any person to be sworn as a witness or to answer any legal or proper interrogatories after being sworn; misbehavior of any and all subordinate officers of the court in any official transaction; and, in reference to constructive contempts, arising by means of publications, etc.: "The publication of grossly inaccurate reports about any trial, or other matter pending before the court," etc., etc. Having reference to the history of this statute, the context and the language employed, it was clearly the purpose and meaning of the act to restrict the power of the court, in this last respect, to the publication of grossly inaccurate reports about a trial or other matter still pending, and, this being in our view the proper and only permissible occasion for the exercise of such a power in reference to these publications, we are of opinion that the provision of the statute should, in this respect, be upheld as written, and the power to punish summarily for defamatory reports and criticisms, about a matter that is past and ended, no longer exists.

It may be that if a grossly indecent or scurrilous publication about a judge in reference to his official conduct should be made and circulated in the community where he was presently holding court and about his rulings in such court conditions might be created where the exercise of the power could be upheld as essential to the due and orderly administration of public justice, a case presented in Reg. v. Gray, supra, but no such conditions appear in this record; the facts showing that the publications complained of were made after the court had adjourned and, so far as appears, after any and all matters referred to concerning the official conduct of the judge had terminated. Under the principles stated, therefore, the respondents may not be dealt with by process of contempt, but, however reprehensible their conduct may have been, redress must be sought before another tribunal and by ordinary methods of procedure.

[6] The motion to dismiss for want of jurisdiction was properly overruled. The court finds as a fact that copies of the publication were circulated in the county of Northampton, where the trial was held and, if it were otherwise, except in cases to enforce obedience to an order or a decree in a suit pending, this, regarded as an independent or collateral matter, is held to be a question of venue (Herring v. Pugh, 126 N. C. 852, 36 S. E. 287), and, ordinarily, a change of venue is not allowed in proceedings of this character. 9 Cyc. p. 35.

[7] And the exception to his honor's refusal to order a reference, under section 875 of the Revisal, is without merit. Even if the section applied, it clearly leaves the matter in his honor's discretion.

For the reasons heretofore stated, the judgment of the lower court must be reversed, and judgment entered that defendants go without day.

Reversed.

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(168 N. C. 434)

## WHITE et ux. v. GUYNN. (No. 172.)

(Supreme Court of North Carolina. March 17, 1915.)

1. PLEADING ⟸301 — VERIFICATION — SUFFICIENCY.

The verification of an answer wherein the defendant deposes "that he has read the foregoing answer, and that the same is true of his own knowledge, except to those matters therein stated on information and belief, and as to those he believes it to be true," is sufficient; it being a substantial compliance with the statute, and almost in the words of the statute.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 314, 318, 892–897, 904–906; Dec. Dig. ⟸301.]

2. TRIAL ⟸187, 193 — INSTRUCTIONS — COMMENT ON EVIDENCE AND CREDIBILITY OF WITNESSES.

In an action by husband and wife to recover the amount of a loan by the wife to defendant's intestate, an instruction that the husband, being a party, was not a competent witness, that if his testimony had been objected to the court would have ruled it out, but that as it was allowed to go in without objection it was the duty of the jury to consider it, but that in considering it they must remember that the burden of proof was upon the plaintiffs to satisfy them by the greater weight of evidence that the money was loaned, and that if they were not satisfied under all the circumstances that the money was loaned it was their duty to find for defendant, was not objectionable as casting an imputation upon the husband's truthfulness, or as expressing an opinion injurious to the plaintiffs as it was a mere caution to the jury that they should scrutinize the testimony of the husband as a party to the suit, having at least a moral interest in the result.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 414–419, 436–438; Dec. Dig. ⟸187, 193.]

3. WITNESSES ⟸146—COMPETENCY—TRANSACTIONS WITH DECEDENT.

In an action by husband and wife against an administrator to recover the amount of a loan to defendant's intestate, the husband was incompetent to testify to the transaction between him and his wife and the intestate.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 644–649; Dec. Dig. ⟸146.]

Appeal from Superior Court, Pamlico County; R. B. Peebles, Judge.

Action by W. C. White and wife against Mumford Guynn, administrator of J. S. White, deceased. Judgment for defendant, and plaintiffs appeal. Affirmed.

This is a civil action, tried upon this issue:

In what amount, if any, is the defendant indebted to Mrs. Kate G. White? Answer: None.

From the judgment dismissing the action, the plaintiffs appealed.

D. L. Ward, of Newbern, for appellants. Guion & Guion, of Newbern, and Z. V. Rawls, of Bayboro, for appellee.

BROWN, J. The plaintiffs, W. C. White and Kate G. White, brought this action to recover of the defendant, administrator of J. S. White, deceased, the sum of $500, alleged to have been loaned to the defendant's intestate by the feme plaintiff.

[1] (1) The plaintiff moved for judgment on the pleadings, because the verification of the answer was insufficient:

"Mumford Guynn, administrator of J. S. White, deceased, being duly sworn, deposes and says: That he has read the foregoing answer, and that the same is true of his own knowledge, except to those matters therein stated on information and belief, and as to those he believes it to be true. Mumford Guynn."

This verification was duly sworn to before a justice of the peace. We are of opinion that in form it is a substantial compliance with the statute; in fact, it is almost in the words of the statute. McLamb v. McPhail, 126 N. C. 220, 35 S. E. 426.

[2] 2. There was evidence offered upon the part of the plaintiff tending to prove that Mrs. White loaned $500, as alleged in the complaint, to the defendant's intestate. The plaintiff's husband was put upon the stand

for the plaintiffs, and testified without objection that the deceased asked his wife to lend him the $500, and that he saw her deliver him the money, and that all three were present at the time. The court, among other things, charged the jury as follows:

"Mrs. White claims the money was loaned by her to the deceased, Joel S. White, and she introduces her husband, W. C. White, to prove the loan. W. C. White, being a party to the suit, was not a competent witness. If his testimony had been objected to, I would have ruled it out; but, as it was allowed to go in without objection, it is your duty to consider it, but in considering it, you must remember that the burden of proof is upon the plaintiff to satisfy you by the greater weight of the evidence that this money was loaned. If you are not satisfied under all the circumstances that the money was loaned, then it is your duty to answer the issue: Nothing."

This is excepted to as an expression of opinion upon the part of the judge. We do not think that it can be fairly interpreted as an expression of opinion sufficiently injurious to the plaintiff to justify us in directing another trial. It was a mere caution to the jury that they should scrutinize the testimony of the plaintiff's husband as a party to the suit, and having at least a moral interest in the result.

[3] The fact that his honor told the jury that, if the testimony had been objected to, he would have ruled it out as incompetent, does not cast any imputation upon the truthfulness of the witness. As a matter of law, the husband, being a party to the action, was incompetent to testify to the transaction between him and his wife and the defendant's intestate. Bunn v. Todd, 107 N. C. 266, 11 S. E. 1043.

We have examined the other exceptions contained in the record, and find them to be without merit.

No error.

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(168 N. C. 407)

JAMES LEFFEL & CO. v. HALL. (No. 211.)

(Supreme Court of North Carolina. March 17, 1915.)

CONTRACTS ⇐15—AGREEMENT.

Where, when defendant purchased an engine from plaintiffs, he arranged to send them an old engine on which plaintiffs, after examining it, were to credit on his note such a price as could be agreed on, defendant, having rejected the offer made, cannot, in the absence of fraud, demand that plaintiffs credit him with the value of the old engine; the minds of the parties never having met on any such agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 61–66: Dec. Dig. ⇐15.]

Appeal from Superior Court, Duplin County; Daniels, Judge.

Action by James Leffel & Co. against W. I. Hall. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is an action for the recovery of personal property, viz., a 9½ x 12 horse power engine and a 40 horse power boiler, which had been sold to the defendant by the plaintiffs, and for which the former had given his note for $318, dated February 23, 1905, and due one year after its date, plaintiffs retaining the title to the property until the note was paid. The only question in the case is whether defendant is entitled to a credit on the note for the value of an old engine under the following circumstances: It appeared that defendant shipped the "old engine" to plaintiffs, subject to his inspection, and, if a price for it could be agreed upon by the parties, the same was to be credited on the note; that, after an inspection by the plaintiffs, they offered defendant $39 for it, which he refused to take, and they failed to agree as to the price. Plaintiffs thereupon notified the defendant that the old engine was held subject to his orders and directions, it having been shipped, as stated, to the plaintiffs for their inspection and the offer of a price. They wrote to defendant on August 25, 1909, as follows:

"We have your favor of the 20th inst., and, as this matter is now in the hands of our attorney, we cannot recall it, and will have to let the matter run its course. We trust that you can arrange in some manner to make payment of this claim, so that you will not lose possession of the machinery. In regard to allowance for the old engine, we are willing to take it back and allow you what we can for it. If your railway agent has not been able to secure you a rate so as to ship it as scrap iron, perhaps you had better direct his attention to same again."

There was evidence as to the value of the old engine.

The court instructed the jury that, if they found the facts to be as stated by the witnesses, their verdict should be in favor of the plaintiffs for the amount of the note, subject to the admitted credits, and without any credit for the value of the engine. There was a verdict accordingly, and judgment thereon, from which defendant appealed.

Geo. R. Ward, of Wallace, and Stevens & Beasley, of Warsaw, for appellant. Gavin & Wallace, of Kenansville, for appellees.

WALKER, J. (after stating the facts as above). There is a suggestion in defendant's brief of fraud on the part of the plaintiffs, but we have failed to find any evidence of it in the case. The agreement was not that the plaintiffs would allow the defendant the value of the old engine, but that, after examining it and knowing its then condition, they would offer him such a price for it as they could afford to give under the circumstances. It was left to them to fix the price that they would be willing to pay, and there was no promise by them to pay its value as fixed by the defendant or any one else, or by the jury. If the defendant wanted any such offer, he should have stipulated for it in language susceptible of that meaning. We cannot make the contract for the parties, but can only construe that which they have made for themselves. We find it expressly

stated in the case that the property was shipped to the plaintiffs subject to their inspection, and, if the parties could agree upon the price, it should be credited upon the note for $318. This certainly is not a contract to pay the value of the engine, the amount to be left open for future determination, but a definite sum to be agreed upon. The minds of the parties must meet upon one and the same thing, and the meaning of their contract must be ascertained from its words, and the mutual agreement of the parties, and not merely from the intention, belief, or understanding of one of them. Bailey v. Rutjes, 86 N. C. 517; Pendleton v. Jones, 82 N. C. 249; Brunhild v. Freeman, 77 N. C. 128; King v. Phillips, 94 N. C. 558; Hedgepeth v. Rose, 95 N. C. 41; Wilson v. Scarboro, 163 N. C. 380, 79 S. E. 811.

"A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree." Prince v. McRae, 84 N. C. 674.

"It is not the understanding, but the agreement, of the parties that controls, unless that understanding is in some way expressed in the agreement. Even if the defendant had clearly shown that it so understood the agreement, it will not do, as the court proceeds, not upon the understanding of one of the parties, but upon the agreement of both. No principle is better settled." Lumber Co. v. Lumber Co., 137 N. C. 431, 49 S. E. 946.

The court, therefore, properly refused to submit the issues tendered by the defendant as to the value of the engine, as there was no evidence to support them, and the other exceptions must be overruled for the same reason.

No error.

(168 N. C. 424)

## DUPREE et al. v. BRIDGERS et al.

(No. 183.)

(Supreme Court of North Carolina. March 17, 1915.)

1. ATTORNEY AND CLIENT ⟸143—COMPENSATION FOR SERVICES—CONVEYANCE OF LAND IN CONTROVERSY.

An agreement between plaintiffs and attorneys, reciting that plaintiff thereby bargained, sold, and conveyed to the attorneys a one-fourth interest in the lands sought to be recovered by plaintiffs, created a valid and enforceable claim not avoidable by the parties by settlement in the absence of any fraud or undue advantage.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 328–331; Dec. Dig. ⟸143.]

2. ATTORNEY AND CLIENT ⟸144 — AGREEMENT FOR COMPENSATION.

When a party contracts with his attorney fixing fees for recovery of property, the death of the party does not revoke the contract, but it is binding upon the funds.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 332, 333; Dec. Dig. ⟸144.]

3. ATTORNEY AND CLIENT ⟸176—COMPENSATION OF ATTORNEY—LIEN.

An agreement between an attorney and client that the attorney shall have a lien on the judgment is decisive as to the existence of the lien and its amount.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 881; Dec. Dig. ⟸176.]

4. ATTORNEY AND CLIENT ⟸190—COMPENSATION — PROCEEDINGS TO RECOVER — INTERPLEA.

Where it was agreed between attorney and client that the attorney should have for his services a portion of the land sought to be recovered, and the plaintiffs and defendants settled the suit, an interplea by the attorneys in the original cause was a proper remedy to recover their compensation.

[Ed. Note.—For other cases, see Attorney and Client, Cent.Dig. §§ 412–417; Dec.Dig. ⟸190.]

Appeal from Superior Court, Pitt County; Peebles, Judge.

Action by Paul C. Dupree and others against Henry C. Bridgers and others, in which Harry Skinner and another file their petition in intervention to enforce a lien or claim for services as attorneys. From a judgment in favor of interveners, plaintiff Tabitha De Visconti and others appeal. Affirmed.

J. L. Horton, of Farmville, and W. H. Lyon, Jr., of Raleigh, for appellants. Winston & Biggs, of Raleigh, for interveners.

BROWN, J. The record discloses that on November 8, 1910, Addie G. De Visconti made two contracts with Henry Clark Bridgers, whereby she undertook to convey to him one-half of 25 acres of land in the town of Farmville. The said land was to be developed and laid off into lots, and she was to have one half of the lots and Henry Clark Bridgers the other half, and the depot was to be located upon the property when the railroad was completed to Farmville. She also conveyed to him for the consideration of $1 a right of way 100 feet wide through her lands near the town of Farmville, and depot site. Mrs. De Visconti lived about one year and died in November, 1901. She left surviving her one son by a former marriage named Paul C. Dupree, and two daughters, Tabitha De Visconti and Sue May De Visconti. These last two were infants and F. M. Dupree, their uncle, was their guardian. After the death of Mrs. Addie De Visconti, her sister, May Sue Albritton, qualified as guardian of her three infant children, Paul C. Dupree, Tabitha De Visconti, and Sue May De Visconti, and employed the petitioners, F. G. James and Harry Skinner, to bring suit to set aside and declare void the above deeds which Henry Clark Bridgers had secured from her sister, on the ground of mental incapacity on the part of the said Mrs. De Visconti, and the unconscionableness of the bargain. The guardian employed the interveners to bring the above-entitled action to set aside the contracts. She made frequent visits to said

attorneys and consulted with them in reference to the matter in consequence of which the action was instituted by said attorneys, who prepared and filed the elaborate complaint set out in the record, and otherwise prepared the case for trial after the defendant had answered and joined issue. Mrs. Albritton died, and F. M. Dupree was appointed guardian for the two feme infants. Paul C. Dupree had become of age, and then this instrument, it is admitted, was duly executed:

Memorandum of agreement made this the 10th day of March, 1911, between Paul C. Dupree and F. M. Dupree, guardian of Tabitha De Visconti and Sue May De Visconti, parties of the first part, and Harry Skinner and F. G. James, parties of the second part, witnesseth: That in consideration of $100 and legal services to be performed, the parties of the first part agree to allow and pay to the parties of the second part one-half of their recovery in the case of Paul C. Dupree and F. M. Dupree, guardian of Tabitha De Visconti and Sue May De Visconti against Henry Clark Bridgers, and to this end the parties of the first part have bargained, sold and conveyed to the parties of the second part a one-fourth interest in the lands fully described in the first and twelfth sections of the complaint filed in this cause. In testimony whereof, the said parties of the first part have hereunto set their hands and seals, the day and year above. Paul C. Dupree. [Seal.]
F. M. Dupree. [Seal.]
Witness: Winnie Skinner.

Paul C. Dupree verified the complaint. The defendant Bridgers employed counsel and filed an answer and otherwise defended the action. Pending the action, Paul C. Dupree died, and his interest in the lands descended to his two sisters, Tabitha and Sue May. It is admitted that on April 2, 1913, Tabitha De Visconti, Sue May, who meanwhile had married Ben. S. Sheppard, and Paul C. Dupree, without their attorneys' knowledge and consent, conferred with Henry C. Bridgers, the defendant, and compromised and settled the action by a written agreement entered into and set out in the record, whereby certain parts of the lands sued for were relinquished and conveyed by said defendant to the plaintiffs. A consent decree was entered by Judge Daniels in the cause, carrying out the compromise and discharging Henry C. Bridgers from the case. This decree provides:

"That it is made without prejudice to the matters and things in controversy between the plaintiffs and the interveners in this action, which said matters are retained for further orders."

Under the written agreement of March 10, 1911, the interveners claim only a share of the land recovered for Paul C. Dupree, who executed the contract or conveyance after he became of age. His honor, Judge Peebles, refused to give judgment for any portion of the feme plaintiffs' shares, as they are under age, but adjudged that, as Paul C. Dupree was admitted to be of age when he executed the agreement, the interveners were entitled to recover one-half of one-third of 5½ acres of land recovered for him under the written agreement.

The plaintiffs demanded a jury trial and tendered certain issues, viz.: At the hearing of said petition, the said Mrs. Sheppard and Miss Tabitha De Visconti tendered the following issues: Did the intervener, Harry Skinner, render any service to the estate of Tabitha De Visconti and Sue May Sheppard? Answer: ———. If so, what was the value of such service? Answer: ———. Did the intervener, F. G. James, render any service to the estate of Tabitha De Visconti and Sue May Sheppard? Answer: ———. If so, what was the value of such service? Answer: ———.

His honor very properly refused to submit these issues. The execution of the agreement by Paul C. Dupree is admitted, and the interveners claim nothing of the other plaintiffs, although it is certain that they profited largely by the action, but plaintiffs, Tabitha and Sue, deny that they "added anything to their comfort or estate in doing so."

At the same time, they admit they compromised the action without their attorney's knowledge and recovered some very valuable land in consequence thereof, although they aver that their mother was fully competent to make the deed to Henry C. Bridgers and allege that this action ought never to have been brought.

[1] If these are the real views of the plaintiffs, it would seem that they should return the land to the defendant. The services which the interveners render appear in the record in this case. It is admitted that they advised, after many conferences and examinations, the bringing of this suit. It appears that they issued the summons, filed the bond, prepared and filed the complaint, and prepared the case for trial. They were prevented from trying it by the action of the plaintiffs and defendant. The interveners do not claim upon a quantum meruit, and no such issue is raised by the pleadings in this case. The interveners claim Paul C. Dupree conveyed to them, by the instrument above set out, a certain interest in the lands described in the complaint.

It is not alleged that the said paper writing was obtained by fraud, or that any undue advantage was taken on the grantor in it by these interveners. It is well settled, when an attorney and his client agree in writing as to the amount of compensation to be paid, such agreement is valid in the absence of fraud. Weeks on Attorneys, p. 580.

[2] Nor is this agreement revoked by the death of Paul C. Dupree. It is held that when a party entered into a contract with an attorney, fixing his fees for the recovery of property, the death of the maker of the contract did not revoke it, but that the same was binding upon the funds and constituted an equitable assignment of the same. Wylie v. Coxe, 15 How. 416, 14 L. Ed. 301.

[3] Written contracts between attorneys

and their clients are to be treated and enforced as all other contracts, and in the absence of fraud, coercion, or undue advantage, the amount of compensation agreed upon in the contract is held to be conclusive and binding between the parties. Weeks on Attorneys, p. 582; 4 Cyc. p. 987, and numerous cases cited in note 78; 3 A. & E. 434.

An agreement between an attorney and client that the attorney shall have a lien on the judgment is decisive as to the existence of the lien and its amount. 4 Cyc. p. 1006.

[4] We think furthermore that the interplea in the original cause is the proper remedy. That was the remedy pursued in the case of Barnes v. Alexander, 232 U. S. 117, 34 Sup. Ct. 276, 58 L. Ed. 530, where it was held that when attorneys had a contract for one-quarter of the amount recovered, this contract was valid, although contingent, and that the decree of the court awarding compensation to the attorneys under said contract was proper. See, also, Weeks on Attorneys, § 368.

The judgment of the superior court is affirmed.

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(168 N. C. 402)

## SINGLETON et al. v. CHERRY et al.

(No. 10.)

(Supreme Court of North Carolina. March 17, 1915.)

1. HUSBAND AND WIFE ⟸49½—TRUSTS ⟸86—CONVEYANCES—PRESUMPTIONS.

Where a husband conveys his property direct to his wife, or causes it to be so conveyed, the law presumes that it is a gift, and no resulting trust arises.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 249–255; Dec. Dig. ⟸49½; Trusts, Cent. Dig. § 128; Dec. Dig. ⟸86.]

2. ACKNOWLEDGMENT ⟸37—POWERS OF MARRIED WOMEN—CONVEYANCES.

Conveyances by a married woman to her husband are void where there was no privy examination, and the probate officer did not make the certificate required by Revisal 1905, § 2107, imposing those formalities on a married woman's deed.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 183, 199–216; Dec. Dig. ⟸37.]

3. ACKNOWLEDGMENT ⟸37 — POWERS OF MARRIED WOMAN—CONVEYANCES.

While Pub. Laws 1911, c. 109, authorizes a married woman to contract and deal, with her real and personal property as if she were a feme sole, it does not authorize the conveyance by a married woman of her landed estate to her husband without observing the requirements of Revisal 1905, § 2107, which provides for a privy examination of the wife and a certificate by the probating officer.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 183, 199–216; Dec. Dig. ⟸37.]

Appeal from Superior Court, Beaufort County; Ferguson, Judge.

Action by Claudia L. Singleton and others against M. L. Cherry and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellants. Ward & Grimes, of Washington, N. C., for appellees.

BROWN, J. This suit was instituted by the feme plaintiff against the defendants to recover an undivided one-fourth interest in the home place of Robert C. Cherry, who was the father of the defendants and of the former husband of the feme plaintiff.

The plaintiffs allege that the land belonged to Harriet C. Cherry or Cornelia H. Cherry, the wife of R. C. Cherry, and that upon her death it descended to her four sons as her heirs at law, and that the interest of Alonza Cherry, one of her sons, passed by his will to Mrs. Singleton, the wife of Alonza Cherry, now deceased.

Mrs. Cornelia Cherry died intestate in 1886, and her husband Robert C. Cherry, died in 1911, leaving a will in which he devised the land to Macon, Claud, and Villa Cherry, the defendants in this action. Alonza Cherry, the other son, died without issue January 10, 1903, leaving a will in which he devised all of his property to the feme plaintiff, except such as he might inherit from his father's estate, "which will go to my half brothers and sisters." He had no half brothers and sisters, the defendants being his full brothers, but had one half-sister, a minor child by his father's second wife. The land in question was sold under an execution on July 1, 1878, execution issuing against Robert C. Cherry, and was purchased at that sale by George H. Brown, for the sum of $5.

On April 10, 1879, Brown and wife executed a deed in fee to Cornelia Cherry. On April 19, 1886, she executed a deed to her said husband. This deed was witnessed by one Congleton, and probated and recorded September 4, 1893, after the grantor's death. No privy examination was ever taken, and none appears in the probate.

On November 6, 1882, Cornelia Cherry executed a deed to her said husband for said land, which was probated and privy examination taken by a justice of peace November 6, 1882. The defendant has abandoned the position that Cornelia Cherry acquired no title through the Brown deed, and now claims under the two deeds above recited.

[1, 2] It is not necessary to consider the charge of the judge as to the presumption of delivery arising from registration after the death of the grantor, as we are of opinion that both deeds by Mrs. Cherry to her husband are void on their face for lack of proper probate. The deed of 1886 has no privy examination, and we find no sufficient evidence that Mrs. Cherry held the land in trust for her husband.

It is well settled that, even where the husband conveys his property direct to the wife, or causes it to be conveyed to her, the law presumes that it is a gift and no resulting trust arises.

The other deed of November 6, 1882, from Cornelia Cherry to her husband, under which the defendants claim, has the ordinary privy examination in due form, but the provisions of Revisal, § 2107, have not been complied with. This section requires certain findings and conclusions of the probate officer to be made with reference to contracts between the wife and husband in relation to her separate property.

[3] While the act of 1911 (chapter 109) known as the "Martin Act" provides that a married woman may contract and deal so as to affect her real and personal property as if she were a feme sole, it excepts contracts between herself and her husband. We are of opinion that in a conveyance of the landed estate of a wife by herself to her husband the requirements of section 2107 must be observed.

In this case, so far as the evidence shows, the wife undertook to convey to the husband her entire landed estate. At least the evidence does not disclose that she had any other real property.

We do not think that the Martin Act intended in such a transaction between the husband and wife that the safeguards provided by the statute for the protection of married women should be set aside. It is a mistake to suppose that the case of Rea v. Rea, 156 N. C. 530, 72 S. E. 573, 873, relied upon by the defendant, applies to the facts of this case, or is any authority that, in the conveyance of real property by the wife to the husband, the provisions of the statute (Revisal, § 2107) are dispensed with. In the Rea Case the wife owned some shares of stock in the cotton mills, and indorsed them to her husband, intending them as a gift.

The majority of the court held that that particular transaction was a valid transfer of the stock without complying with the said statute. Vann v. Edwards, 135 N. C. 662, 47 S. E. 784, 67 L. R. A. 461.

No error.

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(168 N. C. 472)

## SWAN v. CARAWAN et al. (No. 174.)

(Supreme Court of North Carolina. March 24, 1915.)

1. BILLS AND NOTES ⟸499—ACTIONS.

Proof of execution of a note makes out a prima facie case, and defendant has the burden of proving payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1682, 1695–1697; Dec. Dig. ⟸499.]

2. TRIAL ⟸187—PROVINCE OF JURY—INTEREST OF WITNESS—INSTRUCTIONS.

Where a witness admitted that he was a mortgagee of land which plaintiff desired to sell for assets, the question whether that fact affected his credibility is for the jury, and it is an invasion of their province for the court to declare that it did not.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 414–419; Dec. Dig. ⟸187.]

Appeal from Superior Court, Pamlico County, Peebles, Judge.

Petition by C. V. Swan, administrator of David K. O'Neal, against C. C. Carawan and Britiannia O'Neal to sell land for assets. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

This is a proceeding to sell land for assets. The only issue submitted to the jury was as to the indebtedness of the intestate. The plaintiff introduced a note and a witness who testified that he saw the deceased execute it. The defendant relied upon the plea of payment, and introduced a witness, Mr. Watson, who testified that he saw the deceased pay the indebtedness. On cross-examination this witness (Watson) testified that he did not consider that he owned the land yet which the plaintiff was seeking to sell, but that he held a mortgage deed on the land.

His honor charged the jury as follows:

"The plaintiff swears that Mr. O'Neal signed the note. There was no objection to his testimony. If there was, I would have ruled it out, as he was interested in the result of the suit. There was no objection. Therefore it is your duty to consider it. But, when you consider it, remember that he is interested in the result of this suit, and ascertain the best you can what effect his interest would have upon the truthfulness of his testimony, then give to his testimony that weight and effect under all the circumstances you think it is entitled to. It does not appear that Watson is an interested witness, and the whole matter depends upon whether or not you believe Watson, who says that the note was paid, or the plaintiff, who says that it has never been paid. The burden is upon the plaintiff to satisfy you by the greater weight of the evidence that the note was never paid, and that something is due, and what amount is due."

The plaintiff excepted to that part of the charge stating that it did not appear that Watson was an interested witness and to that part of the burden was upon the plaintiff to satisfy the jury that the note was never paid. There was a verdict for the defendant, and from the judgment thereon the plaintiff appealed.

Z. V. Rawls, of Bayboro, for appellant.

ALLEN, J. [1] When the plaintiff proved the execution of the note by the intestate, he was entitled to have the issue of indebtedness answered in his favor, unless the defendant established his plea of payment, and the burden of proof upon this plea was on the defendant. Guano Co. v. Marks, 135 N. C. 59, 47 S. E. 127. It was therefore error to charge the jury that the burden was on the plaintiff to prove that the note had not been paid.

[2] The witness Watson, upon whom the defendant relied in support of his plea, admitted on cross-examination that he held a mortgage on the land which the plaintiff was seeking to sell, and it was for the jury, and not for the judge, to say whether this fact would affect his testimony, and the statement of his honor that it did not appear that this witness was interested was an expres-

sion of opinion upon the weight of evidence which the law does not permit.

There must be a new trial.

New trial.

(163 N. C. 428)

## BRINKLEY & LASSITER v. NORFOLK SOUTHERN R. CO. et al. (No. 170.)

(Supreme Court of North Carolina. March 17, 1915.)

1. APPEAL AND ERROR ⟸692—RULINGS ON EVIDENCE—REVIEW.

Repeal to allow a witness to answer a question cannot be reviewed, the record not disclosing what he would have answered or what was expected to be proved by him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905–2909; Dec. Dig. ⟸692.]

2. APPEAL AND ERROR ⟸1050 — HARMLESS ERROR—ADMISSION OF EVIDENCE.

It being a matter which an intelligent jury would know without any evidence, and as to which there was no real dispute, permitting a witness to testify that a basement in a damp, boggy place, without a concrete floor, would not be free from danger of seepage was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. ⟸1050.]

3. APPEAL AND ERROR ⟸1048 — HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where witness answered that he did not know, permitting an objectionable question was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4145, 4151, 4158–4160; Dec. Dig. ⟸1048.]

4. MUNICIPAL CORPORATIONS ⟸845—DRAINS —DUE CARE—EVIDENCE.

The minutes of the board of aldermen, showing appointment of engineers to construct drainage for the town, is competent on the question of exercise of due care to construct drains of sufficient size.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1796–1802; Dec. Dig. ⟸845.]

5. APPEAL AND ERROR ⟸1048 — HARMLESS ERROR—ADMISSION OF EVIDENCE.

Even if defendant's witness was not qualified, there was no error in allowing him to give his opinion, the fact embodied in the question not being in dispute, but testified to by plaintiff's witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4145, 4151, 4158–4160; Dec. Dig. ⟸1048.]

6. MUNICIPAL CORPORATIONS ⟸835 — WATERS AND WATER COURSES ⟸118—DRAINS —DEGREE OF CARE.

A town which raised a street and put a drain under it for surface water, and likewise a railroad which replaced the drain with another, is, as regards liability for injury to abutting property from accumulation of surface water, under the duty only of exercising ordinary care.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1785; Dec. Dig. ⟸835; Waters and Water Courses, Cent. Dig. §§ 128–130; Dec. Dig. ⟸118.]

Appeal from Superior Court, Pitt County; Daniels, Judge.

Action by Brinkley & Lassiter against the Norfolk Southern Railroad Company and the town of Greenville. Judgment for defendants, and plaintiff appeals. Affirmed.

This is an action in which the plaintiffs are asking for damages from the defendant railroad company and the town of Greenville for building a culvert and closing a ditch which ran through their land and across Dickinson avenue immediately under where the railroad crosses. In putting in the improvements, the defendants placed two 24-inch drain tile parallel in said ditch, and built a culvert between four and six feet high at the opening of said drain tile in the lower edge of plaintiffs' property. Plaintiffs claim damage from the ponding of water by reason of the insufficient opening to carry off the water coming down said ditch which ran along parallel and near to the walls of their brick warehouse, alleging that the water caused the walls of said building to give way and crack, and soaked the basement used for ordering and grading tobacco. This was denied by the defendants.

The evidence tended to show that many years before this place at the street was a low flat, and the town constructed a wooden drain at the street crossing of the drain 18 inches wide; that subsequently one line 24-inch pipe was put in under the street, and it was raised some; that thereafter, the town authorities paved Dickinson avenue and put in two lines of 24-inch pipe and carried this drain across the street, and the railroad company had continued the same drains across its property below Dickinson avenue for about 30 feet. The plaintiffs built their buildings on the ditch and did not cement the basement, and complain because the water rose in the basement.

The jury returned the following verdict:

(1) Has the plaintiffs' property been damaged as alleged in the complaint, by the negligence of the defendant, Norfolk Southern Railroad Company? Answer: No.

Has the plaintiffs' property been damaged as alleged in the complaint, by the negligence of the defendant the town of Greenville? Answer: No.

Judgment was entered upon the verdict in favor of the defendants and plaintiffs appealed, assigning the following errors:

(1) In that the court committed an error in permitting the witness to answer the question as to whether there would have been any ponding in 1910, if the drainage had been properly put there. "Q. Mr. Moore called attention to some rains in 1910, and asked you about the ponding of water then. Would there have been any ponding if the drainage had been properly put in there?"

(2) In that the court permitted the witness to answer the question as to whether any basement could be depended upon to be free from danger of seepage that does not have concrete floor and wall in a damp, soggy place.

(3) In that the court permitted the defendant's counsel to ask T. J. Smith, who was not qualified as an expert, or by practical experience to answer, the following: "Q. From your knowledge and experience of drainways and the area and territory naturally drained into this drainway, I ask you if that drainway is sufficient to carry that water off with reasonable rapidity?"

(4) In that the court permitted defendant's

witness C. H. Harvey to answer the following question, although not expert, or qualified as an expert: "Q. I ask you from your experience if in heavy rainy seasons water will rise in a basement that is located in low springy land that has no concrete floor and concrete side wall. A. Yes, sir, I have seen water rise in basements. I believe concrete is used as a preventative to keep basements dry."

(5) In that the court permitted the introduction of the minutes of the board of aldermen, without showing the purpose for which introduced, as having no bearing on the question at issue before jury.

(6) In permitting witness E. H. Evans to answer the question set forth in the record, page ———, as to the sufficiency of the opening for drainage, without expert knowledge, or experience to answer question as to proper drainage, basing his opinion on what he had seen.

(7) Court's permitting W. H. Dail, Jr., to answer a question as to the water in a previous basement without showing that conditions were the same, or that he was familiar with conditions now.

(8) The plaintiff appellants rely on the exceptions 9, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28.

S. J. Everett, Harry Skinner, and L. G. Cooper, all of Greenville, for appellant. L. I. Moore, of Greenville, for appellee Norfolk Southern R. R. Jarvis & Wooten and F. G. James & Son, all of Greenville, for appellee Town of Greenville.

ALLEN, J. [1] The first assignment of error cannot be sustained, because the record fails to disclose what would have been the answer of the witness or what the plaintiff expected to prove. Lumber Co. v. Childerhose, 167 N. C. 40, 83 S. E. 22. The evidence both for the plaintiff and the defendants was to the effect that the ponding of water referred to in 1910 was the result of an extraordinary rainfall, and we cannot infer from the evidence what the opinion of the witness as to its effect if the drainage had been properly put in, and cannot see that the answer would have been favorable to the plaintiff.

[2] The second and fourth assignments of error present substantially the same question, and we see no reversible error in permitting the witness to answer the questions propounded. In the first place, in the absence of any evidence, an intelligent jury would know that a basement in a damp, soggy place without a concrete floor would not be free from the danger of seepage. And again, the record shows that there was really no dispute as to this fact.

The plaintiff testified:

"The rear end of our warehouse was built on soft land. The only way that water could come into our basement had to come by seepage or going under the walls and rising up. We have no concrete walls in our basement."

And a witness for the plaintiff, S. D. Pruitt, who was manager for the warehouse company, said:

"Our boiler room is built right down close to the edge of this run. If you build a house on springy land and don't put in a concrete floor the water will rise in it."

[3] The third assignment of error is without merit, because, if the question was objectionable, the answer of the witness could not affect the controversy. He said in reply to the question, "I don't know who put in the second pipe, whether the railroad or town."

[4] The minutes of the board of aldermen, the subject of the fifth assignment, showing the appointment of engineers to construct the drainage for the town of Greenville, was competent upon the question of the exercise of due care.

[5] The question asked E. H. Evans, referred to in the sixth assignment of error, and the answers thereto, are as follows:

"Q. Knowing as you do that ditch, and knowing the size of that tile, and knowing the usual rainfall in this community, have you an opinion satisfactory to yourself as to whether that tile is sufficient to carry off that water that comes down that ditch in ordinary rainfall? A. I should say it was."

The fact embodied in this question and answer was not in dispute, as there is no evidence upon the part of the plaintiff that the plaintiff was injured by ordinary rains or that the pipes would not carry off such rains.

The civil engineer introduced by the plaintiff testified:

"I think the drainways in question are sufficient to take off the water in ordinary times."

D. S. Spain, a witness for the plaintiff, said:

"Whenever the ditch was full of water it was after a heavy rain. I never saw that condition after an ordinary rain."

The seventh assignment of error is not supported by the record, which shows that, before the witness was permitted to answer, the court asked him about the construction of the cellar, and that he said:

"It was very much the same as now."

[6] We might decline to consider the exceptions in the eighth assignment of error, upon the ground that they do not conform to our rules, but we have examined the entire charge and the exceptions to it taken by the plaintiff and find nothing of which he can justly complain.

His honor charged the jury, among other things, as follows:

"What duty did the town of Greenville and the railroad company owe the plaintiff? The town of Greenville had the right to, and it was the duty of its board of aldermen to, exercise their discretion in grading and improving the streets of the town, and in doing that they improved this avenue and raised the surface of the street, placed drains under it for the purpose of carrying away the water which naturally came across it from the land of the plaintiffs, and the duty they owed plaintiffs under these circumstances was to provide the streets with sufficient drains to carry off said water without injury to the plaintiffs.

"It was the duty of the town of Greenville to exercise ordinary and reasonable care in the improvement of its streets to provide for such rains, as could, with the exercise of ordinary care, be foreseen, taking into consideration the weather conditions in the community in which the work was done. The plaintiffs allege that

the defendant town of Greenville failed to exercise this care, and was thereby guilty of negligence, and that the railroad company participated in this; and there was evidence tending to show that the railroad company took up the first drain pipe across Dickinson avenue and put that down again, and still another, and that a bulkhead was placed against plaintiffs' property through which these drain pipes ran. The allegation is that these two pipes are not sufficient provision against ordinary rainfalls, that could be foreseen with the exercise of ordinary care. The defendant town of Greenville can't be held liable because it failed to make provision against extraordinary rainfalls, a cloudburst, or unusual or unexpected rain which could not be foreseen in the exercise of ordinary care by a man of reasonable prudence, and the same rule applies to defendant railroad. You can only answer these issues as to the defendants if they failed to exercise reasonable care to provide against the ordinary conditions which a man of reasonable prudence could have foreseen were likely to happen in reference to this drainway.

"They only fail in duty when they fail to exercise ordinary care and prudence.

"The law holds the city liable where they fail to exercise that care, and where their failure to do so is the cause of injury such as is alleged in this case. You will note that it must be a breach of a duty that the defendants owed to the plaintiffs that justifies the finding upon these first two issues, and the only duty that the defendants owed the plaintiffs in this case was to exercise ordinary care to provide such drains as to remove without injury to plaintiffs such surface water as from experience and knowledge of the past might be reasonably anticipated to fall and to be ponded against. They are not required to provide against such extraordinary and excessive rains as could not be reasonably foreseen and provided against."

This imposed upon the defendants the duty of exercising ordinary care and made them liable for negligence, which is in accordance with our authorities. Dorsey v. Henderson, 148 N. C. 423, 62 S. E. 547; Hoyle v. Hickory, 164 N. C. 81, 80 S. E. 254.

We find no error upon the record.

No error.

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(168 N. C. 415)

## CLARK v. NORFOLK SOUTHERN R. CO.

(No. 177.)

(Supreme Court of North Carolina. March 17, 1915.)

LIMITATION OF ACTIONS ⊂⊃199—ACCRUAL OF CAUSE—QUESTION FOR JURY.

There being a conflict in the testimony for plaintiff as to when a railroad was built, whereby the cause of action for diversion of water accrued, the question, as regards the bar of the statutes, is for the jury.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 727–730; Dec. Dig. ⊂⊃ 199.]

Appeal from Superior Court, Pitt County; Peebles, Judge.

Action by W. P. Clark against the Norfolk Southern Railroad Company. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial ordered.

This is an action to recover damages for the diversion of water. The defendant denied that it had diverted any water to the injury of the plaintiff and relied upon the plea of the statute of limitations. The action was commenced March 1, 1912, and was tried in September, 1914.

Plaintiff introduced the following evidence:

W. P. Clark, plaintiff, testified:

That he is the owner of the land described in the complaint, which is the same land described in the deed from John T. Bruce to himself, and that he has been living on said land since 1896. That said land is located about two miles from the town of Greenville, and about one mile east of the line of the Norfolk Southern Railroad. That said tract of land lies along, and is drained through, Patrick's branch. That prior to 1908 his land lying along said branch did overflow slightly during very heavy rains, but that the water would run off quickly. That during 1908 about 17 acres of his land was overflowed, and has remained overflowed ever since. That prior to 1908 he always made a good crop on said 17 acres of land, but that since that time he has been unable to make any crops on said piece of land. That prior to 1908 said land was worth $100 per acre, and by reason of the water standing thereon since that time it has been damaged fully one-half of its value. That said 17 acres of land has been damaged $50 per acre. A great deal more water comes down Patrick's branch than prior to 1908. Prior to 1908 water would overflow that piece of land, but it would not stand long, now it stands on it all the time.

W. Harvey Allen, a witness for plaintiff, testified:

I am acquainted with the Clark land, and also acquainted with the line of the Norfolk Southern Railroad running from Greenville to Farmville, and I am acquainted with the pocosin through which the railroad runs. Lying about one mile west of Clark's line the railroad company cut ditches through a large pocosin which, before the railroad was built, was a flat basin piece of land, and there were several long slashes in there that drained in various courses, and after the railroad company built their railroad there they cut these slashes in little fish holes right down the railroad. Part of it was done at the time they were building the road and part since then. That those slashes of fish holes before the railroad was built emptied into Chinquapin branch which emptied into Forbes millpond. After the railroad was built the water from Chinquapin branch run down the ditches of the Norfolk Southern Railroad and into Patrick's branch. The second ditches were cut a year or so after the railroad was built. I have been living on the Plank road, the main road which Mr. Clark's land lies, and I never saw the said road at Patrick's branch overflow but what a man could go through there dry footed until the Norfolk Southern turned the water down there, and since the railroad turned the water I have been across there at times when it come over my buggy axle, and the land has been so wet that a man could not afford to tend a crop. I think between 15 and 20 acres of cleared land now overflows, and is damaged half or more. The Norfolk Southern Railroad was built six or seven years ago. I cannot say exactly what year it was built.

There was also evidence as to the amount of damages.

At the close of the evidence his honor said he would charge the jury that the plaintiff could not recover, on the ground that the plaintiff's action was barred by the statute of limitations, and in deference thereto the plaintiff submitted to a judgment of nonsuit and appealed.

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F. G. James & Son, of Greenville, for appellant. L. I. Moore, of Greenville, for appellee.

ALLEN, J. The statute of limitations applicable to the plaintiff's cause of action is section 394, subsec. 2 of the Revisal, which limits the time within which an action may be brought to five years from the time the cause of action accrues, and in Duval v. R. R., 161 N. C. 450, 77 S. E. 311, the court, speaking of this section, says:

"Construing the section, the court has several times held that for such an injury recovery must be for the entire wrong, and the cause of action accrues when the first substantial injury is caused by reason of any structure of the railroad of a permanent nature."

And to the same effect are Cambell v. R. R., 159 N. C. 586, 75 S. E. 1105; Stack v. R. R., 139 N. C. 366, 51 S. E. 1024; and Staton v. R. R., 147 N. C. 428, 61 S. E. 455, 17 L. R. A. (N. S.) 949.

Applying this rule to the evidence, it is clear that his honor was in error in holding that, upon any view of the evidence, the plaintiff's cause of action was barred.

The evidence of the plaintiff himself tends to prove that the first substantial injury was in 1908, but if we discard his evidence the witness, Harvey Allen, who was testifying at September term, 1914, said that the road was constructed six or seven years ago, and if we accept the longest period (seven years) this would furnish evidence that the road was constructed in September, 1907, which would be less than five years from the commencement of the action, March 1, 1912. This witness also testified that after the road was built the defendant cut ditches down the railroad, a part of the ditches being cut at the time the road was built and a part a year or so thereafter, and that these ditches diverted water.

The only other witness who speaks of the time when the road was constructed is T. E. Hooker, who says: "I think the road was built in 1906," but this would at most only furnish a conflict in the evidence, which would have to be settled by the jury.

For the error pointed out a new trial is ordered.

New trial.

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(168 N. C. 411)

## WATTERS v. WATTERS. (No. 209.)

(Supreme Court of North Carolina. March 17, 1915.)

1. MARRIAGE ⟸54 — CAPACITY — WANT OF WILL OR UNDERSTANDING—VALIDITY.

Under Revisal 1905, § 2083, forbidding marriages between persons incapable of contracting, and declaring such marriages void, and providing that no marriage followed by birth of issue shall be "declared" void after death of either party, except where one party is a white person and the other a negro, or for bigamy, and in view of section 1560, providing that on application either party may have such marriage declared void ab initio, the only marriages absolutely void are those in the exception, and the others are not void ipso facto, but are voidable until declared void.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 93–103, 105, 106, 109; Dec. Dig. ⟸54.]

2. DIVORCE ⟸18—RIGHT OF ACTION—ESTOPPEL.

One who is himself competent to contract a marriage, or who has afterwards ratified it, cannot ask for a divorce on the ground of his own misconduct or fraud in contracting the marriage.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 35–38; Dec. Dig. ⟸18.]

3. MARRIAGE ⟸58—ACTION TO ANNUL—ESTOPPEL.

Where defendant was incapable of making and entering into the contract of marriage, which incapacity was unknown to the husband at the time, and the parties lived together as husband and wife for eight years, during which five children were born, and during which defendant's mental condition continued to grow worse, until she was finally declared an incurable lunatic and placed in a hospital, the husband was estopped from maintaining that he had not ratified and confirmed the marriage and from an action under Revisal 1905, § 1560, to have the marriage declared void.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 115–123; Dec. Dig. ⟸58.]

Appeal from Superior Court, Duplin County; Daniels, Judge.

Action by W. L. Watters against Lula Watters. Judgment for defendant, and plaintiff appeals. No error.

Stevens & Beasley, of Warsaw, for appellant. Thad Jones, of Kenansville, for appellee.

CLARK, C. J. This action was instituted August, 1911, to declare void a marriage celebrated between the plaintiff and defendant on July 28, 1895, upon the ground that, at the time of the marriage, the defendant, Lula Watters, was incapable of making or entering into the contract of marriage, for the want of will or understanding. The plaintiff lived with the defendant from the date of the marriage till September, 1903, at which time she was declared a lunatic and placed in a hospital at Goldsboro, where she has remained since, demented and incurable. While the plaintiff lived with his wife she became the mother of five children. There was evidence on the part of the defendant that, at the date of the marriage, she had sufficient mental understanding to make and enter into a marriage contract. There was also evidence that on the date of the marriage she was weak-minded and that her condition grew worse until she was finally sent to the hospital. Upon the issue submitted to the jury, they found that the defendant, on the date of her marriage, had sufficient mental understanding to make and enter into a marriage contract.

There are two exceptions, both to the charge. There is, however, only one point which is clearly presented by the second exception, which is because the court charged:

"If the jury shall find from the evidence that the defendant's mind was so weak at the time she was married to the plaintiff that she was not able to understand the marriage contract, and that she did not have sufficient mental capacity to understand the relations into which she was then entering, and that the plaintiff, at the time, was not aware of her mental condition, and that he afterwards discovered her mental condition, and that, after discovering the same, he continued to live with her, and to have children by her, then the plaintiff would be estopped to bring and maintain this suit, and the jury will answer the first issue, 'No.'"

[1, 2] Rev. § 2083, "Who may not marry," specifies the instances in which parties are forbidden to marry, and that such marriages "shall be void," naming, among the instances, "between persons either of whom is at the time * * * incapable of contracting for want of will or understanding," but mentions also, among others, where the male person is under 16 or the female person is under 14 years of age; and there is this proviso to the whole section:

"No marriage followed by cohabitation and birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or an Indian or of negro or Indian descent to the third generation, inclusive, and for bigamy."

It will be seen from this that the only marriages that are absolutely void are those in the proviso. As to the others, they are not void, ipso facto, but must be declared so; that is, they are voidable. In Koonce v. Wallace, 52 N. C. 194, it is said that when at the time of the marriage the female was under 14 years of age, and the parties continued to live together as man and wife after that age, this amounted to a confirmation of the marriage.

In State v. Parker, 106 N. C. 713, 11 S. E. 517, it is declared that the only marriages which were absolutely void are those between a white person and a negro or an Indian and bigamous marriages; the others need to be declared void. If the parties, after arriving at the specified age of consent, continue to live together as man and wife, this is a ratification.

This view is clearly set out in Rev. § 1560, under authority of which this action is brought, and specifies "What marriages may be declared void." It provides that the superior court, on application of "either party to a marriage contracted contrary to the prohibitions contained in the chapter entitled "Marriage," or declared void by said chapter, may declare such marriage void from the beginning, subject, nevertheless, to the proviso contained in said chapter." This recognizes that the only absolutely void marriages are those named in the proviso to Rev. § 2083, and that the others need to be "declared void." Though the declaration may be, if granted, that the marriage was void ab initio, such marriage is valid until this declaration is made by the court after hearing and trial.

In Lea v. Lea, 104 N. C. 603, 10 S. E. 488, 17 Am. St. Rep. 692, it is held that an action to have a marriage declared void, because of pre-existing disqualifications to enter into marriage relations, is an action for divorce. It is only when the marriage comes within the proviso to Rev. § 2083, that the marriage is absolutely void. In other cases the marriage can be ratified by the conduct of the party who is entitled to make the application for such divorce. The ground for such application can be put forward only by the party who has been imposed on, and who has not subsequently ratified the contract and waived the disqualification.

One who was himself competent to contract the marriage, or who has afterwards ratified it, cannot be heard to ask for a divorce on the ground of his own misconduct or fraud in contracting the marriage. In this case there is no contention that the husband was not competent to make the marriage, nor that he was deceived, and he has ratified it to the fullest extent. He lived with his wife for eight years, during which time she bore him five children. There is no allegation nor proof of any fraud or force to trap him into the marriage.

There are cases in which marriages have been set aside on the ground that one of the parties seeking it was mentally incapable of contracting the marriage. But in all cases the action was brought at the instance of the party imposed on.

In Crump v. Morgan, 38 N. C. 91, 40 Am. Dec. 447, the action was brought by the guardian of the wife, and it appeared that she had been married clandestinely and under duress by a young man 20 years of age; that the woman was nearly double his age, was notoriously a lunatic and under the care of her guardian; and that she was married by the defendant with knowledge of that fact and in the manner stated in order to get possession of her property. The decree in that case, drawn by Chief Justice Ruffin, is clear and full, reciting the facts, and pronounces her to be free and divorced from the defendant, and of course that the marriage was null and void ab initio.

In Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665, the action was brought by the guardian of the lunatic, and it appeared that she had been declared a lunatic three days before the marriage, which was declared void ab initio. In that case numerous authorities were cited to the same effect. It was held that, even though the party seeking relief had not been adjudged a lunatic at the time of the marriage, the court had power to declare the marriage a nullity, citing Johnson v. Kincade, 37 N. C. 470; Setzer v. Setzer, 97 N. C. 252, 1 S. E. 558, 2 Am. St. Rep. 290; Lea v. Lea, 104 N. C. 603, 10 S. E. 488, 17 Am. St. Rep. 692. Though the court has jurisdiction to declare a marriage in proper cases void ab initio, they are not so ipso facto, but

must be so declared by a decree of the court, for only in the instances set out in the proviso to Rev. § 2083, can they be treated as void in a collateral proceeding. Setzer v. Setzer, supra.

In all the cases of our reports it will be found that the decree was made at the instance of the next friend or guardian of the party wronged, or incompetent. In Smith v. Morehead, 59 N. C. 360, the action was brought by the wife herself, who had been imposed upon by fraud, though not a lunatic. In all cases on the subject, as already stated, though the marriage is declared null and void ab initio, it is not held that the marriage relation was dissolved ipso facto, but only by the declaration of the court, and at the instance of the party entitled to the relief by reason of the fraud of the other party. His acquiescence with full knowledge and capacity is a ratification. Taylor v. White, 160 N. C. bottom of page 41, 75 S. E. 941.

Contracts, even conveyances, by persons of nonsane memory, "are voidable but not void." 2 Black, Com. 291; 2 Kent, Com. 451; and other authorities cited in Odom v. Riddick, 104 N. C. 521, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686. Such contracts can be set aside by action in behalf of the lunatic only, and not by the other party. As in the contract of marriage, the contract is then declared null and void ab initio in behalf only of the person non compos mentis.

[3] It is true that, in this case, the plaintiff avers that the defendant's mind, at the time of the marriage, was such that she was "incapable of making or entering into the contract of marriage with the plaintiff for the want of will or understanding, which said want of will or understanding was unknown to the plaintiff at the time of the marriage," but at the trial he neither offered evidence nor tendered an issue as to the allegation of want of knowledge on his own part, though he was a witness in his own behalf. He merely says that "soon after the marriage plaintiff discovered that defendant's mind was wrong, and it continued to grow worse." He does not allege nor testify that her mental condition was concealed from him, nor that there was any fraud or imposition practiced upon him. Though he testified at the trial that his wife did not have mental capacity to enter the contract of marriage, he continued to remain with her for eight years and until she had borne five children. By his conduct he is estopped to assert that during all those years he did not ratify and confirm the marriage relation. The mental condition of his wife evidently became worse from time to time, whatever it may have been at the date of the marriage, and whatever the cause. Of this we have no information, nor can the court go into that matter, unless our statute made insanity subsequent to the marriage ground of divorce.

The condition of the plaintiff is one that calls for sympathy. But he took his wife "for better or for worse," and our statute does not afford him the right to a divorce because of her present unfortunate condition. As the court charged, he is estopped by maintaining the marital relation for so many years to now assert that she was an imbecile or lunatic at the time of the marriage.

No error.

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## VIRGINIA CAROLINA PEANUT CO. v. ATLANTIC COAST LINE R. CO.

(No. 65.)

(Supreme Court of North Carolina. March 24, 1915.)

On rehearing. Petition for rehearing dismissed. For original opinion, see 82 S. E. 1.

A. R. Dunning, of Williamston, for appellant. G. B. Elliott, of Wilmington, F. S. Spruill, of Rocky Mount, and W. A. Townes, of Wilmington, for appellee.

PER CURIAM. The court, having considered this case upon rehearing, affirms its former judgment without further opinion. The petition to rehear is dismissed.

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(168 N. C. 452)

## KNIGHT et al. v. JOHN L. ROPER LUMBER CO. (No. 184.)

(Supreme Court of North Carolina. March 24, 1915.)

ADVERSE POSSESSION ⟸72 — VALIDITY OR SUFFICIENCY OF TITLE—"COLOR OF TITLE"—BOND FOR TITLE.

"Color of title" is a paper writing which professes and appears to pass the title, but fails to do so; and a bond for title or an executory contract to convey land, as against third persons, strangers to the title or claims of the parties thereto, is to be construed as an instrument purporting to pass at least an equitable interest, considered as an estate, and the purchaser in possession thereunder asserting ownership holds adversely against all others, and, after the requisite statutory period, acquires title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 430–434; Dec. Dig. ⟸72.

For other definitions, see Words and Phrases, First and Second Series, Color of Title.]

Appeal from Superior Court, Craven County; Peebles, Judge.

Action by Wright Knight, Jr., and others, against the John L. Roper Lumber Company. Verdict and judgment for plaintiffs, and defendant excepts and appeals. No error.

Civil action to recover damages for wrongfully cutting timber on a tract of land, involving also an issue as to title. The action was instituted on 10th of April, 1912. Title was admitted to be out of state. As evidence

tending to show title, plaintiffs introduced a bond for title or contract to convey the land in fee to Wright Knight, ancestor of plaintiffs, from Samuel Peel and wife, Lucinda, bearing date March 7, 1874, describing the land by specific metes and bounds, and offered evidence tending to show that said Wright Knight entered on the land under said bond, built a shanty thereon, and continued to occupy, asserting his claim, till his death, in 1910, and plaintiffs had been in possession since that time; that after the death of his father, Wright Knight, Jr., carried the paper writing to Samuel Peel, and the execution thereof was duly acknowledged by him before a justice, and was registered as such acknowledgment January 17, 1911. The cutting complained of occurred in 1911. The case described that, while defendant showed a grant from state and mesne conveyances to the company, there was no connection between such title and the claim or title of Samuel Peel, etc.

Verdict and judgment for plaintiffs, and defendant excepted and appealed, assigning for error that the court held the bond for title good as color of title.

Moore & Dunn, of Newbern, for appellant. A. D. Ward, D. L. Ward, and C. A. York, all of Newbern, for appellees.

HOKE, J. Color of title has been defined as a "paper writing, usually a deed, which professes and appears to pass the title, but fails to do so." Norwood v. Totten, 166 N. C. 648, 82 S. E. 951.

We were referred by counsel to decisions of other courts to the effect that the bond for title or an executory contract to convey land does not come within the definition, and this on the ground, chiefly, that the instrument in such case does not purport or profess to pass any title, and, further, that the occupation of a vendee, under such a paper, is not adverse. But, to our minds, and in reference to the principle involved, these courts do not correctly interpret such a contract nor the character of the claimant's occupation under it. It is true that, as against the vendor, the possession of the vendee, occupying under such a contract, does not, as a rule, become hostile or adverse until something has occurred that places one of the parties in the position of resistance to the claim of the other, and until that time the ordinary statute of limitations does not begin to operate. It has been so held with us in Worth v. Wrenn, 144 N. C. 656, 57 S. E. 388, and authorities cited, but, as against third persons, strangers to the title or claims of both vendor and vendee, a contract of this character should be construed as an instrument purporting to pass at least an equitable interest, considered an estate with us, and the vendee in possession under it, asserting ownership, should be properly regarded as holding adversely against all others, and, if such possession is maintained for the requisite statutory period, it should, in our opinion, have the effect of maturing the title. This position has been directly upheld elsewhere by courts of recognized authority. McNeely v. Oil Co., 52 W. Va. page 616, 44 S. E. 508, 62 L. R. A. 562; Fain v. Garthright, 5 Ga. 6; Elliott, Adm'r., v. Mitchell, 47 Tex. 445; and Wood on Limitations, § 260, where the author says, among other things:

"But, where a contract is made for the sale of land upon the performance of certain conditions, and the purchaser enters into possession under the contract, the possession from that time is adverse to all except the vendor."

There have heretofore been several cases in our own court which have gone very far in approval of the principle (Burns v. Stewart, 162 N. C. 360, 78 S. E. 321; Greenleaf v. Bartlett, 146 N. C. 495, 60 S. E. 419, 14 L. R. A. [N. S.] 660; Brown v. Brown, 106 N. C. 451–460, 11 S. E. 647; Avent v. Arrington, 105 N. C. 377, 10 S. E. 991), and it was directly so decided with us at the last term, in Gann v. Spencer, 167 N. C. 429, 83 S. E. 620, a case where a bond for title was held to be good as color.

It is said, in some of these decisions, among others, the Georgia cases supra, that the contrary view seems to have the weight of authority in its support, but we are satisfied, on further reflection, that the position as it now obtains here is in accord with the better reason, and are of opinion that his honor made correct decision in holding that the written contract to convey was good as color of title.

In connection with the question presented, we consider it desirable to call attention to the cases of Jasperson v. Scharnikow, 150 Fed. 571, 80 C. C. A. 373, and Power v. Kitching, 10 N. D. 254, 86 N. W. 737, as annotated in two of our standard publications, the first in 15 L. R. A. (N. S.) 1178, and the second in 88 Am. St. Rep. 691, where the learning on the subject will be found very fully stated.

There is no error, and the judgment in plaintiff's favor is affirmed.

No error.

(168 N. C. 473)

## FRANKLIN NAT. BANK v. ROBERTS BROS. CO. (No. 251.)

(Supreme Court of North Carolina. March 24, 1915.)

1. BILLS AND NOTES ⟸158—NEGOTIABILITY —BLANK FOR INTEREST.

A note with a blank for rate of interest, but otherwise negotiable, is negotiable; for, in the absence of a stipulated rate of interest, the legal rate applies.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 401; Dec. Dig. ⟸158.]

2. TRIAL ⟸351—ISSUES—SUFFICIENCY.

Where the issues submitted by the court offered opportunities to the parties to introduce all pertinent evidence to the matter in contro-

versy as set out in the pleadings, it was not error to refuse other issues tendered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 829, 834–839; Dec. Dig. ⊂⊃351.]

3. BILLS AND NOTES ⊂⊃95—CONSIDERATION—SUFFICIENCY.

One note is a good consideration for another note given in exchange.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 174; Dec. Dig. ⊂⊃95.]

4. BANKS AND BANKING ⊂⊃159—INDORSEMENT FOR COLLECTION.

A negotiable note deposited in a bank indorsed for collection remains the property of the depositor, and the mere fact that the bank gives a depositor credit for the amount of a negotiable instrument regularly indorsed is not conclusive evidence that the bank purchased the instrument.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 547–553; Dec. Dig. ⊂⊃159.]

5. BILLS AND NOTES ⊂⊃525—BONA FIDE PURCHASER—EVIDENCE—SUFFICIENCY.

In an action by an indorsee of notes, evidence *held* to show that the indorsee was a bona fide purchaser for value without notice of any infirmity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832–1839; Dec. Dig. ⊂⊃525.]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by the Franklin National Bank against the Roberts Bros. Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a civil action, tried on these issues:

(1) What amount is the plaintiff entitled to recover on the first note sued on? Answer: $2,500, with interest at 6 per cent. from November 16, 1912.

(2) What amount is the plaintiff entitled to recover on the second note sued on? Answer: $1,000, with interest at 6 per cent. from November 23, 1912.

J. C. Little and Winston & Biggs, all of Raleigh, for appellant. John W. Hinsdale, of Raleigh, for appellee.

BROWN, J. This action is brought to recover on two promissory notes:

"$2,500. Wendell, N. C., Aug. 15, 1912.

"Nov. 16, 1912, after date we promise to pay to the order of Harding-Finley Lumber Co. twenty-five hundred dollars at the Bank of Wendell, N. C. Value received, with interest at ——— per cent. per annum.

"[Signed] Robert Bros., Inc.,
"J. L. Roberts, Prest."

Indorsed:

"Harding-Finley Lumber Co.,
"By W. H. Harding, Prest."

The other is similar in form to the above, except it is in the sum of $1,000, and is due November 25, 1912.

It is admitted that these notes were given in exchange for two other notes of similar amounts, executed by the Harding-Finley Lumber Company to the defendant. The defendant discounted the notes received from the said lumber company, and, as they were not paid at maturity, the defendant paid the banks at which those notes were discounted, and refused to pay the notes sued on. This is set up as a defense against the recovery by the plaintiff upon the notes executed by the defendant to the said lumber company. The plaintiff alleges that the notes sued on were indorsed by the Harding-Finley Lumber Company to the plaintiff before the maturity for value, and without notice of any infirmity.

[1] 1. It is contended that the notes sued on are nonnegotiable, because there is a blank space for the rate of interest, which is not filled in. It seems to have been decided in a great many cases that stipulating for interest without the rate—i. e., leaving blank the rate of interest—does not affect the negotiability of a promissory note by rendering uncertain the amount, because a blank for interest cannot be filled above the legal rate, and, in the absence of a stipulated rate, the legal rate applies. Hoopes v. Collingswood, 10 Colo. 107, 13 Pac. 909, 3 Am. St. Rep. 565; Patton v. Shanklin, 14 B. Mon. (Ky.) 15; Holmes v. Trumper, 22 Mich. 427, 7 Am. Rep. 661.

The legal effect of not filling in the blank is the same as if there had been nothing written or printed after the word "interest," and the reading of the note would be to pay "interest until paid." This causes the debt to draw the rate of interest fixed by law where no rate is expressed. Hornstein v. Cifuno, 86 Neb. 103, 125 N. W. 136, 20 Ann. Cas. 1267; Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369; Jewett v. McGillicuddy, 55 Neb. 588, 75 N. W. 1099; Ogden, Neg. Instr. 42; 2 Daniel, Neg. Instr. (5th Ed.) 1385, 1458; Parley, Law of Interest, 8.

[2] 2. The defendant excepted to the issues, and tendered others. These issues offered opportunity to the parties to introduce all pertinent evidence to the matter in controversy, as set out in the pleadings, and that is said to be the proper test. Black v. Black, 110 N. C. 398, 14 S. E. 971; Pretzfelder v. Insurance Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424.

[3] 3. It is contended that there is no consideration for the notes sued on, and that the plaintiff is not a holder in due course, and is therefore affected with notice of such infirmity. It is well settled that one promissory note is a good consideration for another promissory note given in exchange. Higginson v. Gray, 47 Mass. (6 Metc.) 212; Savage v. Ball, 17 N. J. Eq. 142.

In Williams v. Banks, 11 Md. 198, it is said:

A mutual exchange of notes will furnish a good consideration for both, if such affirmatively appears to have been the intention of the parties, and that will depend on the particular circumstances of each case.

[4, 5] 4. His honor charged the jury:

"If you believe the evidence, you will answer the first issue, '$2,500, with interest at 6 per cent. from November 16, 1912,' and the second issue, '$1,000, with interest at 6 per cent. from November 23, 1912.'"

To this charge the defendant excepted.

We think the evidence in this case fully warranted the instructions given. We do not gainsay the general proposition that a negotiable instrument deposited in a bank, indorsed for collection, remains the property of the depositor, nor that the fact that a bank has given a depositor credit for the amount of a negotiable instrument, regularly indorsed, is not conclusive evidence that the bank had purchased the paper. The evidence in this case does not bring it within the principles laid down in Packing Company v. Davis, 118 N. C. 548, 24 S. E. 365; Bank v. Exum, 163 N. C. 201, 79 S. E. 498; Latham v. Spragins, 162 N. C. 405, 78 S. E. 282.

The case comes within the principle laid down in Trust Co. v. Bank, 166 N. C. 113, 81 S. E. 1074, where it appeared that the plaintiff bank had an arrangement with its depositor that it would receive for deposit and as cash items, checks payable to himself, and permit him to draw against them, and that the depositor had drawn out the full amount of the check in question, in which case it was held that the bank was the owner of the check so deposited, and entitled to maintain the action thereon.

The uncontradicted evidence in this case shows that the plaintiff is in the possession of the notes sued on, and that their execution is admitted in the pleadings. The testimony shows that the notes were indorsed by the payee and discounted to the bank for value, and without notice of any infirmity before maturity.

The witness Harding, the president of the defendant company, testifies that he discounted the notes to the plaintiff before maturity, and that the money was placed to the credit of the defendant and drawn out by it, and that the bank became the absolute owner.

The uncontradicted evidence proves that, in the course of dealing with the Harding-Finley Lumber Company, the plaintiff bank discounted notes, but they were never charged back when not paid, but were taken up by the Harding-Finley Lumber Company by its check.

The uncontradicted testimony of the witness Gehmann proves that the notes were actually discounted and paid for; that the money was drawn out by the Harding-Finley Lumber Company before the notes matured. The full statement of account between the bank and the Harding-Finley Lumber Company, which is made a part of the record, shows no item therein of the charging back of these notes by the bank. This statement shows that the credit balance at the time these notes fell due of the Harding-Finley Lumber Company was reduced to $34.54, and remained so until the 9th of December, 1912, when it was reduced to $2.62, and on the 11th of December it was reduced to 56 cents, and remained at that figure until December 23d, when the Harding-Finley Lumber Company went into the hands of the receiver.

The testimony of Gehmann further negatives completely the proposition that the proceeds of these notes were credited to the account of the Harding-Finley Lumber Company and never drawn out by it. On the contrary, it shows that on the 20th of August, the day when the $2,500 note was discounted, the Harding-Finley Lumber Company drew out the full amount; and on the 23d day of September, when the $1,000 note was discounted, the said company drew the full amount of the discount.

A perusal of the entire evidence shows, if it is to be believed, that in any view of it the plaintiff bank discounted the notes sued on for value, and became the absolute owner of them without any notice of any infirmity attached thereto.

No error.

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(168 N. C. 405)

## ROYAL et al. v. SOUTHERLAND. (No. 217.)

(Supreme Court of North Carolina. March 17, 1915.)

1. HUSBAND AND WIFE ⟸87—CONTRACTS—SURETYSHIP.

A contract of suretyship being primarily a contract between the surety and creditor, a wife may, under Laws 1911, c. 109, authorizing married women to contract and deal as femes sole, become surety for her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 346-353, 798; Dec. Dig. ⟸87.]

2. HUSBAND AND WIFE ⟸87—CONTRACTS—SURETYSHIP.

Const. art. 10, § 6, declaring that the real and personal property of any woman acquired before marriage shall be and remain her sole and separate property not liable for the debts of her husband, does not inhibit a wife from becoming the surety of her husband; the purpose being merely to protect the estate of the wife from liability for her husband's debts arising by reason of the coverture.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 346-353, 798; Dec. Dig. ⟸87.]

3. HUSBAND AND WIFE ⟸87 — WIFE AS SURETY ON NOTE.

Where a wife signed a note as surety for her husband, the fact that he induced her through false representations cannot be shown in defense; the note being given for a good consideration and the creditor not being a party to the fraud.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 346-353, 798; Dec. Dig. ⟸87.]

4. EVIDENCE ⟸423 — DOCUMENTARY EVIDENCE—PAROL EVIDENCE TO VARY.

Where a wife as surety for her husband signed a note and mortgage, she cannot in an action on the note and mortgage testify that she only intended to pledge her land and did not

intend to incur further obligation, for that would contradict the terms of the written instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1957–1965; Dec. Dig. ⟹423.]

Appeal from Superior Court, Sampson County; Daniels, Judge.

Action by Alvin Royal and others against Mrs. Georgie A. Southerland. From a judgment for plaintiffs, defendant appeals. Affirmed.

Civil action to recover balance due on a note under seal, executed by feme covert defendant with her husband, R. B. Southerland, as his surety, before his honor, F. A. Daniels, judge, and a jury, at August term, 1914, superior court of Sampson county. The note was given for $1,000, and, to secure same, a second mortgage on the wife's land was also executed to secure the note. The land having been sold under decree of foreclosure, the sum of $757.50 was realized thereon as the portion applicable to the present note, and, this sum having been properly entered as a credit, there was recovery against the feme defendant for the balance due. Judgment on the verdict for balance due on note, and defendant excepted and appealed, assigning a number of errors.

John D. Kerr, of Clinton, for appellant. B. H. Crumpler, of Clinton, for appellees.

HOKE, J. [1] The statute of 1911, c. 109, known as the "Martin Act," authorizes married women to contract and deal as if they were unmarried except in reference to conveyances of real estate and as to contracts between the husband and the wife, in both of which cases certain formalities are required to make these conveyances and contracts efficient and binding. It is the obvious intent and meaning of the statute that a feme covert may bind herself by her ordinary contracts (Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820), and we see no reason why the privilege or capacity does not extend to contracts of suretyship for her husband when the same are otherwise valid, and the same view has prevailed in other states having laws of similar import. Pelzer v. Campbell, 15 S. C. 581, 40 Am. Rep. 705; Major v. Holmes et al., 124 Mass. 108, 109; Mayo v. Hutchinson, 57 Me. 547. This is not primarily a contract between the husband and the wife, but, so far as this statute is concerned, is to be properly considered as one between the husband and wife on the one part and the creditor on the other.

[2] It is urged that to allow recovery on the facts presented would be in contravention of article 10, § 6, of our Constitution, which provides that the—

"real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband," etc.

The purpose of this section was to protect the estate of the wife from liability for her husband's debts, arising under the common law by reason of the coverture; but it was not intended by that section to protect the property from her own obligations. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461; Brinkley v. Ballance & Wife, 126 N. C. 393, 35 S. E. 631. By the enactment of the Martin Act, conferring the capacity to contract on married women as if they were femes sole, when she signs and delivers a note, though it may be as surety, in reference to the creditor or holder, the obligation is hers, and not his, and the constitutional provision referred to has no application.

[3] It was further contended that his honor committed error in excluding testimony tending to show certain representations on the part of the husband to the wife as to the effect of putting her signature on the note, but there is no claim or suggestion that these representations were made known to the payee of the note or that he had any part in them. The note is under seal and given for valuable consideration, and, under the circumstances appearing, the representations to the wife by the husband may not be allowed to affect the creditor.

[4] Again, it is insisted that error was committed in not allowing the feme defendant to testify that, in signing the note and mortgage to secure the same, she only intended to pledge her land for the debt, and did not intend to come under any further obligation; but this would be in express contradiction of her written note, and it is well understood that, when the entire agreement is in writing and the language is clear and meaning plain, the same may not be contradicted or varied by parol. In such case and in the language of the Chief Justice in Walker v. Venters, 148 N. C. 388, 62 S. E. 510, "the written word abides." Deering v. Boyle, 8 Kan. 529, 12 Am. Rep. 480.

There seems to be no question of parties raised in the record, but there is high authority for the position that, in conferring on married women the absolute freedom of contract, the right carries with it the privilege and liability of suing and being sued alone. Patterson v. Franklin, 168 N. C. —, 84 S. E. 18; Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820; Worthington v. Cooke, 52 Md. 297–309.

We find no error in the record, and the judgment in plaintiff's favor is affirmed.

Affirmed.

(100 S. C. 196)

## INTERSTATE CHEMICAL CORPORATION v. FARMINGTON CORPORATION et al. (No. 9027.)

(Supreme Court of South Carolina. March 13, 1915.)

1. BILLS AND NOTES ⟸483—SHAM ANSWER—WHAT IS.

An answer in an action brought in the spring of 1914 on notes due in November and December, 1913, which admits the execution of the notes, and that no part thereof has been paid, and which alleges that after the maturity of the note plaintiff agreed to extend the time of payment to November and December, 1914, by acceptance of a partial payment in cash, and that the agreement was not carried out, is sham, where the trial occurred after the time extended for payment as alleged in the answer.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1534; Dec. Dig. ⟸483.]

2. PLEADING ⟸358 — STRIKING OUT SHAM ANSWER—JUDGMENT.

Code Civ. Proc. 1912, § 306, providing that, on an answer being held frivolous, judgment thereon may be given, does not authorize a judgment for the debt sued on, on striking out an answer as frivolous.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1096–1101; Dec. Dig. ⟸358.]

3. PLEADING ⟸359 — STRIKING OUT SHAM ANSWER—JUDGMENT.

The court, on striking out a sham answer, as authorized by Code Civ. Proc. 1912, § 202, interposed to notes sued on, may render judgment on the notes for want of an answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1120–1128; Dec. Dig. ⟸359.]

Appeal from Common Pleas Circuit Court of Fairfield County; Ernest Moore, Judge.

Action by the Interstate Chemical Corporation against the Farmington Corporation and others. From an order striking out an answer as sham, and for judgment for plaintiff, defendants appeal. Affirmed.

McDonald & McDonald, of Winnsboro, for appellants. Nathans & Sinkler, of Charleston, and McCants & McCants, of Winnsboro, for respondent.

GAGE, J. Appeal from an order of the circuit court, whereby the answer was stricken out as sham, and judgment was awarded the plaintiff against the defendant for $3,596.10. There are four exceptions, but there are only two issues: (1) Was the answer sham? and (2) if it was, ought the court to have given judgment for the sum sued for? The appellant does not contend that the sham character of the answer may not be shown by evidence.

[1] The plaintiff sued in the spring of 1914 on five notes, aggregating $3,287.20, dated in May and June, 1913, and all due in November and December, 1913. The defendant answered, and admitted the execution of the notes, "and that no part thereof has been paid." But the defendant pleaded further that after the notes fell due, and some time in February, 1914, the plaintiff agreed with defendant to indulge defendant (1) by the acceptance of $1,500 in cash, and (2) notes for the balance, payable in November and December, 1914 (3) which notes were to be secured by a mortgage of real estate. The defendant alleged that the above agreement was not carried out on account of the illness of defendant's president, and that as soon as the president was able to transact business the defendant would carry out the agreement in good faith.

The circuit court concluded that the defense so pleaded was not true, or, in the words of the Code of Procedure, was sham; and we concur with the court. That which persons aforetime intended to do may be judged of by that which they in after time actually did do. These are the circumstances from which a sham purpose may and must be inferred. The defendant, at the trial in this court, January 25, 1915, yet owed the plaintiff the money sued for, although the defendant was then in moral and legal duty bound to pay it. The defendant's unvarnished plea is this: We will not pay you in January, 1915, the debt we owe, because we were promised until December, 1914, in which to pay. The defendant had in January, 1914, remitted to plaintiff a check for $1,500, the cash payment that was promised; but the check was sham, although W. C. Heath, the president and the drawer, has attempted some explanation of its nonpayment. The defendant could have paid the $1,500 notwithstanding the president's disability to execute the notes and mortgage. The president was present in the circuit court at Winnsboro in June, 1914, unmindful of his duty to pay then, and contending in effect for further time in which to pay. The conclusion is certain that, if the defendant ever got the extension he claims to have gotten, from the plaintiff, he never intended to perform it. If the pleading and proof left any reasonable inference to the contrary, we should not adjudge the answer sham.

[2] The second issue to be decided is: Ought the court, after adjudging the answer to be sham, to have given judgment against the defendant? The appellant's argument is that it is provided at section 306 of the Code of Procedure that, upon an answer being held frivolous, "judgment thereon" may be given; that no such provision is incorporated in section 202, wherein sham answers may be stricken out; that therefore no power to give judgment follows expressly or by implication the power to strike out as sham. Plainly section 306 does not expressly authorize a judgment for the debt sued on, but only "judgment thereon"; that is, to the effect that the demurrer, answer, or reply is frivolous. That is so by the words of the section, and further because such order (called judgment) is allowable "in or out of the court." It has been held that the order for judgment on the debt is only allowable in open court. Badham v. Brabham, 54 S. C. 404, 32 S. E.

444. Therefore neither of sections of the Code now under review expressly warrant the giving of a judgment for the debt sued upon.

[3] Section 202 is that under which the plaintiff moved in the instant case, and its terms must govern. That section warrants the court to strike out a defense to an answer as sham. That accomplished, what may the court further do? It may impose terms, in its discretion. The court might, upon a satisfactory showing by the defendant, allow another answer to be made. But the defendant has not asked that. It stands upon that already made. The plaintiff, then, is in open court, on an admitted debt. No valid showing has been made why judgment for the debt should not be given. He is in the same situation as if no answer had been made. He is in better situation, for the defendant has admitted that the debt is due and unpaid.

We have been cited to no authority, by case or by text, to govern a predicament like this. Even before the adoption of the Code, the courts looked with disfavor on sham pleadings. At the common law a party might move upon affidavits to strike out a sham answer, and, in the event the motion was granted, then for judgment, as for the want of a plea. Stephen on Pleading, 494. Judgment, therefore, in the case at bar, was allowable upon the very necessity of the case. There was nothing else to do.

The judgment of the court below is therefore affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

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(100 S. C. 204)

## BRIDGEMAN v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO.

(No. 9029.)

(Supreme Court of South Carolina. March 18, 1915.)

1. APPEAL AND ERROR ⟸216—INSTRUCTIONS—REQUESTS—NECESSITY.

Failure to charge on a subject is not ground for complaint, unless there was a request to charge thereon.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⟸216; Trial, Cent. Dig. § 627.]

2. APPEAL AND ERROR ⟸274—REVIEW—INSTRUCTIONS.

An exception which states a sound proposition of law, but which does not show that the court directly or by inference disputed it, or was requested to state it as law, presents no question for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1591, 1592, 1605–1607, 1624, 1631–1645; Dec. Dig. ⟸274.]

3. MASTER AND SERVANT ⟸291—INJURY TO SERVANT—EVIDENCE—INSTRUCTIONS.

Where, in an action for injuries to an employé by the fall of a telephone pole on which he was at work, the complaint alleged that the employé was working under the orders of the local plant superintendent, and the employé testified that it was his duty to follow the instructions of the plant foreman, a charge submitting the law of fellow servant was authorized by the pleadings and the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136–1146; Dec. Dig. ⟸291.]

4. TRIAL ⟸191 — INSTRUCTIONS — INVADING PROVINCE OF JURY—CHARGE ON FACTS.

Where, in an action for injuries to an employé by the fall of a telephone pole on which he was working, the complaint alleged that it was the duty of the employer to inspect the pole, and the answer alleged that by written terms of the employment it was the employé's duty to inspect the pole, a charge whether it was due care to stipulate that an employé should do all the inspection, and not recover for injuries because assuming the duty of inspection, was not a charge on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420–431, 435; Dec. Dig. ⟸191.]

5. MASTER AND SERVANT ⟸278—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for injuries to an employé by the fall of a telephone pole on which he was working, evidence *held* not to show willful misconduct of the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977; Dec. Dig. ⟸278.]

Appeal from Common Pleas Circuit Court of Dillon County; R. W. Memminger, Judge.

Action by A. L. Bridgeman against the Southern Bell Telephone & Telegraph Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Sellers & Moore, of Dillon, for appellant. Ragsdale & Whiting, of Florence, and Gibson & Muller, of Dillon, for respondent.

GAGE, J. Action for actual and punitive damages by a servant against the master. Verdict for the defendant. Appeal by the plaintiff.

History: The plaintiff, a young man 22 years old, was a lineman in the service of the defendant. He was instructed by the defendant's superintendent of the local office at Dillon to do some work on a telephone line at Gallavon, in the country, out eight miles from the town of Dillon. He climbed a pole and cut a wire. The pole broke off just above the ground, and fell with the plaintiff on it, and hurt the plaintiff's shoulder.

There were no requests to charge. The court withdrew from the jury any consideration of punitive damages, and submitted to the jury the issue of actual damages.

There are nine exceptions, and they fall into these classes, to wit: (1) The first, second, and ninth refer to the issue of willfulness. (2) The third, fifth and seventh refer to a failure of the court to charge. (3) The fourth states a proposition of law, but does not claim that the court refused upon request to charge it, or that the court charged a contrary proposition of law. (4) The sixth claims that the court charged a proposition irrelevant to the testimony. (5) The eighth

claims that the court charged on facts. The first class will be considered last.

[1] Those embraced in the second class all complain that the court failed to charge; but that is no ground for complaint, unless the court had been requested, in some fashion, to cover the now suggested phases of the case.

[2] The legal proposition stated in the third class may be true; but the court did not directly or by inference dispute it, and the court was not requested to state it as the law.

[3] The fourth class has reference to that part of the charge which dealt with the law of fellow servant. The entire answer is not printed, but those parts which are printed make no reference eo nomine to fellow servant. There must have been some such defense pleaded, for the court said to the jury, "Now take up the defense of the matter of fellow servant," and proceeded to correctly declare the law upon that subject. The complaint itself suggested the subject, by alleging that "plaintiff was working under the orders of the defendant's local plant superintendent." It is true the testimony does not tend to show that the plaintiff was a fellow servant with Gilbert (the other sole employé with the plaintiff, and referred to in the testimony as superintendent); but the plaintiff himself had testified: "My duties were to follow the instructions of the plant foreman and do what he told me to do." The court was therefore warranted by plea and by testimony to charge the jury the law of fellow servant.

[4] The fifth class refers to the constitutional prohibition to charge on the facts. The specific charge on the facts assailed in the instant case is that the court stated to the jury an issue that was not pleaded in the complaint, to wit:

"Was it due care on their part to stipulate with an employé that he should do all of the inspection, and not be able to recover damages if he got injured by reason of the fact that he had assumed the duty of doing all of the inspection of the pole?"

But the fourth paragraph of the complaint alleged that the duty to inspect the pole was on the master, and the third paragraph of the answer denied that, and alleged that by the written terms of the employment the plaintiff's duty was to inspect the poles. The court did not indicate whose duty it was to inspect the poles. It only stated the contentions of the litigants thereabout. There was no approach to a charge on the facts.

[5] The first class has already been reserved for the last consideration. There were only two witnesses for the plaintiff, the plaintiff himself and the stable boy who drove him to the locus. The testimony is that to all ocular appearances the post was sound. There was no testimony to suggest that the defendant (by its superintendent, Gilbert) had any knowledge of the decayed condition of the post. The plaintiff said nothing to indicate that the master was guilty of any conscious wrong. There is therefore no foundation for any of the exceptions, and they must all be overruled.

The real issue in the case was that suggested by the foreman of the jury: for, granting that the master was convicted of negligence, was the plaintiff also guilty of negligence in climbing a pole and cutting one of three wires running in contrary ways from its top, so that the pole fell to the ground? The foreman asked the court:

"We want to know that if in your charge was it that, if we found both acted carelessly, were we to find nothing for the plaintiff."

That was the issue in the case, and on it the plaintiff lost.

Judgment below is affirmed.

GARY, C. J., and WATTS, HYDRICK, and FRASER, JJ., concur.

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(100 S. C. 177)

## BURFORD v. SEABOARD AIR LINE RY.

(No. 9024.)

(Supreme Court of South Carolina. March 9, 1915.)

RAILROADS ⊂=282—INJURIES — ISSUE—VARIANCE.

Where a complaint for personal injuries alleges negligence in not keeping a spur track in repair, and in attempting to move four heavily loaded coal cars without proper brakes on the engines and cars by which to control them, and in failing to provide a safe stop or barrier to prevent cars from running over the track when placed for unloading, and that the cars were backed at a reckless rate of speed and broke the barrier, injuring plaintiff, there can be no recovery on the complaint, the evidence showing that the barrier was safe and that the cars became uncoupled for some unexplained reason, causing the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 910-923; Dec. Dig. ⊂=282.]

Appeal from Common Pleas Circuit Court of Abbeville County; I. W. Bowman, Judge.

Action by Clark Burford against the Seaboard Air Line Railway. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Wm. N. Graydon and Robert S. Owens, both of Abbeville, for appellant. Wm. P. Greene, of Abbeville, and J. L. Glenn, of Chester, for respondent.

WATTS, J. This was an action for damages, actual and punitive, brought by plaintiff against defendant for alleged personal injury. After issue joined the case was tried by his honor, Judge Shipp, who granted a nonsuit as to punitive damages, and the case resulted in a mistrial as to actual damages. The cause was tried the second time before Judge Bowman and a jury, and at the close of plaintiff's testimony a motion for nonsuit was made by defendant on the grounds, in substance: That he failed to prove any of the allegations of negligence set

forth in his complaint; and that the evidence showed that he was a trespasser, and defendant owed him no duty except not doing him any wanton or willful injury; and that the plaintiff was guilty of contributory negligence to such an extent as to bar recovery by him. His honor granted the nonsuit as moved for without indicating upon what grounds, and plaintiff appeals, and by nine exceptions, asks reversal.

We do not think that the nonsuit should have been granted on the grounds that he was a trespasser, as there was sufficient evidence to carry the case to the jury as to whether he was a trespasser or licensee. Neither should the nonsuit have been granted on the ground that the plaintiff's contributory negligence was the proximate cause of his injury. But the serious question in the case is, Did the plaintiff prove any of the allegations and specifications of negligence as set forth in his complaint?

The allegations of negligence were that the defendant was negligent in not keeping its spur track in repair, and that the defendant was negligent in attempting to move four heavily loaded coal cars without proper brakes on the engine and cars by which to properly control them.

A careful examination of all the evidence in the case fails to show any testimony to prove these allegations of negligence whatsoever. The other allegation of negligence is that the defendant carelessly and negligently failed to properly provide a safe stop, or barrier, to keep cars from running off the end of the track when they were placed for unloading, but constructed said stop, or barrier, out of scantling and other material too weak to stand the strain of heavily loaded cars being backed against it, and that it was not properly braced, and that the defendant negligently backed said cars on said spur track at a fast and reckless rate of speed, ran against said barrier, or stop, and broke it down, causing plaintiff's injury.

The evidence in the case shows that the cars were being backed in on the spur track at the rate of about four or five miles per hour, and that the cars from some unexplained cause became uncoupled, and the accident was the result of the cars becoming uncoupled. There is neither allegation or proof that the defendant negligently did anything that caused the uncoupling of the cars that brought about the accident and results therefrom, and, in considering whether the plaintiff has proven any of his allegations of negligence, we will consider the question whether or not the evidence shows that the defendant furnished a suitable and proper stop, or barrier, at the end of the trestle for the cars to be placed on. The evidence shows that the timber placed there was 12 by 12, and when the cars became uncoupled, ran away, and struck this timber it shattered the timber and broke it. There was no evidence of defect in the stop, or barrier, whereby negligence on the part of the defendant could be imputed, neither was there any evidence of lack of care on the part of the defendant whereby any of the allegations of negligence set forth in the complaint could be sustained. The plaintiff could only recover on the allegations of negligence set out in his complaint, and the evidence shows that his injuries were caused by an accident over which the defendant had no control and was in no manner responsible for by any negligence on its part as alleged in the complaint, and plaintiff has failed to furnish any evidence to substantiate his allegations of negligence whereby he would be entitled to recover.

The exceptions are overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

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(100 S. C. 220)

## FOLK v. HUGHES et al. (No. 9030.)

(Supreme Court of South Carolina. March 13, 1915.)

1. DEEDS ⟸129—ESTATES CREATED.
A deed whereby J. conveys land to G. to have and to hold for his uses and benefit and for the maintenance and support of his children during his life, and conveys it to the children of G. to have and to hold to themselves, their heirs and assigns, immediately after G.'s death, is one to G. for life for his own uses and in trust for the maintenance and support of his children, with remainder in fee to his children.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 172; Dec. Dig. ⟸129.]

2. TRUSTS ⟸61—CONTINGENT REMAINDERS—EXTINGUISHMENT.
Though the remainder, in a deed to G. for life with remainder to his children, is contingent, he having no children at the time, it cannot be destroyed by G., before having any children, reconveying to J., his grantor, and J. conveying to G. alone; G.'s life estate not having been absolute, but the conveyance having been for his uses and benefit and for the maintenance and support of his children during his life, thereby giving him a trust estate for life for the benefit of the children, which he could not convey.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 83–87; Dec. Dig. ⟸61.]

3. TRUSTS ⟸9—CREATION — EXISTENCE OF CESTUI QUE TRUST.
It is not necessary to creation of a trust estate that the cestui que trust be in existence at the time.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 6, 7; Dec. Dig. ⟸9.]

4. TRUSTS ⟸61—DESTRUCTION BY TRUSTEE.
A trustee cannot, by his own act, defeat or destroy his trust.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 83–87; Dec. Dig. ⟸61.]

5. TRUSTS ⟸356—PURCHASE FROM TRUSTEE.
Purchasers of a trust estate with knowledge of the trust take it incumbered therewith.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 529–538; Dec. Dig. ⟸356.]

6. REMAINDERS ⟸4—VALIDITY — EXISTENCE OF REMAINDERMEN.

A deed to one for life, with remainder to his children, is not void as to the remainder because he has no children at the time; after-born children being necessarily intended.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 2; Dec. Dig. ⟸4.]

Appeal from Common Pleas Circuit Court of Bamberg County; T. S. Sease, Judge.

Action by Wilhelmina S. Folk against Lottie Hughes and others. Judgment for plaintiff, and defendants appeal. Reversed.

Carter & Carter and E. H. Henderson, all of Bamberg, for appellants. Mayfield & Free, of Bamberg, for respondent.

HYDRICK, J. This is an action to foreclose a mortgage, given to C. Ehrhardt & Sons by G. W. Hughes, and now owned by plaintiff. The children of the mortgagor claim title to the mortgaged property, contending that their father had only a life estate therein, with remainder in fee to them. On September 22, 1890, J. W. Hughes conveyed the land to his son, G. W. Hughes, by deed which reads:

"Know all men by these presents, that I, J. W. Hughes of the county of Barnwell and state aforesaid, for and in consideration of the sum of twenty dollars to me in hand paid by G. W. Hughes of the county and state aforesaid (the receipt whereof is hereby acknowledged) do grant, bargain, sell and release unto the said G. W. Hughes all that plantation. * * *

"To have and to hold the said described tract of land with all privileges and appurtenances thereof to the said G. W. Hughes for his uses and benefits, and for the maintenance and support of the children of the said G. W. Hughes during the term of his natural life. And I, the said J. W. Hughes for and in consideration of the love and affection I have for the lawful children of the said G. W. Hughes, do hereby grant, release and convey unto the lawful children of the said G. W. Hughes all the above described tract of land.

"To have and to hold the same immediately after the death of the said G. W. Hughes.

"Together with all the rights and appurtenances thereto belonging.

"To have and to hold all and singular the said premises unto the children of the said G. W. Hughes, their heirs and assigns forever. And I do hereby warrant said premises unto said children their heirs and assigns forever against myself and my heirs, executors and administrators or any person or persons lawfully claiming or to claim the same or any part thereof."

On November 10, 1892, G. W. Hughes reconveyed it to his father by deed as follows:

"Know all men by these presents that whereas on the 22nd day of September, 1890, J. W. Hughes did make unto me a deed of conveyance, whereby he purported to convey unto G. W. Hughes a certain tract of land, in said county and state, the same hereinafter described and containing seven hundred and sixty-three acres, and for the consideration therein expressed of the sum of twenty dollars, the same being agreed under certain family arrangements resting on a contingency, which did not and now cannot arise. Therefore, know all men by these presents that I the said G. W. Hughes, for and in consideration of the like sum of twenty dollars to me in hand paid by the said J. W. Hughes (the receipt whereof I do hereby acknowledge) have granted. * * * To have and to hold the same unto him the said J. W. Hughes, his heirs and assigns forever.

"Together with all and singular the rights titles, hereditaments, and appurtenances to the same in anywise appertaining or belonging.

"And I do hereby warrant and defend the said premises with the said J. W. Hughes, his heirs and assigns from and against the claims of myself and my heirs and assigns and all and every person whomsoever lawfully claiming or to claim the same or any part or parcel thereof."

On April 15, 1899, J. W. Hughes conveyed it back to G. W. Hughes, his heirs and assigns, with full covenants of warranty. On October 22, 1901, G. W. Hughes executed the mortgage herein sought to be foreclosed. At date of the first deed to him, in 1890, G. W. Hughes was married, but had no child, and was still childless at date of his reconveyance to his father in 1892. His first wife died March 2, 1894, having borne him one child, the defendant, Robert, the date of whose birth is not stated in the record. The defendants Ruth and Grace are his children by his last wife, the defendant Lottie Hughes. He died some time before the commencement of the action. The circuit court held that the effect of the deeds above recited was to vest the fee-simple title in G. W. Hughes, and decreed foreclosure of the mortgage.

[1] Read in the light of the facts and the rules, which require that attention and effect shall be given to all its parts, and that the intention of the grantor so ascertained shall be given effect unless it conflicts with some settled rule of law, the deed of 1890 must be construed as conveying to G. W. Hughes the land therein described for life, for his own uses and in trust for the maintenance and support of his after-born children, with remainder in fee to his after-born children, if any, as purchasers. Reeder v. Spearman, 6 Rich. Eq. 88; Hill v. Thomas, 11 S. C. 346; Mendenhall v. Mower, 16 S. C. 303; Mims v. Machlin, 53 S. C. 6, 30 S. E. 585; Rawls v. Johns, 54 S. C. 394, 32 S. E. 451; Lee v. Miles, 56 S. C. 428, 35 S. E. 2. Of course, if no children had been born to G. W. Hughes, the fee would have reverted, by operation of law to J. W. Hughes.

[2] The remainder to the children of G. W. Hughes was contingent. Thereupon the question arises whether his reconveyance to J. W. Hughes, in 1892, before the birth of a child, destroyed the precedent life estate in him, which was necessary to support such a remainder, and reverted the entire estate in J. W. Hughes—by merger of the life estate and reversion—so as to destroy the intervening contingent remainder. It has been held that a contingent remainder may be so destroyed. McCreary v. Coggeshall, 74 S. C. 42, 53 S. E. 978, 7 L. R. A. (N. S.) 433, 7 Ann. Cas. 693. But it is generally held that merger is not favored by the courts of law or equity, especially when it would defeat the

intention of the parties. In this case, while it would have defeated the original intention of the parties to the deed of 1890, it would probably have carried out their subsequent intention, for it is inferable from the several deeds, under the circumstances that they were executed for the purpose of destroying the remainder and vesting the fee-simple title in G. W. Hughes. But we need not inquire into the intention of the parties, nor what would have been the effect of the deeds of 1892 and 1899, if the deed of 1890 had given G. W. Hughes an absolute estate for life, because the character of his life estate renders such inquiries unnecessary. The life estate given him was not absolute but, by the terms of the deed, it was given to him "for his uses and benefits and *for the maintenance and support of the children of the said G. W. Hughes during the term of his natural life.*" It was therefore partially in trust for the benefit of his after-born children. In Hunter v. Hunter, 58 S. C. 382, 36 S. E. 734, 79 Am. St. Rep. 845, a devise to the testator's widow, "for and during her lifetime, to support herself and my children and to educate my children," was construed to give the widow a trust estate for life for the benefit of the children, and it was held that the widow had no power to sell even her life estate; no such power having been given her in the will.

[3] It is not necessary to the creation of a trust estate that the cestui que trust should be in existence at the time of its creation. 1 Perry on Trusts, § 66; Tiffany & Bullard on Trusts, 3; Carson v. Carson, 1 Winst. (60 N. C.) 24; Ashurst v. Given, 5 Watts & S. (Pa.) 329. In the case last cited, a devise to a father in trust for his children at the time of his death was held to be good, although the father had no children at the time of the vesting of the estate in him as trustee.

[4,5] A trustee will not be allowed by his own act to defeat or destroy his trust, and those who deal with him in respect of the trust estate, with knowledge of the trust, are bound by the terms of the trust, and if they purchase the trust estate, they take it incumbered with the trust. 1 Perry on Trusts, §§ 217, 334. It follows that the deeds of 1892 and 1899 did not affect the remainder created by the deed of 1890, for, of course, both the grantor and grantee therein knew of the trust created by the deed of 1890.

[6] The cases cited and relied upon by respondent, to the effect that a deed is inter vivos and must take effect in præsenti, and holding, therefore, that a deed to the children of another, in the absence of language from which a different intention may be inferred (as in Mellichamp v. Mellichamp, 28 S. C. 125, 5 S. E. 333), includes only children in being at the time of execution thereof, are not applicable. In each of the cases cited, the deed was directly to the children, and some children were in being at the date of the deed, and some were born afterwards, while in this case the deed created a precedent life estate, with remainder to the children of the life tenant, and, at date of the deed, the life tenant had no children; hence the parties must necessarily have intended after-born children; for otherwise that part of the deed which provides for the children could be given no effect at all.

Judgment reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

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(100 S. C. 200)

## McKINLEY MUSIC CO. v. GLYMPH.

(No. 9028.)

(Supreme Court of South Carolina. March 13, 1915.)

1. APPEAL AND ERROR ⟸271—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS.

Where defendant neither excepted to a magistrate's judgment in his favor, nor to an order of the circuit court granting a new trial, the question whether the circuit court should not have rendered judgment absolutely for defendant was not open to consideration on plaintiff's appeal to the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1440–1442, 1572; Dec. Dig. ⟸271.]

2. JUSTICES OF THE PEACE ⟸190—APPEAL—ORDERING NEW TRIAL.

On an appeal by plaintiff from a magistrate's court, the circuit court did not err in granting a new trial on the ground that the testimony for defendant was not "fully taken down," instead of directing a further or amended return under Code Civ. Proc. 1912, § 403, providing, relative to such appeals, that if the return be defective, the appellate court may direct a further or amended return as often as may be necessary; as an amended or further return would not have supplied testimony not "taken down."

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 734; Dec. Dig. ⟸190.]

3. APPEAL AND ERROR ⟸271—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS.

Where, in an action commenced in a magistrate's court on a written contract, defendant admitted, and the magistrate found, that defendant executed the contract, and defendant made no exception with respect thereto in the circuit court or in the Supreme Court, it would be assumed that the execution of the contract by both parties was not an issue below as against defendant's contention that there was no testimony to show that plaintiff ever signed the contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1440–1442, 1572; Dec. Dig. ⟸271.]

4. SALES ⟸38 — VALIDITY OF CONTRACT — FALSE REPRESENTATIONS.

Where a party, in executing a contract for the purchase of goods, relied on the deceptive representations of the seller's agent, leading him to believe that he alone was to sell such goods in his town, it did not matter that the contract stipulated the contrary, as the recitals of a contract fall to the ground when the party

who drew it intended and used words to deceive the other party about its contents.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65–77, 85; Dec. Dig. ⟸38.]

5. JUSTICES OF THE PEACE ⟸190—APPEAL—ORDERING NEW TRIAL.

On appeal from a magistrate's court, where, on the record as presented, the circuit court was unwilling to render a final judgment for either party, it was a just exercise of its power to order the case retried.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 734; Dec. Dig. ⟸190.]

Appeal from Common Pleas Circuit Court of Union County; Tho. S. Sease, Judge.

Action by the McKinley Music Company against W. N. Glymph, trading and doing business as Glymph's Pharmacy. From an order of the circuit court on appeal from a magistrate's court granting a new trial, plaintiff appeals. Affirmed.

John K. Hamblin, of Union, for appellant. Young & Beaty, of Union, for respondent.

GAGE, J. The plaintiff sued defendant in a magistrate's court to recover $61.39. The suit is upon a long written instrument dated September 20, 1912, and purporting to have been signed by both parties to this action. The thing for which defendant is alleged to have agreed to pay $61.39 is a "McKinley Edition outfit"; but of what that consists it is hard to understand from the testimony. The magistrate found for defendant. The plaintiff appealed to the circuit court. That court ordered a new trial. The plaintiff appeals here from that order.

The circuit court's order was made upon two grounds: (1) Because the testimony for defendant was not "fully taken down"; (2) "and for other reasons."

There are six exceptions, but by appellant's own admission, only two issues, and they are: (1) By section 403 of the Code of Procedure the court ought at most only to have directed a further or amended return, so as to show defendant's testimony; (2) the whole testimony warrants only one conclusion, and that is the plaintiff is entitled to judgment against the defendant for the sum claimed.

[1] The defendant has not excepted to the order of the circuit court; nor did he except to the magistrate's judgment. We may not therefore consider if that order should, under the testimony, have been a judgment absolutely for the defendant. The respondent has argued for so much.

[2] The plaintiff's exceptions therefore need only be considered. They cannot be sustained.

(1) An amended or further return by the magistrate would not have been effective to supply testimony which had not been "taken down." A new trial was ordered, amongst other things, to have that testimony taken down by the magistrate; and that though the defendant had the judgment below. There must be a trial de novo to have the defendant's testimony taken down.

[3, 4] (2) A consideration of all the testimony does not warrant the sole conclusion of a judgment for the plaintiff. The suit was upon a reciprocal and special contract. The respondents contend here that there is no testimony tending to show plaintiff ever signed the contract. That is true. But the answer of defendant is an admission of the execution of the contract, and the magistrate found that "defendant admitted the execution of the contract." The respondent made no exception thereto on circuit or here; and it must be assumed that the execution of the contract by both parties was not an issue below. But it was further contended by the defendant that the salesman, Max Bloom, had it in his heart and used words to deceive defendant into believing that the defendant alone was to sell the "McKinley Edition outfit" in the town of Union, and that defendant was deceived to believe it. If that be so, it matters little that the contract, in its fourth paragraph, stipulated exactly the contrary. The recitals of a contract fall to the ground when the party who drew it had the intent and used the words to deceive the other party about the contents of the written contract, and the other party to it relied upon the deceptive utterance. There was some testimony tending to support the defendant's contention; and, if there be any, we may not ignore that contention.

[5] The circuit court also granted the order for "other reasons" not specified. The court was manifestly not satisfied to render a final judgment for either party upon the testimony which was before the court. The testimony as presented here is far from satisfactory. If the circuit court was unwilling to render a final judgment on the record as presented to the court, it was a just exercise of its power to order the case retried.

The judgment of the circuit court is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(100 S. C. 187)

ASHE v. SOUTHERN RY. CO. (No. 9026.)

(Supreme Court of South Carolina. March 13, 1915.)

PLEADING ⟸9—PLEADING MATTERS OF EVIDENCE—LEGAL CONCLUSION THEREFROM.

In an action for a carrier's alleged willful wrong in ejecting plaintiff, an answer, alleging that plaintiff boarded the wrong train and facts showing the reason why its agent could not supply tickets, was not objectionable as pleading matters of evidence without any legal conclusion therefrom.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. ⟸9.]

Appeal from Common Pleas Circuit Court of Lancaster County; C. M. Efird, Special Judge.

Action by W. N. Ashe against the Southern Railway Company. From an order overruling a demurrer to the second defense of the answer, plaintiff appeals. Affirmed.

The pleadings and exceptions were as follows:

The complaint of the plaintiff herein would respectfully show to the court:

(1) That the defendant, Southern Railway Company, now is, and was, at the times hereinafter stated, a corporation created and existing under the laws of the state of Virginia, and as such is a common carrier of freight and passengers, in said state and county, having a railroad system in said county, and throughout South Carolina.

(2) That on or about February 4, 1913, the defendant ran a passenger train from Rock Hill, S. C., to Columbia, S. C., said train being the regular passenger train of the defendant, but on said date said train had a reduced passenger rate, or excursion rate for a round trip ticket between said points, also all other points on said road to Columbia, S. C., and return.

(3) That said reduced rates or round trip tickets was advertised by posters, circulars, in the newspapers, and in other ways and methods usually employed by the defendant to advertise its special trains, and excursion rates and trains.

(4) That the plaintiff about an hour previous to the arrival of said train, according to its schedule time, went to the station at Rock Hill, S. C., a regular passenger station of the defendant, and there made due and proper effort to secure a round trip ticket or proper ticket to Columbia, S. C., and return to Rock Hill, S. C.; but there was no ticket agent, or other official of the defendant, at said station from whom this plaintiff could secure a proper ticket, or any ticket at all.

(5) That, upon the arrival of the said train, the plaintiff stated to the conductor thereof his inability to secure a ticket, and the said conductor immediately ordered said train to start, whereupon the plaintiff boarded the said train and then tendered to the defendant its agents and servants the proper and correct fare for a round trip or excursion ticket from Rock Hill, S. C., to Columbia, S. C., and return, as advertised by said defendant.

(6) That defendant refused to accept the money or fare thus tendered by the plaintiff, and after leaving the station of Chester, S. C., the agents of the defendant ejected and expelled the plaintiff from said train.

(7) That plaintiff was ejected from said train in the presence of the passengers, and others, and in consequence was humiliated, delayed in his travel, insulted by the conductor or other agents, abused, and otherwise damaged $3,000.

(8) That the defendant, its agents and servants, acted willfully, wantonly, recklessly, and negligently in ejecting and expelling the plaintiff from said train.

Wherefore the plaintiff demands judgment for $3,000.

Answer.

The defendant above named, by way of amendment to its former answer herein, further answering the complaint herein, alleges, for a second defense:

(1) That, at or about the time stated in the complaint, the defendant had on sale at its station at Rock Hill, S. C., special excursion tickets, which were sold at a greatly reduced rate of fare on account of the National Corn Exposition then being held in the city of Columbia, S. C., which said excursion tickets were coupon tickets, one of which was for the going trip, and the other for the return trip, and, in connection with the sale of said tickets, the defendant then sold an admission coupon to said National Corn Exposition, which was of the value of 50 cents, being the amount required to be paid for admission there into.

(2) That, at the same time, the defendant was operating in the morning two trains passing through the said town of Rock Hill, S. C., to the said city of Columbia, S. C., one of said trains being No. 31, which was due to arrive at the said station of Rock Hill at a very early hour in the morning, and which said train was a through passenger train from the city of Washington, D. C., to the city of Jacksonville, Fla. That the other train mentioned was a local train running from the city of Charlotte, N. C., to the city of Columbia, S. C., which was run specially for the purpose of handling and caring for the local travel between said city of Charlotte, N. C., and the city of Columbia, S. C.

(3) That, on the morning of the 4th of February, 1913, an unusual and unprecedented number of passengers presented themselves at defendant's station at Rock Hill, S. C., who desired to purchase said coupon excursion tickets for the purpose of attending the National Corn Exposition at Columbia, S. C. That it required a longer time to prepare and sell such coupon excursion tickets with the admission coupon, than it did to sell straight, full-fare tickets, and, owing to the very large number of persons desiring to purchase said coupon excursion tickets, the defendant's agent was not able to prepare and sell such excursion coupon tickets to all the passengers who applied for the same before the arrival of train No. 31, being the through train above mentioned; and the failure of plaintiff to procure an excursion ticket and admission ticket was due entirely and solely to the causes above mentioned, and not to any negligence, willfulness, wantonness, or recklessness upon the part of this defendant, or any of its agents and servants.

(4) That, as this defendant is informed and believes, the plaintiff, instead of waiting for the local train, went on board defendant's said through train No. 31 without having purchased either an excursion coupon ticket, or a full-fare ticket, entitling him to ride thereon, and, upon request being made for transportation between Rock Hill, S. C., and Columbia, S. C., the plaintiff tendered the defendant's agent or ticket collector on said train, and offered to pay to him for transportation only the price of one of said excursion tickets, and thereupon it was explained that defendant's agent or ticket auditor had no power or authority to accept for such transportation of plaintiff the amount so tendered, and requested plaintiff to pay the full fare, and assured him that the difference would be refunded to him upon application; but the plaintiff declined and refused to pay the full and legal rate of fare for transportation as a passenger from Rock Hill, S. C., to Columbia, S. C., and thereby, as the defendant is informed and believes, became a trespasser upon defendant's said train.

(5) That upon the plaintiff's continued refusal to pay the usual full, legal rate of fare for transportation from Rock Hill, S. C., to Columbia, S. C., and after having failed to present any kind of ticket entitling him to transportation upon said train, the defendant's agent and conductor ejected the plaintiff from said train a short distance south of Chester, S. C., as it was his duty to do in the circumstances, and because the plaintiff refused to leave the said train at the station of Chester, and because of the further fact that plaintiff was a trespasser thereon; and in ejecting the plaintiff the defendant's servants and agents did not use any harsh, rude, or improper means to eject the plaintiff, but did so in a courteous manner, and solely for the reason that he declined to pay the usual, legal fare demanded, and because of the fact that the plaintiff was a trespasser upon said train, and defendant denies that in so ejecting the plaintiff it was guilty of maliciousness, wantonness, or recklessness, or other improper treatment of the plaintiff.

Wherefore, the defendant prays that the complaint herein be dismissed, with costs.

Demurrer.

The plaintiff herein demurs to the second defense of the defendant, alleged in the amended answer hereof, upon the following grounds:

(1) That the said defense does not allege that an ample opportunity, or any opportunity, was given the plaintiff to purchase a ticket, excursion, or other ticket.

(2) That the defense fails to allege that the plaintiff was negligent, or at fault in that the plaintiff did not purchase a ticket.

(3) That the defense fails to allege that the plaintiff did not have a legal right to board said train, and be given transportation to Columbia, S. C.

(4) That the defense fails to allege a valid reason for ejecting the plaintiff, or to allege a valid refusal to transport the plaintiff to Columbia, S. C.

(5) That the defense fails to allege a valid refusal of the tender of said excursion ticket fare by the plaintiff.

Exceptions and Grounds of Appeal.

(1) That the court erred in refusing to sustain the demurrer, in that the second defense failed to state a defense.

(2) That the court erred in failing to sustain the demurrer, in that the defense did not allege that an ample opportunity, or any opportunity, was given the plaintiff to purchase a ticket, excursion, or other ticket, and in the absence of such an allegation the answer failed to allege a defense.

(3) That the court erred in failing to sustain the demurrer, in that the defense failed to allege that the plaintiff was negligent, or at fault, in the failure to purchase or provide himself with a proper ticket.

(4) That the court erred in overruling the demurrer, in that the answer failed to allege that the plaintiff did not have a legal right to board said train, and be given transportation to Columbia, S. C.

(5) That the court erred in overruling the demurrer, in that the defense failed to allege a valid reason for ejecting the plaintiff, or to allege a valid refusal to transport the plaintiff on said cars.

(6) That the court erred in overruling the demurrer, in that the defense did not allege a valid excuse for refusing the tender of fare made by the plaintiff and set forth in said defense.

(7) That the court erred in overruling said demurrer, as it affirmatively appeared from the defense set forth in the defense that the defendant was at fault in failing to provide a reasonable opportunity whereby plaintiff could have procured a ticket, and, in consequence of such failure, the plaintiff could not be ejected, since it is alleged the plaintiff tendered a proper ticket fare.

Dunlap, Dunlap & Hollis and J. Harry Foster, all of Rock Hill, for appellant. B. L. Abney, of Columbia, and McDonald & McDonald, of Winnsboro, for respondent.

GAGE, J. The appeal is from an order of the circuit court, overruling a demurrer by the plaintiff to the second defense of the answer. It is a matter of sore regret that so much consideration seemingly must be given to procedure, the mere reconnoitering for a real contest, but no contest, about the real difference of the parties. Let the pleadings and exceptions be reported. The demurrer was overruled by a pro forma order.

There are five stated grounds of demurrer, and there are seven stated exceptions to the order. These specific alleged reasons for the demurrer and for the exceptions will not be considered in detail and eo nomine, but only the essential issue necessary to be decided now. A majority of both the grounds and the exceptions charge a failure of the answer to allege conclusions of law, rather than to allege those facts from which such conclusions are inferable. The complaint states a bald case of willful wrong. Its allegations refer exclusively to a train designated in the answer as No. 31. It gives no account of a following local train which is referred to by the answer. It makes out that No. 31 was "the regular passenger train"; that No. 31 was "its special train" advertised by posters to run at reduced rates on a round trip, but on an occasion not named by the complaint; that no agent was at the Rock Hill office to sell the special tickets for the train No. 31 so posted to run, or any ticket at all; that plaintiff boarded No. 31, and tendered the conductor the advertised fare for such a round trip and reduced fare ticket; and that the conductor refused the money, insulted and abused the plaintiff, and put him off the train at Chester, to which point he had impliedly ridden from Rock Hill. Upon such a case, if proven, the plaintiff asks $3,000 for damages. The answer in brief, and by necessary inference, alleges that the occasion for the reduced rates was a "National Corn Exposition" at Columbia, the fee to enter which was 50 cents collected by the carrier for the exposition as a part of the price of the round trip ticket; that the defendant operated two trains past Rock Hill; that the first, called No. 31, was a through train running from Washington to Jacksonville, and the following train was the local from Charlotte to Columbia; that on the day named an unusual and unprecedented number of passengers applied for these exposition tickets at Rock Hill, and defendant was not able to make out tickets for all the applicants in the time at its disposal, and that was the only reason why a ticket was not issued to the plaintiff; that plaintiff did not wait for the following local train, but got aboard No. 31, had no ticket of any sort, and tendered money for the price of one of the alleged return and reduced fare tickets; that defendant's servants on the train had no authority to issue any such ticket, and demanded the regular fare; that plaintiff refused to pay the regular fare; and that defendant gently ejected plaintiff from the train at or near to Chester. The action is for willful misconduct of the defendant company.

The defendant is plainly entitled to show the reason why the plaintiff could not get a ticket at Rock Hill; and that such failure was not due to the perversity of the defendant, but was due to all the circumstances of the transaction recited in the answer. And the defendant company is for the same reason entitled to show why the passenger was

ejected. The legal effect of the things alleged by complaint and answer need not now be adjudged with all the particularity suggested by the demurrer. The evidence may modify the pleadings, and present issues somewhat altered from those made by the pleadings. A judgment on the issues made by the pleadings might embarrass the court which shall adjudge the issues to be made by the testimony. It will be time enough to declare the mutual rights of the litigants when the cause comes to trial on circuit. It is sufficient now to say that the answer alleges new matter which may at least mitigate the damages claimed, and which may explain to the jury the allegation of willful conduct made against the defendant.

The judgment of the circuit court is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

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(100 S. C. 181)

## HUTTO v. SOUTHERN RY. CO. et al.

(No. 9025.)

(Supreme Court of South Carolina. March 12, 1915.)

RAILROADS ⟸360 — FRIGHTENING HORSES — PERSONAL INJURIES—FAILURE TO GIVE SIGNALS.

Civ. Code 1912, § 3222, requiring the sounding of bell and whistle 500 yards from railroad crossings or public places, was intended for the protection of persons using the highway or public place, and did not give a right of action to plaintiff working in a field near by the railroad track, and about 200 yards from the crossing, when injured by fright of his horse by the passing of a train which had failed to give the crossing signal.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1241–1244; Dec. Dig. ⟸360.]

Appeal from Common Pleas Circuit Court of Lexington County; T. H. Spain, Judge.

Action by Murphy Hutto against the Southern Railway Company and others. From judgment for plaintiff, defendants appeal. Reversed.

Johnstone & Cromer, of Newberry, and W. H. Sharpe, of Lexington, for appellants. Melton & Sturkie, of Columbia, and Thurmond, Timmerman & Callison, of Lexington, for respondent.

HYDRICK, J. Plaintiff was plowing in his field about 55 feet from defendant's track. The rows ran parallel with the track. Along the end of the rows there was a neighborhood road which crossed the track. There was evidence tending to prove that the crossing was "a traveled place," within the meaning of the statute. Plaintiff drove out into the road and stopped, intending to quit work for the day and go to his house, which was on the same side of the railroad, about 200 yards from the crossing. He had taken hold of his horse's bridle preparatory to unhitching him from the plow, when one of defendant's trains ran by without giving the statutory signals. The horse was so frightened by the noise of the train that he jumped and jerked plaintiff down across the plow stock and injured him, for which he recovered judgment against defendant for $800.

The only negligence alleged as the ground of recovery was the failure to give the signals required by section 3222 of the Civil Code, which reads:

"A bell of at least thirty pounds weight and a steam whistle shall be placed on each locomotive engine, and such bell shall be rung, or such whistle sounded, by the engineer or fireman, at the distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine has crossed such highway or street or traveled place; and if such engine or cars shall be at a stand-still, within a less distance than one hundred rods of such crossing, such bell shall be rung, or such whistle sounded, for at least thirty seconds before such engine shall be moved; and shall be kept ringing or sounding until such engine shall have crossed such public highway or street or traveled place."

The sole question, therefore, is: Did defendant's negligence, in failing to give the signals required by the statute at such crossings, give plaintiff a cause of action?

The intention to be gathered from the language of the statute is that the signals were required for the protection of persons, who may be using a highway, street, or traveled place, against the dangers incident to the crossing thereof by engines and cars. This is the uniform construction which has been given to it by this court, and the same construction has been given similar statutes by other courts and by the text-writers. Williams v. Railroad Co., 135 Ill. 491, 26 N. E. 661, 11 L. R. A. 852, 25 Am. St. Rep. 397, where numerous authorities are cited. In some of the cases such statutes are given a restricted construction, and it is held that the signals are required to protect travelers against actual collision with passing engines or cars. In others, they are given a more liberal construction, and it is held that they are intended also to enable them to secure their horses against taking fright at passing trains. This court has adopted the latter view. Clifford v. Railway, 87 S. C. 325, 69 S. E. 513; Spears v. Railroad Co., 92 S. C. 297, 75 S. E. 498.

Certainly, the statute was not intended for the protection of all persons who may be on or near a railroad at any and all places, for, if it had been, signals of approach would have been required all along the railroad, and not merely for the distance of 500 yards before reaching such crossings, and until the engines or cars had crossed them. The same inference is to be drawn from the provision that, if engines or cars are standing still within 100 rods of such crossings, the signals must be given for 30 seconds before

they are moved, and must be continued until they shall have crossed, which is not required when engines or cars are standing still at all places. Nor was it intended for the protection of all persons who may be on a highway, street, or traveled place, which is crossed by a railroad, without regard to their use thereof, as the same may be affected by the dangers incident to such crossings. If it could be extended to the protection of plaintiff, under the circumstances stated, there would be no reason why it should not be extended to protect him, if he had been at the other end of his field. Such an enlargement of the scope of the legislative intention would not be warranted by any fair and legitimate construction of the language used.

In the Clifford Case, which is relied upon by the respondent, Miss Clifford was traveling along the highway, and was on the crossing before she had any warning of the approach of the train, and had just cleared the track, when the train passed, without having given any signal of its approach, and missed the hind wheels of her buggy only a few inches. Her horse was so frightened that he threw her out and injured her. She was clearly within the danger against which the statute was intended to protect those using the highway with respect to the crossing thereof by the railroad, for, if the signals had been given, she might have delayed her crossing until the train had passed, or being upon the crossing, or having just crossed, she might have hurried away to a safe distance, or have guarded against the danger of fright to her horse in several ways, which will readily suggest themselves.

The difference between that case and this does not lie wholly in the fact that the one was brought under the common law and the other under the statute, for, as was said in that case, the statute is cumulative of the common law. And therefore, in actions under the common law, proof of the failure to give the signals required by the statute at near-by crossings has been held in numerous cases to be competent evidence in support of the charge of negligence. But such failure has never been held to be negligence per se, except as to those using or intending to use such crossings. The true difference lies in the duty which the railroad companies owed to the parties in their respective situations. In Miss Clifford's case, the company owed her the duty, in her situation, to give the crossing signals. In this case, the company owed no such duty to the plaintiff, because his injury had no connection with the use or intended use of the crossing. His situation with reference to it was merely casual, and so was the fact that he happened to be actually in the road, because he was not using the road with respect to the crossing. His situation, therefore, is the same as if he had been in his field some distance from the road, and yet near enough for the signals to have afforded him protection. The signals were not required for the benefit of one so situated, for clearly, if they had been, they would have been required all along the road.

The question which has been considered is not whether the defendant owed plaintiff any duty, or, more specifically, the duty of giving him any signal of the approach of its train, for the allegation is that the defendant owed him the duty, in his situation, to give the crossing signals required by the statute, and, for its neglect in respect of that supposed duty, his action was sustained.

It is elementary that a duty may be owing to one in a given situation which would not be owing to him in another. In Stone v. Railroad Co., 96 S. C. 228, 80 S. E. 433, it was held that the railroad company owed Stone, a car repairer, no duty to exercise care for his protection, while under a car in its yard, without the protection of a blue flag, in violation of a rule of the company. In that case, the court quoted with approval the principle as thus stated in 29 Cyc. 419:

"The duty must be owing to the person injured, and must be in respect of the very matter or act charged as negligence."

In the Clifford Case, it was pointed out that section 3222, which requires the signals at crossings, is independent of section 3230, which materially modifies the principles of the common law in actions for damages in cases of injury to persons or property by actual collision with engines or cars at such crossings, when the signals required by section 3222 have not been given. And while those cases in which there has been a collision, as well as those in which the question has been considered whether the injury must be "at the crossing," are not directly in point, consideration of them shows that this court has uniformly held that the section requiring the signals is not applicable in case of injuries to persons or property, when there was no use or intended use of the crossings therein mentioned. Sims v. Railway, 59 S. C. 246, 37 S. E. 836; Cooper v. Railway, 65 S. C. 214, 43 S. E. 682; Fowles v. Railway, 73 S. C. 306, 53 S. E. 534; Hughes v. Railway, 82 S. C. 45, 61 S. E. 1079, 63 S. E. 5. In the Cooper Case, it was held that the section did not apply to crossings at different levels.

In the same case, the court said that:

"Independently of statute, it is the duty of those in charge of a train to give notice of its approach at all points of known or reasonably apprehended danger."

In this case there was no evidence that the place at which plaintiff was at work was one of known or reasonably apprehended danger. So that, even if we could view the case in its common-law aspect, there was no evidence of negligence.

Judgment reversed.

GARY, C. J., and FRASER, WATTS, and GAGE, JJ., concur.

(16 Ga. App. 178)

FENNELL v. STATE. (No. 6073.)

(Court of Appeals of Georgia. March 30, 1915.)

*(Syllabus by the Court.)*

FALSE PRETENSES ⊜7, 38, 49 — CHEATING AND SWINDLING—PROOF—FAILURE TO PERFORM PROMISE.

Where the vendor of a mule took from the vendee a purchase-money note in which title to the mule was retained in the vendor as security for the payment of the note, and he subsequently consented for the vendee to swap the mule to some other person, on the vendee's promise to give him title to the property received for the mule, and thereafter the vendee swapped the mule for a horse, but failed to perform his promise, and, instead, executed a note purporting to reserve to the original vendor the title to a certain mule, the property of another, which mule was not represented to be, and the original vendor knew was not, the animal received in the swap, the facts did not authorize a conviction of cheating and swindling, alleged to have been committed by defrauding the original vendor out of the first-mentioned mule by representing that the second mule was the animal received in the swap.

(a) The promise and the failure to perform it would not authorize a conviction. "False representations, to be the basis of a prosecution for cheating and swindling, must relate either to the past or the present. No promise or statement as to what may occur in the future * * * will serve as a basis for such a prosecution." Dickerson v. State, 113 Ga. 1035, 39 S. E. 426, and citations.

(b) The fact that the title to the mule described in the second note was in a third person would not support the charge made in the indictment that the prosecutor was cheated and defrauded by a representation that this mule was the animal received by the defendant in the swap.

(c) The prosecutor could not have been cheated and defrauded out of the original mule by representations made at the time of the execution of the second note, as charged in the indictment; for he had already parted with whatever interest he had in that mule.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5–12, 25, 50–53, 62; Dec. Dig. ⊜7, 38, 49.]

Error from City Court of Dublin; J. B. Hicks, Judge.

Amos Fennell was convicted of cheating and swindling, and brings error. Reversed.

S. P. New, of Dublin, for plaintiff in error.

WADE, J. Judgment reversed.

(16 Ga. App. 185)

SIMPSON v. MAYOR AND COUNCIL OF CITY OF EASTMAN. (No. 6194.)

(Court of Appeals of Georgia. March 30, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⊜1179 — INTOXICATING LIQUORS ⊜236—APPEAL—FINDING—EVIDENCE.

On a trial in a municipal court for the violation of a city ordinance prohibiting the keeping of intoxicating liquors for sale, there was evidence that a certain person gave the defendant 75 cents, went off, and a few minutes later received from him a pint of whisky. This authorized the inference that he sold the whisky and was keeping whisky for sale. Langston v. City of Hazlehurst, 9 Ga. App. 449 (3), 71 S. E. 592; Gaskins v. State, 127 Ga. 51, 55 S. E. 1045. The statement of the accused that he acted merely as agent for the purchaser, and obtained the whisky for him from another person mentioned, did not require a finding that this inference was rebutted. Langston v. City of Hazlehurst, supra. There was testimony to the effect that he was seen talking with a "brown-skinned negro," dressed in a manner described, who handed him "something that looked like a bottle of whisky," but it was not testified that he paid this person for it, or bought it. The judgment finding him guilty was authorized by the evidence. See Fletcher v. State, 12 Ga. App. 809, 78 S. E. 478. Where the judgment of a municipal court is attacked in a petition for certiorari solely on the ground that the evidence was insufficient to support the judgment, and that judgment is approved by the judge of the superior court, this court will not set aside the finding, where there is some evidence, although slight, which supports the judgment. Burley v. Atlanta, 14 Ga. App. 815, 82 S. E. 357.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3001; Dec. Dig. ⊜1179; Intoxicating Liquors, Cent. Dig. §§ 300–322; Dec. Dig. ⊜236.]

2. CRIMINAL LAW ⊜1178 — APPEAL — GROUNDS OF ERROR—ABANDONMENT.

Grounds of error set out in a petition for certiorari, but not insisted upon in the brief of counsel, will not be considered by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011–3013; Dec Dig. ⊜1178.]

Error from Superior Court, Dodge County; E. D. Graham, Judge.

Sol Simpson was convicted of violating a city ordinance, and, his conviction having been approved on certiorari by the superior court, he brings error. Affirmed.

D. D. Smith, of Eastman, for plaintiff in error. J. H. Milner, of Eastman, for defendant in error.

WADE, J. Judgment affirmed.

(16 Ga. App. 185)

WILKES v. STATE. (No. 6214.)

(Court of Appeals of Georgia. March 30, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⊜807 — INSTRUCTIONS — STATEMENT OF CONTENTIONS.

The charge of the court, when viewed as a whole, was not argumentative, and did not stress the contentions of the state to the exclusion of those of the defendant, but the contentions of both were fairly and correctly presented. It was not such a summary of the testimony as to convey the impression that the presiding judge was expressing an opinion on the facts proved in the case, but was merely a presentation of the issues raised by the testimony, and made in reference to the particular testimony by which those issues were supported.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. ⊜807.]

2. CRIMINAL LAW ⊜814 — INSTRUCTIONS — FLIGHT—EVIDENCE.

The state introduced evidence that the defendant left his home, abandoned his place of business, and "ran away" immediately after the discovery of whisky at the latter place, and

that he remained away for more than a year thereafter; and this was sufficient to authorize the statement, in the charge of the court, that it was insisted on the part of the state that the defendant had fled, and to authorize instructions as to the law of flight.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924 1979–1985, 1987; Dec. Dig. ⟸814.]

3. Criminal Law ⟸1172—Harmless Error —Instructions.

The defendant in his statement at the time, said that he had loaned his "grip" to another person, and that when it was returned to him he found two pints of whisky in it. The statement by the court that the defendant said "he loaned a man his grip to go off and get some medicine in," although inaccurate, did not introduce anything more prejudicial to the defendant's interest than his actual statement, and the error was not of sufficient importance to demand a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. ⟸1172.]

4. Criminal Law ⟸762 — Instructions — Intimation of Opinion—Weight of Statement.

The court charged the jury as follows: "The defendant * * * has the right to make to the court and jury such statement as he deems proper in his own defense. The statement of the defendant, our law declares, shall not be under oath, and is entitled to such credit only as the jury trying the case think proper and right to give it. If you think it deserves that credit, you are authorized to believe that statement in preference to the sworn testimony in the case, or you may believe it in part and reject it in part, or you may reject it altogether. So you see that it is a question purely for the jury to determine as to what credit you will give the defendant's statement in the case." This charge did not amount to an expression or intimation of opinion minimizing the weight and value of the defendant's statement. The charge was practically a paraphrase of section 1036 of the Penal Code of 1910, and measured by the rule laid down in Klug v. State, 77 Ga. 734 (3), was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. ⟸762.]

5. Criminal Law ⟸1059—Appeal—Exception to Instruction—Sufficiency.

An exception that a particular excerpt from a charge was erroneous, because "it was an incorrect statement of the law of the case, and the evidence in the case required a proper charge to be given on this line," is too general to present any question for consideration by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. ⟸1059.]

6. Intoxicating Liquors ⟸239—Prosecution—Evidence.

Some evidence for the state tended to show that there was whisky in a certain "grip" at the place of business of the defendant, and that he opened the grip and took some of the whisky therefrom. The court charged the jury: "It is insisted on the part of the state in this case that Bob Wilkes had whisky at his place of business, had knowledge that it went into the grip, knew that the whisky was in there, that he took the whisky out of the grip." There was no material variance between this and the evidence for the state, referred to above. If the defendant took whisky out of the grip, as was testified, he must have known, when he was taking it from the grip, that it was then in the grip, and also that it had been previously put into the grip.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 331–347; Dec. Dig. ⟸239.]

7. Instructions and Conviction Approved.

There is no substantial merit in any of the exceptions to the charge of the court, and the evidence was sufficient to authorize the verdict.

Russell, C. J., dissenting.

Error from City Court of Carrollton; James Beall, Judge.

Bob Wilkes was convicted of keeping intoxicating liquor in violation of law, and brings error. Affirmed.

Boykin & Boykin, of Carrollton, for plaintiff in error. C. E. Roop, Sol., of Carrollton, for the State.

WADE, J. It is unnecessary to discuss the various exceptions in the amendment to the motion for a new trial more fully than in the rulings embodied in the headnotes; and, since the evidence was amply sufficient to authorize a verdict of guilty, it is unnecessary to discuss the general grounds of the motion. However, in view of the fact that this court has several times disapproved of charges in criminal cases, where the expressions "the state insists," and "the state contends," were used to introduce recitals as to the facts or inferences drawn from evidence relied upon to sustain a conviction, it may not be inapropos, though perhaps trite, to make some slight comment on those grounds of the amendment to the motion for a new trial which complain that the court unfairly presented the contentions of the defendant and emphasized those of the state, and that his presentation of the contentions of the state in the case was argumentative and tended to prejudice the rights of the accused.

[1-7] The judge charged the jury as follows:

"It is insisted on the part of the state in this case that Bob Wilkes, the defendant on trial, is guilty; insisted that he kept liquor at his place of business on Depot street; insisted that he kept that liquor in violation of law. It is insisted on the part of the state, gentlemen, that when he was overtaken in this offense he fled; that is, that he left the country, ran away. That is what the state insists in this case. The defendant, gentlemen, on his part denies these charges. He says that he did not keep any liquor at his place of business; that he had no knowledge of any liquor being kept at his place of business. He says he loaned a man his grip to go off and get some medicine in, and if he brought liquor back in it, and put it in his place of business, he didn't know it. These, gentlemen, are all questions for you to thrash out and determine what the truth of the transaction is."

He further charged the jury as follows:

"I charge you, gentlemen, as a matter of law, if Bob Wilkes had any whisky at his place of business, whether it belonged to him or not, if he had knowledge of it, he would be guilty. But if liquor was put in there without Bob

Wilkes' knowledge or consent, he didn't know anything about it, he couldn't be convicted. A man cannot be convicted of an offense he had no knowledge of, that he is not guilty of: but, gentlemen, as before stated, it is insisted on the part of the state in this case that Bob Wilkes had whisky at his place of business, had knowledge that it went into the grip, knew that the whisky was in there, that he took the whisky out of the grip. The defendant denies that, says that it is not true, that he didn't do that. Those are questions for you to determine."

From these two excerpts it will be observed that the judge not only stated the contentions of the state, but also the counter contentions of the defendant, and that he stated the latter with sufficient fullness to put clearly before the jury the various matters of defense relied upon. The mere use of the expression "the state insists" (and in fact its repeated use), as was said in Rouse v. State, 2 Ga. App. 184, 58 S. E. 416, will not diminish the error of the judge, should he review in detail each fact and circumstance in testimony in such a way as would tend to impress upon the jury the idea that the testimony has established the contention of one party, or that certain testimony is entitled to more weight than other testimony. Or should he so particularize and impress upon the jury various inferences which might arise from the evidence, regardless of the qualifying words "the state insists," "it is contended," etc., the charge would amount to an intimation of an opinion forbidden by the statute. Penal Code, § 1058; Civil Code, § 4863.

In Brown v. State, 6 Ga. App. 356, 360, 361, 64 S. E. 1119, 1121, this court held:

"It is no valid objection to a charge of the court that it presents the issues of the case vividly and graphically, if it is fair, is not argumentative, does not sum up the testimony, and does not express or intimate any opinion as to what has or has not been proved."

And further, in the same case, it was said that the charge in that case, when viewed in connection with its context, was not argumentative and did not stress the state's contentions to the exclusion of those of the defendant, but that the contentions of both were fairly and accurately presented; and that it was not such a summary of the testimony as to convey the impression that the judge was expressing an opinion on the facts proved in the case; and further that:

"It was a very fair presentation, not of the testimony, but of the issues raised by the testimony. It draws the issues clearly and correctly, but it makes no reference to the particular testimony by which these issues are supported."

We think this comment on the charge of Judge Hammond in the Brown Case (which went into details to a far greater extent than did the charge in the instant case, and which so graphically presented all the contentions of the state, while at the same time fully putting before the jury for their consideration the counter contentions of the defendant) would apply to the charge now under consideration, in so far as relates to the fairness of the charge, and the impartial and full statement therein of the contentions of both the state and the accused. As was said in Thomas v. State, 95 Ga. 484(3), 22 S. E. 315, the trial judge should "refer to the evidence only so far as is necessary to present the leading issues in the cause, leaving the minor contentions of opposing counsel to the consideration of the jury under appropriate general instructions. It should contain no such summary of the evidence as might to a jury either seem to be an argument or amount to the expression or intimation of an opinion thereon."

Measured by this rule, the charge of the court complained of in the case under consideration is not subject to exception on the ground that it presented to the jury the contentions of the state in such a manner as to amount to the expression or intimation of an opinion thereon. The major contentions of the state, necessary to warrant a conviction of the defendant, were stated, and the court stated also the reverse contentions of the defendant. No reference was made to the testimony, nor was it suggested by the court that any of the contentions insisted upon by the state were sustained by the evidence, or that any particular evidence tended to sustain any particular contention or all the material contentions of the state. While the use of the words "the state insists," "the state contends," would not, as already stated, and as heretofore decided by this court, relieve from error an argumentative and objectionable statement of the contentions of the parties, still the fact that the court repeated, in connection with every reference to a material contention on the part of the state, the words "the state insists," might serve in some degree to remove from the minds of the jury any impression that the court was stating the various contentions as facts, or was intimating that such contentions had been proved, and rather tended to impress upon the jury that the contentions recited were merely such contentions as were "insisted" upon by the state, and not by any means contentions which had been established by the testimony. It is hard to imagine how a trial judge may present to a jury for their consideration the material and essential contentions on the part of the state without subjecting himself to the just criticism of having (by inadvertence) at least intimated an opinion to the jury, unless he should preface any statement as to the contentions of the state by the words "the state contends," or "the state insists," or by other words of like import, though, where the evidence itself is reviewed and commented upon in such a way as amounts to an intimation or expression by the court, it is well settled that the use of these words, no matter how often, will not remove the effect of such an intimation or expression. Undoubtedly the safer and wiser plan is for the trial judge to avoid any attempt to present the

contentions of the state in a criminal case with great minuteness and particularity, lest he encroach upon the province of the jury; but a mere general presentation of the various contentions relied upon by the state to warrant a conviction, where the obverse of the picture is also fully and fairly presented to the jury, does not necessarily amount either to an argumentative presentation of the case for the prosecution or to an expression or intimation as to what may or may not have been proved.

Judgment affirmed.

RUSSELL, C. J., dissents.

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(16 Ga. App. 171)

## DARBY v. STATE. (No. 5833.)

(Court of Appeals of Georgia. March 30, 1915.)

*(Syllabus by the Court.)*

1. HOMICIDE ⟸309 — MANSLAUGHTER — INSTRUCTION.

An instruction to the jury, defining voluntary manslaughter, which failed to advise them that, to constitute the crime, the killing must be unlawful, was erroneous, since an essential element of the offense was thereby eliminated.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652–655; Dec. Dig. ⟸309.]

2. CRIMINAL LAW ⟸828 — INSTRUCTIONS — THEORY OF DEFENSE.

In the absence of a timely written request, it was not error for the trial judge to omit all reference to the theory that the killing was purely accidental, since that theory was clearly suggested only by the statement of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. ⟸828.]

3. CRIMINAL LAW ⟸763, 764, 811—INSTRUCTIONS—DYING DECLARATION.

A charge that "the theory of the law, in admitting dying declarations as evidence, is that a person would be just as *sure* [italics ours] to make a truthful statement when he was in the article of death, and when he knows that he is to leave this world and enter the next, as if he was under the sanctity of oath," was erroneous. The use of the word "sure" tended to indicate the judge's opinion as to the weight and value of the dying statement as compared with testimony in conflict with it; and the instruction gave undue emphasis to evidence, the weight of which should be left for determination by the jury. Baker v. State, 12 Ga. App. 553 (4), 77 S. E. 884; Pyle v. State, 4 Ga. App. 811, 62 S. E. 540.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731–1748, 1752, 1768, 1770, 1787, 1969–1972; Dec. Dig. ⟸763, 764, 811.]

4. HOMICIDE ⟸300—INSTRUCTIONS—REASONABLE FEAR—URGENT DANGER.

The court, near the conclusion of the charge to the jury, after having charged the law embodied in sections 70 and 71 of the Penal Code of 1910, instructed them as follows: "In connection with what I have already charged you, I will give you in charge this section of the Code" (referring to section 73, which was thereupon given in charge). This was error, as the jury may have understood section 73 as qualifying what had been said previously in reference to justifiable homicide and reasonable fears. "The law embodied in the Penal Code of 1910, § 73, should never be given in charge to the jury in such a way as to confuse it with that contained in sections 70 and 71." Jordan v. State, 117 Ga. 405, 43 S. E. 747.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616–620, 622–630; Dec. Dig. ⟸300.]

5. CRIMINAL LAW ⟸ 829 — INSTRUCTIONS — REFUSAL.

The court did not err in refusing a request to charge in reference to dying declarations, where the instruction requested was couched in strongly argumentative language, and its essential substance was included in instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⟸829.]

6. HOMICIDE ⟸216—DYING DECLARATION—FOUNDATION.

The court erred in permitting Dr. Neal, a witness for the state, to testify to a statement of the deceased which was offered as a dying declaration, where it appeared that the witness was unable to say that the dying man was conscious of his condition and knew he was about to die, but testified on cross-examination: "He knew that he was dying. * * * I do not know now that he thought so, but I think he thought so. * * * I did not hear Mr. Moore [the deceased] remark that he thought so, but I say now I think he thought so. As to whether I knew that he thought so, I thought he thought so. I don't know now that he thought so, but I think he did. I did not hear him make any statements on the subject that he was dying." No sufficient foundation was laid for the introduction of the statement of the deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 457; Dec. Dig. ⟸216.]

7. HOMICIDE ⟸169—EVIDENCE—RELEVANCY.

The court erred in permitting one Todd, a witness for the state, to testify to the effect that the accused told him, in a certain conversation prior to the homicide, "that if Mrs. Moore [the wife of the deceased] had been a man, me or her one would have to die." The conversation related by the witness had no immediate connection with the homicide, and was with a person other than the deceased, and merely indicated the state of feeling on the part of the accused towards that person. The evidence was irrelevant and prejudicial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 341–350; Dec. Dig. ⟸169.]

8. ASSIGNMENTS OF ERROR.

The tenth ground of the amendment to the motion for a new trial was not approved by the trial judge. The exception based on the alleged disqualification of a juror need not be passed upon, as it is not probable that the same question will arise on the next trial. Except as indicated above, there is no substantial merit in any of the other assignments of error.

Error from Superior Court, Toombs County; K. J. Hawkins, Judge.

W. L. Darby was convicted of crime, and brings error. Reversed.

H. D. D. Twiggs, of Savannah, Chas. W. Sparks, of Vidalia, E. J. Giles and G. W. Lankford, both of Lyons, and Hines & Jordan, of Atlanta, for plaintiff in error. R. Lee Moore, Sol. Gen., of Statesboro, and Haygood & Cutts, of Fitzgerald, for the State.

WADE, J. Judgment reversed.

BROYLES, J., not presiding.

(16 Ga. App. 155)

PASCHAL v. STATE. (No. 6089.)

(Court of Appeals of Georgia. March 23, 1915.)

*(Syllabus by the Court.)*

1. OBSTRUCTING JUSTICE ⟸11—INDICTMENT —AUTHORITY OF OFFICER.

An indictment charging a violation of section 311 of the Penal Code of 1910 must "disclose the official character of the officer alleged to have been obstructed and the nature of the process he was attempting to serve, or show otherwise that the officer was authorized to execute the process." The authority of the officer to execute or attempt to execute the process is an essential element of the offense.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. §§ 19–28; Dec. Dig. ⟸11.]

2. OBSTRUCTING JUSTICE ⟸11—INDICTMENT —SUFFICIENCY—LEGALITY OF PROCESS.

An allegation that the defendant did knowingly and willfully obstruct and oppose a named person, who was then and there deputized as a deputy sheriff to execute a certain process, described as "a mortgage execution on personalty," issued against a person named in favor of another person named without naming the court from which it issued, would not sufficiently show that it was a lawful process in the county in which it was sought to execute the process.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. §§ 19–28; Dec. Dig. ⟸11.]

3. OBSTRUCTING JUSTICE ⟸11—INDICTMENT —SUFFICIENCY—AUTHORITY OF OFFICER.

Where such an indictment described the officer whom the accused was charged with resisting as "one W. S. Gresham, who was then and there deputized as a deputy sheriff to execute the process hereinafter described," without more, this was insufficient to show the authority of the officer to execute the process in the state of Georgia or in the county in which the attempt to execute was made.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. §§ 19–28; Dec. Dig. ⟸11.]

4. OBSTRUCTING JUSTICE ⟸11—INDICTMENT —REQUISITES.

It was not necessary for the indictment to set out the specific acts by which the defendant forcibly obstructed and opposed the execution of the process.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. §§ 19–28; Dec. Dig. ⟸11.]

Error from Superior Court, Morgan County; J. B. Park, Judge.

Res Paschal was convicted of obstructing legal process and brings error. Reversed.

M. C. Few, of Madison, for plaintiff in error. Jos. E. Pottle, Sol. Gen., of Milledgeville, for the State.

WADE, J. Res Paschal was convicted in the city court of Madison of the offense of obstructing legal process. The indictment charged Jack Paschal and Res Paschal "with the offense of a misdemeanor, for that the said two named persons, in the county [of Morgan] aforesaid, on the 4th day of November, in the year of our Lord 1913, with force and arms, did knowingly and willfully obstruct, resist, and oppose one W. S. Gresham, who was then and there deputized as a deputy sheriff to execute the process hereinafter described, in serving and executing and attempting to serve and execute a lawful process, to wit, a mortgage execution on personalty, issued against the said Jack Paschal, alias Will Paschal, the same being in favor of J. Hulme Morgan, contrary to the laws of said state, the good order, peace, and dignity thereof." The defendant, before pleading and arraignment, demurred to the indictment as insufficient in law, because: (1) It fails to state in what way or by what means the defendant resisted legal process; (2) it fails to set out the resisted process with sufficient particularity for the defendant to prepare his defense; (3) it fails to show by what authority the said W. S. Gresham was made deputy sheriff; (4) it fails to show the county of which the said W. S. Gresham was a deputy sheriff; (5) it fails to show from what court the process was issued. The demurrer was overruled, and the defendant filed exceptions pendente lite. The case proceeded to trial, and the defendant was found guilty. He sued out certiorari, the judge of the superior court overruled the certiorari, and he excepted to that judgment. Under the view we take of the case it is unnecessary to discuss the evidence, since our decision as to the demurrer will dispose of the verdict as well as of the indictment.

Section 311 of the Penal Code is as follows:

"If any person shall knowingly and willfully obstruct, resist, or oppose any officer of this state, or other person duly authorized, in serving or attempting to serve or execute any lawful process or order, or shall assault or beat any officer, or person duly authorized, in serving or executing any process or order aforesaid, or for having served or executed the same, he shall be guilty of a misdemeanor."

Section 954 of the Penal Code provides:

"Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this code, or so plainly that the nature of the offense charged may be easily understood by the jury."

Sections 275 and 277 of the Political Code are as follows:

Section 275: "All deputies before proceeding to act, must take the same oaths as their principals take, which must be filed in and entered on the minutes of the same office, and with the same indorsement thereon; but these provisions do not apply to any deputy who may be employed in particular cases only."

Section 277: "The official acts of an officer are not the less valid for his omission to take and file the oath, unless in cases where so specially declared."

Section 4912 of the Civil Code is as follows:

"They [sheriffs] are authorized in their discretion to appoint one or more deputies, from whom they must take a bond with sureties."

[1] The first ground of the demurrer, to the effect that the indictment is not sufficient in law because it fails to state in what way or by what means the defendant resisted

legal process, is without merit. The question has already been adjudicated in so many words by our Supreme Court in the case of Gibson v. State, 118 Ga. 29, 44 S. E. 811, where the accused were charged, as in the indictment now under consideration, with obstructing legal process, for that they did "unlawfully and with force and arms, knowingly and willfully obstruct and oppose" an officer named, in the execution of a judgment and order described, etc.

[2-4] The second, fourth, and fifth grounds of the demurrer may be considered together. The second ground is that the particular legal process, the enforcement of which was resisted, is not set out with such particularity as would enable the defendant to properly prepare his defense; the fourth ground is that the indictment fails to show the county of which W. S. Gresham was a deputy sheriff; and the fifth ground is that the indictment fails to show from what court the alleged legal process was issued. It has been held that one who knowingly and willfully obstructs, resists, or opposes a deputy sheriff serving or attempting to serve a lawful process or order is guilty of a violation of section 311 of the Penal Code, if force be exerted in so obstructing, resisting, or opposing the officer, regardless of whether or not the officer had filed his official oath or had given any bond before attempting to execute or serve the order or process. Stephens v. State, 106 Ga. 116, 118, 32 S. E. 13. See, also, Moses v. State, 6 Ga. App. 251, 64 S. E. 699.

In Gibson v. State, supra, the indictment charged the accused with the offense of obstructing legal process, for that they did, on a named day—

"unlawfully and with force and arms, knowingly and willfully obstruct and oppose H. H. Smallwood, legal constable of said county of Decatur, in his attempt to execute the judgment and order, the same being lawful process, of W. E. Smith, N. P. and ex officio J. P. of the 694th district G. M. said county, rendered and framed by said magistrate at the January term, 1912, of the justice's court in and for said district and county, in the case then and there tried and determined of James Watson versus B. H. Gibson, same being a possessory warrant proceeding for the recovery of a certain cow, the said magistrate then and there awarding the possession of said cow to said James Watson, and ordering and directing the said Smallwood, L. C., to execute and enforce said judgment by delivering said cow to said Watson, the execution of which said order by the said Smallwood, L. C., was obstructed and opposed by said defendants as aforesaid, contrary to the laws of said state."

The court said that indictment not only contained the terms of the Code definition of the offense, but was otherwise sufficient, as—

"it set out the nature of the order which the constable was endeavoring to execute, and charged that the defendant, with force and arms, knowingly and willfully obstructed and opposed its execution. The specific act or acts by which he obstructed or opposed the officer were not set out; but the allegations were sufficiently definite for a case of this character, where so much of the attendant circumstances was set out, and where there could have been no very material variation in the manner in which the officer was obstructed."

In the case now under consideration the indictment alleges merely that a deputy sheriff was attempting to serve and execute "a lawful process, to wit, a mortgage execution on personalty issued against the said Jack Paschal, alias Will Paschal, the same being in favor of J. Hulme Morgan, contrary to the laws of said state, the good order, peace, and dignity thereof." It does not appear whether the mortgage execution which Gresham as a deputy sheriff was seeking to execute was issued by any court which possessed authority to issue the same, or, in fact, that it was issued by any court of any kind within the confines of this state, but, so far as the allegations in the indictment are concerned, the mortgage execution may have been issued either by some court in this state without proper authority to issue it, or by some court in another state. It appears to us that it is essential that the indictment should show from what court the process issued, not only in order that the defendant might be informed as to the particular process he is charged with obstructing, but also that it may appear from the indictment itself that the process was at least presumably a lawful one. The mere allegation that the process was "a lawful process," without more, amounts to nothing but the expression of a conclusion. The code section declaring what constitutes the offense of obstructing lawful process makes it a penal offense for any person to knowingly and willfully obstruct or oppose "any officer of this state, or other person duly authorized," in serving or attempting to serve, etc. The indictment charges that the defendant, "with force and arms, did knowingly and willfully obstruct, resist, and oppose one W. S. Gresham, who was then and there deputized as a deputy sheriff to execute the process hereinafter described." From the indictment it does not appear whether W. S. Gresham was "an officer of this state" or was "duly authorized," or even whether he was or was not deputized as a deputy sheriff of Morgan county, Ga.; but, for aught that appears in the indictment itself, Gresham may have been a deputy appointed by the sheriff of any county in the state "between Rabun Gap and Tybee Light," or of some county in the state of Alabama, Maine, or Texas. Of course the defendant probably knew that Gresham was assuming to act as deputy sheriff of Morgan county, and that the execution which Gresham was seeking to enforce was issued from some court in Morgan county, and the particular court he might have been able to ascertain by proper investigation, but whether this be true or not is entirely immaterial, since the indictment must itself charge the crime with sufficient definiteness, irrespective of extrinsic matters.

The question has been covered in principle

in the case of Hunter v. State, 4 Ga. App. 579, 61 S. E. 1130, where it was held that an accusation in a prosecution for obstructing legal process is insufficient, even to withstand a motion in arrest of judgment—

"where it fails to disclose the official character of the officer alleged to have been obstructed and the nature of the process he was attempting to serve, or to show otherwise that the officer was authorized to execute the process."

The court said:

"Due authority in the officer executing or attempting to execute the process, for the obstructing of which the defendant is accused, is an element essential to a violation of section 306 of the Penal Code [Penal Code of 1910, § 311]. If the official character of the officer and the nature of the process are disclosed, and the process is of the kind the officer is authorized to execute, this element sufficiently appears. In the present case the prosecutor is alleged to have been an officer of this state; but the accusation is silent as to the nature of the office. Was he a constable, a justice of the peace, a fertilizer inspector, or what? The pleading fails to disclose. What process was he attempting to execute—a common-law fi. fa., a writ of possession in ejectment, a criminal warrant, a tax execution, an attachment, a death warrant, or what? The record is silent. If he was a common constable attempting to execute a writ of possession in an ejectment case, or a justice of the peace attempting to hang a prisoner under a death warrant, or a county commissioner attempting to levy a fi. fa., or a fertilizer inspector attempting to serve an attachment (and we may suppose a hundred other cases), the allegations of the accusation would be completely supported, and yet the defendant would be innocent. The guilt of the accused does not follow as the logical legal conclusion from the facts stated in the accusation."

Since it does not appear whether Gresham was an officer of this state (though it does appear that he was "deputized" at the time he attempted to execute the process "as a deputy sheriff") and it does not appear whether the process in question was a lawful process in the state of Georgia and against property in Morgan county, or that the officer attempting to execute the process was an officer who had authority to enforce the same, we think the indictment was fatally defective, and that the judge of the superior court erred in overruling the second, fourth, and fifth grounds of the demurrer.

The third ground of the demurrer is that the indictment fails to show by what authority W. S. Gresham was made deputy sheriff. If the indictment had alleged that Gresham was deputized as a deputy sheriff of Morgan county, the presumption would be that he was made deputy sheriff by the authority of a sheriff having the power to act within the confines of Morgan county, and to appoint under the law deputies to perform services generally as provided by law, or to perform special services only without taking oath, as provided by section 275 of the Political Code, supra. Since, under what we have already said as to the law on that point, it is immaterial, in making out the offense of obstructing lawful process, whether the deputy officer seeking to enforce the process had previously made oath or given bond, it would appear to be immaterial to the defendant whether the indictment alleges how and in what manner the deputy officer he was charged with resisting and opposing had been deputized to act in the particular case.

Since, under our ruling, the demurrer to the indictment should have been sustained, it would be fruitless to discuss or comment upon what followed in the trial.

Judgment reversed.

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(16 Ga. App. 174)

## BALDWIN v. STATE. (No. 6136.)

(Court of Appeals of Georgia. March 30, 1915.)

*(Syllabus by the Court.)*

BURGLARY ⟸41—CRIMINAL LAW ⟸511—SUFFICIENCY OF EVIDENCE — CORROBORATION.

The evidence relied upon to sustain the conviction of the accused, outside of the testimony of the alleged accomplice, was wholly circumstantial, and was not enough in itself to directly connect the accused with the commission of the crime.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94–103, 109; Dec. Dig. ⟸41; Criminal Law, Cent. Dig. §§ 1128–1137; Dec. Dig. ⟸511.]

Broyles, J., dissenting.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Will Baldwin was convicted of feloniously entering and stealing certain articles from a house, and brings error. Reversed.

Napier, Maynard & Plunkett and W. A. McClellan, all of Macon, for plaintiff in error. John P. Ross, Sol. Gen., of Macon, for the State.

WADE, J. The house of Arthur Walton, in the country, was feloniously entered through a fastened window while he and his wife were away in the fields and the house was unoccupied, and a hat, a shirt, a pair of women's shoes, a razor, and six sacks of smoking tobacco of a brand in general use were stolen and removed therefrom. No one witnessed the occurrence, and it does not appear that there were any tracks or other circumstances about the house to indicate who or how many people committed the crime. Walton's wife returned from the field and discovered that the house had been entered. She summoned her husband, who thereupon took his shotgun and proceeded along the railroad in the direction of a nearby station and hamlet, where he found three negroes and a white man, all seated together in a little shed room belonging to the railroad company. On his approach the white man fled towards the adjacent river swamp, and later was apprehended. One of the negroes attempted to flee, but halted and surrendered when Walton fired his gun in the air to intimidate him and called upon

him to stop. The other two—Baldwin, the plaintiff in error, and Moore—made no effort to escape, though they began walking off when Walton approached. Walton called upon Davis, who kept a store near by, to take charge of Moore and Baldwin until he caught Williams, the negro who ran, and neither Moore nor Baldwin made any attempt to get away from Davis, though Davis was not armed. When Walton approached Baldwin and Moore, each had a sack of "Bull Durham" tobacco, the brand of tobacco stolen from his house, but he was unable to identify it as the tobacco he had lost. Each had apparently made four or five cigarettes out of the tobacco when arrested by Walton. The three negroes and the white man were placed in custody, and at the trial of the plaintiff in error the white man, George Knight, who had previously pleaded guilty, testified that the robbery was the work of himself and these three negroes; that Williams, Moore, and Baldwin entered the house through a window after breaking the fastening which secured its shutter, and that he remained outside, and later a division of the spoils was made; that the hat was given to him, Williams retained the razor and some other things, and Moore and Baldwin received some of the stolen sacks of tobacco. There was evidence that Baldwin had previously borne a reputation for industry and honesty, and had been regularly employed for several years by a manufacturing concern in Macon. He explained his presence at the place where he was arrested by asserting that he was seeking employment from a certain company engaged in extensive construction work in that neighborhood, which would pay him better wages than he had been getting, and that he had only casually encountered the other defendants, and knew nothing of the crime. The next morning after the arrest the stolen razor was found in a little box or crate in which chickens had been shipped, and upon which, it was testified, "one of these boys" was sitting while under the shed at the railroad station; and some tobacco of the kind and brand stolen from Walton was also found at that time underneath certain planks upon which "one of the boys" had been then seated; but it does not appear whether the razor was found where Moore or where Baldwin had been seated, nor does it appear, except by conjecture or possible inference, that either Moore or Baldwin placed the razor or the tobacco where they were discovered.

The plaintiff in error was arrested while in the company of a self-confessed burglar, near a railroad station in the country, while making no effort to conceal himself, and the testimony of his alleged accomplice implicated him in the commission of the crime; but it was not shown that he had on his person or in his possession any of the articles identified as stolen, nor was it shown by the testimony of any person other than the accomplice that he had been near the scene of the crime. He yielded to arrest quietly, and made no effort to escape, notwithstanding that the man guarding him was not an officer and was unarmed, and his previous character for industry and honesty corroborated his rational explanation of his presence in the locality where he was when arrested. It is true that a partially used bag of smoking tobacco of the same brand as that stolen appears, from the testimony of one witness, to have been in his possession at the time he was arrested; but this tobacco was not identified as a part of that which had been stolen, and it does not appear that the brand was unusual, and not one commonly in use. Also the next morning after the arrest some smoking tobacco like that stolen and the stolen razor were found under a box and some planks on which the defendants had been seated, but it does not appear which of the defendants was seated where the razor was found, and the tobacco then found was not identified as a part of that which had been stolen. There was evidence that one of the three negroes arrested had on the pair of shoes which had been stolen, but the evidence does not disclose that Baldwin was the one wearing the shoes, but rather points to one of the other defendants. From all the above it does not appear that, outside of the evidence of the accomplice, there was any evidence which directly connected Baldwin with the commission of the crime, though the facts shown were extremely suspicious, and possibly the defendant may be guilty. Applying, however, the strict rule so often announced by our Supreme Court and this court, we feel compelled to hold that the court erred in overruling the motion of the defendant for a new trial.

While it is not essential that the testimony in corroboration of an accomplice shall of itself be sufficient to warrant a verdict of guilty (Partee v. State, 67 Ga. 570, 571), or that the testimony of the accomplice shall be corroborated in every material particular (Bishop v. State, 9 Ga. App. 205, 70 S. E. 976; Dixon v. State, 116 Ga. 186, 42 S. E. 357), nothing is better settled, under the decisions of the Supreme Court and of this court than that the corroborative testimony shall be of itself sufficient to raise an inference that the defendant is guilty. Corroborating circumstances must be such as, independently of the testimony of the accomplice, would lead to the inference of the guilt of the accused, and must in some way connect the defendant with the criminal act. Bishop v. State, supra; Smith v. State, 7 Ga. App. 781, 783, 68 S. E. 335; Childers v. State, 52 Ga. 106, McCalla v. State, 66 Ga. 346; Taylor v. State, 110 Ga. 154, 35 S. E. 161; McCrory v. State, 101 Ga. 779, 28 S. E. 921. While it is true that the sufficiency of circumstances offered for the purpose of corroboration is a matter for

determination by the jury (Dixon v. State, 7 Ga. App. 604, 67 S. E. 699), and "the law cannot lay down a rule to measure the extent of corroboration necessary, still, where the only witness in a felony case is confessedly an accomplice, the corroborating circumstances are not sufficient to dispense with another witness, unless they are such as to connect the defendant with the crime. It is not sufficient for a witness to corroborate as to the time, place, and circumstances of a transaction, if there is nothing except the statement of the accomplice to show any connection of the prisoners therewith" (Smith v. State, supra). And facts which merely place upon the defendant a grave suspicion of guilt are not sufficient (Taylor v. State, supra; Harrell v. State, 121 Ga. 607, 49 S. E. 703), though slight evidence that the crime was committed by the defendant, and also identifying him with it, will corroborate the testimony of his accomplice and warrant a finding of guilty (Partee v. State, supra; Roberts v. State, 55 Ga. 220; Evans v. State, 78 Ga. 351).

While it is the province of the jury to determine whether the circumstances shown by outside evidence are sufficient to corroborate the testimony of a confessed accomplice, the jury may not be allowed to attach undue and unreasonable weight and importance to slight or trivial circumstances sufficient perhaps to produce a strong suspicion of guilt, and thereby create a connection between the accused and the commission of the crime, where it is not otherwise established to the satisfaction of the rational mind. So where, as in this case, it appears to a reviewing court that the only circumstances relied upon to connect the defendant with the crime are wholly insufficient of themselves to create more than a suspicion of guilt, the verdict depending upon such circumstances cannot be allowed to stand. While this court is properly without power to interfere with the findings of juries on questions of fact, yet one of the fundamental reasons for its existence is that it may determine if the evidence produced against any person charged with the commission of a crime is legally sufficient to warrant the inference drawn by the jury as to the guilt of the defendant. If a jury had the absolute power to determine the legal sufficiency of any kind of evidence to establish the guilt of those accused of crime, without check or hindrance, and without the opportunity for review in a forum presumably removed from the possible influence of local impulses or feeling, bias, or prejudice, which may often to some degree unconsciously affect even the most scrupulous and careful jurors, one charged with a crime particularly offensive to the spirit of the community where he happens to be tried, or so terrible in its nature as to cry aloud to every law-abiding citizen for the infliction of the severest penalties upon the perpetrator, might be swept onward to ruin by "trifles light as air," which in the reflective calm following the storm of impulse may be found to have been wholly insufficient to connect the defendant with the crime for which he has been sacrificed upon the altar of a wrathful, though mistaken, Nemesis. While circumstances may to some extent be sufficient to corroborate an accomplice, still, if they fail to connect the accused with the crime by a thread of evidence of even cobweb fineness or if a single link be missing from the chain of facts that may be wound about him, no matter how grave the suspicion created against him, he must be accounted innocent, and liberated from the toils of the law, since only by a *complete* chain of evidence, or by an *unbroken* thread of testimony connecting him with the crime, can the presumption of innocence with which he enters upon his trial be finally removed. Also, whether offered as the sole proof of guilt, or in corroboration of an accomplice, the general rule applies that, where circumstantial evidence alone is relied upon, it must be sufficient to satisfy the jury of the guilt of the accused to the exclusion of every other reasonable supposition.

Except as indicated above, there is no such substantial merit in any of the assignments of error as would make it necessary to discuss or specifically refer to them.

Judgment reversed.

BROYLES, J. (dissenting). Slight evidence corroborating the testimony of an accomplice may be sufficient to authorize a jury in finding the accused guilty; and, under the decisions of this court and of the Supreme Court, the sufficiency or weight of corroborating evidence is a question solely for the jury, and when they find that it is sufficient, and the trial judge approves their finding, a reviewing court will not interfere with the discretion of the trial judge in refusing a new trial, unless it has been manifestly abused. Roberts v. State, 55 Ga. 220; Ransone v. Christian, 56 Ga. 356; Bell v. State, 73 Ga. 572; Evans v. State, 78 Ga. 351; Sikes v. State, 105 Ga. 592 (3), 595, 31 S. E. 567; Powers v. State, 44 Ga. 210; Chapman v. State, 109 Ga. 164, 165, 34 S. E. 369; Hargrove v. State, 125 Ga. 275, 54 S. E. 164; Anglin v. State, 14 Ga. App. 566, 81 S. E. 804. In this case, the jury having found that the corroborating evidence was sufficient, and their verdict having been approved by the trial judge, and no error of law having been committed by him, I think that his judgment overruling the motion for a new trial should be affirmed.

(16 Ga. App. 110)

BOWEN v. STATE. (No. 5853.)

(Court of Appeals of Georgia. March 18, 1915.)

*(Syllabus by the Court.)*

1. ROBBERY ⊂⊃6—ROBBERY BY FORCE—ELEMENTS OF OFFENSE.

To constitute robbery by force, it is not essential that the victim shall be conscious. While it is not robbery to abstract property furtively from the person of one who is unconscious, that offense is committed where, to accomplish the taking, he is beaten or bodily injury is inflicted upon him.

(a) What was said in the decision in the case of Williams v. State, 9 Ga. App. 170, 70 S. E. 890, to the effect that it must be shown that the victim was conscious of the taking, was not intended to apply to robbery by force (in the sense in which the term "force" is used in the law as to robbery), but related to a kind of robbery in which such force is not essential, and which the act of 1903, amending the Code definition of robbery, added as an offense distinct from robbery by force and robbery by intimidation, to wit, "the sudden snatching, taking, or carrying away" of property, "without the consent of the owner or person in possession or control thereof." Penal Code 1910, § 148.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 6; Dec. Dig. ⊂⊃6.

For other definitions, see Words and Phrases, First and Second Series, Robbery.]

2. ROBBERY ⊂⊃6—ROBBERY BY FORCE—ELEMENTS.

The force which distinguishes robbery from larceny from the person, where the property is taken without the knowledge of the owner, may be no more than is used to break a watch chain, in detaching a watch from the person.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 6; Dec. Dig. ⊂⊃6.]

3. ROBBERY ⊂⊃24—ROBBERY BY FORCE—SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to show that the prosecutor's watch, money, and other things of value, of which the indictment alleged he had been robbed by force, were taken from his person while he was drunk or unconscious from liquor furnished to him by the defendant, which probably was drugged, and that his watch chain was broken and bodily injuries were inflicted upon him while he was in that condition; and the circumstances authorized the jury to conclude that the watch chain was broken and the injuries were inflicted in the taking of these things from his person, and that the defendant was the perpetrator of the crime.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32–36; Dec. Dig. ⊂⊃24.]

Error from Superior Court, Fulton County; B. H. Hill, Judge.

Tom Bowen was convicted of robbery by force, and brings error. Affirmed.

Tom Bowen was convicted under an indictment charging him with robbery by force, alleged to have been committed in taking a watch and certain other property from the person of J. A. Rozier. From the testimony of the state it appeared that between 1 and 2 o'clock at night, on December 27, 1913, Rozier engaged the defendant (who was a cab driver) to drive him in cab No. 89 from a club on Marietta street, in the city of Atlanta, to the Brittain Hotel, and directed him to go by a store owned by Rozier and his brother. At the store Rozier opened the door and invited the defendant to come in, as the night was very cold, and in his presence opened a safe and took from it 10 $1 bills. Thereafter Rozier re-entered the cab and instructed the defendant to take him to a house on Edgewood avenue, which he entered, and after a minute or two he returned to the street, got into the cab, and requested the defendant to drive to "the hotel." The cab was driven up Edgewood avenue and Marietta street to Broad street, and out Broad street to Alabama street, and there it stopped, and the defendant turned to Rozier, who was then considerably under the influence of liquor, and said: "It was a little bit dangerous for me to drive over this way. I have been having some trouble over here." Rozier replied, I don't reckon there is any harm in it," but the defendant said it was getting late in the morning. Just then a policeman came up and spoke to the defendant, but Rozier did not hear what was said, and the defendant turned the cab around and said, "I told you we would get into trouble if we didn't mind," and suggested pulling down the shades in the cab, so that no one could see who was inside, and that they "drive around another way." Rozier agreed to this, the defendant pulled down the shades, and the cab resumed its journey. Rozier failed to look out of the windows, or pay any attention to the direction in which they were going. The cab finally stopped, the driver jumped out, and Rozier opened the door, and, failing to recognize the locality, inquired where the defendant was going. The defendant replied that he was going "into this house a minute," and would be "right back." Rozier said: "All right; hurry back"—and sat down again in the cab, but after 10 or 15 minutes he grew tired of waiting; it was very cold, and he got out of the cab and went to the house, and entered without knocking. The defendant was sitting by the fire, and, in reply to Rozier's question why he did not come on, he said he was just getting ready to come. The defendant asked Rozier if he would not like to have a half pint of whisky before leaving, and, when Rozier answered, "Yes," and gave him a half-dollar, the defendant handed Rozier a half-pint bottle of some kind of liquid. Rozier, thinking it was whisky, took a drink from the bottle, gave the bottle back to the defendant, and went out with him and got in the cab. The defendant then said he had forgotten something, and went again into the house, with the statement that he would "be right back." Rozier began feeling the effects of the drink he had taken from the bottle, and which he said made him dizzy when he took it and "went all through" him, and was "nothing like an ordinary drink of whisky," and, suspecting that something was wrong, he took out a diamond stud that he wore, and put

it under the lapel of his coat, and in a few minutes became unconscious. He testified that he had been drinking before he took this drink, but was not drunk, and that after he became unconscious he knew no more until the following night, when he recognized his brother leaning over him at Grady Hospital, asking him to tell who was with him "that night." His diamond stud, watch and chain, overcoat, Masonic pin, and the contents of his pockets were taken from him after he drank the liquor and became unconscious.

The doctor on duty at the Grady Hospital at the time Rozier was brought there testified that he "was in such condition his own brother could not recognize him; his face was beaten to a jelly; his jaw was broken and nose broken, chin cut, several cuts on his face, eye knocked out"; that he seemed to have been beaten with some blunt instrument, and that the beating could have been done with an instrument similar to one exhibited at the trial; that it was necessary for him to remain in the hospital a month or six weeks; that in response to questions, before he was able to talk, he wrote the cab number, 89, on a piece of paper, the name of the club, and the time at which he left the club, 1:30; that his condition was desperate, and he was unconscious when he was brought to the hospital, but when he wrote the cab number, etc., "he knew what he was talking about"; that the writing was done "Sunday afternoon after he was injured Friday night"; that he said the driver promised to take him to a "sporting house," but he never reached it. Policeman Hannah testified that he saw Rozier "on the night of December 27, 1913, about 5 o'clock in the morning"; that a colored woman came by on his beat and reported that some one was lying down in an alley, "moaning and going on"; that he went down to the alley, back of Gilmer street, and found a man beaten up worse than he had ever seen anybody; that he could not recognize him at all, or tell whether he was white or black; that he called the patrol wagon and sent the man to the Grady Hospital. The witness said, further, he had known Tom Bowen, the defendant, for several years and had seen him at 2 o'clock the same morning; that the police examine cabs that go over their beats after 12 o'clock; that Tom Bowen's number was 89, and that he came into Decatur street from Fort street about two blocks away from where Rozier was found later. This witness said that Rozier was covered with blood and was unable to talk, and—

"there was a little piece of watch chain hanging onto his vest, about as long as your finger. His overcoat was gone. I saw that piece of wood down there. After I sent him in I went back to search, and I found a pool of blood right in the mouth of the alley, and this was lying right by it, and I found where it had been pulled off the fence, about 10 feet from where I found Mr. Rozier."

The witness said, on cross-examination, that he was on duty from 12 o'clock to 8:30; that he found Rozier in the alley or back yard of a place on Fifth avenue, "a little over a block from Decatur street, and about as far from Gilmer street, across the street right at Gilmer street"; that Fifth avenue is a little alley running from Fort street, and Rozier was lying in the alley or backyard; that blood and bloody tracks were all about there, and blood "seemed to have been scattered all over everything when he was beaten up, and must have got on the man who beat him up, too"; that he saw cab 89 going in about 2 o'clock "at Decatur and Fort streets," and at that time there was nobody in the cab, and the driver, Tom, was by himself; that the body was found about two blocks "this side" of where he saw the cab—the cab was two blocks beyond.

Policeman Clack testified as follows:

"I remember the night Mr. Rozier was assaulted. I saw him in the cab that night about 2 or little after 2 o'clock at Broad and Alabama streets, in Tom Bowen's cab, No. 89. I am positive it was Tom Bowen. I don't know how long I have known him. There was a man in the cab at the time, but I didn't know it was Mr. Rozier. He drove the cab up and straight across the sidewalk at Broad and Alabama, and I never said anything to him. I stopped there a moment. I never said anything to him. I walked on to Mitchell street and come back, and he was still standing there. I says, 'Drive on somewhere;' and he turned around and drove back across the viaduct. Mr. Rozier was in cab 89, at Broad and Alabama streets at 2 o'clock or a little after. I took the driver to be Tom Bowen."

It will be observed that this witness first stated that he saw Rozier in Tom Bowen's cab, No. 89, about 2 o'clock at Broad and Alabama streets, and also stated that there "was a man in the cab at the time, but he didn't know it was Mr. Rozier"; and on cross-examination he said:

"Mr. Rozier was in cab 89 at Broad and Alabama streets at 2 o'clock or a little after."

Evidently the witness meant by this testimony that when he saw Rozier in the cab he did not know who he was, that is, did not know his name, but he recognized the prosecutor, Rozier, as the same man, and then testified the man he had seen in the cab was Rozier. There was further evidence that 89 was the number of Tom Bowen's cab, and evidence that Rozier, after his discharge from the hospital, went with certain policemen to the place where he was found, and entered three or four houses near that point, some of which were exactly alike, and finally identified, without aid, the house where he obtained the drink from Bowen, and this house proved to be Bowen's house on Gilmer street, about a block from Fifth avenue, where the witness Hannah said he saw the defendant on that night; that after the identification of the house by Rozier, he went to the jail and immediately identified Tom Bowen as the negro who was with him on the night he was robbed, and as the last man

he had spoken to then. It further appeared that the defendant on several occasions made conflicting statements as to his movements at or about the time the robbery occurred. None of the stolen property was found in his possession, and none was recovered except the diamond stick pin, which officers found in the possession of a negro orderly at the hospital, who had waited on Rozier. The piece of wood picked up near where Rozier was found was introduced in evidence. There was testimony for the defendant from his mother, his brother, and his sister-in-law (who lived in the same house with him) to the effect that he did not come home between midnight and the morning of December 27, 1913. His mother and his sister-in-law testified that they did not see Rozier there that morning; the defendant's brother did not say whether he saw Rozier. The sister-in-law testified that there were three rooms in the house; that she slept in the middle room; that there was fire in the front room; and that she did not sit up all night. There was testimony from another witness, tending to prove an alibi, and the defendant made a rambling statement, in which he recounted what he understood Rozier had stated in regard to his movements on the night in question, and finally, when by permission of the court his attention was directed to his own movements, he told what trips were made in his cab and where he had gone, but he nowhere mentioned that he had driven Rozier to any place whatever, nor did he deny in so many words any statement made by Rozier or by any witness for the state.

Moore & Moore and Sims & Von Nunes, all of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., of Atlanta, for the State.

WADE, J. (after stating the facts as above). [1] The motion for a new trial is based on the general grounds only, and it is insisted by the plaintiff in error that the verdict finding him guilty of robbery was unauthorized because the testimony for the state showed that the property was taken without the knowledge of the owner, and while he was unconscious, and therefore that the offense was larceny from the person and not robbery. Prior to 1903 our Code (Penal Code 1895, § 151) defined robbery as—

"the wrongful, fraudulent and violent taking of money, goods or chattels from the person of another by force or intimidation, without the consent of the owner."

In 1903 the definition of robbery was amended by adding the following:

"Or the sudden snatching, taking, or carrying away any money, goods, chattels, or anything of value from the owner or person in possession or control thereof, without the consent of the owner or person in possession or control thereof."

In Williams v. State, 9 Ga. App. 170, 70 S. E. 890, Judge Russell, speaking for the court, said:

"Under the act of 1903 (Acts 1903, p. 43) amending the former definition of robbery, there was added to robbery by force and robbery by intimidation a new class or kind of robbery, to wit, 'the sudden snatching, taking, or carrying away' of property, 'without the consent of the owner or person in possession or control thereof.' Penal Code 1910, § 148. Prior to this amendment violence of some kind was an indispensable essential of the offense of robbery. Without violence there could be no robbery: but the offense might be larceny from the person. Since the amendment, in order to prove a case of robbery by suddenly taking or carrying away the property of another without his consent, it is only necessary to show that the person robbed was conscious that something was being taken away from him, and that for any reason he was unable to prevent it; and consequently the only difference now between robbery of this class and larceny from the person is that in the latter case the property is abstracted without the knowledge of its possessor; but if the possessor becomes conscious, even in the taking, that his property is being taken away from him, and this knowledge is obtained before the taking is complete, the offense of robbery is committed."

That case is relied upon by the plaintiff in error as authority for the position that since the evidence disclosed that the person robbed was, at the time of the taking, unconscious that his property was being taken from him, a conviction for robbery could not be sustained. It will be observed that the holding of the court that in order to convict, it was "necessary to show that the person robbed was conscious that something was being taken away from him, and that for any reason he was unable to prevent it," applies distinctly and plainly to the "new class or kind of robbery" referred to in the amendment of 1903.

Under the common law, and under the decisions of our Supreme Court relative to robbery by force or intimidation, it is not essential that the person robbed should be conscious at the time the robbery is committed that something is being taken away from him. In Blackstone's Commentaries (vol. 4, p. 196) it is said:

"Lastly, the taking must be by force, or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing. * * * This previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcenies. * * * Not that it is indeed necessary, though usual, to lay in the indictment that the robbery was committed by *putting in fear;* it is sufficient, if laid to be done by *violence.* * * * Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be *put in fear*, yet this is undoubtedly a robbery."

"When a robber has disabled his victim, a taking then from the person with no further violence suffices." 2 Bishop's New Criminal Law, § 1168 (1).

[2] In 24 Am. & Eng. Enc. of Law (2d Ed.) 1002, it is said:

"While it is not robbery to abstract money from the person of one drunk and unconscious, it is otherwise if, to accomplish the taking, the intoxicated person is beaten and bruised."

"Where the prosecutor's watch was fastened to a steel chain, which went around his neck, the seal and chain hanging from his fob, but the steel chain still secured it, upon which the pris-

oner, by two jerks, broke the steel chain, and made off with the watch, the judges were unanimous that this was a robbery, as the prisoner did not get the watch at once, *but had to overcome the resistance made by the steel chain, and used actual force for that purpose.*" (Italics ours.) 2 Russell on Crimes, 1135.

"The mere snatching of an article from the person of another, without violence or putting in fear, is not robbery, except where there is some injury or violence to the person of the owner, or where the property snatched is so attached to the person or clothes of the owner as to afford resistance." 34 Cyc. 1800. This statement is modified in Georgia by the amendment of 1903, supra. "To show that force and violence were used the extent of the injuries inflicted on the person robbed may be proved." Id. 1807.

"It avails the accused nothing if the person robbed makes no resistance, or is even unconscious at the time that a robbery is being perpetrated. The victim of a sand bag may be stripped while unconscious from the blow. It is not necessary to show a suggestion of force or violence on the part of the person robbed. The force which differentiates robbery from larceny from the person *is the force employed by the criminal.* (Italics ours.) It is the act which is supposed to evidence a bolder lawbreaker than a sneak thief. * * * While in the present case there was no struggle, there was personal violence and a personal outrage, within the meaning of the law. It is true that resistance by the person robbed has been said to be one of the decisive tests distinguishing robbery from larceny from the person. See Spencer v. State, 106 Ga. 695 [32 S. E. 849], and cit. But *this test* seems to have been applied *in only those cases* where the person was deprived of his property *by a snatching.*" (Italics ours.) Moran v. State, 125 Ga. 33, 34, 35, 53 S. E. 806.

In Smith v. State, 117 Ga. 320, 43 S. E. 736, 97 Am. St. Rep. 165, it was held:

"Where a purse secured by a steel chain wrapped around the owner's finger is suddenly snatched by one intending to steal the same, and the force used is sufficient to break the chain and injure the owner's finger, the offense is robbery, and not larceny from the person."

In the opinion delivered by Justice Lamar in that case it was said:

"The evidence shows that the article was so attached as to afford considerable resistence; the violence necessary to secure the purse was sufficient to break a steel chain, and inflicted injury on the person robbed. Here there was open force and violence, resistance by the owner, and injury to the person; so that it could not have been merely larceny from the person, but was robbery."

The ruling in that case was made before the passage of the amendment of 1903, making "snatching" robbery under certain circumstances. In Long v. State, 12 Ga. 293(9), it was said:

"Actual *force,* in our definition of robbery, implies personal violence. If there is any injury done to the person, or if there is a struggle to retain possession of the property, before it is taken, it is the force of our Penal Code."

In Pride v. State, 125 Ga. 748, 54 S. E. 686, the Supreme Court said:

"The offense of robbery, as defined in section 151 as amended (Penal Code of 1910, § 148), consists in the wrongful, fraudulent, and violent taking of money, etc., from the person of another, whether such a taking be accomplished by force, intimidation, or the sudden snatching without the consent of the owner or person in possession. * * * The sudden snatching from the victim *with his knowledge* (italics ours) is violence in the sense of this word as used in the amending act. In other words, the General Assembly has enlarged the meaning of the words 'open force and violence,' as used in the section of the Penal Code; so that the crime of robbery may now be committed by force exerted directly upon the person robbed, or by suddenly snatching the property from the person, where no other force is used than is necessary for the thief to obtain possession of the property."

It may be said in passing, as is remarked in some one of the decisions of the Supreme Court or of this court, in discussing the amendment of 1903, that the enlargement of the definition of robbery made thereby was evidently with the purpose of covering such cases as Fanning v. State, 66 Ga. 167, and Spencer v. State, 106 Ga. 692, 32 S. E. 849.

[3] The accused in this case was charged with robbery, for that, on a day named, "with force and arms [he] did wrongfully, fraudulently, and violently, by force and intimidation, take from the person of J. A. Rozier, without his consent and with intent to steal the same," one open-face gold watch and other property described. It is apparent, then, that the accused was not indicted for the sudden snatching, taking, and carrying away of property declared by the act of 1903 to be robbery, but was indicted under that part of section 148 of the Penal Code of 1910 which defines robbery to be the wrongful, fraudulent, and violent taking of money, goods, or chattels from the person of another by *force or intimidation.* In Pride v. State, supra, Justice Evans, speaking for the court, said that "where the property was suddenly taken, by the thief from the owner, who was off his guard, and no force was used by the thief other than was necessary in possessing himself of the article taken," he would nevertheless be guilty of robbery, under the provisions of section 148 as amended in 1903, as, since the passage of that amendment, the offense may be committed though no force be exerted beyond the effort of the robber to transfer the property from the owner to his own possession. As already said, this court, in Williams v. State, supra, held that since the amendment of 1903, in order to prove a case of robbery by the sudden taking and carrying away of the property of another, without his consent, it is only necessary to show that the person robbed was conscious that something was being taken from him, and for some reason he was unable to prevent it, and it is said, that "the only difference now between robbery of *this class* [by snatching] and larceny from the person is that in the latter case the property is abstracted without the knowledge of its possessor," and that, should the possessor become conscious of the taking, the act is robbery.

It appears, then, to be well settled that where one is prosecuted for robbery by force, and it appears that the property taken from the person of the victim was attached to his

clothes, and in removing it the thief exerted force—as by breaking a chain connecting the property with the person—such force is sufficient to make the crime robbery rather than larceny from the person, and this is true even though the victim was drunk or unconscious at the time; and where injury or violence is inflicted upon the person of the owner to effect the taking, it is immaterial, in a prosecution for robbery by force, whether he was conscious of the taking or not. In one case, where a heavy diamond pin, with a corkscrew stalk, which was twisted and strongly fastened in a lady's hair, was snatched out, and part of the hair torn away, the crime was held to be robbery. 1 Leach, 335. In another case one who tore an earring from the ear, and in so doing lacerated the flesh, was found guilty of robbery. 1 Leach, 320. In 24 Am. & Eng. Enc. (2d Ed.) supra, it is said:

"While it is not robbery to abstract money from the person of one drunk or unconscious, it is otherwise if the intoxicated person is beaten and bruised."

As was said by Justice Cobb in Moran v. State, supra, where such force is used, "it avails the accused nothing if the person robbed makes no resistance, or is even unconscious at the time that a robbery is being perpetrated." While the evidence in this case discloses that the person robbed became unconscious, so far as he was able to assert, before any violence was done to his person and before any of his property was removed therefrom, it further appears that when he was discovered by the policeman some hours later, he had been terribly beaten, his jaw broken, one eye destroyed, and his watch and other property gone, and that there was still attached to his person a small remnant of his watch chain, from which his watch had been broken off. The presence of the piece of broken watch chain, together with the physical injuries inflicted upon his person, was sufficient, under the well-recognized rules referred to above, to authorize the jury to conclude that force had been used in depriving the injured man of his property, and especially in detaching or tearing away from his person his watch. The force exerted by the robber in jerking the watch from the pocket of his victim, and the resistance afforded by the chain which attached the watch to his person, constituted technically all the force and resistance necessary to support a charge of robbery. Again, the jury were authorized to conclude that the terrible injuries inflicted upon the person of the owner of the property indicated active resistance on his part and the use of force on the part of the accused in removing the property from his person, even though the resistance may have been blindly offered and the force exercised against a man practically unconscious from drink or drugs, who was unable to recall the facts when finally restored to reason. Whether the giving of the liquor which almost immediately affected him and soon rendered him unconscious, was "constructive" force need not be discussed, under the view we take of the facts of this case. The jury had a right to consider all the proved facts and circumstances in determining whether force was used by the accused in taking the stolen watch from the person of Rozier, and in this connection doubtless considered the evidence showing that he had been badly beaten and bruised when discovered soon after the commission of the crime. The evidence was ample to sustain the verdict, and the trial judge did not err in overruling the motion for a new trial.

Judgment affirmed.

BROYLES, J., not presiding.

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(16 Ga. App. 96)

SMITH v. CITY OF ROME. (No. 5835.)

(Court of Appeals of Georgia. March 18, 1915.)

*(Syllabus by the Court.)*

1. PLEADING ⇐248—AMENDMENT—RIGHT.

An amendment to a petition should be allowed, where the facts added by it, however different they may be from those alleged in the original petition, show substantially the same wrong in respect to the same transaction. It is not then objectionable as adding a new and distinct cause of action. If there is substantial identity of wrong, there is substantial identity of cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689–706, 708½, 709; Dec. Dig. ⇐248.]

2. MASTER AND SERVANT ⇐217—INJURY TO CONVICT—LIABILITY OF PRISON BOSS.

The rule forbidding a recovery from his master by a servant who subjects himself to injury by doing something he knows is dangerous is not applicable to a convict whose movements are controlled and directed by a "boss" or guard having and exercising authority to compel the convict to obey his orders.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. ⇐217.]

3. TRIAL ⇐140—NONSUIT—CONFLICT IN EVIDENCE.

The fact that there is conflict between the testimony of the plaintiff and that of his witnesses is not a good ground for the granting of a nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. ⇐140.]

4. MASTER AND SERVANT ⇐124, 127, 150—DEFECTS IN MACHINERY—DUTY OF MASTER.

While a servant is under no duty to observe changes from gradual wear and tear of machinery, until they become obvious to any careful man, the master's duty is to discover such changes by constant inspection, and to repair them, and to warn the servant of their existence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235–242, 252, 297, 299–302, 305–307; Dec. Dig. ⇐124, 127, 150.]

5. GRANTING OF NONSUIT.

The evidence of the plaintiff was sufficient to have carried the case to the jury; and the granting of the nonsuit was error.

Error from City Court of Floyd; J. H. Reece, Judge.

Action by Frank Smith against the City of Rome. Judgment for defendant, and plaintiff brings error. Reversed.

Eubanks & Mebane, of Rome, for plaintiff in error. Max Meyerhardt, of Rome, for defendant in error.

BROYLES, J. The plaintiff in error, Frank Smith, brought an action for damages against the city of Rome, averring in his petition that on November 6, 1912, while confined in the chain gang of the city, and compelled by the authorities to work in the rock quarry of the municipality, he was directed by the boss of the chain gang to do certain work, in common with two other convicts, in drilling holes in the rock, for blasting; that he was compelled to hold a certain steel drill some 2½ or 3 feet long, while the two other convicts struck upon the top of this drill with large hammers; and that while he was so engaged a small piece of steel was split off the top of the drill and flew into his left eye, destroying the sight thereof. He further alleged that the drill had become so battered and "spread" on the top as to be dangerous, that its condition was known to the authorities, that it had been in this condition for some weeks, and that he did not have the right to refuse to use the drill. He alleged that the city authorities were negligent in compelling him to use the defective drill, and in compelling two other convicts to strike upon the end thereof when it was in this defective condition, thereby causing a piece of steel to chip off and strike him in the eye. He alleged that it was negligence in the city to compel him to use this drill when it was made of steel not sufficiently tempered, which caused it to become battered and flattened out on the end when struck with hammers. He alleged, also, that he used all care possible to be exercised in his peculiar condition, and that he could not object to holding the drill while the other two convicts struck upon it, when he was ordered to do so by his boss; if he had refused to obey, he would have been liable to receive severe punishment. Upon the trial of the case the plaintiff attempted to amend his petition by striking from paragraph 12, and line 3 thereof, the following, to wit, "some 2½ or 3 feet long," and inserting in lieu thereof the following:

"Your petitioner shows that he, with two other convicts, had already drilled a hole some 2 feet deep in said rock. He shows that in drilling holes in said rock at said quarry three drills were used. The first drill is some 2½ feet long. The first drill had already been used, and said hole in said rock had already been drilled out to a depth of some 2 feet, and it became necessary to use the second drill, which was some 3½ or 4 feet long. He shows that said second drill was in bad repair, and was dull, and was not filed or suited for use; that thereupon said boss aforesaid directed and commanded petitioner and said two other convicts to use the third drill, which said drill was some 5½ or 6 feet long. He shows that said third drill was about 2 feet too long to drill the hole as it had been made by the said first drill, and that because of said length of said drill, when petitioner was holding and turning same in the drilling of said hole, the end of said drill, which said two convicts were striking, came up even with the eyes and face of petitioner; that if said boss had used a drill of the proper length the end thereof would have extended only to about the breast of petitioner when using same, and not at or near the eyes of petitioner. Petitioner shows that in drilling a hole in rock at a quarry the person turning said drill of necessity squats or sits on some object near the ground; that this is necessary in working and turning said drill, and petitioner was so doing in the proper discharge of his duties on said date. He shows that the person working and turning said drill never stands, but always assumes the condition [position?] aforesaid; that if the defendant through its agents had used on said date and at said time drill No. 2, as aforesaid, the end of same would not have extended up, at, or near the eyes of petitioner [but] the end of said drill would have been at and near the eyes [breast?] of petitioner. He shows that it was negligence in said city in using said third drill which was too long as aforesaid. (2) Petitioner shows that it was negligence in said city, through its officers and agents aforesaid, in compelling petitioner to work at said drill with two said convicts striking the end of said drill. (3) He shows that the position occupied by two said convicts is an important one; that only experienced technical and expert men can properly do the work which said men were doing; that a common and inexperienced laborer cannot properly perform said work in the striking of the end of said drill; that inexperienced and incapable and nonexpert men, such as the two convicts aforesaid were, cannot strike the end of a drill in drilling holes in a rock, because an inexperienced and common laborer cannot hit the end of a drill, and as a result of said striking by said incapable men the end of said drill had become battered as is set forth in petitioner's original declaration."

This amendment was disallowed. Plaintiff then offered to amend his petition by striking from paragraph 12, line 3, the words, "2½ or 3 feet," and inserting the words "6 feet," so that the said description of the drill should read "about 6 feet long." This amendment, also, was disallowed, and the plaintiff assigns error upon the disallowance of each amendment. The plaintiff testified that upon the day above mentioned he was serving a sentence in the city chain gang; that he was under the direction of a "boss," one Marshall, who directed him where to work, with what tools and in what manner to perform his work; that he was allowed no freedom in the selection of his tools or his place of working; that upon the morning of the injury he was given all of his instructions by Marshall, the chain gang boss; that he stated to Marshall that he objected to turning a drill under those inexperienced or "green" men, but that Marshall made him go, and he went; that, by reason of the absence of one of the three drills usually employed in drilling the holes for blasting, he used the longest drill, one about six feet in length; that he "did not have the proper steel, the next following, to go into the hole at that time and had to

use another steel"; and that while holding the final or longest drill, which was "frazzled," battered, and split down at the top, and while the two other convicts were striking it with hammers, a small piece of steel from the drill flew off and struck him in the left eye, knocking him over; that it cut a hole in the lid of his eye, and made a little wound on the ball of the eye.

"When I was hurt, the men who were working with me hollered to the 'boiler,' and Tom Harris came up and washed my eye, but never gave me anything to put on it then. When I was brought back to the station house, they gave me some turpentine to put on it. I never had anything to wrap it up with."

He testified that he got out of the chain gang the next day, as his sentence of 30 days had expired; and thereafter his eye was treated by Dr. Smith, an eye specialist, until treatment became useless, the sight having been destroyed. The plaintiff further testified that:

The drill he was using was worn down, especially on the sides of the top, and that the edges of the top of the drill were battered and flattened out, and that "untrue hammering" made it that way; that steel always has a temper just the same as when it comes from the manufacturer, "but it is the untrue hammering that causes it to become battered and flattened out, hitting it first on one side and then on the other. If it is not hit plumb on the head, the edges of it split." "Steel that is too soft will batter. Steel that is too hard will break off, or flake off." "Those men hit that steel first on one side and then on the other. It should have been hit plumb on the head. They did not hit it plumb on the head, and that is what made it split off. If you hit it on the head, it will go down evenly." "I understood turning the drill, and I was the only one who had been there about 30 days who showed any experience about turning." "Mr. Marshall told me that morning to go up there where the two green convicts were waiting for a turner, but I objected to going, and said: 'You have some green whippers up there. I don't like to turn under green men who have just come from a hotel.' But he told me to go, and I went, and did not object any more." "Steel generally comes out of the hardware store just like it is pulled through the roller in the rolling mill, but if it is hit true it will last that much longer. I am not an expert about steel, and don't know whether it was hard or soft."

A. R. Davis, introduced by the plaintiff, testified as an expert upon the properties of steel as follows:

"If a piece of steel which is being used for the purpose of drilling a hole in a rock, for blasting, becomes battered on the ends and flattened out, that would indicate that that piece of steel is soft; if it should splinter off, that would show it was hard. If it was too hard and the end of it is hammered, pieces of it would flake and fly off; but, if you had it too soft on the end upon which you hammered, it would batter and flatten out. It would be impossible to provide against steel battering out over the top and flattening out, but the softer it is the more it batters out, and the less soft it is the less it batters out; the harder it is, the more it flakes off. A point at which it could be tempered just right and proper, where it would not flake too much nor spread too much, is a condition which you could hardly reach; but the nearer you reach that point, the nearer your ideal steel is reached for the purpose of drilling. A man using a drill for drilling a hole in a rock ought to have a drill that is as near perfect an ideal as he can get. If you have it too hard, it will flake off; something has got to give, and the steel, of course, is harder on the end of it. It would be impossible to make steel absolutely to suit the condition. It would be bound to flake off or to flatten out some; but, if it had a certain degree of temper in it, it would not flatten out as fast as it would otherwise. I think the steel at the top has to be, to a certain extent, flattened—I mean soft, in order to do its work. All drills batter out at the edges, to a certain extent; that is a condition which you cannot prevent absolutely. When a steel drill is hammered upon, it finally becomes an umbrella shape on top, and you have to keep it ground down and shaped up."

At the conclusion of the testimony for the plaintiff (a substantial summary of which we have given), upon the motion of counsel for the defendant, on the ground that the allegations in the petition and the proof did not agree, and that there had been no proof whatever in support of any of the material allegations set forth in his petition, the court granted a nonsuit. To this judgment the plaintiff excepted.

The record does not disclose upon what ground or grounds the amendments offered by the plaintiff were disallowed by the trial judge. It is argued in the brief of the defendant (and we assume it was so argued in the court below) that the facts alleged in the proposed amendments were not brought to the notice of the governing authorities before the suit was instituted, and also that they set up a new and distinct cause of action. In Kennedy v. Mayor, etc., of Savannah, 8 Ga. App. 98, 68 S. E. 652, it was held by this court that:

"Only such substantial compliance with the provisions of the act of 1899 (Acts 1899, p. 74), requiring notice to be given to municipal corporations of claims for damages against them is necessary as will enable the municipality to fully investigate the claim and to determine whether it prefers to adjust the claim without suit or to contest its validity in the courts."

See, also, Smith v. City of Elberton, 5 Ga. App. 286, 63 S. E. 48; Langley v. Augusta, 118 Ga. 590 (11, 12), 45 S. E. 486, 98 Am. St. Rep. 133.

Counsel for the defendant argues also very earnestly that the proposed amendments set up a new and distinct cause of action, for the reason that the original petition alleged that the steel drill used by the defendant when injured was "about 2½ feet long," whereas, by amendment, it was sought to allege the length of the defective drill to be about 6 feet, and also that, by the first amendment, it was proposed to add a new element of negligence, in that by the use of the 6-foot drill, which was too long, out of its proper order, the striking point was brought in line with the plaintiff's eye and face, when, had the proper drill (the one shown to have been missing) been used, it would have extended only to his breast.

[1] 1. It is clear to us that the second amendment should have been allowed. When we come, however, to consider the first one, we are beset with more difficulty. We can-

not agree, though, with the learned counsel for the defendant, that the allegations in this amendment set up a new cause of action, or that they were so different from the averments in the petition that the municipal authorities could not, by the exercise of proper diligence, have ascertained the truth of the transaction and the merit, if any, of the plaintiff's claim. That claim was, substantially, that the plaintiff was injured by reason of being compelled to hold a defective and dangerous drill while two fellow convicts struck upon it with hammers, and that a piece of the drill flew off while he was so holding it and struck him in the left eye, thereby destroying its sight. We think there was enough in the petition to allow this amendment, which, while amplifying and correcting statements in the petition, and stating additional acts of negligence (which showed substantially the same violation of the same right), did not set up another cause of action. As said by Chief Justice Simmons, in City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318:

"Amendments are allowed to cure defects. The original petition need not be perfect in either form or substance, but it should have in it at least enough to indicate some particular cause of action. * * * He may, however, add further facts to more fully describe the cause of action—the wrong—which he originally alleged. He may allege additional facts to show the existence of his primary right, as long as he does not undertake to set up another and distinct right. And he may allege additional facts to show that the defendant has been guilty of the alleged violation of plaintiff's right. If there is substantial identity of wrong (which necessarily includes identity of the right violated), there is substantial identity of cause of action. This identity is not the same as that required between allegata and probata. * * * So long as the facts added by the amendment, however different they may be from those alleged in the original petition, show substantially the same wrong in respect to the same transaction, the amendment is not objectionable as adding a new and distinct cause of action. * * * A single cause of action is not multiplied and made more than one merely because the facts showing it are alleged only partially in the original petition, and the allegations completed in the amendment."

And it was held the Supreme Court, in Bowen, Jewell & Co. v. Adams, 129 Ga. 688 (2), 59 S. E. 795, that:

"An amendment which sets forth an act of negligence additional to others originally pleaded as being a concurring and contributing cause of the injury, for which damages are asked in the original petition, does not add a new and distinct cause of action."

In the instant case, while the alleged wrong done to the plaintiff was single, several alleged acts of negligence entered into it. It was alleged (1) that the drill was defective by reason of being battered and "spread" on the top; (2) that the drill was too long for the hole in which it was being used; and the fact that the first allegation was made in the original petition, and the second one in the amendment, is immaterial. Only one injury —one wrong—was declared in both petition and amendment. See, also, Ellison v. Georgia R. Co., 87 Ga. 691, 13 S. E. 809; Western & Atlantic R. Co. v. Burnham, 123 Ga. 28 (1), 50 S. E. 984; Georgia Ry. & El. Co. v. Reeves, 123 Ga. 697 (1), 51 S. E. 610; Central of Georgia R. Co. v. Inman & Co., 129 Ga. 654, 59 S. E. 784; Charleston & Western Carolina R. Co. v. Lyons, 5 Ga. App. 668, 63 S. E. 862; Deen v. Wheeler, 7 Ga. App. 507 (1a), 67 S. E. 212; Southern Ry. Co. v. Flynt, 9 Ga. App. 757 (2), 72 S. E. 189; Smith v. County of Jasper, 9 Ga. App. 667 (2), 72 S. E. 65; Heard v. Camp, 10 Ga. App. 167, 72 S. E. 1098. Construing this amendment most strongly against the pleader, we are of the opinion that the additional acts of negligence which it sets out constitute, at most, merely concurring and contributing causes of the original wrong, and that they did not add any new or distinct cause of action; and that the court erred in not allowing the amendments.

[2-4] 2–4. Error is also assigned upon the judgment of the court in granting a nonsuit and dismissing the case. The learned counsel for the defendant argues that the nonsuit was properly granted, because the court permitted the plaintiff to introduce all the evidence which could possibly have been introduced if the amendments had been allowed, and still there was insufficient evidence to go to the jury; that the plaintiff, by his testimony, showed that he knew the condition of the drill, saw that it was too long, and yet made no objection to using it, and that "his entire action in the transaction was voluntary and not under any compulsion whatever"; that there was no proof that the city authorities knew or had reason to know that the drill was dangerous; and that the plaintiff's expert witness Davis testified that it would be impossible to make a steel drill which would not flatten or batter out on the top when hammered upon. If the amendments had been allowed, there would have been but little variance between the allegata and probata, and we cannot say that the jury would not have been authorized to find that the defendant municipality was liable for the injury (which was undisputed), at a time and place undisputed, due to some one of the negligent acts alleged. We do not, of course, intimate that these facts would require a recovery for the plaintiff; but, in our opinion, the acts of negligence alleged in the petition and in the amendments were sufficiently supported by proof to have carried the case to the jury. The plaintiff charged several acts of negligence against the defendant, and his evidence substantially supported the allegations in his petition and in his amendments, at least as to some of them, and, as said by this court in White v. Seaboard Air Line Railway, 14 Ga. App. 139 (4):

"The plaintiff's petition averred that the defendant was negligent on each and all of these grounds, and the plaintiff was entitled to recover upon the proof of any one of them, if the jury determined that any one of the charges

of negligence was sustained. Consequently the court erred in awarding a nonsuit."

While the testimony of Davis, the expert witness introduced by the plaintiff, contradicted, in some respects, the plaintiff's own testimony, and tended to show that the injury was an unavoidable accident, we think that there was sufficient doubt on this latter point for it to have been passed upon by the jury. The former point—as to contradictions between the testimony of the plaintiff and his witnesses—if true, is not good ground for a nonsuit. In Outcault Advertising Co. v. American Furniture Co., 10 Ga. App. 211, 73 S. E. 20, this court said that:

"The fact that there is conflict in the testimony of the witnesses introduced by the plaintiff is no reason for granting a nonsuit. The issue of fact, nevertheless, goes to the jury."

And in Henry v. Etowah Dredging Co., 141 Ga. 406 (2), 81 S. E. 197, the Supreme Court held that:

"Although the evidence introduced by the plaintiff from some of his witnesses may have conflicted with his testimony as to whether the machinery which caused the injury to him was safely constructed, and whether the injury was brought about by the plaintiff's own carelessness in the manner of its operation, yet in the light of his own testimony it cannot be said that there was no evidence authorizing the case to be passed on by the jury. The differences in the testimony of witnesses introduced by the plaintiff do not furnish ground for nonsuit, if there is evidence sufficient to carry the case to the jury. What the truth may be is for their determination."

As to the contention that no proof was introduced to show that the city authorities knew or had reason to know that the drill was defective, the undisputed evidence was that it was defective, and as the law imposes upon the master the duty by constant inspection, to observe when machinery or tools used by his servants become dangerous or defective, we cannot hold that the jury could not legally have inferred that the city authorities knew or should have known of this defect. Section 5743 of the Civil Code provides that:

"In arriving at a verdict, the jury from facts proved, and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent on those proved."

And in Cochrell v. Langley Mfg. Co., 5 Ga. App. 317 (3), 63 S. E. 244, this court held that:

"A servant is under no duty to observe changes resulting from the gradual wear and tear of machinery, until they become obvious to any careful man. The master's duty is to find out such changes by constant inspection, and to repair them, and to warn the servant of their existence."

The contention that the plaintiff, as shown by his testimony, knew of the defective condition of the drill, and voluntarily assumed the risk, has, in our opinion, no merit whatever. This plaintiff was a convict, laboring in a chain gang, under the direction of a chain gang "boss," and to term any action of his, relating to his work in his unfortunate environment, "voluntary," would be, to say the least of it, a violent assumption. Nor do we believe the learned counsel will seriously maintain that in such peculiar circumstances a convict is "under no compulsion whatever" in the selection of his place of work, the manner of performing his labor, or the selection of the tools or implements employed. Even though the plaintiff admitted his previous knowledge of the alleged defective condition of the drill, such knowledge is not necessarily conclusive of negligence on his part; it must depend upon the facts of the particular case, and in the instant case the plaintiff testified that he objected to holding the drill while the two inexperienced convicts struck it, but that his boss, Marshall, made him do it. As said by Justice Lumpkin in Chattahoochee Brick Co. v. Braswell, 92 Ga. 634, 18 S. E. 1016:

"Ordinarily, where a servant is ordered by his master to engage in a work, or go into a place, which the servant knows to be dangerous, the latter is not bound to obey the order, and, if he does so with full knowledge of the impending peril, the master may not in law be liable for the consequences. In the present case, however, the plaintiff had no election. When the guard said go, he was obliged to go; and there is no hardship in compelling a corporation of which the guard was an employé to compensate the plaintiff for injuries received because of his obedience to the guard's commands."

See, also, Boswell v. Barnhart, 96 Ga. 521 (2), 23 S. E. 414.

[5] 5. There was, in our opinion, sufficient testimony adduced by the plaintiff, in support of the allegations of the petition and of the amendments, to carry the case to the jury, for their determination of the truth of the matter, and the judge erred in refusing the amendments, and in granting the nonsuit.

Judgment reversed.

(143 Ga. 217)

BRYANT v. THOMAS et al. (No. 220.)

(Supreme Court of Georgia. Feb. 20, 1915.)

*(Syllabus by the Court.)*

1. CREDITORS' SUIT ⊂=27—PROPER PARTIES—NONRESIDENT CREDITOR.

Where a petition by a creditor against his debtor and other defendants is brought in the county of the debtor, a part of the relief sought being to subject the land, and for that purpose to obtain a receivership and sale of all the property of the debtor, and an accounting from another resident creditor as to rents and profits arising from certain property of the debtor, which it is alleged the creditor, under a collusive arrangement with the debtor, is operating, and misapplying the profits to the payment of claims inferior to a special lien of the plaintiff on the property, another creditor, who is proceeding by mortgage foreclosure to sell a part of the land involved in the relief sought by the plaintiff against the resident defendants, may properly be made a party defendant to the partition, although a nonresident of the county in which it is brought.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 100–109, 112, 113; Dec. Dig. ⊂=27.]

2. CREDITORS' SUIT ⊂=33—ORDER OF SALE—REFUSAL OF INJUNCTION—INCONSISTENCY.

In such a case, an order appointing a receiver for the property and directing its sale by him was inconsistent with an order granted in the same case, on the same facts, refusing to enjoin the holder of the mortgage fi. fa. from selling a part of the property under judicial process; the court having jurisdiction of all the parties, and no exception being taken to the order first above described.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 133–144; Dec. Dig. ⊂=33.]

Error from Superior Court, Jefferson County; B. T. Rawlings, Judge.

Action by C. S. Bryant against W. A. Thomas and others. Judgment for defendants, and plaintiff brings error. Reversed, with direction.

C. S. Bryant filed an equitable petition in the superior court of Jefferson county against his debtor, W. A. Thomas, and other defendants, a number of whom were also creditors of Thomas. The main defendant was a resident of Jefferson county, as were also certain named creditors. Other defendants were nonresidents of that county, among them being the firm of Hunter, Pearce & Battey, who were residents of Chatham county. Petitioner held a judgment against Thomas for certain amounts (aggregating about $3,000), which was founded on a deed given by Thomas to secure a debt, and said judgment fixed a special lien on certain tracts of land described in the deed. Hunter, Pearce & Battey held two mortgages, one dated February 27, 1911, and the other April 16, 1912, which were recorded, respectively, March 11, 1911, and April 30, 1912, in Washington county. The mortgages were given on what are known as the Holland, the Josey, and the Bailey places. The last named is not included in petitioner's deed, but the first two named are, and on them petitioner has a special judgment lien. Hunter, Pearce & Battey had foreclosed their mortgages, caused the mortgage fi. fa. to be levied on the lands, and the sheriff had advertised them for sale. Petitioner believed that the Bailey place, on which he had no special lien, would bring a sufficient amount to pay the debt of Hunter, Pearce & Battey, were it not for the fact that the wife of the debtor and one Jim Brinson (who were also named as defendants) claimed title to the Bailey place, and these claims would cause the place to be sacrificed for less than its value, thus depriving petitioner and other creditors of their security over the Josey and Holland places, and the Bailey place should be subjected to the fi. fa. of Hunter, Pearce & Battey. Smith Bros. & Co., who were resident defendants, held a security deed, which embraced, with other property, the Holland and Josey places; their deed purporting to be on consideration of $3,683, and having been recorded prior to the record of petitioner's deed. During the year 1913 Smith Bros. & Co. operated all the farms of W. A. Thomas; and petitioner asks an accounting from them of the rents, issues, and profits of said farms, and alleges that the profits therefrom should be appropriated to the payment of their claim pro tanto. By amendment it was alleged that the appropriation of the rents and profits of the farms by Smith Bros. & Co. was under a collusive arrangement between W. A. Thomas and them, whereby they were permitted to appropriate such profits to claims of an inferior dignity to the claims of petitioner and other creditors. By the petition and its amendments, the priority of the mortgages of Hunter, Pearce & Battey over the lien of petitioner was attacked on the grounds that they were not attested in such manner as to entitle them to be recorded; that the sum due on the two mortgages had been consolidated, and a new note taken therefor, and the two mortgages, securing debts due at different times and having liens of different dignity, could not be consolidated into one note, and the mortgages foreclosed for a debt not described therein; and that the acceptance of the note was a settlement of the debts described in the mortgages, and prevented their foreclosure for the debt evidenced by the new note.

The foregoing is a partial summary of the allegations of the petition. It is of considerable length, and sets forth in detail various debts to named creditors, liens held for the security thereof, etc., a general statement as to which is thus made in the petition:

"Petitioner alleges that said W. A. Thomas is hopelessly insolvent; that all parties to this petition, or most of them, hold judgments, and many of them hold mortgages or security deeds over the same property; that there are many conflicting claims, rights, and equities; that it is necessary to resort to equity to avoid a great variety of claims, suits, and actions at

law; many creditors are now proceeding with mortgage foreclosures, levies, etc., while other parties are interposing claims; and that there is a multiplicity of suits and will be in various courts of Washington and Jefferson counties."

Among the various prayers of the petition, it was asked:

"That the court appoint a receiver to take possession of all the property of said W. A. Thomas;" also, "that this court order the said receiver so appointed to sell all of said property upon such terms as the court may prescribe, and that all liens over the property so sold be transferred to the fund, as well as all claims arising under security deeds, so that the unincumbered title be sold freed from all liens and incumbrance."

With respect to Hunter, Pearce & Battey, it was asked that they be restrained and enjoined from selling under their mortgage fi. fas. the property levied upon, and that the sheriff of Washington county and his deputy be enjoined from further advertising or selling the same.

All of the defendants who were creditors filed answers. The debtor, W. A. Thomas, admitted practically all the allegations of the petition, including the allegation that he was insolvent; but he averred that the plaintiff was not entitled to the relief prayed for, because all the matters concerning which he sought relief could be determined and adjudicated in a court of law. Some of the creditors demurred to the petition; some merely asserted their claims of lien and asked for their establishment; others, in addition to this, joined in the prayer for injunction and receiver; and still others in the prayer for a receiver only. Hunter, Pearce & Battey demurred to the petition on several grounds, among them being that, in so far as the petition related to them, it was an effort to make a collateral attack upon the judgment obtained by them, which a court of equity had no jurisdiction to entertain, and that a court of equity will not enjoin the sale of property under a mortgage foreclosure at common law; "that the court is without jurisdiction so far as relates to these defendants, as the enforcement of the judgment which they seek to enjoin was obtained in the superior court of Washington county, and all of the land is located in Washington county, and none of these defendants are residents of Jefferson county, but all, as shown by the petition, are residents of Chatham county." They also filed a plea, in which they raised the question of the court's jurisdiction as to them. The orders subsequently referred to were passed after interlocutory hearing, the bill of exceptions reciting that the case was heard "upon the original petition, and the amendments allowed thereto, and the answers of the several defendants, and no evidence was introduced at the hearing by any of the parties, the judge having before him only the pleadings, upon which pleadings, as aforesaid, he denied the injunction and appointed a receiver." The ruling excepted to is the denial of an injunction as to Hunter, Pearce & Battey.

Jordan & Harris, of Sandersville, for plaintiff in error. Evans & Evans and Hardwick & Wright, all of Sandersville, and W. L. Phillips, R. N. Hardeman, and Price & Price, all of Louisville, for defendants in error.

HILL, J. (after stating the facts as above). [1] 1. One of the contentions of the defendants is that the refusal to enjoin Hunter, Pearce & Battey was necessarily right, for the reason that the court had no jurisdiction over them. In their brief they say:

"The only parties against whom any substantial relief was prayed were the plaintiff in fi. fa., Hunter, Pearce & Battey; the other parties were merely nominal parties."

The action was brought in the county of the residence of the debtor defendant, W. A. Thomas. One of its chief purposes was to obtain a receivership over all of his property, and to have it sold by an order of court, divesting the various liens and conflicting claims against it, and transferring them to the funds, and to settle in one suit the rights of all creditors. Substantial relief was certainly sought against the debtor himself. Also Smith Bros. & Co. were residents of the county where the suit was filed, and as to them substantial relief was sought. It was alleged that under a collusive arrangement with the debtor they were operating all of his farming properties, and were being allowed to appropriate to claims against the debtor, inferior to the special lien of petitioner, the rents and profits from these properties, which should in equity be applied pro tanto to the extinguishment of the lien of deed to secure a debt held by them and embracing the property on which petitioner's lien rested; and they were called on to make an accounting for the purpose of having the profits thus applied. The property on which petitioner claimed a special lien consisted of what was known as the Holland and Josey places, and these two places were included in the mortgages of Hunter, Pearce & Battey, which they were proceeding to foreclose, and from which action it was sought to enjoin them. The priority of these mortgages over the lien of petitioner was attacked, as well as the validity of the foreclosure.

Thus it will be seen that substantial equitable relief was sought against at least two of the resident defendants, involving the land which Hunter, Pearce & Battey were seeking to sell under judicial process. The question of whether the attacks made on the priority of their lien, or the validity of their foreclosure proceedings, were such that they could be successfully asserted, is not the proper criterion by which to determine whether they could be brought in as parties defendant to a general bill seeking to have adjudicated in one action the various rights of creditors of an insolvent debtor. The nature of the at-

tacks, and their sufficiency in law, might be reasons why the court should deny the relief sought by the creditor, but would not prevent the court from obtaining jurisdiction over them for the purpose of passing on these matters, in a suit like this, where it is sought to put in the hands of a receiver the property they are seeking to sell, and to adjudicate the relative rights of other creditors with respect thereto. Substantial relief being asked against resident defendants, involving the lands upon which their levy and sale was proceeding, they could properly be made parties defendant to a suit of the nature with which we are dealing.

[2] 2. The bill of exceptions recites that the court, acting upon the pleadings only, "denied the injunction and appointed a receiver." A restraining order was in force against Huntor, Pearce & Battey, and the order with respect to them was "that the injunction, so far as the same relates to the defendants Hunter, Pearce & Battey, be and the same is dissolved." The order appointing a permanent receiver provided:

"Said receiver is hereby authorized and required to sell all of the property of the said defendant W. A. Thomas, such sale or sales to be confirmed and made subject to the confirmation of the court. The said receiver shall keep a separate account of the fund arising from the sale of each piece of property and all liens of every kind, including security deeds; and claims of every kind shall be transferred to the fund, said property to be sold free from all incumbrances, and the purchasers thereof to take title freed from all liens of claims against W. A. Thomas."

It further provided:

"Said receiver shall sell all lands situated in Washington county before the courthouse door in said county, after four weeks' advertisement in the legal organ of Washington county."

It will therefore be seen that the court, in passing the receivership order, was acting in the same case and on the same state of facts, and was dealing with the same lands, the sale of which at the instance of Hunter, Pearce & Battey it was sought to enjoin. The record shows that, when issuing a rule nisi on the petition, the judge had appointed a temporary receiver of all the property of the defendant and issued a restraining order as prayed against Hunter, Pearce & Battey. At the time of the interlocutory hearing, these lands were already in possession of the court, through its temporary receiver; and the court, by appointing a permanent receiver, made that possession permanent, and specially directed the manner of their sale, providing that all claims of liens should be divested by the sale and transferred to the proceeds arising therefrom. This order was not excepted to by any one, and is of full force. It was inconsistent to release Hunter, Pearce & Battey (they being under the jurisdiction of the court) from restraint as to a levy and sale by them of property already in charge of a receiver appointed by the court, and also to grant an order giving the receiver permanent possession and control of the property, and directing its sale by him in a specific manner. Thus dealing with the property excludes the propriety of leaving Hunter, Pearce & Battey to proceed further against it independent of the present suit. The court, having them before it as parties, and having full control and disposition of the res involved in the injunction sought against them, should not have granted an order which apparently left them free to proceed against the property by independent levy and sale, but should have passed such protective order as would leave no doubt that they were prohibited from interfering with property over which the receiver was given full power of control and disposition. As stated, the orders are wholly inconsistent; and regardless of what effect the receivership order would have to prevent any attempted interference with the property on the part of Hunter, Pearce & Battey, the order purporting to release them from restraint should not be allowed to stand. To do so might give rise hereafter to disputes as to its legal effect on the rights of the parties, all of which, under the uncontested order of receivership, are to be determined in the present proceedings.

The judgment of the court below is therefore reversed, direction being given that the court enter an appropriate order protecting the property in charge of the receiver from being interfered with by Hunter, Pearce & Battey.

Judgment reversed, with direction. All the Justices concur, except FISH, C. J., absent, and EVANS, P. J., disqualified.

(117 Va. 409)

## VIRGINIA RY. & POWER CO. v. MEYER.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

1. STREET RAILROADS ⟸93—USE OF STREETS.
Travelers on a street may cross in sight of a street car, and the operator is not warranted in assuming they will refrain from so doing.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 195–200; Dec. Dig. ⟸93.]

2. TRIAL ⟸243—INSTRUCTIONS—CONFLICT.
In an action for damages from a collision with a street car, plaintiff's instruction charged that the operator of the car had no right to assume that no person would attempt to cross in view of his car, and that the operator should use ordinary care to check his car's speed upon seeing a person about to cross in dangerous proximity. On behalf of defendant the jury was instructed that the operator of the car had the right to assume that all persons seeking to drive upon or across street car tracks would use reasonable prudence in doing so. *Held*, that there was no conflict between the two instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. ⟸243.]

3. STREET RAILROADS ⟸118—INJURIES TO TRAVELERS — INSTRUCTIONS — LAST CLEAR CHANCE.
In an action for damages from a collision with a street car, an instruction that the operator of a car must use ordinary care to attempt to check its speed as soon as he sees, or ought to have seen, that a person is about to cross in dangerous proximity to the car, and that, if the jury believed that the motorman of the defendant company did not use ordinary care when he saw plaintiff, or ought, in the exercise of ordinary care, to have seen him about to cross the tracks in dangerous proximity to the car, and by such failure to use ordinary care plaintiff was injured, the jury should find for plaintiff, properly submits the doctrine of last clear chance.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258–269; Dec. Dig. ⟸118.]

4. TRIAL ⟸228—INSTRUCTIONS.
In an action for damages for injuries resulting from collision with a street car, an instruction that the motorman should use ordinary care to check the speed of his car as soon as he sees that a traveler is about to attempt to cross in dangerous proximity is correct without qualifying the expression ordinary care by the words "as an ordinarily prudent person acting prudently under the circumstances would have exercised," particularly as defendant requested instructions using the expression "ordinary care" without qualification.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 509–512, 526; Dec. Dig. ⟸228.]

5. APPEAL AND ERROR ⟸362—ASSIGNMENTS OF ERROR—SUFFICIENCY.
An assignment of error not made in the petition for the writ of error, and appearing for the first time in the reply brief, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1960, 1961, 3282–3284; Dec. Dig. ⟸362.]

Error to Hustings Court of Richmond.

Action by Samuel Meyer against the Virginia Railway & Power Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

H. W. Anderson, A. B. Guigon, and T. Justin Moore, all of Richmond, for plaintiff in error. O'Flaherty, Fulton & Byrd, of Richmond, for defendant in error.

HARRISON, J. This action was brought by Samuel Meyer to recover of the defendant street car company damages for the practical destruction of his automobile in a collision on Broad street, in the city of Richmond, alleged to have been caused by the negligence of the defendant company. The trial resulted in a verdict and judgment in favor of the plaintiff for $500, which this writ of error brings under review.

[1] The first assignment of error is to the action of the trial court in giving, for the plaintiff, instruction No. 12, as follows:

"The jury is instructed that the operator of a street car has no right to assume that no person will attempt to cross the tracks in view of a car, and he must use ordinary care to attempt to check its speed as soon as he sees, or ought to have seen, that a person is about to cross in dangerous proximity to his car, and, if they believe from the evidence in this case that the motorman of the defendant company did not use ordinary care in attempting to check his car at a time when he saw the plaintiff, or ought, in the exercise of ordinary care, to have seen him about to cross the track in dangerous proximity to his car, and by such failure to exercise ordinary care in attempting to check the car the plaintiff was injured, the jury will find for the plaintiff."

There is no merit in the contention that the first lines of this instruction is an incorrect statement of the law. That the operator of a street car has no right to assume that no person will attempt to cross the tracks in view of a car is a proposition too plain to admit of dispute. The public ride and drive in conveyances of innumerable kinds across the streets of our populous cities many times daily in plain view of the cars operated on such streets, and not to allow them to do so would be to stop traffic and travel over the same. This court has repeatedly held that the traveling public have the same right to use, travel upon and across the public streets that street car companies have.

In Richmond Traction Co. v. Clarke, 101 Va. 382, 43 S. E. 618, it is held that the rights of street cars on a city street, no matter by what power propelled, are not superior to those of any other vehicle, but simply equal. Between crossings, as well as at crossings, vehicles may cross street car tracks in full view of approaching cars, if it is consistent with ordinary prudence to do so. It is not negligence, as a matter of law, for one to attempt to drive across a street car track when he sees a car coming. Whether or not it is negligence for one to drive across a street car track when he sees a car coming is a question for the jury un-

der all the facts and circumstances of the case. If the operator of a street car were permitted to run the same upon the assumption that the public would not attempt to cross the track in view of his car, there would be no safety for the public in crossing the streets at all.

[2] This instruction is further criticized as being in conflict with instructions 3 and 7, given for the defendant company. This objection is not well taken. Instruction No. 12 properly tells the jury that the operator of a street car cannot assume that persons will not attempt to cross the track in view of his car; whereas instructions 3 and 7, with equal propriety, told the jury that the motorman had a right to assume that all persons seeking to drive across or upon street car tracks would exercise reasonable prudence in doing so. Instruction No. 12, given for the plaintiff, dealt with the rights and duties of a motorman to the public in attempting to cross the streets, while instructions 3 and 7, given for the defendant, dealt with the duties of the traveling public in crossing such streets. There is no conflict in those instructions; they state the law correctly, and the jury could not have been misled by them.

[3] We are further of opinion that instruction No. 12 does not, as suggested, incorrectly state the doctrine of the last clear chance. On the contrary, the jury are expressly told that, if the motorman did not use ordinary care to check his car when he saw the plaintiff, or in the exercise of ordinary care ought to have seen him, about to cross the track in dangerous proximity to his car, and by such failure to exercise ordinary care in attempting to check the car the plaintiff was injured, the jury will find for the plaintiff. Whether or not the motorman failed to exercise ordinary care and thereby injured the plaintiff was left entirely to the jury. Norfolk & P. Traction Co. v. Forrest's Adm'x, 109 Va. 658, 64 S. E. 1034.

[4] It is contended that the degree of care imposed upon the motorman by the instruction was stated to be "ordinary care," without the qualification "such as an ordinary prudent person acting prudently under the circumstances would have exercised." We have been cited to no case, and are not aware of one, which holds that it is error to use the phrase "exercise of ordinary care" without the suggested qualifying words. On the contrary, the phrase "exercise of ordinary care" has been used without the qualifying words mentioned in innumerable similar instructions held by this and other courts not to be erroneous.

In the case of Norfolk & P. Traction Co. v. Forrest, supra, the phrase "exercise of ordinary care" is used in a similar instruction to No. 12, without any qualifying words, and this court, in commenting upon that instruction, said:

"This is a correct statement of the doctrine of the last clear chance, and there was ample evidence to justify such an instruction."

Further, the record shows that the defendant company has used the same phrase, "exercise of ordinary care," in the same sense, and without any qualifying words, in three separate instructions given at its request in this case. It is to be presumed that the defendant, when it secured these instructions, was dealing in the best of faith with the court, and therefore thought that this phrase, used three times by them, would be understood by the jury, and that it was not error to use it without the addition now suggested for the first time by it.

[5] The point is made in argument that instruction No. 12 is erroneous, in that it concludes with a direction to find for the plaintiff without adding the following qualification:

"Unless the jury shall further believe from the evidence that the plaintiff was guilty of contributory negligence."

This assignment of error cannot be considered. It was not made in the petition for a writ of error, but appears for the first time in the reply brief of the defendant company. Orr v. Pennington, 93 Va. 268, 24 S. E. 928; Norfolk & Western Ry. Co. v. Perrow, 101 Va. 345, 43 S. E. 614; Hawpe v. Bumgardner, 103 Va. 91, 48 S. E. 554; American Locomotive Co. v. Hoffman, 105 Va. 343, 54 S. E. 25, 6 L. R. A. (N. S.) 252, 8 Ann. Cas. 773. In the last-named case the court said:

"But in the reply brief filed by counsel for plaintiffs in error a number of assignments of error are made and argued.

"Counsel for defendant in error makes the point that the assignments made in the reply brief should not be considered by the court, and in this view we concur.

"Section 3464 of the Code provides that 'a petition for an appeal, writ of error or supersedeas shall assign error'; * * * and in the opinion by Buchanan, J., in Orr v. Pennington, 93 Va. 268, 24 S. E. 928, it is said: 'The petition required is in the nature of a pleading and should state the case which the party applying for the appeal wishes to make in the appellate court. It ought to assign clearly and distinctly all the errors relied on for a reversal of the case, so that the opposite party may know what questions are to be raised in the appellate court, and not have new questions sprung upon him at or just before the hearing of the cause, when there may not be sufficient time or opportunity for meeting them.'

"The mere intimation or even declaration in a petition for an appeal or writ of error that there are other objections to the rulings of the trial court does not reserve to the petitioner the right to assign errors in the brief filed in his behalf in reply to the brief filed for the opposing party."

The only remaining assignment of error is to the action of the court in refusing to set aside the verdict as contrary to the law and the evidence. It is sufficient, in response to this assignment, to say that the case was fairly submitted to the jury, and that there was ample evidence to sustain and justify their verdict.

Upon the whole case we find no error to

the prejudice of the defendant company in the judgment complained of, and it is affirmed.

Affirmed.

CARDWELL, J., absent.

(117 Va. 416)

## VIRGINIA RY. & POWER CO. v. MEYER.

(Supreme Court of Appeals of Virginia. March 11, 1915.)

DAMAGES ⊂⊃132 — PERSONAL INJURIES — AWARD.

Where a female motorist was injured in a collision with a street car, and her sufferings were serious and protracted, an award of $2,500 damages cannot be held excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385, 396; Dec. Dig. ⊂⊃132.]

Error to Hustings Court of Richmond.

Action by Emma Meyer against the Virginia Railway & Power Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

H. W. Anderson, A. B. Guigon, and T. Justin Moore, all of Richmond, for plaintiff in error. O'Flaherty, Fulton & Byrd, of Richmond, for defendant in error.

HARRISON, J. This action was brought by Emma Meyer, the wife of Samuel Meyer, to recover of the defendant street car company damages for personal injuries alleged to have been sustained by her as a result of the defendant's negligence. It is a companion suit to that of Virginia Railway and Power Company v. Samuel Meyer, 84 S. E. 742, grows out of the same accident, and rests upon practically the same facts. The two cases were heard together in this court, the questions involved being in all essential particulars the same.

Instruction No. 2 in the present case is the same as No. 12 in the Samuel Meyer Case, except that here it concludes with the words, "unless the jury shall further believe from the evidence that the plaintiff was guilty of contributory negligence." The same objections are urged to the instruction here that were made to it in the Samuel Meyer Case, and the view there taken of these objections need not be repeated in this case.

The only additional assignment of error in the present case is that the verdict was excessive. The evidence shows that the injuries sustained by the plaintiff were serious, and her suffering protracted. It was for the jury to say what compensation she was entitled to, and we cannot hold that their estimate of $2,500 was excessive.

For the reasons given in the opinion herewith handed down in the case of Virginia Railway & Power Co. v. Samuel Meyer, in addition to what is herein said, the judgment complained of must be affirmed.

Affirmed.

CARDWELL, J., absent.

(75 W. Va. 739)

## LYONS v. DAVY-POCAHONTAS COAL CO. et al.

(Supreme Court of Appeals of West Virginia. March 2, 1915.)

*(Syllabus by the Court.)*

1. MALICIOUS PROSECUTION ⊂⊃16—RIGHT OF ACTION—REQUISITES.

To maintain an action for malicious prosecution it is essential to prove: (1) That the prosecution was malicious; (2) that it was without reasonable or probable cause; and (3) that it terminated favorably to plaintiff.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 19–22, 59; Dec. Dig. ⊂⊃16.

For other definitions, see Words and Phrases, First and Second Series, Malicious Prosecution.]

2. MALICIOUS PROSECUTION ⊂⊃31—PROOF OF MALICE—SUFFICIENCY.

Proof that plaintiff, formerly a tenant of defendant, was arrested on a warrant, charging him with trespass to property, procured to be issued by the landlord's agent, acting within the scope of his employment, for the sole purpose of getting him off the land, establishes malice.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 64–66; Dec. Dig. ⊂⊃31.]

3. CORPORATIONS ⊂⊃513 — ACTIONS — DECLARATION—AGENCY.

In a declaration charging a corporation with a trespass committed by a certain person as its agent, it is not essential to aver the agency.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2017–2027, 2031–2034, 2036–2045; Dec. Dig. ⊂⊃513.]

4. MALICIOUS PROSECUTION ⊂⊃42—CORPORATIONS—ACTS OF AGENTS.

A coal mining corporation is liable for a malicious prosecution procured to be made by its superintendent acting in furtherance of its business.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 83–86; Dec. Dig. ⊂⊃42.]

5. MALICIOUS PROSECUTION ⊂⊃4—CONTINUATION OF PROSECUTION — MALFEASANCE OF OFFICER.

A person who sets on foot a malicious prosecution is liable for its continuance and for the malfeasance of the officer making the arrest.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 4; Dec. Dig. ⊂⊃4.]

6. CONTRACTS ⊂⊃95—VALIDITY—DURESS.

A person unlawfully imprisoned, who is induced by his prosecutor, or his agent, to sign a writing agreeing not to sue for damages, in order to obtain his liberty, is not bound thereby.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 431–440; Dec. Dig. ⊂⊃95.]

7. EVIDENCE ⊂⊃591 — CONCLUSIVENESS ON PARTY INTRODUCING—DURESS.

And in an action for malicious prosecution he may prove that he signed such paper under duress, notwithstanding he put it in evidence himself for the purpose of proving a termination of the prosecution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2440–2443; Dec. Dig. ⊂⊃591.]

Error to Circuit Court, McDowell County.

Action by T. J. Lyons against the Davy-Pocahontas Coal Company and others. Judgment for defendants, and plaintiff brings error. Reversed and rendered.

Joseph M. Crockett, of Welch, and Sanders & Crockett, of Bluefield, for plaintiff in error. Strother, Taylor & Taylor, of Welch, for defendants in error.

WILLIAMS, J. Plaintiff recovered a verdict for $3,500 against Davy-Pocahontas Coal Company and P. A. Grady, in an action for malicious prosecution, and, on motion of defendants, the court set it aside and granted them a new trial. By this writ of error plaintiff seeks to have that order reversed and judgment entered here upon the verdict.

Defendants offered no evidence. The case was submitted to the jury upon plaintiff's evidence alone, and instructions, with the result above stated. The material facts, as they appear from the uncontroverted testimony, are as follows: In November, 1913, plaintiff was in the employ of defendant coal company, as a coal miner, occupying one of its houses. The defendant P. A. Grady, superintendent for the coal company, met plaintiff in Welch on the 18th of December, 1913, and told him that the company wanted the house he was occupying, and asked him when he intended to give it up. Plaintiff replied he was ready to give it up at any time, and Mr. Grady said they wanted it "right now." Plaintiff testified that Mr. Grady was angry and said to him:

"You and I are going to run together, and we are going to have trouble. I am going to fix you, and I will fix you proper, too."

About 30 minutes after that conversation plaintiff was arrested upon a warrant issued by A. C. Hufford, justice of the peace, upon a complaint made by W. A. Burrell, deputy sheriff of McDowell county. Burrell also worked for the Baldwin-Felts Detective Agency. The warrant charged plaintiff with unlawful trespass upon the personal property of the Davy-Pocahontas Coal Company, and was directed to F. E. Miller, another deputy sheriff of McDowell county. Miller and Burrell arrested plaintiff immediately, and instead of taking him before the justice, as the writ commanded, they delivered him over to the keeper of the jail. He was therein confined from the 18th to the 20th of December, 1913, when he was released in the manner hereinafter described. Burrell testified that he did not remember making the complaint, nor where he got the information on which he made it, and admitted that he did not know plaintiff before the day he helped to arrest him. Defendant Grady had gone to Justice Hufford's office, a short while before the warrant was issued, and told the justice plaintiff was no account to work, was bothering them, and he wanted to get him off his job, and asked the justice to do the best he could to get him off the job, and said that neither he nor the company wanted to be mixed up in it. Mr. Hufford says he then told Grady he would do the best he could and would issue a warrant for the arrest of Lyons for trespassing. Grady then went out, and the justice says he thinks Burrell came in immediately after Grady left, and made the complaint upon which he issued the warrant. No further proceedings were taken before the justice, and plaintiff was never taken before him or any other justice on the warrant, but was released by the jailer on the 20th of December, immediately after he had signed the following paper, viz.:

"I, T. J. Lyon, for and in consideration of the withdrawal of all charges against me as a trespasser upon the property of the Davy-Pocahontas Coal Company near Roderfield, McDowell county, West Virginia, hereby agree to return to said company at once and remove my family and goods from off of the lands of the said coal company at once and not again go upon said property for any purpose, and I further agree and hereby bind myself not to bring any suit by way of damages or otherwise for my arrest on a charge of trespass on said property.

"T. J. Lyons.

"Dated this the 20th day of Dec. 1913.

"Witness: F. E. Miller.

"Turned over to W. L. Taylor May 27th 1914."

It is not directly proven who prepared that paper, but the jury could properly infer from the testimony of Hufford and Miller that it was prepared by W. L. Taylor, president and attorney of the coal company, acting in its behalf. It was in his possession, and was produced by him at the trial, on request of plaintiff's counsel, who put it in evidence, over defendants' objection. Mr. Taylor does not deny having prepared it, but said he did not know whether he did or not. In speaking of the paper, the justice says:

"I think Mr. Taylor drawed, had him to draw that up—that release; and I called Miller, to the best of my recollection, over to Mr. Taylor's office after that. Then Miller brought it back to me, and then I suppose Miller went to the jail and had him to sign that, and then Miller brought that back to me the second time, after it was signed."

Miller swore the paper was given to him at Mr. Hufford's office, that he took it to the plaintiff in jail, and, after plaintiff signed it, he returned it to Mr. Hufford. Describing the manner in which he obtained plaintiff's signature, witness said he laid the paper on the jailer's desk before plaintiff, and said:

"There is a paper that you can read over. If you care to sign it, I will release you; that the plaintiffs don't care to bring any charges further against you, or anything of that kind. That is all he wants, is to get you off the property. He read it over. He said, 'I have a lawyer.' I said: 'I have got to catch this train; I haven't got time. So you can do as you like about signing it,' I said, 'If you want to sign it, I will release you.' So he said, 'All right'; and he signed the paper in the presence of Mr. Collins (the jailer) and myself. So we turned him loose, and I asked him to get off this property that he had been trespassing upon. He had been ordered to get off, so I understood."

[1, 2] In order to maintain his action it was essential for plaintiff to prove: (1) That his prosecution was malicious, that is, that it was instituted for some unlawful and improper purpose, and not for the purpose of punishing him for a crime; (2) that it was

without reasonable or probable cause; and (3) that it had terminated favorably to the accused, either by a judgment of acquittal upon the merits, failure of the grand jury to find an indictment, or abandonment by the prosecutor. 26 Cyc. 58. The jury could find from the evidence, as they unquestionably did in order to reach a general verdict for the plaintiff, that the foregoing essentials were proven. According to the evidence, the sole purpose of the criminal writ was to get plaintiff out of possession of the property he was occupying under lease from the coal company. That constituted legal malice. Nor is there the slightest evidence of the existence of any such facts, as would have led a reasonably prudent person to suspect, much less to believe, that plaintiff had committed a trespass upon the property of the defendant company; and plaintiff's release from jail, and the failure to further prosecute the charge against him, proved a termination of the prosecution by abandonment; unless, as defendants' counsel insist, the writing signed by plaintiff proves that it was compromised, in which event he cannot recover. 19 A. & E. E. L. 684; and 26 Cyc. 59. If the termination of a prosecution is by the consent or procurement of the accused, or his discharge is merely technical, or has been improperly obtained, no foundation exists for the action. We will again return to a discussion of the force of the paper.

[3] It is insisted by counsel for the defendant coal company that its demurrer to the declaration should have been sustained, because of the failure to aver that P. A. Grady was its agent. No such averment was necessary. The declaration does aver:

"That the said defendants P. A. Grady and the Davy-Pocahontas Coal Company, through its officer, agent, representative and employé, P. A. Grady, conspiring," etc.

This was sufficient to inform defendant company that the wrong complained of was committed by it through one of its agents. Being a corporation, it could act only through its agents and officers. The familiar maxim, "Qui facit per alium facit per se," applies. The demurrer was properly overruled.

[4] That Grady was acting for the defendant coal company and within the scope of his employment, in getting plaintiff out of its house, is clearly to be inferred from his relation as its general superintendent. It was he who, acting for the company, gave plaintiff the right to occupy the house in the first instance. Rent therefor was collected by deducting it from his wages.

[5] That a corporation is liable for a malicious prosecution, set on foot by one of its agents, acting within the scope of his employment and in furtherance of its business, even though it may not have expressly authorized or ratified the wrong, was decided in Fetty v. Huntington Loan Co., 70 W. Va. 688, 74 S. E. 956. See, also, Williamson v. Glen Alum Coal Co., 72 W. Va. 288, 78 S. E. 94, and Turk v. N. & W. Ry. Co., 84 S. E. 569, decided at the present term of court. The latter cases, while not actions for malicious prosecutions, are authority for the proposition that a corporation is liable for the wrongs committed by its agents within the scope of their employment.

Complaint is made that plaintiff was improperly permitted to prove his imprisonment in jail. From the written opinion of the trial judge, copied into the brief of counsel, it appears that he was of the opinion that he had committed a mistake, prejudicial to defendant, in allowing that fact to be proved, and for that reason he set aside the verdict. But we do not think the evidence was improper. Evidence of plaintiff's incarceration was only incidental to proving his release, a fact essential to show the termination of the prosecution. Counsel insist that plaintiff's imprisonment was not a proper element of his damage, because it appeared that the officer had violated the writ in taking him to jail, instead of taking him before the justice, as he was commanded by the writ; and that defendants should not be held liable for the wrongs and mistakes of the officer. We do not so understand the law. The parties who set a prosecution on foot, maliciously and without probable cause, are liable for the damages sustained by the accused, even though they may result in part from the malfeasance of the officer. Williamson v. Glen Alum Coal Co., supra; and Turk v. N. & W. Ry. Co., supra. In Johnson v. Miller et al., 63 Iowa, 529, 17 N. W. 34, 50 Am. Rep. 758, defendants had caused plaintiff to be indicted. The indictment was quashed, and the case resubmitted to the grand jury, and another indictment was found. Defendants claimed they had nothing to do with the resubmission, but the court held that, having caused the criminal action to be commenced, they could not escape liability for its continuance. The same principle was declared in Bacon v. Towne et al., 4 Cush. (Mass.) 217; and Goodrich v. Warner, 21 Conn. 432.

It is immaterial whether defendant Grady swore to the complaint or procured another to swear to it. Grady went to the justice's office and told him what he wanted done, and immediately, or within a few minutes thereafter, Burrell appeared and made the complaint. The jury could therefore properly infer that Burrell made the complaint at the request of Grady. Tangney v. Sullivan, 163 Mass. 166, 39 N. E. 799.

[6, 7] Returning to the evidence, plaintiff was not bound by the paper signed by him to procure his discharge from jail; he being then under duress. Counsel urge, however, that, having put the paper in evidence himself, plaintiff was bound by it, and could not impeach its validity. The paper was not indispensable to plaintiff's case, for he could have proven his release without it. Therefore it is proper to consider the purpose for

which he introduced it, which was to prove his release from jail. As a general rule, we must admit that a party, introducing documentary evidence for the purpose of proving a material part of his case, is bound by its contents, and will not thereafter be permitted to contradict any part of it. This rule, however, like most other general rules of law, is subject to exceptions, and the exception, rather than the rule, we think, here applies. The paper was in defendants' possession, and, if they had introduced it for the purpose of showing that the prosecution had terminated by the consent and agreement of plaintiff, there can be no question of plaintiff's right to have impeached it. Why may he not be permitted to do so, even though he introduced the paper himself, when it is so apparent that he did so for a special and limited purpose? Rules of evidence are certainly intended to aid courts in the administration of justice. Hence they should not be rigidly adhered to, when to do so would result in manifest injustice. We find the law thus stated in 4 Enc. of Ev. 842:

"It quite frequently occurs that in order to establish a matter in dispute a party finds it necessary to introduce a document as the foundation of further proof relating to such document, in order to sustain the issue on his part. In such case he is not bound by such document so as to prevent him from introducing such further testimony relating thereto, though the evidence introduced may have the effect of discrediting the document."

In Merchants' Bank of Macon v. Rawls, 7 Ga. 191, 50 Am. Dec. 394, it was held that a party introducing in evidence the books of a bank, while not allowed to discredit them as a whole, might show errors in particular items. In Kingman v. Tirrell, 11 Allen (Mass.) 97, it was held that one who puts in evidence a note with indorsements may show that the indorsements were incorrect. In Douglass v. Huhn, 24 Kan. 766, which was an action to quiet title, plaintiff offered in evidence a quitclaim deed to the defendant, which recited the execution of a tax deed to the grantor therein named. The deed was offered for the purpose of proving the adverse claim made by defendant, and the court held that plaintiff was not bound by the recitals in the quitclaim deed, and also that he was not bound to show that the tax deed was void or did not exist. In Henny Buggy Co. v. Papp, Garnishee, 73 Iowa, 485, 35 N. W. 587, the court held that the good faith of a bill of sale might be challenged by the party offering it in evidence. See, also, the following cases, some of which, however, seem to rest upon statutes, making certain documents only prima facie evidence: Fogg v. Farr et al., 16 Gray (Mass.) 396; Raymond v. Nye, 5 Metc. (Mass.) 151; Parry v. Parry, 130 Pa. 94, 18 Atl. 628; Waldron v. Evans, 1 Dak. 11, 46 N. W. 607; and Dowdell v. Wilcox, 58 Iowa, 199, 12 N. W. 271.

The paper was not offered by plaintiff to prove a compromise of his prosecution, but to prove its termination by his release from jail. His discharge seems to have been conditioned on his signing the paper. How long he would have been detained in jail without a trial, if he had not signed the paper, does not appear. The evidence presents a case showing a flagrant misuse of the criminal process by a landlord, to eject his tenant, who, after having procured his arrest and imprisonment unlawfully, exacts from him a promise in writing not to sue for the wrong done, as a condition of his release. Such wrongs ought not to occur in a free country, governed by law. Although plaintiff introduced the paper, he had a right, under the circumstances of this case, to prove that he signed it in order to obtain his liberty.

The amount of damages is claimed to be excessive. Wide discretion is vested in juries in assessing damages in cases of this character, and notwithstanding we, if sitting as jurors, might not be willing to assess so great damages as the jury did in this case, still, as a court, reviewing their finding, we cannot say that the verdict is so large as to evince corruption, partiality, passion, or prejudice. That is the criterion by which we must be governed in cases of this character.

We have carefully read and considered the instructions given at the request of plaintiff, as well as those given on behalf of the defendant, also a number of others requested by defendant and refused by the court, and we find no error in the court's ruling in relation thereto. The jury were fairly instructed concerning the law applicable to the case, and we find no good cause for setting aside the verdict. The order appealed from will therefore be reversed, the verdict reinstated, and a judgment entered thereon by this court.

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(75 W. Va. 747)

## BOARD OF EDUCATION OF DISTRICT OF NORTHFORK v. ANGEL et al.

(No. 2683.)

(Supreme Court of Appeals of West Virginia. March 2, 1915.)

*(Syllabus by the Court.)*

1. BILLS AND NOTES ⇐421—PROTEST—NOTICE.

If notice of protest of a negotiable note be regularly mailed, as prescribed by section 8, chapter 99, Code 1906, it is immaterial that such notice may not have been in fact received by the endorser thereon. He is nevertheless legally bound by such notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1173, 1178–1187; Dec. Dig. ⇐421.]

2. CONTRACTS ⇐128—AGREEMENT TO REPAY EMBEZZLED MONEY—VALIDITY—CONSIDERATION—PENDENCY OF PROSECUTION.

Notwithstanding the pendency of criminal proceedings against the wrongdoer, one whose money or property has been embezzled, or fraudulently obtained, may contract with such wrong-

doer for repayment of the money or satisfaction for the loss sustained, and take security therefor, without invalidating the contract, unless there be included therein, as a part of the consideration therefor, some promise or agreement, express or implied, that such prosecution shall be suppressed, stifled or stayed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 633–653; Dec. Dig. ⟸128.]

3. CONTRACTS ⟸128—AGREEMENT TO REPAY EMBEZZLED MONEY—VALIDITY—CONSIDERATION—PENDENCY OF PROSECUTION.

Such contract, however, if made in whole or in part upon consideration of such unlawful promise or agreement is void as against public policy, and will not be enforced by the courts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 633–653; Dec. Dig. ⟸128.]

4. CONTRACTS ⟸128 — ILLEGALITY — SUFFICIENCY OF EVIDENCE.

In this case the verdict of the jury against the defendants on the plea of such an illegal contract was sustained by the proof, and there was no error in the judgment below denying them a new trial.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 633–653; Dec. Dig. ⟸128.]

Error to Circuit Court, McDowell County.

Action by the Board of Education of the District of Northfork against C. S. Angel and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Anderson, Strother & Hughes and Stokes & Sale, all of Welch, for plaintiff in error. F. C. Cook, of Welch, and H. A. Ritz, of Bluefield, for defendants in error.

MILLER, J. Defendants, Angel, Toney, Kaufman and Strudwick, seek reversal of a judgment against them on a note dated October 30, 1903, made by one Roberts, payable sixty days after date, to one E. T. Sprinkle, Sheriff of McDowell County, for nine hundred and twenty one dollars and five cents, negotiable and payable at the McDowell County Bank, Welch, West Virginia, and endorsed by them and also by their co-defendants, Tipton, Roberts, Ballard and Botsford.

Besides, the general issue and the plea of the statute of limitations of ten years, plaintiffs in error interposed as defenses, by special plea number 2, "that if they signed the note sued upon as endorsers thereon, the said note was given and their endorsements obtained for an illegal consideration, to-wit: to suppress a criminal prosecution for a felony begun and put on foot against the maker of said note, F. G. Roberts, and this they are ready to verify;" and by special plea number 3, "that they were merely endorsers upon the note sued upon, and that said note was not presented for payment according to the time thereof, and protested for non-payment thereby relieving and releasing these defendants from liability thereon as endorsers, and this they are ready to verify."

On the trial the plea of the statute of limitations was not sustained by the proof, and no point of error on said plea is made or relied on here.

[1] On the plea of want of notice of protest and consequential release as endorsers on the note, we think, as the court below evidently concluded, that this defense also failed for want of proof. The evidence was that the note and certificate of protest had been lost, and evidence was admitted showing conclusively its contents, and that the note was duly presented for payment, payment refused, and protest and notice thereof mailed to each of said endorsers at their regular post office addresses. The only evidence to the contrary was the personal recollection of two or three of these defendants, after nine years, that they had never received such notices. But there is no evidence that any of them ever denied liability on the note on that account until suit brought, and moreover, some of them, at least, negotiated for payment of the note after its maturity, and one of them seems to have paid over to another his part or portion of the debt that the whole might be settled and paid. The note having been so regularly protested and notices mailed to the endorsers it is wholly immaterial whether the endorsers received their notices or not. Section 8, chapter 99, serial section 3446, Code 1906; Insurance Co. v. Wilson, 29 W. Va. 528, 2 S. E. 888. Defendants' instruction number 4, propounding a contrary proposition, was therefore rightfully rejected.

[2] The real and only question of merit presented by plea, and by an instruction given by the court in lieu of instruction number 1, requested by plaintiff, and defendants' instructions numbered 2 and 3, rejected, is whether, as alleged in the plea, and as assumed by defendants' two instructions rejected, said note and the endorsements thereon were given or procured in consideration of the suppression of a criminal prosecution for a felony begun and put on foot against said Roberts, as alleged in said plea, or to stop such intended prosecution, as assumed in said instructions.

The evidence is that the note was made by Roberts, who had been secretary of said board of education, to cover the amount of certain orders drawn by him on said sheriff, as treasurer ex officio of the school funds of said district, and on which he had forged the name of the president, and had thereby fraudulently procured and embezzled money and funds belonging to said school district, and that at the time he executed said note with the endorsers he had been arrested and was then in the custody of a constable on a warrant sworn out by the prosecuting attorney, and who also represented the said board of education in the taking of said note.

It is well settled law that, though criminal proceedings have been begun and be pending against the wrongdoer for the crime, one whose money or property has been embezzled,

or fraudulently procured, may contract with such wrongdoer for re-payment or satisfaction of the loss, and take security therefor, without invalidating such contract, unless there be included therein and as part consideration therefor some promise or agreement, express or implied, that such prosecution shall be suppressed, stifled or stayed. 9 Cyc. 506, and notes, citing cases; Johnston v. Allen, 22 Fla. 224, 1 Am. St. Rep. 180; Portner v. Kirschner, 169 Pa. 472, 32 Atl. 442, 47 Am. St. Rep. 925; 1 Page on Cont. sec. 418; Tecumseh National Bank v. Chamberlain Banking House, 63 Neb. 163, 88 N. W. 186, 57 L. R. A. 811; Fosdick v. Vanarsdale, 74 Mich. 302, 41 N. W. 931.

[3] On the other hand, it is equally well settled, that if such an unlawful promise or agreement constitutes any part of the consideration for the promise or agreement of the wrongdoer or his sureties, the contract is wholly void and will not be enforced by the courts. All such contracts are deemed contrary to good morals and public policy, and as to which the courts will turn a deaf ear, when their enforcement is sought therein. And this rule of law as between the parties thereto is applicable to the making and enforcement of negotiable instruments. 1 Daniel on Neg. Inst. (6th Ed.) section 196a and notes; 3 R. C. L. p. 957; Norton on Bills and Notes, 268, 277, 278; Henderson v. Palmer, 71 Ill. 579, 22 Am. Rep. 119; Friend v. Miller, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340; 1 Chit. Com. L. 4; 4 Am. & Eng. Ency. Law, 191.

[4] The evidence is clear and convincing that as between Roberts, the offender, and maker of the note, and the board of education, and the sheriff, the nominal payee in the note, not a word of communication was had. No promise or agreement, written or verbal, was made between them, directly at least, in regard to the pending prosecution, or what was to become of it, on execution and endorsement of the note. The prosecuting attorney in charge of the prosecution, and representing the board of education, admits a conversation with the members of the board who were together conferring on the subject on the day the note was executed and endorsed, in which they indicated to him that so far as they were concerned, if Roberts would secure them by a note with good security, they would not insist on his being prosecuted. This conference and communication, however, was wholly private, and between the board and prosecutor, and was not communicated in any way, so far as the records shows, to maker or endorsers of the note, and the prosecuting attorney swears positively that he at no time made any promises to Roberts or his endorsers that Roberts would not be prosecuted. He said on cross-examination that his recollection was that Roberts wanted to pay the board the money he admitted he had taken, and wanted these defendants as his friends to endorse the note as an accommodation to him, and he was satisfied that no promise not to prosecute Roberts was made to maker or endorsers, or either of them, as part consideration for the execution of the note by them. Plaintiffs in error, Angel, Toney and Kaufman, the only defendants who gave testimony on the trial, do not swear that any promises not to prosecute Roberts were made to them; and all they did say on the subject was that they endorsed the note to keep Roberts out of jail. Neither of them swore that the prosecuting attorney, or the board of education, or the sheriff who was not present, made any promise not to prosecute Roberts. It is conceded, however, that immediately after the note was made and endorsed Roberts was released from custody, and contrary to his representations that he proposed to go to work and pay the note to the relief and discharge of his sureties, he left the State the same night by a freight train, and never returned. This fact is referred to by plaintiff's counsel as corroborative of the fact that no promise not to prosecute him was made as part consideration for the note. Certainly there is no evidence of an express promise. That is expressly and positively denied. True such a promise and agreement may be inferred from the facts relating to the transaction; but such inference is one of fact for the jury, and not of law for the court, and as their verdict was for plaintiff, we must assume that they decided the issue in favor of plaintiff, and the validity of the note.

We have examined the instructions relied on by defendants and rejected by the court. We think the court's instruction, given, covered the whole case presented by pleadings and proofs, and that there was no reversible error in rejecting defendants' instructions.

Nor do we find any error based on the theory that plaintiff had no right of action on the note. The note was admittedly made to cover money fraudulently drawn out of the treasury of the board of education, and while credit might possibly have been denied the sheriff on settlement, evidently such was not the fact, for the board of education counselled with the prosecuting attorney, and consented to the taking of the note, dealt with it as their own, and brought suit upon it. The sheriff took no part in the transaction except to receive the note as treasurer. The point is overruled.

We are of opinion to affirm the judgment.

(75 W. Va. 719)

## GRASS et al. v. BIG CREEK DEVELOPMENT CO. (No. 2533.)

(Supreme Court of Appeals of West Virginia. March 2, 1915.)

*(Syllabus by the Court.)*

1. PLEADING ⟸193—DECLARATION—DEMURRER—GROUNDS.

A declaration, though indefinite and uncertain, is not demurrable, if with reasonable certainty it states one or more good and not inconsistent causes of action. A demurrer does not lie for mere indefiniteness or duplicity. Such defects are curable under section 46, c. 130, Code 1913 (sec. 4903).

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428–435, 437–443; Dec. Dig. ⟸193.]

2. PLEADING ⟸433—CURE OF ERROR—VERDICT.

A defect in a declaration which cannot be regarded on demurrer is, by section 3, c. 134, Code 1913 (sec. 4977), cured after verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451–1477; Dec. Dig. ⟸433.]

3. TRIAL ⟸359—ANSWERS TO INTERROGATORIES—GENERAL VERDICT.

Answers to special interrogatories inconsistent with the general verdict will control.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857–860, 875, 877, 878; Dec. Dig. ⟸359.]

4. JUDGMENT ⟸19—VERDICT—EVIDENCE TO SUPPORT.

A verdict on evidence furnishing no reasonably accurate foundation for computation of damages resulting from breach of contract cannot serve as a basis for a judgment thereon.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. ⟸19.]

5. MINES AND MINERALS ⟸78—OIL AND GAS LEASE—BREACH—DAMAGES—PROOF.

Where no definite basis is available for the ascertainment of damages for breach of the implied covenants of an oil and gas lease, the best evidence which the circumstances will permit is all the law requires.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205–207; Dec. Dig. ⟸78.]

6. MINES AND MINERALS ⟸78—OIL AND GAS LEASE—DUTY OF LICENSEE.

The owner of a lease for the production of oil and gas, containing the usual terms and conditions, must, if either mineral is found in paying quantities on the lands, exercise due and reasonable diligence in prosecuting operations thereunder for the mutual benefit of himself and his lessor; and, if he unreasonably fails or refuses so to do, damages therefor are recoverable against him in an appropriate action at law.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205–207; Dec. Dig. ⟸78.]

7. MINES AND MINERALS ⟸78—OIL AND GAS LEASE—DUTY OF OPERATOR—DETERMINATION.

The judgment of an operator of such lease, as to the diligence with which and extent to which wells should be drilled thereunder, upon discovery of either mineral in paying quantities, will control, if exercised in good faith and not unreasonably or arbitrarily, to promote his own peculiar benefit, to the manifest prejudice of the lessor. Both are bound by that degree of diligence which, surrounding circumstances and conditions being considered, would reasonably be expected of operators of ordinary prudence, experienced and engaged in the same business, having due regard for the interests and advantage of themselves and their lessors.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205–207; Dec. Dig. ⟸78.]

8. MINES AND MINERALS ⟸78—OIL AND GAS LEASE—BREACH—ACTION FOR DAMAGES—BURDEN OF PROOF.

To entitle him to damages for unreasonable or arbitrary evasion of implied covenants of an oil and gas lease, nothing therein preventing, for diligent prosecution of operations, either mineral being found in paying quantities on the premises, plaintiff assumes the burden of showing, and by clear and convincing proof must to avail him show, by witnesses having experience and skill and engaged in similar operations, that the lessee, having due regard for the advantage and profit of himself and lessor, has not, surrounding circumstances and conditions being considered, exercised ordinary diligence in conducting such operations. If he has, plaintiff cannot recover.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205–207; Dec. Dig. ⟸78.]

9. MINES AND MINERALS ⟸78—OIL AND GAS LEASE—BREACH—RECOVERY BY LESSOR—RIGHT.

Among such circumstances and conditions are the situation of the parties; the character of the mineral products; the nature of the oil-bearing sand, whether dense or soft and porous; developments on contiguous lands, whether by same or different operators; cost of drilling; proximity to market, and facilities for marketing; current prices, whether high or low; location of the lands; and such other conditions attendant upon the operations as may explain necessity for prompt, or excuse for delayed, action in prosecuting such developments. And if, considering these, the operator has exercised that reasonable diligence and sound, practical judgment common to and exercised by operators of ordinary prudence and experience in the same business under the same or similar circumstances and conditions, plaintiff cannot recover.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205–207; Dec. Dig. ⟸78.]

Error to Circuit Court, Lincoln County.

Action by John M. Grass and others against the Big Creek Development Company. Judgment for plaintiffs, and defendant brings error. Reversed, and new trial granted.

Vinson & Thompson and F. C. Leftwich, all of Huntington, for plaintiff in error. Neal & Strickling, of Huntington, D. E. Wilkinson, of Hamlin, and Campbell, Brown & Davis, of Huntington, for defendants in error.

LYNCH, J. Of a judgment for $7,000, rendered upon the verdict of a jury in an action of assumpsit brought by John M. Grass, defendant Big Creek Development Company complains on writ of error.

In July, 1907, Grass as owner leased 100 acres of land to C. H. Freeman for the sole purpose of mining and operating for oil and gas, the consideration being a cash payment of $100, one-eighth of the oil produced, and $200 annually for each gas well the product from which should be marketed and used off

the premises. As Freeman's assignee, defendant soon thereafter entered upon the premises and drilled four wells producing oil in paying quantities, locating them so as to operate as offsets to wells previously drilled on contiguous lands producing oil in like quantities. Deeming the four wells insufficient, under the implied covenants of the lease, for the full development of the lands for oil and ample protection from drainage through wells operated on neighboring lands, defendant operating both tracts under similar leases, plaintiffs instituted this proceeding, averring, or attempting to aver, in an original and amended declaration of one count each, two causes of action; one the breach of an implied covenant to protect against drainage, and one the breach of a like covenant for the exercise of reasonable diligence in prosecuting developments necessary for extraction of all oil contained within plaintiff's lands. To these declarations defendant tendered its demurrer, assigning as grounds therefor indefiniteness and uncertainty in the statement of the causes of action, and the joinder of two causes in the same count; and of the court's action thereon it complains.

[1] The sufficiency of a declaration indefinitely stating a good cause of action cannot, with us, be tested by demurrer, but only by a demand for a bill of particulars containing a more specific statement of the cause imperfectly averred as the basis for recovery. Section 46, c. 130, Code (sec. 4903); Clarke v. Railroad Co., 39 W. Va. 733, 742, 20 S. E. 696; Transportation Co. v. Oil Co., 50 W. Va. 612, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895; Jacobs v. Williams, 67 W. Va. 377, 380, 67 S. E. 1113; Gartin v. Coal & Coke Co., 72 W. Va. 405, 78 S. E. 673. Defendant, however, made no motion for an order requiring a specification of the particulars in which plaintiffs claimed defendant had failed to comply with the duties alleged to be so imperfectly assigned. It relied solely on its general demurrer.

Neither declaration definitely distinguishes between the breaches averred or the damages severally attributed to them. The most each pleading attempted was merely a statement of the implied covenants of the lease, and defendant's failure to perform them, whereby plaintiffs suffered damage in the amount stated in the ad damnum clauses. Nevertheless it cannot reasonably be said they are insufficient to impart adequate notice of the causes assigned as the basis of the action; for, while the rules of good pleading require certainty in the averment of the material facts relied on, only such circumstantial accuracy is necessary as will reasonably afford notice of what is intended to be proved. Certainty to a common intent is all that is required. If intelligible to a person of ordinary understanding, and sufficient to afford him, the court, and the jury the means of determining what is intended, the pleading is sufficient. Moreover, in respect of matters peculiarly within the knowledge of defendant, he cannot be heard to complain, unless the averments are so uncertain as not to disclose the essential elements of the cause of action he is required to answer, or are so vague and indefinite that they cannot be said to state any cause of action sufficient to warrant a recovery. 31 Cyc. 72, 282; Railroad Co. v. Lawrence, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768; Railroad Co. v. Tyree, 110 Va. 38, 65 S. E. 500; Transportation Co. v. Oil Co., supra; Clarke v. Railroad Co., supra.

Nor can duplicity in a pleading, that being defendant's second ground of demurrer, be reached in any manner except as provided by section 46, c. 130, Code (sec. 4903), unless, as in Knotts v. McGregor, 47 W. Va. 566, 35 S. E. 899, there is a misjoinder of two inconsistent causes of action. There plaintiff sued for damages occasioned by breaches of the implied covenant for quiet enjoyment of leased premises—one by the testator, one by his executrix after his death. That case holds that, unless plaintiff amends his pleading by striking one or more counts from his declaration, or elects to proceed only on one assignment of the breaches averred in one count, a demurrer will lie to such declaration as a whole or to any of its counts. Generally, however, duplicity is a defect in form only, and could be taken advantage of at the common law only by special demurrer, now abolished with us by section 29, c. 125, Code (sec. 4783); Coyle v. Railroad Co., 11 W. Va. 94; Sweeney v. Baker, 13 W. Va. 158, 200, 31 Am. Rep. 757; Poling v. Maddox, 41 W. Va. 780, 786, 24 S. E. 999; Martin v. Railroad Co., 48 W. Va. 542, 37 S. E. 563; Gartin v. Coal & Coke Co., supra.

Evidently, in the original and to some extent in the amended declaration, the pleader's main object was recovery for drainage; and the trial of the case seems to have proceeded as if that were the sole purpose of the action. Both do aver existence of the two implied covenants for diligent operation and for protection from drainage, and defendant's breach of each of them. But, in the original declaration, the duty requiring diligence in development is merely incidentally stated. The charge made in it is that "there has been drawn from under the lands of these plaintiffs" their royalty, "at least fifteen thousand dollars worth," which royalty oil has been "delivered to the respective owners of said adjoining tract, whereby plaintiffs have lost and been deprived of great gains which might and otherwise would have arisen and accrued to them from the sale and delivery of" such royalty "had defendant drilled offset wells or sufficient wells upon the said premises to develop the same and to protect them from drainage against the said four wells" operated on adjoining farms. The theory as to drainage seems to permeate the amended

declaration also. After specifying the wells drilled on the several tracts, including those on plaintiffs' land, it avers "no wells other that the three mentioned were drilled by defendant to develop the said farm and protect it from drainage," pursuant to the implied covenants of the lease of the breach of which complaint is made, "but that on the side of said premises next to the said four wells" on adjoining tracts "no drilling was done by the defendant, nor was any well drilled as an offset against any one of the aforesaid wells, and the said four wells have been operated continuously since they were drilled, through which plaintiffs' oil is being taken by drainage, notwithstanding" defendant "has been in possession of the said premises under the assignment from the said Freeman during all the time" the four wells on the adjoining tracts "have been producing oil and draining plaintiffs' land." And, after averring failure by defendant to perform its covenants by properly developing said lands for oil and properly protecting them from drainage of oil through the wells aforesaid on adjoining lands by offset wells to each and every of said wells, the declaration concludes, "whereby and by means whereof the plaintiffs have been damaged in a large sum, to wit, fifteen thousand dollars," and they "say that by reason of the location of the aforesaid wells near the line of these plaintiffs as aforesaid there has been drawn from under the lands of these plaintiffs their" share of the royalty in the oil, "at least fifteen thousand dollars worth as aforesaid, which said royalty oil has been drawn from under their land and been delivered to the respective owners of said adjoining tracts, whereby plaintiffs have lost and been deprived of great gains which might and otherwise would have arisen and accrued to them from the sale and delivery of said royalty to them had the said defendant drilled offset wells or sufficient wells upon said premises to develop the same and to protect them from drainage against the said four wells."

[2] Thus, it will appear, as suggested, that the chief purpose of this proceeding is a recovery of the value of the oil extracted from the leased premises through wells operated on contiguous lands, although by indefinite and uncertain averments the declaration does charge a breach of the implied covenant for developments sufficient to extract all oil discoverable upon the premises demised. As against this indefiniteness, defendant directed its objection under color of a general demurrer, which, as we have seen, is not available to it. And, even if the defect were so obvious as reasonably to justify allowance of a motion, if made in due time, and none was made, for a more definite specification of the cause or causes of action, no advantage can now be taken of it, under the statute of jeofails, after judgment; because, for reasons stated, the defects urged against the declarations in this action could not be regarded on demurrer. Section 3, c. 134, Code (sec. 4977); Holliday v. Myers, 11 W. Va. 276; Fulgham v. Lightfoot, 1 Call (Va.) 250; Improvement Co. v. Karn, 80 Va. 589; Taylor v. Stewart, 5 Call (Va.) 520; Spengler v. Davy, 15 Grat. 381.

[3] The disposition of these defects leads to the inquiry as to the other assignments of error. We will first consider the effect of the special findings of the jury upon its general verdict. The statute authorizing this method of procedure (section 5, c. 131, Code [sec. 4909]) says:

"Where any such separate verdict or special finding shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

By its negative reply to the interrogatory whether defendant failed "to drill wells upon the plaintiffs' land to properly protect" it from drainage of oil into specified wells on other lands, "and if so how many barrels of oil" plaintiffs lost "by reason of such failure," the jury eliminated any further inquiry as to damage suffered by plaintiffs from drainage. Virtually, they said there was no loss from that source. Nor does any question now arise as to the correctness of the jury's response to that inquiry. The evidence did not warrant a different answer.

[8-9] Although to the question, "Did the defendant fail to properly drill and develop the land of the plaintiffs, and if so how many barrels of oil did it fail to deliver to them by reason of such failure?" the jury replied, "Yes," evidently as to the first proposition, and, as to the second, "The number of barrels we cannot determine," they nevertheless did fix the sum of $7,000 as compensation in damages for such failure, although in effect they conceded the insufficiency of the proof upon which to base their judgment as to the quantity of oil which defendant ought to have produced from wells not drilled which it should have drilled. Evidently, the court deemed a reasonably accurate ascertainment of the quantity of oil defendant ought to have produced but did not produce, as an essential element for recovery in the action; for, by an instruction propounded on plaintiffs' motion, the jury was required to ascertain:

"(1) The number of additional wells, if any, the defendant should have drilled on plaintiffs' land to sufficiently develop it, and the time when such wells should have been completed; (2) how much oil such additional wells would have produced from commencement of production to the bringing of this suit; and (3) the value of that oil in the Griffithsville field at the various times it would have been sold if it had been produced."

One of these elements, so deemed essential, the jury said it could not determine from the evidence before it; and we find no data from which a different conclusion could have been reached. Without such data, it is difficult to perceive the existence of any substantial basis for the award of damages fixed as compensation for delay in productive opera-

tions on the leased premises. A jury cannot mulct a suitor in damages where the evidence furnishes no reasonably accurate or substantial basis for the ascertainment and computation of the loss sustained by the breach of duty complained of. Otherwise, their verdict must be deemed to have resulted from the exercise of a mere arbitrary conclusion, one based on no substantial foundation, or, as in this case, upon proof insufficient to show breach of any duty due from defendant to plaintiffs. Construing the two responses to the dual interrogatory mentioned in the light most favorable to plaintiffs, we cannot understand how or why they were entitled, in any aspect of the case as presented, to a verdict for more than merely nominal damages. Because, although by the first answer the jury said defendant had failed to drill as many wells on plaintiffs' land as it ought to have drilled under the implied covenants of the lease, by the second it virtually said plaintiffs had failed to furnish any proper basis for estimating the damages arising out of such breach. We reversed the judgments reviewed in Bess v. Railroad, 35 W. Va. 492, 14 S. E. 234, 29 Am. St. Rep. 820, and Douglass v. Railroad, 51 W. Va. 524, 41 S. E. 911, the first because of the jury's negative response to the inquiry as to the name and official relation to defendant of the agent to whose assault the injury sued for was attributed, the second because the jury could not properly ascertain damages under the proof submitted to them. To avoid any misconception, in this connection, it may be observed, we do not express the opinion that, to entitle plaintiffs to recover, they must definitely prove the extent of the injury, if any, sustained by them by reason of unduly delayed developments on their lands; for only such proof as the case will reasonably admit of is required.

Evidently, plaintiffs have misconceived the theory on which they ought to have prosecuted their case to final determination. The course pursued by them apparently was based on the idea that the number of wells necessary for the extraction of all the oil from their land and the quantity of oil that ought to have been, but was not, produced by defendant therefrom prior to institution of this action, constituted the real ground on which they had the right to predicate their claim for damages; for to this end they directed such evidence as tends to support such recovery. Whereas they are entitled only to such damages as they sustained by defendant's failure, if any, to exercise an honest judgment in proceeding with the necessary explorations on the lands and the extraction of oil therefrom, taking into consideration the subject-matter of the lease, the character of the mineral products, the nature of the oil-bearing sand in that territory, the situation of the parties, the cost of drilling, the current prices of oil produced, the location of the land, and all the surrounding circumstances and conditions attendant upon operations necessary for the extraction of such mineral products. In other words, the authorities hold that if, under such circumstances, the operator exercises a sound and honest judgment, and not unreasonable or arbitrary one, in continuing operations for mineral oils, he has faithfully discharged the duties implied devolving upon him by virtue of the lease, although he may not exercise that high degree of diligence which the exaggerated expectations of the landowner may demand. Even when charged with undue delays, the proof must be clear, positive, and convincing, in order to warrant recovery.

Brewster v. Zinc Co., 140 Fed. 801, 72 C. C. A. 213, states the reasonable rule to be:

"Where the object of the operations contemplated by an oil and gas lease is to obtain a benefit or profit for both lessor and lessee, neither is, in the absence of a stipulation to that effect, the arbiter of the extent to which or the diligence with which the operations shall proceed; but both are bound by the standard of what, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both."

And, on the same subject, we said, in Jennings v. Carbon Co., 80 S. E. 368:

"To the judgment of the operator, when, and where, and how many wells he shall drill, deference is justly due. But the judgment must be an honest, not an arbitrary, judgment. He must deal with the leased premises, not exclusively to serve his own peculiar and selfish interests, unmindful of his obligations to the source from which his authority is derived, but so as to promote the mutual advantage and profit of himself and the lessor"; and, to excuse the operator, his judgment "must conform to that judgment generally exercised by other operators under similar circumstances and conditions, and in view of the real purpose and intention of the parties when entering into the agreement," and not merely the opinion of those not so engaged.

This statement of the general and reasonable rule finds material support in Harris v. Oil Co., 57 Ohio St. 118, 48 N. E. 502, wherein it is said:

"The development and protection of lines, which is * * * implied when the lease is silent, is such as is usually found in the same business of an ordinarily prudent man, neither the highest nor lowest, but about the medium or average."

To the same effect is Guffey v. Chaison, 48 Tex. Civ. App. 555, 107 S. W. 609. Of like import, also, is the language of the trial court approved in Bradford v. Blair, 113 Pa. 83, 4 Atl. 218, 57 Am. Rep. 442, saying:

"If the knowledge and skill of persons engaged in the oil producing business and the machinery and appliances then known, and the prices of the product, were such that the business could not then be carried on with a profit to the defendant after giving to the plaintiff the agreed royalty, then we think the defendant was not bound to prosecute the same to any greater diligence than was done." Core v. Petroleum Co., 52 W. Va. 276, 43 S. E. 128; Ammons v. Oil Co., 47 W. Va. 610, 628, 35 S. E. 1004.

[4, 5] So that, in these particulars, the verdict rendered was based upon evidence whol-

ly insufficient to sustain it; because, as clearly appears, the proof was directed solely to the number of wells necessary, in the opinion of the witnesses testifying, for the full development of the leased premises for oil and gas, and not to the degree of diligence defendant ought to have exercised. The only exception to this character of proof was the testimony of one or two witnesses, who did express the opinion that the drilling of each additional well by them deemed essential should have followed within 60 days after the completion of the preceding one. As they fixed no basis therefor, the opinion was wholly arbitrary. But, if not arbitrary, it does not measure up to the standard deemed material and requisite by the authorities cited. Has the operator been duly diligent under all the circumstances requiring him to exercise a reasonable judgment as to the proper course to pursue in regard to continuity and extent of developments? Is the vital question. Not, how many wells are necessary to withdraw all the oil from any particular tract of land? Or, differently stated, has the operator exercised that degree of diligence reasonably and ordinarily exercised by prudent operators engaged in the same line of business under the same or similar circumstances and conditions, keeping in view the covenants of the lease and the mutual benefit and advantage of the parties to the contract? If he has been thus diligent, plaintiffs cannot recover; otherwise, they can recover for the loss sustained by them as the result of the unreasonable delay in the drilling of wells and the production of oil on their lands.

There are cases, prescribing the measure of damages for failure faithfully to prosecute developments on leased premises, not in accord with the views we have expressed. These are Bradford v. Blair, 113 Pa. 83, 4 Atl. 218, 57 Am. Rep. 442, and Daughetee v. Oil Co., 151 Ill. App. 102, affirmed 263 Ill. 518, 105 N. E. 308. These cases state the measure of damages to be as prescribed in plaintiffs' instruction. See, also, White on Mines and Mining Rights, 235. The lease involved in Bradford v. Blair expressly required the lessee, after discovery of oil, "to continue, with due diligence and without delay, to prosecute the business to success or abandonment; and, if successful, to prosecute the same without interruption, for the common benefit of the parties." And it presented to the jury the question as to whether defendant had been duly diligent. The measure of damages there prescribed was approved in the Illinois case. Without citing any authority therefor, White says only:

"The measure of damages which the lessor would be entitled to recover for violation of the covenant to drill sufficient wells to properly test the land for oil would, ordinarily, be the rent or royalty which would have resulted to the lessor had the lessee complied with such covenant, and upon this question expert evidence would be competent as to the probable amount of, or whether any, recovery should be allowed."

In effect, he concedes that mere delay in drilling is not per se actionable. So Howerton v. Gas Co., 81 Kan. 553, 106 Pac. 47, 34 L. R. A. (N. S.) 34, holds that "the contract contemplated * * * other wells should be drilled and operated with reasonable diligence to utilize the lease," and that "four years' delay under the circumstances shown was unreasonable." That was an equitable proceeding to cancel the lease for failure to exercise diligence in the production and marketing of gas. The case prescribes no measure of damages for delay in development.

Indeed, the very absence of reported cases prescribing such measure or standard for the ascertainment of damages readily leads to the conclusion that persons interested in the result of operations for mineral oils are disposed to accede to the judgment of the lessee exercised as to the diligence and extent with and to which such operations should be prosecuted. While there are many such leases and many developments under them, few actions based on delay in development have reached appellate courts of the different states. It is therefore reasonable to infer that lessors willingly defer to the judgment reasonably exercised by the lessee. The cases involving rights under such leases are ordinarily limited to inquiries as to forfeiture, abandonment, drainage, or fraudulent conduct on the part of the lessee resulting in delay of developments. Excepting the cases cited, we find none prescribing the measure of damages the lessor is entitled to recover for nondevelopment, and think the measure they prescribe is not the proper one in cases of this character. We are not now speaking of what is the measure of damages recoverable for drainage through wells operated on other lands near plaintiff's boundary line. That question, as heretofore observed, is not before us; the jury having said no such drainage had occurred.

But, surely, it would be grossly unfair to permit recovery of damages to the extent allowed by the jury in this case. It scarcely is conceivable that plaintiffs have suffered such loss from lack of wells on a tract of land containing only 100 acres. To have that effect, the tract must indeed be richly productive of minerals. At the rate ascertained for one-sixteenth, the production from it would reach $112,000. Conceding that result remotely probable, or as in any event possible, are not plaintiffs still entitled to another sixteenth from that quantity when produced? If so, they will receive twice the sum fixed by the contract as compensation for right of exploration on their land. The verdict is not for the share of oil produced; it is damages for failure to produce. Clearly, then, plaintiffs' share of the production is not the true measure of the injury suffered. To allow double damages for the same breach of a contract silent on the subject of compensation therefor is wholly irreconcil-

able with and disproportionate to a due regard for justice and right. We cannot conceive such result as reasonably possible under any circumstances. The proof shows no foundation for it. Indeed, no testimony justifies any such finding. Plaintiffs may not have suffered any loss. None is shown, none proved.

The jury arbitrarily fixed the amount named. It had not the slightest evidence to support it. How plaintiffs were injured they do not tell us. As said before, they limited the inquiry to an ascertainment of the number of wells not drilled which witnesses say they think defendant ought to have drilled, a mere arbitrary conclusion. Plaintiffs assumed the burden of showing, by competent proof, the extent of the injury to them resulting from delay in drilling wells under the implied provisions of the lease. Yet they made no effort to produce any evidence on that feature of their case. Not a word spoken by them, or by any other witness, tends in the slightest degree to show they suffered any damage from operations deferred. So far as disclosed, they have lost nothing more than interest on the value of productions obtainable had defendant exercised that degree of diligence we have suggested as due under certain conditions and circumstances.

Moreover, additional wells may not produce an ounce of oil, or they may produce great quantities of it. If none, the lessee loses the cost and expense incident to the operation; if in paying quantities, the lessor obtains his share without expense. But, as the operator assumes all the risk and burdens of a hazardous business, and the lessor no risk, no burden, a verdict without merit because based on evidence wholly insufficient under any view of the case cannot and ought not to be permitted to stand as a foundation for the judgment rendered thereon.

We have said nothing regarding defendant's instructions, the admission of evidence, or the existence of the implied covenants in oil and gas leases; because what has been said virtually disposes of the first two, and no question is raised as to the other. The authorities uniformly concede the existence in oil and gas leases of covenants for protection against drainage and for the exercise of reasonable diligence in promoting production on the lands leased. Brewster v. Zinc Co., supra; Jennings v. Carbon Co., supra.

Being based on a wrong theory, the judgment is reversed, the verdict set aside, and a new trial awarded, to be governed by the principles herein announced.

POFFENBARGER, J. (concurring). The claim for damages on account of alleged drainage wholly fails for want of proof. The opinion of the court concedes that, under circumstances, not established by the evidence in this case, the lessee, under a lease, such as the one involved here, containing no express covenant to drill additional wells or to operate the land diligently for oil, might recover damages for nondrilling of additional wells. Though some of our decisions contain dicta in agreement with this theory (Hall v. South Penn Oil Co., 71 W. Va. 82, 76 S. E. 124, and other cases there cited), I am of the opinion, after mature consideration, that there is no such right of action. It is not affirmed, as matter of decision, by any of our cases. What was actually decided is that the lessee has no remedy in equity, under such circumstances, and the observation that there is remedy at law must be taken subject to a very important qualification, namely, if the plaintiff has any right to relief at all. Though these observations read as if the court has said there was such a right, they do not amount to decisions affirming it. Accurately expressed, the view was that, if the plaintiff had any right, his remedy for violation thereof was in a court of law.

The implied covenant on the part of the lessee to operate the lease and make it mutually beneficial to himself and the lessor has been affirmed, as matter of actual decision, only in cases involving the doctrine of abandonment. These cases say the lessee cannot hold on to the lease, after he has ceased operations thereon. He is under an implied covenant to make the lease productive and so beneficial to the lessor as well as himself. None of them undertake to say the implied covenant imposes duty to do more than make the lease produce oil or gas in paying quantities. Not one of them undertakes to say the lessee must make it beneficial in any certain degree. The degree of benefit or extent of production did not arise in any of them. In each there had been an actual, legal abandonment, or such an abandonment was asserted, and the issue was whether or not the lessee had abandoned the lease and thus reinvested the lessor with possession and control of the leased premises for oil and gas purposes. Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566; Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107; Huggins v. Daley, 99 Fed. 613, 40 C. C. A. 12, 48 L. R. A. 320; Munroe v. Armstrong, 96 Pa. 307; Conrad v. Morehead, 89 N. C. 31; Petroleum Co. v. Coal Co., 89 Tenn. 381, 18 S. W. 65.

Extension of this covenant, raised by necessary implication, for the purpose of testing the question of abandonment, was a natural error on the part of the lessors and their attorneys, due to the generality of the terms in which it was expressed. The lessor, desiring something more than had ever been legally accorded him, readily and naturally seized upon it as justification for his claim, and the court, having no occasion either to affirm or deny its validity in the equity suits,

in which it was presented, rather conceded it as mere matter of opinion, not decision, without inquiry as to the soundness of the claim. Extension of the covenant cannot be justified upon the ground of necessity, arising out of the terms of the lease. In cases of abandonment, there is such necessity, or there must be such a covenant, else the lessee gets from the lessor something for nothing. There can be no such result as long as the lessee produces oil or gas in paying quantities. Such production makes the lease mutually beneficial.

Implied covenants can only be justified upon the ground of legal necessity. Such a necessity may arise out of the terms of the contract or out of the substance thereof. One absolutely necessary to the operation of the contract and the effectuation of its purpose is necessarily implied, whether inferable from any particular words or not. It is not enough to say it is necessary to make the contract fair, or that it ought to have contained a stipulation which is not found in it, or that, without such covenant, it would be improvident or unwise or would operate unjustly; for men have the right to make such contracts. Accordingly, courts hesitate to read into contracts anything by way of implication, and never do it except upon grounds of obvious necessity.

"All authority opposes construction, or the reading in of matter not expressed, when it is not rendered necessary in some way or for some reason." White v. Bailey, 65 W. Va. 573, 576, 64 S. E. 1019, 23 L. R. A. (N. S.) 232; United States v. Fisher, 2 Cranch, 358, 2 L. Ed. 304; Jackson v. Lewis, 17 Johns. (N. Y.) 475; Turnpike v. People, 9 Barb. (N. Y.) 161; Morgan v. Railroad Co., 96 U. S. 716, 24 L. Ed. 743.

In Hamlyn & Co. v. Wood & Co., 2 Q. B. 488, Lord Esher said:

"I have for a long time understood that rule to be that the court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense I have mentioned."

In the Moorcock, 14 P. D. 64, Bowen, L. J., said:

"The implication which the law draws from what must obviously have been the intent of the parties, the law draws with the object of giving efficacy to the transaction and prevent such a failure of consideration as cannot have been within the contemplation of either side."

In Sterling v. Maitland, 5 B. & S. 840, Chief Justice Cockburn stated the rule as follows:

"I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative."

This was quoted and approved by Kay, L. J., in Hamlyn & Co. v. Wood & Co., 2 Q. B. 488. Bowen, L. J., said in Oriental Steamship Co. v. Tylor, 2 Q. B. 518:

"The case comes within the well-known rule that where the contract as expressed in writing would be futile, and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual."

In Mackay v. Dick, 6 App. Cas. (1881) 251, Lord Blackburn said:

"I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances."

The limitations upon the rule have been expressed in terms no less clear. Lord Esher said in Butler v. Manchester, Sheffield & Lincolnshire Railroad Co., 21 Q. B. D. 207:

"No court has a right to imply any term as between parties which was not clearly and obviously within the contemplation of both parties."

In Hamlyn & Co. v. Wood & Co., Kay, L. J., said:

"The court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the court is necessarily driven to the conclusion that it must be implied. To state the rule in any wider terms would be going, I think, beyond what is justifiable on principle."

This rule amply justifies recognition of an implied covenant to operate the lease and make it produce oil or gas in paying quantities. Otherwise the lessee would hold the lessor's land for nothing, a thing the parties could not possibly have contemplated. It is born of necessity that something be done under the lease. No such necessity underlies the claim of a covenant to take out the oil as fast as it is practicable or possible to extract it, for, as long as oil or gas is produced in paying quantities, the expectation of the lessor is measurably fulfilled. In the other case, it is not. This marks the distinction very clearly. As long as oil is flowing in paying quantities, the lessor derives a benefit. If the lessee leaves the premises and oil ceases to flow, the lessor gets nothing, and his land is held to no purpose, except the mere hope of speculative profit on the part of the lessee. While the oil flows in paying quantities, the letter of the contract is fulfilled. It provides that the lessee shall have the use of the premises for oil and gas purposes, for a fixed term, and as long thereafter as oil and gas is produced in paying quantities. That condition, production of oil or gas in paying quantities, is all the landowner expressly stipulated for. For all that anybody can see or know, he has relied, for further benefits and profits, upon the inducement which the land itself, as oil or gas territory, holds out to the lessee, assuming

the sufficiency thereof to secure the drilling of as many wells as are profitable. Who can say with any degree of certainty he did not? How does it conclusively appear that he reserved the right to require more wells than the lessee should see fit to put down, or faster drilling than the lessee cares to do? Nothing in the terms of the lease or circumstances of the parties drives or forces the court to say he did either. The assertion thereof is mere speculation.

That such inducement is ordinarily sufficient is evidenced by the fact that the great oil fields of this state and of the country generally have been developed and completely operated, to the satisfaction of lessors, under provisions of this kind, construed as leaving to the lessee the determination of the number of wells and the time and place of drilling. Under the thousands of leases taken in this form, complaints of lack of diligence on the part of the lessees have been rare. In only three or four instances have lessors come to this court with complaints on grounds of refusal of the lessees to drill additional wells, and, in almost every such case, an effort was made to establish drainage as the real ground of relief. Such was the complaint in Hall v. South Penn Oil Co., 71 W. Va. 82, 76 S. E. 124; Ammons v. South Penn Oil Co., 47 W. Va. 610, 35 S. E. 1004; Harness v. Eastern Oil Co., 49 W. Va. 232, 38 S. E. 662; Core v. Petroleum Co., 52 W. Va. 276, 43 S. E. 128. And, in this case, the principal grievance set forth in the declaration is the unsustained allegation of drainage. The meagerness of complaints of this kind strongly argues the sufficiency of the hope of profit to the lessee as an inducement to the drilling of additional wells. In most of these complaints, the territory was apparently worthless, and the efforts were to compel the lessees to spend vast amounts of money on the mere hope of returns and contrary to their judgment. The hundreds of leases that have come into this court, in the course of litigation, are nearly all in the form of the one here involved, and this signifies the inability of landowners to secure such stipulations for development according to any prescribed standard. In a few rare cases, stipulations for additional wells to the extent of two or three or four have been found; but such instances have very seldom occurred. The hazard, the risk, is all on the part of the lessee. The landowner risks nothing except the use of his land. The oil business is extremely hazardous to the operator, wherefore it is not an easy matter to obtain a contract for additional wells. Such contracts are decidedly exceptional. Very few of them have ever been seen. The following observation of Mr. Justice Mitchell, dissenting in Kleppner v. Lemon, 176 Pa. 502, 35 Atl. 109, quoted with approval in Core v. Petroleum Co., 52 W. Va. 276, 43 S. E. 128, accords with the incontrovertible facts:

"The lessee has to bear the cost of putting down wells, and his interest is to proceed carefully, with due regard to expense and probable returns, while the lessor's interest is to have search and experiment without regard to present cost. The decision in regard to such matters belongs primarily to the lessee. It is a proper subject for agreement, and when the parties have agreed what shall be done their rights are not subject to the judgment of any court to fix a different standard. If the parties to the present controversy had expressly stipulated that one well should be sufficient for the whole tract, no court would venture to enlarge the test by directing another to be put down at the lessee's expense, yet the covenant of the lease amounts to just that, as I understand the learned court below to admit. I would reverse this judgment as a flagrant violation of the liberty and sanctity of contracts by raising a purely factitious equity to enable the complainant now to make a better bargain at the defendant's expense than he chose or was able to make for himself at the time."

Having demonstrated inhibition of the proposed extension of the implied covenant by the limitations of the rule governing such covenants, I now apply two other familiar rules of interpretation, giving effect to the words of the contract and force to establish customs and usages. By the terms of the agreement, it is to continue as long as oil or gas is produced from the land in paying quantities. This clearly negatives any implication of right in the lessor to require production in any greater quantity. Compliance with that condition continues the estate in the lessee. As long as it is complied with, the lessor cannot forfeit the lease. McGraw Oil Co. v. Kennedy, 65 W. Va. 595, 64 S. E. 1027, 28 L. R. A. (N. S.) 959. For the same reason, we must say, to be consistent, he cannot require more than compliance with the prescribed condition, unless there is danger of loss by drainage.

This contract was made with full knowledge of the usage and custom of lessors under such agreements, to leave the locations and number of wells and times of drilling to the determination of the lessees. It is a usage so general as to require judicial notice thereof. Practically all of the tens of thousands of leases under which the vast oil and gas fields of this state have been developed have been made in the form of this one. The lessors never so much as thought of the alleged right here asserted. They left it all to the lessees, and, so interpreted and executed, these leases have adequately and fully protected the lessors and effectuated full, complete, and diligent development of their lands. The interest of the lessee has been a sufficient inducement in almost every case. It has been in this case. This court so finds and decides.

An established usage known to the parties to a contract is a part of the contract, unless excluded by its terms. Anderson v. Lewis, 64 W. Va. 297, 61 S. E. 160; Cobb v. Dunlevie, 63 W. Va. 398, 60 S. E. 384; Johnson v. Burns, 39 W. Va. 658, 20 S. E. 686; Governor, etc., v. Withers, 5 Grat. (Va.) 24, 50

Am. Dec. 95; Hansbrough v. Neal, 94 Va. 722, 27 S. E. 593; Richlands & Co. v. Hiltebeitel, 92 Va. 91, 22 S. E. 806; Anson, Con. 246 et seq. (2d Ed.) 322 et seq.

(168 N. C. 433)

FOY et al. v. STEPHENS et al. (No. 173.)

(Supreme Court of North Carolina. March 24, 1915.)

1. PLEADING ⊂⊃192 — COMPLAINT — SUFFICIENCY.

A pleading is not so defective as to involve dismissal of the action on demurrer unless it entirely fails to state a cause of action, and cannot be amended so as to do so.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 408–427; Dec. Dig. ⊂⊃192.]

2. VENDOR AND PURCHASER ⊂⊃341—BREACH OF CONTRACT—FRAUD.

Where defendants sold a tract of land, which they represented to contain 5,000 acres, to plaintiffs, who placed cash in the hands of a third person with the understanding that it should not be delivered to defendants until the land had been surveyed and title declared satisfactory by a lawyer, and delivered to defendants a note with the understanding that it should not be used until the same conditions had been fulfilled, and a mortgage, which was recorded, and where defendants' title to the lands was so defective that they could not procure an attorney's certificate of clear title, while the acreage of the lands was greatly deficient, a complaint setting forth such facts alleged a cause of action justifying the cancellation of the note and mortgage and return of the money, either on the ground of breach of contract or on the ground of fraud, necessarily implied in the allegations of the complaint, that defendants knew their title was defective, and that the tract did not contain 5,000 acres, although no direct allegation of intent to deceive was made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008–1017; Dec. Dig. ⊂⊃341.]

Appeal from Superior Court, Craven County; Peebles, Judge.

Action by W. J. Foy and C. E. Ipock against A. H. Stephens and others. Judgment on demurrer for defendants, and plaintiffs appeal. Reversed and remanded, with instructions.

The complaint and the answer were read at the trial, and then the defendants demurred ore tenus upon the ground that the complaint failed to state a cause of action. His honor sustained the motion and dismissed the action.

Guion & Guion, of Newbern, for appellants. D. L. Ward, of Newbern, and Robert Ruark, of Wilmington, for appellees.

BROWN, J. [1] The only question presented relates to the sufficiency of the complaint to make out a cause of action. We have held that a demurrer will not be sustained, to the extent of dismissing the action, unless it entirely fails to state a cause of action. If in any portion of it it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements; for contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient. Brewer v. Wynn, 154 N. C. 472. This case is affirmed and cited with approval in the recent case of Hoke against Glenn, S. E., vol. 83, at page 808. Where it is manifest that the complaint defectively states a good cause of action, and the defect can be cured by amendment, the courts will allow the amendment rather than dismiss the action. This is in the interest of justice, and the speedy trial of actions.

[2] The complaint states substantially these facts: That the defendant Stephens contracted to sell certain tracts of land to the plaintiff for $24,000; at the time representing to the plaintiff that the said lands had been fully surveyed and plotted, and exhibited to plaintiffs a blueprint thereof, which survey purported to cover one entire tract or body of land containing 5,000 acres. The defendant further represented that he had a good and indefeasible title to the land. The plaintiffs further allege that they had no knowledge or information whatever concerning the acreage, boundaries, or title to the land other than that imparted by the defendant, that they agreed to purchase said land at the price named, upon condition that the tract contained the acreage as represented, and that the title was good and indefeasible. It was agreed between the plaintiffs and the defendant that the plaintiffs should proceed to survey and plot the land and employ a lawyer to investigate the title upon the agreement of the defendant to convey the full boundaries and acreage by deed in fee. The defendant executed to the plaintiff a deed, which was duly recorded. The plaintiffs further allege that it was agreed that the plaintiff Foy pay into the hands of Geo. H. Roberts $7,000, to be held by him to await the survey of the land for the purpose of ascertaining the acreage, as well as determining the title. It was agreed that D. E. Henderson, an attorney, should investigate the title and the money should be paid over upon his certificate that the titles to said land were good and indefeasible. Upon like condition the plaintiff Foy executed his note for $4,000, which was deposited as aforesaid, and the sum of $1,000 was paid by Foy to the attorney, as per agreement with the defendant, to pay attorney's fees and expenses. the residue, if any, to be turned over to the defendant in case the purchase was finally consummated. The plaintiff Ipock executed his note for $12,000, secured by mortgage on his one-third interest in said lands so contracted to be conveyed. This note was de-

livered to the defendant with the distinct understanding and agreement that the defendant was to hold the same to await the report of the attorney as to the acreage, boundaries, and title to the land. The plaintiffs further allege that it turned out, upon a survey of the said land, that the whole acreage thereof was 3,315 acres, and that by actual survey out of that acreage 2,109 acres were held and claimed by superior titles, leaving only 1,206 acres, and the title to that was reported by the said attorney to be defective and insufficient; that said attorney reported that the whole of said acreage was defective in title, and he refused to give certificate of a good title thereto. The plaintiffs further allege that the defendant well knew, at the time he made the representations, that the contract did not contain 5,000 acres, and that he did not have a good and indefeasible title thereto; that the said blueprint purporting to be a correct survey of said land was not a true copy of the survey. By these representations the plaintiffs allege that they were deceived with reference to the acreage and boundaries of the land, as well as to the title. The plaintiff alleges repeatedly that the defendant Stephens knew that the tract did not contain the number of acres represented, that he knew that the blueprint was an incorrect presentation of the land, and that he knew he had no title to it. The plaintiffs allege that when these facts became known from the report of the attorney, they offered to execute a deed back to the defendant for the said land, and demanded that the said Roberts, with whom the money had been deposited, return the same to them, and that the notes delivered to the defendant Stephens be delivered up for cancellation. The plaintiffs further allege that the defendant has been endeavoring to negotiate the sale of the said note, and that if he is permitted to do so, the plaintiffs would be irreparably injured. The plaintiffs pray for an injunction, enjoining the assignment of the note, that the money be repaid to them by the said Roberts, and that the notes be delivered up to them for cancellation, and for other and further relief unnecessary to mention.

These facts would seem to us amply sufficient to justify, if established, the relief prayed for. They state substantially two causes of action: First. The plaintiff bases his ground for relief upon the contract and agreement of the parties. It is immaterial that the defendant made the plaintiffs a deed for the land, for the plaintiffs offered to reconvey it. It is immaterial that the mortgage executed by Ipock upon his share of the land was recorded. That may be canceled. The point is, was the money deposited with Roberts and the notes delivered to the defendant Stephens upon the terms and conditions stated in the complaint? If Stephens acquired no title to the note, he acquired no title to the mortgage, for the latter is merely security for the former, and if there was no unconditional delivery of the note, the fact that the defendant had the mortgage put on record would avail him nothing. It is said by Mr. Justice Hoke in Gaylord v. Gaylord, 150 N. C. 232, 63 S. E. 1033:

"It is a familiar principle that the question of the delivery of a deed or other written instrument is very largely dependent on the intent of the parties at the time, and is not at all conclusively established by the manual or physical passing of the deed from the grantor to the grantee."

With reference to the delivery of a policy of insurance, the same justice said:

"The fact that a policy in a given case has been turned over to the insured is not conclusive in the question of delivery. This matter of delivery is very largely one of intent, and the physical act of turning over a policy is open to explanation by parol evidence."

See, also, Fortune v. Hunt, 149 N. C. 358, 63 S. E. 82; Tarlton v. Griggs, 131 N. C. 216, 42 S. E. 591, and other authorities cited in Gaylord v. Gaylord, all of which show that the intent and act must concur in making a valid delivery, and that whether such existed is a question of fact to be found by the jury. Floyd v. Taylor, 34 N. C. 47.

The second ground upon which the plaintiffs base their claim for relief is because of the alleged fraud practiced upon the plaintiffs. It is true that the complaint fails to allege that the representations were made with intent to defraud. Such conclusion may be easily inferred, if the allegations of the complaint are established. It is further true that fraud should be positively charged, and not by implication. The representations must not only have been false and known by the defendant to be so, but they must be made with the intent to deceive. Fraud cannot exist, as a matter of fact, where the intent to deceive does not exist, for it is emphatically the action of the mind which gives it existence. Foy v. Houghton, 85 N. C. 172. It is apparent from the allegations of the complaint that the plaintiffs have alleged that the representations were false, and that the defendant knew them to be false, and it is apparent that the plaintiffs intended to allege that they were made with a fraudulent intent. This is a defective statement of a cause of action, and can be cured by amendment. If the plaintiffs rely upon this ground for relief, they will be permitted to amend their complaint so as to charge the necessary purpose to deceive.

His honor erred in sustaining the demurrer and in dissolving the injunction. The cause is remanded, with instructions to proceed in accordance with this opinion.

Reversed.

(168 N. C. 457)

## WARREN et ux. v. SUSMAN et al.

(No. 175.)

(Supreme Court of North Carolina. March 24, 1915.)

1. CHATTEL MORTGAGES ⟸169—CONVERSION BY MORTGAGEE.

Where the seller of mules took a mortgage which gave him no power of sale, his seizure and sale of the animals without a decree of court was a conversion rendering him liable for the value of the animals, as well as for their use after the conversion.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 302–304; Dec. Dig. ⟸169.]

2. MORTGAGES ⟸362 — FORECLOSURE — PURCHASE BY MORTGAGEE.

Where a mortgagee buys in the mortgaged property, through an agent, for an inadequate price, equity will disregard the form and treat the mortgagee as the purchaser.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1080–1084; Dec. Dig. ⟸362.]

3. MORTGAGES ⟸369—FORECLOSURE.

Where a mortgagee in breach of trust bought in the mortgaged property at foreclosure for much less than its value, the mortgagor may either have the sale set aside or recover the difference between the foreclosure price and the value of the property.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1093–1100; Dec. Dig. ⟸369.]

4. APPEAL AND ERROR ⟸1073 — REVIEW — HARMLESS ERROR.

Where property bought in at foreclosure by the mortgagee was transferred to a bona fide purchaser, the rendition of a judgment in favor of the mortgagor for the value of the property, which left title in the mortgagee, is not, if erroneous, prejudicial as to the bona fide purchaser.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240–4247; Dec. Dig. ⟸1073.]

5. MORTGAGES ⟸362 — FORECLOSURE — PURCHASE BY MORTGAGEE.

While a mortgagee may buy in the property in order to prevent a loss, it is a breach of trust for him to acquire the property at less than its value.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1080–1084; Dec. Dig. ⟸362.]

6. APPEAL AND ERROR ⟸171 — REVIEW — CHANGE OF THEORY ON APPEAL.

A party, defeated below, cannot, on appeal, change his theory of the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1063, 1066, 1067, 1161–1165; Dec. Dig. ⟸171.]

7. APPEAL AND ERROR ⟸195—OBJECTION BELOW—NECESSITY.

Though the original complaint sought to set aside a sale of mortgaged premises, defendant, having permitted without objection an amendment whereby plaintiff sought to recover the value of the land, cannot, after trial on the merits, contend that the original complaint was an irrevocable election of the remedy by setting aside the sale.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1149; Dec. Dig. ⟸195.]

8. ELECTION OF REMEDIES ⟸7—ACTS CONSTITUTING ELECTION.

In view of the liberal provisions of Revisal 1905, §§ 507–509, as to amendments, a mortgagor of land, who after foreclosure and purchase by the mortgagee filed a complaint setting forth the facts of the case, did not make an irrevocable election to set aside the sale and not to sue for the value of the land, by praying for the vacation of the sale.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 12; Dec. Dig. ⟸7.]

9. APPEAL AND ERROR ⟸205 — OFFERS OF PROOF—DISCLOSING TESTIMONY EXPECTED.

The exclusion of a question cannot be reviewed in the absence of an offer of proof as to what the witness would have testified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1281, 1282; Dec. Dig. ⟸205.]

Brown, J., dissenting.

Appeal from Superior Court, Pamlico County; Peebles, Judge.

Action by G. W. Warren and wife against B. L. Susman and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

This action was brought to recover the value of certain mules and land sold by defendant, the Washington Horse Exchange Company, under a mortgage given by the defendant to it. There is a power of sale in the mortgage, but it is restricted to the land. It was executed to secure $500, the price of the two mules, for which two notes of $250 each were given on March 9, 1910, one payable November 1, 1910, and the other on November 1, 1911. The transaction took place in Pamlico county where the land is situated and where the mortgage was registered. Plaintiff changed his residence to Carteret county and carried the mules with him. They were seized by the defendant, the mortgagee, carried to Washington, Beaufort county, N. C., and there sold at public outcry for $225. The land was afterwards sold in Pamlico in like manner and bought by the defendant, the mortgagee, through an agent, for $325. The jury returned the following verdict:

"1. What was the value of the mules described in the complaint at the time the said mules were taken into the possession of the defendant, Susman, and the Washington Horse Exchange Company? Answer: $500.00.

"2. What is the highest fair hiring or rental value of said mules? Answer: $50.00 per year.

"3. What was the value of the lands described in the complaint at the time the same was taken into the possession of the defendants? Answer: $800.00.

"4. What is the highest rental value of said lands since the defendants took the same into their possession? Answer: $25.00 per year.

"5. Did E. L. Stewart buy in said lands for the Washington Horse Exchange Company? Answer: Yes.

"6. Did said Stewart pay any money for said lands? Answer: No."

Judgment was entered on the verdict, and defendant appealed.

Z. V. Rawls, of Bayboro, and Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellants. Abernethy & Davis, of Beaufort, for appellees.

WALKER, J. (after stating the facts as above). [1] The mortgage had no power of sale as to the mules, and when the defendant seized and sold them to a third party, it

amounted to a conversion and rendered them liable to the plaintiff for their real value. Otherwise, if the defendant had sold them regularly under a decree of court or under some authority given to that end. Bird v. Davis, 14 N. J. Eq. 467. The jury have found that the mules did not bring a fair price at the sale made by the defendant, but, on the contrary, were worth more than twice the amount they brought at the sale. The defendant is also liable for the value of any use of the mules by it.

[2, 3] As to the land, defendant bought it for itself, though it acted indirectly by an agent. It is the same in equity as if it had bought in its own name. Whitehead v. Hellen, 76 N. C. 99. The plaintiff could elect to have the sale set aside and the property returned to the trust fund, or recover of the defendant, who had sold and bought at the same time, in breach of his trust, the value of the land, where the trustee insists on the validity of the sale and his right to retain the property, and has conveyed it to a third person whose title he also insists is unassailable; otherwise the trustee would be allowed to speculate upon his trust and make an unfair profit out of it, which will not be tolerated by a court of equity. This is held to be the rule in Froneberger v. Lewis, 79 N. C. 426, where the subject is fully discussed. Huston v. Cassidy, 14 N. J. Eq. 320; Smith v. Drake, 23 N. J. Eq. 302. The cestui que trust, in making his election, is not required, in such circumstances, to take the property upon his trustee's terms, or at a price fixed by him, but equity requires that if the trustee elects to stand upon his right as purchaser, instead of surrendering the property to the beneficiary, he must pay the reasonable value of the land, or a fair compensation for the breach of his trust, and this, with greater reason, is true where the trustee has himself subsequently conveyed the land to a bona fide purchaser for value and without notice. Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827; Froneberger v. Lewis, supra. When Froneberger v. Lewis was before this court the first time (70 N. C. 456) the court said:

"It is against the policy of the law to allow an administrator to buy at his own sale. And when he does so, those interested have their election to treat the sale as a nullity—in this case to have the sale set aside and a new sale ordered—or to let the sale stand, and demand a full price" (citing Ryden v. Jones, 8 N. C. 497, 9 Am. Dec. 660, and the trustee was charged accordingly in that case, even though the cestui que trust was present at the sale and assented to it).

[4-6] This suit was heard in the court below upon the theory that the plaintiff had elected to take the value of the land as compensation for the breach of trust by the trustee in buying the land for himself at the sale, and afterwards disposing of it, and it was so submitted to the jury without apparent objection to the issues. The trustee, according to the record, is now insisting that the sale was valid, and that he has conveyed to an innocent purchaser, Felix Lee, as he excepted to the court's intimation that he was not such, and also moved to nonsuit the plaintiff. The court expressly states that the plaintiff has elected to take the value of the land. Although Felix Lee was made a party, he filed no answer, and no issue was submitted concerning his rights, as a bona fide purchaser for value and without notice. His honor told the jury, it is true, that he would submit an issue and to answer it, "No," but it was not, in fact, submitted and answered. Besides, as plaintiff takes the value of the land in the place of the land itself, Felix Lee cannot be prejudiced by the judgment, as he has a deed for the land from the defendant, who purchased it at the sale.

We observe that no issue was tendered and no request for instructions made upon the theory that defendants were entitled to have the same set aside and return the land to the plaintiff. Their whole defense proceeds upon quite a contrary basis, namely, that they have a right to hold the land against the plaintiff, having acquired it under a valid sale, and for this reason they moved for a nonsuit, which could not be based upon any other notion. Another exception taken by defendant was that the proceeds from the sale of the mules were not sufficient to pay the mortgage debt, and therefore it had the right to sell the land and to purchase at the sale. This proved not to be true, but even if it had been, it did not justify the defendant in buying the land at its own sale and afterwards resisting the claim of the plaintiff by denying that he had any right in or to the land, or any equity to have the sale set aside. The case of Tayloe v. Tayloe, 108 N. C. 69, 12 S. E. 836, where the trustee bought property at his own sale, seems to be directly in point. The court there said that the trustee had dealt with the property unlawfully and sold it for a sum of money greatly less than its value, to appellee's injury, and, having failed to dispose of it as the law directed, he was clearly liable for its value.

We do not mean to intimate that a mortgagee may not sometimes buy in property at his own sale to prevent a sacrifice of it by a sale to a third party below its value, as such a course may be necessary in order to prevent a loss to himself and the mortgagor. But he must do so in good faith, and in recognition of the mortgagor's right to avoid the sale, if he elects so to do. Instead of pursuing this course, defendant company at the very outset denied plaintiff's right to anything out and out, and prayed for judgment that they take nothing by their action, but be taxed with the costs. They seized and sold the mules unlawfully, and after becoming responsible, by reason of the conversion,

for their full value, which was sufficient to pay the debt, they nevertheless sold the land under the power contained in the mortgage, bought it in for themselves, asserted their right to hold it free from any interest or claim of plaintiff and conveyed it to a third party, and, as they alleged and maintained in the trial below, for value and without notice, if there was any defect in its title, which was denied. There is nothing in the record, by way of prayers for instructions, exceptions to issues, instructions of the court, or assignment of errors, that raises the question properly as to the defendant's nonliability for the value of the land. The issue as to the value of the land was submitted without objection, and it was raised by the pleadings, as plaintiffs by their amendment to the complaint asked that the value of the land be determined, and that they have judgment for it, and the inquiry was confined to this phase of the case without any objection. The effect of an amendment of a complaint, as superseding the original pleadings, was stated at the last term in Zagier v. Zagier, 83 S. E. 913, and in Warren v. A. & Y. R. Co., 156 N. C. 591, 72 S. E. 481. It is sufficient to say, though, that the case was tried below on the issues as to the value of the property with defendant's full acquiescence, and we hear the case here according to the theory upon which it was tried in the court below. Allen v. Railroad Co., 119 N. C. 710, 25 S. E. 787; Hendon v. Railroad Co., 127 N. C. 110, 37 S. E. 155; Graves v. Barrett, 126 N. C. 267, 35 S. E. 539; State v. McWhirter, 141 N. C. 809, 53 S. E. 734. The whole theory of the defense below is wholly inconsistent with the present contention that plaintiffs should be required to take the land. It is too late to set up this claim, and it does not meet with the favor of the court, and especially since defendant has complicated the matter by other conveyances.

[7, 8] It is suggested, though, with much confidence, that plaintiff made a binding and irrevocable election in the original complaint, and therefore the amendment, which is inconsistent with and repugnant to it, cannot be considered, but no such objection was taken to the pleading by motion to strike out, demurrer, or in any other regular way, which is necessary to raise such a question, and, too, defendant by not objecting consented to the amendment and agreed to the submission of the issue as to the value of the land. In Scott v. Turley, 9 Lea (Tenn.) 631, where a conclusive election or ratification was relied on at first, and an amended or supplemental bill afterwards filed, which was repugnant to it, and presented "the anomaly of antagonistic rights being prosecuted in the same suit," the court held (as the headnote of the case shows) that when the plaintiff brought—

"the agent before the court, repudiating his act and seeking to hold him individually liable for the debt, while insisting at the same time upon the relief sought in the original bill, and the agent answered to the merits, without objecting to the form of suit or setting up the defense of ratification by reason of the course pursued, the principal will be entitled to relief under the bill repudiating the act of the agent. The amended and supplemental bill filed under such circumstances is, in substance, an original bill upon a different cause of action, and, if the defendant, without objection, goes to trial on the merits, must be treated as such."

That defendant has waived the benefit of the election by not availing itself of it by proper pleading is also held in Davis v. Terry, 114 N. C. 29, 18 S. E. 947; Hawkins v. Hughes, 87 N. C. 115. A party cannot take advantage of a defense, which he has ignored or foregone during the entire course of the trial, including the judgment. It is too late, after an adverse verdict and judgment, to take a position which is foreclosed by them, because not presented at an earlier stage of the case in the orderly course of pleading. The authorities clearly show that the objection may be waived by answering to the merits or taking issue thereon. If there is one rule settled by the courts, it is that a party will not be permitted to have two chances, one on a favorable verdict, and another on some supposed defect or irregularity, or even a defense, preceding it. Defendant could not take a chance on a low assessment of value and, when disappointed by the verdict, fall back upon an inconsistent position. It was also required to elect, and must abide by its choice, freely and intelligently made. Besides, the doctrine of election does not apply. It is only enforced when the facts are ascertained and known, but here, by its answer, defendant raised an issue as to the validity of the sale, asserting strenuously that it acquired an unassailable title, and that it had conveyed a valid title to the land by its deed to a purchaser for value and without notice. How could the plaintiff be made to elect, unless he was required to take the risk of an adverse verdict, as to the latter defense. If he had chosen to take the land, and his choice was irrevocable, the jury might have found that Felix Lee was a purchaser for value and without notice, which would have deprived plaintiff of the land. The law will not subject him to this quandary and eventual loss by the happening of some event which could not be foreseen. The rule must operate fairly and equitably or not at all. The very authority relied on to fasten the election upon plaintiff so says:

"If, in attempting and designing to make an election, one puts forth an act or commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, his act or action is not binding. He may, when informed, adopt a different remedy." Enc. of Pl. & Pr. p. 366.

The plaintiff made his election as to the value when he discovered the true situation and the defense from the answer. It may also be said that the authorities are about

evenly divided in number as to whether the mere bringing of a suit is to be considered a conclusive election, the weight of reason being against it, when no one is prejudiced by the change in the form of relief afterwards prayed, the doctrine of election being founded on the idea of an estoppel. In Trimble v. Bank, 71 Mo. App. 467, it was held that:

"An election is in the nature of an estoppel, and unless it is shown by the record of a final judgment, or contains the elements of an estoppel in pais, owing to intervening rights, it will not conclude the party against whom it is invoked" (citing Johnson v. Railroad, 126 Mo. 344, 28 S. W. 870, 26 L. R. A. 840, 47 Am. St. Rep. 675, and other cases, among them Wiggins Ferry Co. v. Railway Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055; Bolton Mines Co. v. Stokes, 82 Md. 50, 33 Atl. 491, 31 L. R. A. 789).

See, also, H. B. L. R. Co. v. Corpening, 97 Ala. 681, 12 South. 295; McCoy v. Stockman, 146 Ind. 668, 46 N. E. 21; J. B. Com. Co. v. K. C. Cont. Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; Spurr v. C. U. Assur. Co., 40 Minn. 428, 42 N. W. 207; Spurr v. Home Ins. Co., 40 Minn. 424, 42 N. W. 206; Norcross v. Cambridge, 166 Mass. 508, 44 N. E. 615, 33 L. R. A. 843; Moore v. Sanford, 151 Mass. 285, 24 N. E. 323, 7 L. R. A. 151; R. U. P. R. Co. v. N. Y., etc., R. Co., 95 Va. 386, 28 S. E. 573; N. G. Bank v. Tyndale, 179 Mass. 390, 60 N. E. 927; Hargadine, etc., Co. v. Warden, 151 Mo. 578, 52 S. W. 593; Matter of McLaughlin, 76 App. Div. 75, 78 N. Y. Supp. 798. In Kehoe v. Patton, 21 R. I. 223, 42 Atl. 868, the court said:

"We do not think, however, that the mere bringing of the suit in equity, it not having proceeded to final decree, amounts to an election (Jenks v. Smith, 14 R. I. 634; Quidnick Co. v. Chafee, 13 R. I. 367, 369), and therefore we are of opinion that the plea is not sufficient. The defendant's remedy is by motion to require the plaintiff to elect whether he will proceed in the suit in equity or by the present action."

Referring to an amendment inconsistent with the original bill, the court, in McDougald v. Williford, 14 Ga. 665, said:

"In courts of justice, equity, and common law, the time will come, and now is, when misleading will never be allowed to prejudice any party; but every case will be ultimately tried upon its real and substantial merits."

The court added that it does not follow that because the original and amended bills are contradictory the amendment will be rejected, but amendments will be liberally allowed to change the nature of the bill and rectify mistakes. Our present Code system was adopted for the very purpose here indicated, and is liberal in its allowance of amendments. Rev. §§ 507-509. It is said to modify the doctrine of election of remedies, 7 Enc. of Pl. & Pr. p. 368, and to require the trial of cases to proceed according to right and justice, rejecting antiquated and refined technicalities. In a case similar to the one at bar, this court held that the proper course was to amend and substitute the last allegation for the first; the two remedies sought being inconsistent. Milton v. Hogue, 39 N. C. 416.

[9] The question asked the witness, as to the controversy about the title, was not answered, and counsel did not indicate what they expected to prove, or that the answer would probably be favorable to them. It, therefore, comes within the rule, so often announced by this and other courts, that unless we can know certainly what is the nature of the evidence proposed to be elicited, we cannot decide as to its competency, and especially as to its relevancy. State v. Leak, 150 N. C. 843, 72 S. E. 567; State v. Lane, 166 N. C. 333, 81 S. E. 620, and cases cited at page 337; In re Smith's Will, 163 N. C. 464, 79 S. E. 977; Dickerson v. Dail, 159 N. C. 541, 75 S. E. 803; Lumber Co. v. Childerhouse, 167 N. C. 34, 83 S. E. 22; A. L. W. Co. v. C. B. & T. Corporation, 138 Ga. 618, 75 S. E. 646; Wadley Southern Railway Co. v. State, 137 Ga. 497, 73 S. E. 741; Manning v. Webb, 136 Ga. 881, 72 S. E. 401; Cutchin v. City of Roanoke, 113 Va. 452, 74 S. E. 403. In Leak's Case, supra, Justice Allen says:

"The exceptions to the refusal to permit the witness to say whether or not the defendant was considered bright, or had the reputation of not having a strong mind, are without merit. There is nothing to indicate what was expected to be proved, or what answer would have been given to the questions, and, so far as we can see, the witness would have answered both questions in the negative."

As far as we can see from the record, if there was any error, it was harmless. The witness, if permitted to answer the question, might have stated that there was no such controversy, or that he knew nothing about it, and it is very probable that he would have so answered.

The other exceptions are without any merit.

No error.

BROWN, J. (dissenting). I agree with the majority of the court that the defendants are liable to the plaintiff for the value of the mules, as the power of sale contained in the mortgage is confined in express terms to the land, and does not extend to the mules. Therefore, having seized and sold the mules without any power of sale, the defendants are undoubtedly liable to the plaintiff for their actual value. But I do not think the defendants are liable for the actual value of the land. Under the well-settled principles of law, the plaintiff must elect as to whether he will set aside the sale and claim the land itself, and its rents and profits, or whether he will affirm the sale of the land and demand its actual value. The original complaint plainly elects to recover the land itself, with its rents and profits, and demands judgment that the sale be declared null and void, and that the deed executed by the defendant Horse Exchange, under the power of sale, be set aside. It is true that, after the defendants had joined issue by filing an answer to that complaint, the plaintiff at October

term, 1914, the term when the case was tried, filed by leave of court, an amended complaint in which they seek to affirm the sale of the land and to recover its value. While the court may allow amendments to pleadings, the amendment cannot be permitted to have the effect of reversing and revoking the election already made in December, 1913, when the original complaint was filed. It is well settled that an election, once made, with knowledge of the facts, between coexisting remedial rights, which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding, upon a remedial right, inconsistent with that asserted by the election. 15 Cyc. 262, citing an array of cases. Speaking of the finality of an election, it is said in the Encyclopedia of Pleading & Practice, vol. 7, p. 364:

"It may therefore be stated as approximately, if not substantially, true that, subject to the exceptions hereafter stated, the first pronounced act of election is final and imperative. It is certainly the established law, in every state that has spoken on the subject, that the definite adoption of one of two or more inconsistent remedies, by a party cognizant of the material facts, is a conclusive and irrevocable bar to his resort to the alternative remedy."

The exceptions to the rule are want of jurisdiction, premature action, mistaken remedy, ignorance of material facts, none of which apply to the facts in this case. When the plaintiff filed his original complant, he had full knowledge of the facts therein stated, and more particularly of the value of the land, as he was its owner and had been for some time.

It does not appear in this record that the defendant consented to the amendment by which the plaintiff was permitted to revoke his election. For these reasons, I am of opinion that the court should set aside the sale and order a resale, instead of giving judgment against the defendant for the value of the land.

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(168 N. C. 466)

JORDAN et ux. v. FAULKNER. (No. 215.)

(Supreme Court of North Carolina. March 24, 1915.)

PARTITION ⇐111—SALE—LIENS — PROCEEDS.

As Revisal 1905, § 2512, declares that the deed of the commissioner conveys to the purchaser the title which the tenants in common had, a sale of land for partition does not destroy liens against the interest of one of the tenants in common, and therefore the proceeds of the sale of the tenants' interest cannot be applied to payment of the liens.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 401–418; Dec. Dig. ⇐111.]

Appeal from Superior Court, Lenoir County; Daniels, Judge.

Petition by C. M. Jordan and wife against I. Frank Faulkner, in which W. C. Fields and others interpleaded. From the order made, continuing the restraining order to the hearing, and refusing to order the payment to the defendant, Faulkner, of certain money in the hands of a commissioner, the defendant appealed. Reversed.

Certain interpleaders, W. C. Fields, John G. Cox, and others named in their interplea, asked that the funds in the hands of the commissioner be applied to the payment of certain judgments against the defendant.

W. D. Pollock, G. V. Cowper, and R. H. Lewis, Jr., all of Kinston, for appellant. McLean, Varser & McLean, of Lumberton, and G. G. Moore, of Kinston, for appellees.

BROWN, J. In this proceeding a decree was entered, directing the sale of certain lands for partition among the plaintiffs and the defendant. Before the commencement of this proceeding, certain of the interpleaders had obtained judgments against the defendant, Faulkner, which were duly docketed in the superior court of Lenoir county.

A decree of sale was entered, and the commissioner appointed to sell the land. At the sale the two Mitchells, interpleaders, were the purchasers of the land; the other interpleaders being the judgment creditors. The sale was duly confirmed and the deed made to the purchasers by the commissioners. The purchasers sold the land to one Clyde Cunningham for $7,500, $1,500 over their bid.

Prior to the institution of this proceeding, the homestead of the defendant, Faulkner, had been legally allotted to him in lands other than those sold in this proceeding. It is admitted that the defendant is insolvent. The interpleaders asked that that part of the proceeds of the sale belonging to the defendant, Faulkner, be applied to the payment of the said judgments, or as much as may be necessary. It is admitted that the purchasers of the property had full knowledge of the docketed judgments before the confirmation of the sale.

We are of opinion that his honor erred in continuing the restraining order and refusing to direct the payment of the share of the funds belonging to the defendant to him. Under our statute (Revisal, § 2512), the deed of the commissioner conveyed to the purchaser "such title and estate in the property as the tenants in common had."

The deed of the commissioner, by virtue of the partition proceedings, is in law the conveyance of all the parties, and vests in the grantee the same title and rights as would another conveyance equally comprehensive in terms. 30 Cyc. 287(b).

In many states the statutes provide that a partition sale frees the land from all preexisting liens, and deprives the lienholder of all remedies, save that of seeking payment out of the proceeds of sale. 30 Cyc. p. 210. Such is not the statute law of this state; and in the absence of such statutes, requiring this to be done, it cannot be affirmed that incumbrancers or judgment creditors of an

individual parcener are necessary parties to the partition proceeding.

It was early held in this state that:

"Where slaves, on the petition of the owners, have been ordered to be sold for a division, one who was no party to the petition, but claimed by a lien, under an execution against one of the petitioners before the sale, has no right to apply to the court to have the share of such petitioner in the proceeds paid over to him." In re Harding, 25 N. C. 320; Harding v. Spivey, 30 N. C. 63.

It seems to be generally held, in the absence of such statutes, that lienholders are not necessary parties in partition proceedings, and have no right to intervene after final judgment. 30 Cyc. 229.

It is said in 24 Cyc. p. 62:

"The purchaser at a judicial sale takes the property subject to whatever liens and incumbrances exist thereon at the time of the attaching of the lien under which the property is sold, and cannot have the proceeds of sale applied to discharge such liens."

In Roberts v. Hughes, 81 Ill. 130, 25 Am. Rep. 270, it is held by the Supreme Court of Illinois that:

"In the absence of fraud or misrepresentation, the purchaser at a judicial sale" takes, subject to prior judgment and incumbrances, and "must bear the loss, if any ensues."

In Vaughn v. Clark, 5 Neb. 238, it is held that:

"A purchaser at a judicial sale, under a decree of foreclosure, takes the property subject to whatever liens may exist thereon at that time."

In Zeigler v. His Creditors, 49 La. Ann. 144, 21 South. 666, the Supreme Court of Louisiana holds:

"Where a tutor, holding an undivided interest in real estate, purchases the entire property at a judicial sale made in partition proceedings, a tutorship mortgage affecting at the time of the sale the tutor's undivided interest in the property remains unaffected by the sale."

We might cite other authorities, but it is unnecessary. The cause is remanded to the superior court of Lenoir county, with directions to enter a decree that the commissioner pay over to the defendant, Faulkner, his share of the proceeds of sale. The costs of this court will be taxed against the interpleaders.

Reversed.

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(168 N. C. 454)

## BRYANT TIMBER CO. v. TILGHMAN LUMBER CO. (No. 219.)

(Supreme Court of North Carolina. March 24, 1915.)

1. LOGS AND LOGGING ⟸3—SALE OF STANDING TIMBER—CONTRACTS—EVIDENCE.
A vendor of standing timber who sues for the price thereof may show its deed purporting to convey the timber to show its readiness and willingness to perform its part of the contract.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6–12; Dec. Dig. ⟸3.]

2. LOGS AND LOGGING ⟸3—SALE OF STANDING TIMBER—CONTRACTS—EVIDENCE.
Where a vendor contracting to convey timber to which he had good title free from incumbrances brought suit for the price and claimed title in part under a proceeding for the sale of land to which a third person was a party, and the third person filed a petition wherein he sought to set aside the proceeding on the ground that he had been made a party without authority, and the purchaser relied thereon as evidence of a defect in the vendor's title, the vendor could prove that the third person authorized his joinder as a party to the proceeding, and that he was present when the petition was prepared and knew its contents.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6–12; Dec. Dig. ⟸3.]

3. APPEAL AND ERROR ⟸692 — QUESTIONS REVIEWABLE—EXCLUSION OF EVIDENCE.
Exceptions to the refusal to permit a witness to answer questions are not reviewable where the record does not indicate what the answers would have been.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905–2909; Dec. Dig. ⟸692.]

4. LOGS AND LOGGING ⟸3—SALE OF STANDING TIMBER—CONTRACTS—EVIDENCE.
In an action by a vendor of standing timber for the price based on the purchaser's refusal to accept a deed conveying the timber, evidence of a depreciation in the value of the timber by fire was inadmissible in the absence of evidence that the depreciation occurred before the vendor tendered its deed.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6–12; Dec. Dig. ⟸3.]

Appeal from Superior Court, Sampson County; Daniels, Judge.

Action by the Bryant Timber Company against the Tilghman Lumber Company. From judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover the purchase price of certain timber on a tract of land known as the Wilson tract.

On and prior to the 14th day of June, 1907, the plaintiff was the owner of certain timber, timber rights, and easements in Sampson county, and on said date entered into a contract with the defendant to sell certain of said timber upon the terms and conditions as set out in a contract at that time entered into between plaintiff and defendant. The defendant, complying with said contract and agreement, took deeds for all the timber described, upon the terms and conditions therein contained, and paid for same, with the exception of the one tract which is in dispute. This particular tract the defendant claims it was not compelled to take on account of the fact that the said contract does not require it to take any of the said timber to which the plaintiff has not a good title, or any of said timber to which the plaintiff does not have a title which "is good and sufficient and free from all incumbrances," and a title which is "absolutely free from all conditions and incumbrances." The defendant also contends that they were not required to take said timber until the plaintiff had tendered them such title as above referred to, and that they should then have a period of ten days within which to investigate such title.

The jury returned the following verdict:

(1) Did the plaintiff, the Bryant Timber Company, tender to defendant, Tilghman Lumber Company, a good and sufficient deed for the timber rights and easements as set forth in the complaint; and, if so, when? Answer: Yes; November 5, 1909.

(2) Did defendant, Tilghman Lumber Company, wrongfully refuse to accept said deed? Answer: Yes.

(3) What was the price agreed to be paid for said timber rights and easements? Answer: $7,500.

(4) What amount is plaintiff entitled to recover of defendant for said timber? Answer: $7,000, with interest from November 15, 1909.

His honor charged the jury: That if the jury shall believe all the evidence in the case they should answer the first issue, "Yes; November 15, 1909," and the second issue "Yes," and the third issue, "Seven thousand five hundred ($7,500) dollars, with interest from November 15, 1909."

The defendant excepted.

Fowler, Crumpler & Gavin, of Clinton, for appellant. C. M. Faircloth, of Clinton, and H. L. Stevens, of Warsaw, for appellee.

ALLEN, J. It was conceded upon the argument, and properly so, that the instructions to the jury are correct if there is no error in the admission of evidence, and, upon a careful consideration of the record, we find none.

[1] It is true, as contended by the defendant, that a deed only takes effect from delivery, but it was competent for the plaintiff to introduce in evidence its deed purporting to convey the timber in controversy to the defendant for the purpose of showing that it was ready and willing to perform its part of the contract.

[2] The plaintiff claimed title in part under a proceeding for the sale of lands to which Jesse F. Wilson was a party, and on the morning of the trial of this action Jesse F. Wilson filed in the clerk's office a petition which was not served, seeking to set aside the proceeding upon the ground that he had been made a party thereto without authority, and this was relied on by the defendant as evidence of a defect in the title of the plaintiff.

It then became competent for the plaintiff to introduce Messrs. Grady & Faison, and to prove by them that Jesse F. Wilson authorized his joinder as a party to the proceeding; that he was present when the petition was prepared and knew its contents.

[3, 4] The exceptions of the defendant to the refusal of the court to permit a witness to answer certain questions as to damage to the timber by fire and otherwise since the execution of the contract are without merit. In the first place, there is nothing in the record to indicate what would have been the answers to the questions (Lumber Co. v. Childerhose, 88 S. E. 22), and, again, it does not appear that, if there was a depreciation in value, it occurred prior to the time the plaintiff tendered its deed to the defendant.

There was ample evidence to support the findings of the jury, and the motion for judgment of nonsuit was properly denied.

No error.

(168 N. C. 435)

## ALLEN v. McPHERSON. (No. 259.)

(Supreme Court of North Carolina. March 24, 1915.)

1. APPEAL AND ERROR ⇐⇒842—MOTION TO SET ASIDE JUDGMENT—FINDINGS—CONCLUSIVENESS.

The trial judge's findings of fact on a motion to set aside a default judgment for excusable neglect are conclusive on appeal when sustained by any evidence, but his findings whether, as a matter of law, there was excusable neglect, are reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316–3330; Dec. Dig. ⇐⇒ 842.]

2. APPEAL AND ERROR ⇐⇒957—DISCRETIONARY RULING—REFUSAL TO SET ASIDE DEFAULT JUDGMENT.

Though the trial judge finds on a motion, under Revisal 1905, § 513, to set aside a default judgment for excusable neglect, that the neglect was excusable, his refusal to grant the motion is not reviewable except for gross abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. ⇐⇒957.]

3. JUDGMENT ⇐⇒143 — DEFAULT — GROUNDS FOR SETTING ASIDE—EXCUSABLE NEGLECT—NEGLIGENCE OF COUNSEL.

Negligence of counsel is not excusable neglect such as will authorize the setting aside of a default judgment, where the client himself has been negligent.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272–291; Dec. Dig. ⇐⇒ 143.]

4. JUDGMENT ⇐⇒145 — DEFAULT — RIGHT TO SET ASIDE—MERITORIOUS DEFENSE.

A finding that defendant has a meritorious available defense is essential to the right to set aside a default judgment for excusable neglect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292–295; Dec. Dig. ⇐⇒145.]

5. JUDGMENT ⇐⇒163—DEFAULT—MOTION TO SET ASIDE—MERITORIOUS DEFENSE—FINDING—CONSTRUCTION.

A finding by the judge on a motion to set aside a default judgment for excusable neglect that "defendant denies the obligations set out in the complaint" is not a finding that he has a meritorious defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 323; Dec. Dig. ⇐⇒163.]

6. JUDGMENT ⇐⇒134—DEFAULT—EFFECT.

A judgment by default and inquiry establishes merely that plaintiff has a cause of action, and is practically only a judgment for costs; the burden of proving his case still resting on plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 244; Dec. Dig. ⇐⇒134.]

Appeal from Superior Court, Wake County; Cooke, Judge.

Action by Frank Allen against A. P. McPherson. From refusal to set aside a default judgment, defendant appeals. Affirmed.

Charles Ross, of Lillington, and Douglass & Douglass, of Raleigh, for appellant. Armistead Jones & Son and W. C. Harris, all of Raleigh, for appellee.

CLARK, C. J. This was a motion to set aside the judgment on the ground of excusable neglect. The summons was issued January 25, 1913. Time to file complaint was extended, and it was filed at April term, 1913. The defendant was allowed till next term to file answer, but he did not then file answer, and at the fifth term, after filing the complaint, the plaintiff moved for and obtained judgment by default and inquiry. The defendant had employed a lawyer living at Lillington, in Harnett county (where the defendant himself lived), and did not employ any resident or local counsel in Wake, where the cause was pending, to represent him. The motion to set aside the judgment was not made till November term, 1913, of Wake.

[1, 2] On a motion to set aside a judgment for excusable neglect, the finding of facts by the judge is conclusive and irreviewable, and we cannot look into the affidavits to contradict his findings, except on allegation that there is no evidence to sustain the finding, which is not the case here. On the findings of fact, whether, as a matter of law, there was or was not excusable neglect, is reviewable on appeal. If the judge finds correctly that the neglect was not excusable, that concludes the matter. If, however, he finds that the neglect was excusable, whether in such case he shall set aside the judgment is a matter in his discretion, and not reviewable, except in a case of gross abuse. This section (Revisal, § 513) was analyzed and fully discussed in Norton v. McLaurin, 125 N. C. 185, 34 S. E. 269. See, also, citations to that case in the Anno. Ed.

[3] In Norton v. McLaurin, supra, the court held:

(1) The negligence of counsel will not excuse, if the client himself has been neglectful; (2) before granting an application to set aside a judgment, the court must find, as a material fact, that the defendant has a meritorious defense. In this case the facts show that the client himself was neglectful. A client cannot place his case in the hands of his counsel and pay no further attention to it. "It is not enough that parties to a suit should engage counsel and leave it entirely in his charge. They should, in addition to this, give it that amount of attention which a man of ordinary prudence usually gives to his most important business." Roberts v. Allman, 106 N. C. 391, 11 S. E. 424; Pepper v. Clegg, 132 N. C. 315, 43 S. E. 906. See, also, numerous cases cited in that opinion, and the citations thereto in the Anno. Ed. In Pepper v. Clegg, supra, we said: "When a man has a case in court the best thing he can do is to attend to it." This has been quoted with approval in McClintock v. Insurance Co., 149 N. C. 36, 62 S. E. 775, and in Lunsford v. Alexander, 162 N. C. 530, 78 S. E. 275.

In State v. Downs, 116 N. C. 1064, 21 S. E. 689, quoted and approved in State v. McLean, 121 N. C. 601, 28 S. E. 140, 42 L. R. A. 721, and Barber v. Justice, 138 N. C. 21, 50 S. E. 445, we said that the ignorance of law by counsel would not be an excuse for a client, for, if it were, "the more ignorant counsel could manage to be the more he might be in demand." For the same reason, if the negligence of counsel were an excuse, when the client himself pays no attention to the case, then "the more negligent counsel could manage to be, the more valuable he would become."

In Manning v. Railroad, 122 N. C. 828, 28 S. E. 963, we discussed the duty of clients to look after their lawsuits, and not surrender the matter entirely to the hands of their counsel, and deprecated the system of employing counsel nonresident in the county where the action is pending, or not regularly attending that court, and said: "Our laws do not recognize this leisurely, kid-glove, and dilettante manner of attending to legal proceedings at long range." To same effect Osborn v. Leach, 133 N. C. 430, 45 S. E. 783; Bank v. Palmer, 153 N. C. 503, 69 S. E. 507.

[4, 5] It is also essential for the judge to find that the defendant has a meritorious defense which could be set up if the judgment is set aside. Stockton v. Mining Co., 144 N. C. 599, 57 S. E. 335, and cases there cited; Minton v. Hughes, 158 N. C. 587, 73 S. E. 810. The additional finding that: "The defendant denies the obligation set out in the complaint is not the finding that he has a meritorious defense."

[6] In this case it so happens, fortunately for defendant, that the judgment is only by default and inquiry, and the burden is still upon the plaintiff to prove his case, as such judgment is practically only a judgment for costs. It establishes merely that the plaintiff has a cause of action. Stockton v. Mining Co., 144 N. C. 595, 57 S. E. 335; Osborn v. Leach, 133 N. C. 427, 45 S. E. 783.

The refusal of the motion to set aside the judgment is affirmed.

ALLEN, J., did not sit.

(169 N. C. 811)

## STATE v. JOHNSON. (No. 202.)

(Supreme Court of North Carolina. March 24, 1915.)

1. CRIMINAL LAW ⟸982 — JUDGMENT—SUSPENSION—TERMINATION—SENTENCE.

Where a prayer for judgment was suspended on condition of the good behavior of accused, and accused was guilty of another offense, judgment could be rendered and accused sentenced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. ⟸ 982.]

2. CRIMINAL LAW ⊂⊃1023—SUSPENDED SENTENCE — TERMINATION—FINDINGS—REVIEW.
A finding that accused has been guilty of misconduct, so that sentence may be imposed under judgment of conviction, suspended during good behavior, is not reviewable.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583–2598; Dec. Dig. ⊂⊃1023.]

Appeal from Superior Court, Lenoir County; Daniels, Judge.

Hattie Johnson was convicted of crime, and, from a judgment imposing a sentence, she appeals. Affirmed.

Langston, Allen & Taylor, of Goldsboro, T. C. Wooten, of Kinston, and Murray Allen, of Raleigh, for appellant. The Attorney General, for the State.

BROWN, J. The defendant, at the January term, 1913, had pleaded guilty to three bills of indictment charging her with retailing, and prayer for judgment was continued on condition of good behavior, and so ordered to be further continued from term to term for three years.

[1, 2] The defendant appeared for the purpose of showing her good behavior from term unto term until the August term, 1914. At that term it was made to appear that the defendant had been engaged in maintaining a bawdyhouse in the town of Kinston since the previous term of six months. This exception is disposed of by the decision of the court in the case of State v. Tripp, 83 S. E. 630, at the last term. The condition of continuing the prayer for judgment was "upon condition of good behavior." This does not mean that she must not have been guilty of the same kind of misconduct as that of which she had been convicted, but that, as was said in the case of State v. Everitt, 164 N. C. 407, 79 S. E. 277, 47 L. R. A. (N. S.) 848:

"When the judgment was suspended, defendant assumed the obligation of showing * * * the court, from time to time, that he had demeaned himself as a good citizen and was worthy of judicial clemency."

The finding of the court is not reviewable. State v. Bailey, 162 N. C. 583, 77 S. E. 701; State v. Register, 133 N. C. 747, 46 S. E. 21; State v. Wilcox, 132 N. C. 1120, 44 S. E. 625; State v. Kinsauls, 126 N. C. 1095, 36 S. E. 31; State v. Carter, 126 N. C. 1011, 35 S. E. 591.
Affirmed.

(169 N. C. 306)

## STATE v. WADE et al. (No. 203.)

(Supreme Court of North Carolina. March 17, 1915.)

1. ADULTERY ⊂⊃11 — PROSECUTION — EVIDENCE.
Evidence that defendant was a married man, and had separated from his wife and failed to support her and their children, was admissible as tending to show his immoral and illicit relations with his codefendant with whom he lived, and that they were not married.
[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 20, 23; Dec. Dig. ⊂⊃11.]

2. CRIMINAL LAW ⊂⊃374—EVIDENCE—PREVIOUS SEXUAL INTERCOURSE.
The fact of previous sexual intercourse was merely explanatory of acts and conduct during the two years within which the jury must find that the crime was committed.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 835; Dec. Dig. ⊂⊃374.]

3. CRIMINAL LAW ⊂⊃825—TRIAL—REQUESTS FOR INSTRUCTIONS.
Defendant claiming an omission in the charge was bound to call the attention of the court thereto by a request for more specific instructions.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. ⊂⊃825.]

4. CRIMINAL LAW ⊂⊃1059 — TRIAL — OBJECTION TO CHARGE.
An exception against the general structure of the charge cannot be entertained, as the particular error must be pointed out.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. ⊂⊃1059.]

Appeal from Superior Court, Lenoir County; Daniels, Judge.

E. W. Wade and another were convicted of fornication and adultery, and defendant Wade appeals. No error.

Rouse & Land, of Kinston, for appellant. Attorney General Bickett, for the State.

WALKER, J. The defendants, E. W. Wade and Pearlie Wade, were indicted for fornication and adultery, and from the judgment upon a verdict of guilty as to the male defendant, he appealed to this court.

[1] There were circumstances from which the jury might have inferred his guilt, and evidence of this kind is sufficient to support a conviction. State v. Poteet, 30 N. C. 23; State v. Eliason, 91 N. C. 564; State v. Rinehart, 106 N. C. 787, 11 S. E. 512. The judge permitted the state to prove that defendant had separated from his wife and failed to support her and her children, who were begotten by him, for 10 or 12 years, and in the charge he stated that the prosecution relied upon that circumstance as one to be considered by the jury in passing upon the defendant's guilt, but this was not irrelevant, as urged by the defendant, and was not introduced by the state for the purpose of contending that, because guilty of the offense of abandoning his family, he was also guilty of this offense. It was a circumstance leading up to his immoral and illicit relations with his codefendant, and the first link in the chain of evidence pointing to his guilt. If he had been a faithful and dutiful husband and father, instead of deserting his home and seeking another where his paramour lived with him, this charge would never have been made against him. The case states:

"That the defendant is a married man; that he has a wife and children living upon an adjoining plantation; that the other defendant is a single woman; that for 10 or 12 years she has been living in his house or upon the land rented by him; that he does not support his family—his wife and children; he leaves that to his father-in-law; that they [defendants]

have been seen about his place together; that she is seen cooking and washing at a place rented by him; that they eat at the same table; that they work in the fields together; that during the time that she has lived upon his premises she has given birth to five illegitimate children; that these children have been seen crawling to his lap and calling him 'papa.'"

It was competent, of course, to show that the defendant was a married man, and had not been divorced, but had merely separated from his wife, as it tended to prove an allegation of the indictment that the two defendants were not married to each other, as they could not be under such circumstances. State v. Manly, 95 N. C. 661. If a married man with children abandons his family and consorts with a loose woman, whose lewd character is shown by her having had five children by him, all of whom he recognizes as his own offspring and fondles with affection, and by whom, from time to time, he is called "father," and he continues to live under the same roof with their mother, in close proximity, working and eating with her, spending his money on her, and not on the support of his wife and legitimate offspring, it is not a strained deduction from these facts that he has continued her in his service as his mistress. State v. Chancy, 110 N. C. 507, 14 S. E. 780.

Underhill, in his work on Criminal Evidence (section 381), says:

"Direct evidence of the act of sexual intercourse can seldom be obtained. Hence evidence of all the circumstances of the parties, their relations to one another, their domestic and social surroundings, their acquaintance, conduct, and familiarity, the facts that they went out together and visited each other, and often expressed a desire to be together, are relevant. Improper familiarities and adulterous acts between the same parties prior or subsequent to the act charged, but not too remote, or, if remote, connected with it so as to form a part of a continuous course of conduct, may be shown for the purpose of bringing out the relations and adulterous disposition of the defendant."

The Supreme Court of Michigan, in People v. Jenness, 5 Mich. 305, at page 322, says that:

In the case of an indictment for this offense, "previous familiarities, and the general or habitual submission of the female to his [the defendant's] sexual embraces, must, in the nature of things, tend to render it more probable that like intercourse took place on the occasion charged. * * * Such is the force and ungovernable nature of this passion, and so likely is its indulgence to be continued between the same parties, when once yielded to, that the constitution of the human mind must be entirely changed before any man's judgment can resist the force of such an inference to be drawn from previous acts of intercourse."

[2] These extracts, and the many cases cited in the notes to section 381 of Underhill on Criminal Evidence, show what great stress some of the courts have laid upon the fact of previous sexual intercourse as an important probative one, but this court has held that such evidence is merely explanatory of acts and conduct within the two years, though the jury must find that the crime was committed within that period (State v. Guest, 100 N. C. 410, 6 S. E. 253), and it was so treated by the presiding judge.

Defendant complains that the charge did not state his contentions fully and impartially, but laid more stress on those of the state. We have read the charge most carefully, and have been unable to discover this fault. It appears to us to have been fair and just, clear and comprehensive, and arrayed the facts, which the evidence tended to prove, with perfect discrimination and proper application to the different phases of the case, giving to each side equal consideration.

[3] But if there had been any such omission, as is alleged by the defendant, it was his duty to call the attention of the court to it, by a request for more specific instructions, so that the judge could state his contentions more definitely and accurately. Jeffress v. Railroad Co., 158 N. C. 215, 73 S. E. 1013; State v. Cox, 153 N. C. 638, 69 S. E. 419; State v. Blackwell, 162 N. C. 672, 78 S. E. 316.

[4] The exceptions directed against the general structure of the charge cannot be entertained, as the particular error must be pointed out. A "broadside" attack upon the charge is not permissible. State v. Johnson, 161 N. C. 264, 76 S. E. 679; State v. Cameron, 166 N. C. 379, 81 S. E. 748. The judge sufficiently instructed the jury that the illicit association of defendants more than two years before this prosecution was commenced could only be considered as explanatory of what occurred since, and in this respect complied with the rule of this court. 164 N. C. 548, 81 S. E. xi. The evidence was sufficient to convict. State v. Chancy, 110 N. C. 507, 14 S. E. 780; State v. Rinehart, supra.

We have considered the positions taken by the defendant's counsel in their well-prepared brief, but have concluded that the trial was conducted, in all respects, according to law.

No error.

(168 N. C. 477)

## NEVINS v. HUGHES. (No. 256.)

(Supreme Court of North Carolina. March 24, 1915.)

1. BROKERS ⟸88—ACTION FOR COMMISSION—STATEMENT OF CONTENTION—EVIDENCE TO SUPPORT.

In a broker's action against another broker for a commission, the court's statement that plaintiff contended that defendant had two tracts of timber for sale and offered to divide his commission with plaintiff, and that he complied with such agreement, and was entitled to one-half of the commission, had support in the evidence.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123–130; Dec. Dig. ⟸88.]

2. APPEAL AND ERROR ⟸215—OBJECTIONS AT TRIAL—INSTRUCTIONS.

Where defendant thought that the court's contention was erroneous or calculated to mis-

lead the jury, he should have called the court's attention to it at the time, so that it could be corrected to conform to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309–1314; Dec. Dig. ⟸ 215.]

8. Brokers ⟸88—Action for Commission—Instruction—Evidence.

In a broker's action against another broker for a commission, evidence *held* to warrant a submission of the plaintiff's case to the jury.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123–130; Dec. Dig. ⟸88.]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by W. L. Nevins against A. C. Hughes. Judgment for plaintiff, and defendant appeals. No error.

This is an action for the recovery of $750, plaintiff's part of the commissions for selling certain "timber and timber rights" belonging to the Deep River Lumber Corporation. Plaintiff alleged that the defendant, who is a real estate broker, had been appointed to make the sale, and stated that his commissions would be 5 per cent. on the purchase price, which had been fixed at $30,000, and that he would pay to plaintiff one-half of the commissions if he would make the sale; that the sale was made accordingly by him at the stipulated price; and that the contract on his part was fully performed, whereby he became entitled to his part of the commissions, or $750. Defendant denied all of this, and, on the contrary, alleged that, if he offered one-half of 5 per cent., he made a mistake as to the amount of the commissions he was to receive; that there was an original contract, the terms of which were altered afterwards, and that, when the contract was thus amended, it was understood and agreed between all the parties, the timber company, plaintiff, and defendant, that no commissions would be paid for the sale, either to the defendant or by him to the plaintiff, and that this was fully understood and assented to by all the parties. There was evidence to sustain the contentions of the respective parties. The jury rendered a verdict for the plaintiff for $750, and from the judgment thereon defendant appealed.

P. J. Olive, of Apex, and H. E. Norris, of Raleigh, for appellant. Cox & Cox, for appellee.

WALKER, J. (after stating the facts as above). The only question in the case, as we view it, is one of fact. There are two exceptions, both to the charge of the court.

[1, 2] The first is addressed to the statement by the judge of the contention of the plaintiff, and the ground of objection is that there was no evidence to support it; but, upon a careful perusal of the testimony, we think otherwise. If the defendant thought that the statement was erroneous or calculated to mislead the jury, he should have called the court's attention to it at the time, so that it could be corrected and conformed to the evidence. Jeffress v. Railroad Co., 158 N. C. 215, 73 S. E. 1013; State v. Cox, 153 N. C. 638, 69 S. E. 419; State v. Blackwell, 162 N. C. 672, 78 S. E. 316; State v. Wade, 84 S. E. 768, at this term. But we discover no such fault in the charge.

[3] The second exception was taken to an instruction to the jury in substance as follows:

If you are satisfied, by the greater weight of the evidence, that the contract was made as alleged by the plaintiff, and that he performed it "in accordance with its terms" in making the sale, the burden being on the plaintiff to so satisfy you, then you will answer the issue, "Yes; $750;" but, if not so satisfied, you will answer it, "No; nothing."

And the ground of the exception is not to the form of the instruction, for it could not well be, but that there was no evidence to warrant it; but we think that there was some evidence to support the entire charge, which was fair, full, and impartial, and presented the issues to the jury with clearness and precision.

Apart from these exceptions, the defendant testified that there was an agreement, after the original contract was changed at Norfolk, that there would be no commissions, but the plaintiff, in his testimony, contradicted this, and stated that it was understood and agreed that the same amount, as his share of the commissions, would be paid to him, notwithstanding the alteration in the terms of the sale. This presented an issue of fact purely.

Upon full consideration of the case, no error has been found. The jury have simply found the facts against the defendant.

No error.

(76 W. Va. 207)

## HARBERT v. HOPE NATURAL GAS CO.

(Supreme Court of Appeals of West Virginia. April 20, 1915.)

*(Syllabus by the Court.)*

1. Covenants ⟸61—Oil and Gas Lease—Construction—Covenant Running with the Land.

A stipulation, in an oil and gas lease, that, if gas is found in paying quantities, the lessor shall have free gas for domestic purposes, by making his own connection, is a covenant running with the land, but is not, necessarily, to be performed on the land.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 58; Dec. Dig. ⟸61.]

2. Mines and Minerals ⟸79 — Oil and Gas Lease — Construction — Determination of Intention.

Consumption of the gas not being confined to a dwelling house on the leased premises, by the terms of the lease, the place of consumption is one of intention, to be determined by the facts and circumstances relating to the subject-matter of contract, known to the parties at the time, and by their subsequent conduct in the execution thereof, indicating such intention.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 209; Dec. Dig. ⟸79.]

3. MINES AND MINERALS ⊂=79 — OIL AND GAS LEASE—CONSTRUCTION BY CONDUCT.

If, after a producing gas well is drilled on the lease, the lessor's grantee and assignee of the free gas right applies to the lessee's assignee of the lease for free gas for use in his dwelling house, not situate on the lease, and such assignee, through its agents, having knowledge of the facts, permits him to tap one of its gas lines in the vicinity of such well, but not connected with it, and to use gas therefrom for a long period of time, such conduct evidences a practical construction of the covenant, and is an implied admission of the covenantee's right to consume the gas elsewhere than on the lease, but not of his right to free gas from wells other than those on the leased premises.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 209; Dec. Dig. ⊂=79.]

4. TRIAL ⊂=255—INSTRUCTIONS—REQUEST — BREACH OF COVENANT.

In such case, the assignee of the covenantor may be enjoined from interfering with the rights of the lessor's grantee to make connection with, and obtain gas from, a well on the leased premises.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 114–116, 128; Dec. Dig. ⊂=59.]

Robinson, P., dissenting.

Appeal from Circuit Court, Doddridge County.

Suit by Elmus E. Harbert against the Hope Natural Gas Company. From a decree for defendant, plaintiff appeals. Reversed and rendered.

Homer Strosnider, of Clarksburg, for appellant. A. B. Fleming, Chas. Powell, and Kemble White, all of Fairmont, for appellee.

WILLIAMS, J. Plaintiff brought this suit against the Hope Natural Gas Company, praying that it be enjoined from interfering with his right to take and use, for domestic purposes, free of charge, the gas from defendant's gas well situate on his land. A temporary injunction was awarded; and defendant gave notice that it would move for its dissolution. Plaintiff appeared and resisted the motion, which was heard by the judge in vacation, upon the bill, answer, and affidavits taken, pro and con; and the judge took time to consider thereof. On the 25th of February, 1911, at a special term of court, he overruled the motion, and continued the injunction in force, until further order of the court. The cause was thereafter fully matured, and heard upon the pleadings and numerous depositions taken by the respective parties, and a final decree entered on the 15th of September, 1913, holding that plaintiff was entitled to gas from defendant's well for domestic purposes, free of charge, to be consumed on the land on which the well was situate, and not elsewhere, and dissolving the injunction and dismissing plaintiff's bill; and he has appealed.

The land, described as containing 221.47 acres and situate in Doddridge county, was conveyed to plaintiff by W. H. H. Lyon and wife on the 9th of February, 1906. It was subject to an oil and gas lease made by the grantors to the South Penn Oil Company, in 1902. In addition to the usual oil and gas rentals, which, for each gas well, was $400 a year, the lease contained this clause:

"If gas is found on this farm in paying quantities, the first party shall have gas free of charge for domestic purposes by making their own connections at their own risk."

In the conveyance to plaintiff, Lyon excepted and reserved the Pittsburg stratum of coal, and all the oil and gas in and under the land, together with mining rights for exploring for and removing said minerals, but the right to free gas for domestic purposes was expressly conveyed; and the deed further provided that, if Lyon should make any other or further oil and gas lease, he was to make a similar reservation of free gas for plaintiff's benefit. When Lyon leased to the South Penn Oil Company, he was living on another tract of land, situate about two miles from the one leased; and the only building on the leased tract was a two-room log cabin, a story and a half high. As to whether it was occupied by any one at that time, the evidence is conflicting. Mr. Lyon says he thinks his son was then living in it, but he is not certain. At the time of the conveyance to plaintiff, he also was living on another tract of land, separate from that on which Lyon lived, situate about a mile from the leased land, and continued to reside thereon.

In the year 1904, the South Penn Oil Company assigned to the Hope Natural Gas Company the gas and mining rights in connection therewith on the Lyon land; and in 1905 it drilled a producing gas well thereon. In the latter part of 1906, plaintiff applied to it, through its agents in the field, for gas from the well for domestic purposes; and in January or February, 1907, his line was connected with one of defendant's pipe lines, which connected with other wells than the well on the Lyon tract. He continued to use the gas thus supplied until he was disconnected by defendant on June 13, 1910. He thereupon moved his line, and connected it up with the J. O. Ice line, which was fed by the gas well on the Lyon tract; and he was again cut loose. He then brought this suit to enjoin defendant from interfering with his right to connect his pipe line with the well on the Lyon farm, and for general relief. The bill avers that, at the date of the lease to the South Penn Oil Company, Lyon was not living on the leased land; that in November, 1906, plaintiff applied to defendant for free gas, for domestic purposes, to be used in the dwelling house in which he now lives; that defendant permitted him to take and use it from one of its lines, not connected with the Lyon well, until some time in June, 1910, when his line was disconnected; and that he thereafter connected with the well on the Lyon farm, and was again disconnected. None of these allegations are

denied, and most of them are expressly admitted, in defendant's answer. The bill also avers that plaintiff has not consumed any more gas in his dwelling house, where he now lives, than he would have consumed if he had lived on the leased premises. This averment is not denied, but is alleged to be immaterial.

Defendant has taken much evidence to prove that the connection with its line was made without authority; and there is some conflict in the testimony as to which one of defendant's agents did make the connection. But, in view of defendant's admission, it is unnecessary to consider this conflicting testimony. That defendant knew plaintiff was connected with its line, and was using gas, free of charge, in his dwelling house, not on the leased premises, is, we think, abundantly shown. All of its field agents, who had charge of its lines in that vicinity during the time plaintiff was using gas, must have known that he was consuming it off the leased land. A letter to plaintiff from defendant's home office in Pittsburg, written by John G. Pew, its vice president, on December 30, 1908, exhibited with plaintiff's deposition, proves that it knew he was using gas, free of charge, from its line. In this letter Mr. Pew complains of leakage in plaintiff's pipe line and of using an open outside light; and he closes by saying:

"We do not object to your using an outside inclosed light of a Welsbach or similar pattern, but all others must be disconnected."

This letter was accompanied by a circular one, intended for consumers of gas generally, in defendant's territory, and it calls attention to the great waste of gas in the field, on account of leakages in private lines, and to past efforts by the Legislature and public-spirited men generally, to prevent such useless waste, and requests the users of gas to put their pipe lines and appliances in good repair by the 20th of January, 1909. This letter was addressed to all consumers of gas from defendant's wells or lines, and a copy of it, together with the private letter, was delivered to plaintiff by one of defendant's agents. It concludes with the following clause:

"In order to secure prompt co-operation in this movement, the Hope Natural Gas Company offers the labor of its own employés free of charge to you, to complete the first repairs to your lines, regulators, and appliances, after which you will be expected to maintain your pipes, etc., in proper condition with reasonable care. The company also offers to furnish a new regulator at cost."

Even if defendant did not expressly authorize the connection to be made with its line, these letters, admitted by Mr. Pew to have been written by him, prove a ratification of its agent's act. It is therefore not material to inquire which one of defendant's numerous field agents made the connection; that it was done by some one of them is made sufficiently certain by the evidence.

Plaintiff, of course, had not the right to demand free gas from any of defendant's wells, except the one on the Lyon tract; still, as long as defendant supplied him with free gas, it was immaterial to him where it came from, provided it cost him no more to make his connection with the line or well. But his right was limited to the wells on the Lyon land; and he could demand that he be supplied with gas therefrom, on making his own connection, so long as he owned the surface of the Lyon tract, and the wells thereon produced gas. That the Lyon well was producing, at the time this suit was brought, is proven by Mr. Lyon, who testified that he was still receiving, from defendant, his gas well rental of $400 per year. If the well were not flowing, it would not be paying.

[1-4] Defendant seeks to excuse itself for denying free gas to plaintiff on the alleged ground that it is not bound by law, or by the terms of its covenant, to furnish free gas for domestic purposes to plaintiff's dwelling house situate off the Lyon land. The lease is silent as to where the free gas is to be consumed, and defendant insists that the law confines its use on the particular tract of land. It urges, furthermore, that the covenant for free gas was personal to the covenantee and unassignable. The latter claim, we think, is wholly untenable. But, passing it for the present, we ask: What possible pecuniary interest can defendant have in the question where the gas shall be consumed, so long as it is at no expense in delivering it, and no more is consumed at one place than would be consumed at another? The question answers itself. Defendant knew, by its agents, that plaintiff lived off the land when he made application for free gas; and it also knew, from the same source, that he lived on a different tract of land from that on which Lyon lived at the time the South Penn Oil Company covenanted with him for free gas for domestic purposes. Yet, notwithstanding, it permitted plaintiff to lay a private line, more than a mile in length, at considerable cost, and allowed him to connect with one of its pipe lines, and continue to use the gas therefrom for a period of 3½ years. Presumably it did so as a compliance with its obligation to perform what it understood to be the covenant of its assignor, the South Penn Oil Company, with Lyon, without raising the slightest objection thereto, so far as appears from the record. If defendant objected to the consumption of the gas elsewhere than on the Lyon land, why did it not advise plaintiff before he incurred the expense of laying his line? These facts and circumstances clearly indicate that the objection now made is an afterthought with defendant, and tend to prove the interpretation the parties placed upon the covenant; they are evidence of a practical construction of it. The lease itself is silent as to where the free gas is to be consumed. It is clear, however, that the covenant is not a mere

personal one, but a covenant running with the land; as much so as the covenant to pay the money rental on gas wells. It was a benefit to the land, and would have passed with a grant of the land. 2 Min. Inst. (2d Ed.) pages 167 and 698; Akin v. Oil Co., 188 Pa. 602, 614, 41 Atl. 748, 1119. But, to avoid any question on this point, Lyon expressly assigned the covenant to plaintiff, in terms. He saw fit, however, to reserve to himself the money rental for the gas wells. Had he not done so, it, too, would have passed to plaintiff by the grant of the land. A covenant to pay rent is one running with the land; but that it is such does not prevent the owner from passing title to it and reserving the land, or vice versa. Whether Lyon could have separated the free gas covenant from the land, by a reservation of it, or by assigning it to a stranger to the title, is a question we are not required to decide. But, granting that he could have done so, it still would not indicate that the covenant was not a real covenant, running with the land. He did not do so, but passed both the land and the covenant to plaintiff.

The legal question presented for decision is this: Has plaintiff, owning both the land and the covenant for free gas from the wells thereon, for domestic purposes, the right to carry the gas off the land for his consumption? The covenant for free gas, although running with the land, is, nevertheless, a part of the consideration of the lease. Thornton on Oil and Gas, § 226. What right has the lessee to say how the lessor shall use the consideration, so long as his burden is not increased? A covenant running with the land need not, necessarily, be performed on the land itself. 11 Cyc. 1080. "A covenant is capable of running with the land, although not directly to be performed on it." Van Rensselaer v. Smith, 27 Barb. (N. Y.) 104. See, also, Norman v. Wells, 17 Wend. (N. Y.) 136. There is certainly nothing in the public policy which would prohibit the owner of the land and covenantee for free gas from consuming it off the premises; and we find no reason for so interpreting the lease. If the purpose was to confine the use of gas to a dwelling house on the leased premises, why did not the covenantor so stipulate? The subsequent conduct of the parties, giving practical construction to the covenant, indicates that they did not so intend. Consumption of the gas, elsewhere than on the land, does not destroy the real character of the covenant. The covenant runs with the land, regardless of where the gas is consumed, because it issues out of the land and is a benefit to it. As before stated, defendant is interested only in the quantity consumed. It is bound, however, to furnish gas for one dwelling house only, and has a right to demand that plaintiff keep his pipe lines and appliances in good repair, and use a closed light on the outside, with a Welsbach or some other approved burner, in order to prevent needless waste. Hall v. Philadelphia Co., 72 W. Va. 573, 78 S. E. 755.

Defendant's counsel have assigned cross-error. One is that defendant was improperly refused permission to file an amended answer. This was not error. The amended answer was tendered after the issues had been made and numerous depositions taken, and after the cause was ready for final submission. Defendant does not show sufficient reason why he should have been allowed to amend. The rule is much stricter in regard to amending answers than bills. Ratliff v. Sommers, 55 W. Va. 30, 46 S. E. 712, 1 Ann. Cas. 970. It is largely within the discretion of the chancellor, and we do not see that he has abused his discretion in this instance. Liggon v. Smith, 4 Hen. & M. (Va.) 407. The statute permitting a defendant to file his answer any time before a final decree has no relation to amendments. Plaintiff's case is disclosed by his bill, and defendant is supposed to be fully advised of his defense before answering. Moreover, both the bill and answer were sworn to in this case, an additional reason for refusing amendment. The other cross-assignments are sufficiently answered in the discussion of the principal question concerning the nature of the free gas clause in the lease.

The decree will be reversed, and a decree entered here reinstating the injunction and requiring defendant to permit plaintiff to connect his private pipe line with the well on the Lyon tract of land, or with its pipe line running thereto, as it may elect.

ROBINSON, P., dissents. LYNCH, J., absent.

(168 N. C. 442)

## HAMPTON GUANO CO. v. HILL LIVE STOCK CO. (No. 252.)

(Supreme Court of North Carolina. March 24, 1915.)

1. SALES ⊂=267 — EXPRESS WARRANTY — EFFECT.

In sale of goods, where the buyer takes an express warranty, it will exclude any implied warranty on the same or related subjects.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 760, 761; Dec. Dig. ⊂=267.]

2. SALES ⊂=267—EXPRESS OR WRITTEN WARRANTY—EFFECT.

Where fertilizer was sold under a written warranty that the fertilizer should contain certain ingredients, as printed on each bag, that the seller would not be responsible for the result of its use, and that the whole contract was expressed in the written agreement, the special warranty and the provision against liability for results excluded any implied warranty as to the suitableness of the fertilizer for use in fertilizing crops.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 760, 761; Dec. Dig. ⊂=267.]

3. SALES ⊂=440—SALE OF FERTILIZER—EXPRESS WARRANTY OF INGREDIENTS.

Where fertilizer was sold under a written warranty as to its ingredients, and expressly excluding any liability for results in use, evidence of the effect of its fertilizer upon particular crops was admissible to show that it did not contain the guaranteed ingredients, or that they were not present in the proportions warranted, provided that the jury was carefully instructed that the evidence was only to show such facts, and not for the purpose of assessing damages because of any loss or diminution of the crops.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1261–1276; Dec. Dig. ⊂=440.]

4. SALES ⊂=442—SALE OF GOODS—BREACH OF WARRANTY—DAMAGES.

Where fertilizer was sold under an express warranty as to its chemical ingredients, but not its results in use, the measure of damages of the buyer on breach of warranty was the difference between the article actually tendered and what its value would have been if it had been as warranted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284–1301; Dec. Dig. ⊂=442.]

Appeal from Superior Court, Franklin County; Whedbee, Judge.

Action by the Hampton Guano Company against the Hill Live Stock Company. Judgment for defendant, and plaintiff appeals. New trial ordered.

This civil action was tried before Whedbee, judge, and a jury, at November term, 1914, of Franklin superior court.

Plaintiff is a manufacturer of fertilizers, and defendant a merchant of Louisburg, who deals in fertilizers, selling them on credit to farmers. On January 31, 1913, defendant purchased fertilizers from plaintiff under a written contract; the provisions thereof, material to this case, being as follows:

"And it is further understood and agreed that the fertilizer named is furnished with the guaranty of analysis printed on the sack, but not of results from its use. Verbal promises that conflict with the terms of this contract are unauthorized, and will not be recognized by this company."

Under this contract, in the spring of 1913, plaintiff shipped and delivered to defendant 80 tons of 8–2–2 fertilizer. On July 1, 1913, in payment therefor, defendant executed to plaintiff notes aggregating $1,050.75, which said notes were indorsed by K. P. and J. P. Hill, and were payable in January and February, 1914. Upon maturity of said notes, and long after the crops, under which the fertilizer was used, had been harvested, defendant wrote plaintiff several times and promised to pay the notes, as will appear from letters written from January to May, 1914, and set out in the record. In January, 1914, defendant sought to renew its contract with plaintiff, and to purchase 250 tons of the same fertilizer (being over three times as much as it had purchased in 1913) under a contract identical with the first one, but plaintiff refused to ship the goods because defendant had not paid for those purchased under the contract above referred to. At no time prior to the institution of this action did defendants ever claim or contend that the fertilizer delivered in 1913 was defective in quality or otherwise, or that they had any defense against said notes; on the other hand, they recognized their liability upon said notes and promised to pay the same, expressing regret that a scarcity of money had prevented them from making payment at maturity. Defendants failing to comply with their promises to pay said notes, this action was instituted on June 18, 1914, to recover the amount due thereon. Defendants answered, admitting the execution and nonpayment of the notes, but pleading as a counterclaim that it had sold the fertilizer to its customers under warranties that the goods were in every respect highly efficient, suitable and fit for the fertilization of the crops for which they were recommended; that their customers complained to them that the goods were not fit or suitable and did not measure up to the standard and quality warranted; and that defendant had suffered damage thereby.

Upon the trial defendant, over the objection of plaintiff, offered evidence from persons who had used fertilizers purchased from defendant in 1913, tending to show that the fertilizer so purchased was in bad mechanical condition, being lumpy and off color; that it did not assimilate or was not taken up by the soil and did not fertilize the crops; that they had used it under their crops with poor results and made bad crops; and that in their opinion the fertilizer was not worth as much as they were charged for it. Plaintiff objected to all this evidence, repeating the objections, until the court ruled that all such testimony should be considered as objected to. It was objected to: First, because the effect thereof was to vary the written contract between the parties, which expressly provides that the plaintiff did not in any way guarantee the effect or results from the use of the fertilizer; second, because

testimony tended to set up a new con-
guaranteeing results from its use,
eas the written contract expressly limit-
ie warranty to the analysis appearing
ie sacks; third, because said testimony
way tended to show that the fertilizer
ot contain the constituents in the quan-
guaranteed by the analysis; fourth,
se there was no evidence of any chem-
analysis by the state chemist or other
n, and that, until such analysis was
d, evidence as to its effect upon crops
ncompetent and inadmissible; and, fifth,
se Revisal, §§ 3949-3951, as amended
blic Laws of 1911, c. 96, provides that
nalysis therein referred to is the best
ice of the contents of said fertilizers.
were some other specific grounds, not
ary to be stated. The contract be-
the parties was introduced in evidence,
ows that the fertilizer was guaranteed
tain the ingredients and in the propor-
tated on the certificate of analysis
l on the sack, before the sale by plain-
vhich shows the contents to be 8 per
f phosphoric acid, 2 per cent. of am-
and 2 per cent. of potash. Plaintiff
ed ore tenus to the answer and coun-
n, upon the following grounds:
It failed to state or allege wherein the
nts, or either of them, had been damag-
) It fails to allege or state, except in
terms, that defendants, or either of
ave suffered any damage whatever, ac-
special. (3) It fails to specify or allege
unds upon which defendants base their
or damages. (4) It fails to specify
defendants, or either of them, have
maged in any manner whatsoever, even
ertilizer was not as guaranteed in the
. (5) It fails to allege that any chemi-
ysis has been made by the agricultural
ent, or any one else, and any of the in-
s found to be deficient. (6) It admits
ution of the contract containing an ex-
rranty as to analysis as shown on the
nd no implied warranty as to results
et up or considered."

emurrer was overruled, and plaintiff

ry returned the following verdict:
e the defendants indebted to the plain-
count of the notes sued on, and, if so,
sum? Answer: $1,060.28, with 6 per
rest on $525 from January 15, 1914,
d, and 6 per cent. interest on $525.75
ruary 14, 1914, until paid, and inter-
.53 from May 4, 1914, until paid.
d the plaintiff warrant the fertilizer
8 per cent. available phosphoric acid,
t. ammonia, and 2 per cent. potash,
ble for use as a fertilizer of crops?
Yes.
yes, was said fertilizer, when delivered
nt, as warranted? Answer: No.
at damages, if any, are defendants
to recover of plaintiff? Answer:

rt gave the following instructions
second and third issues, to which
was taken:
ntract itself says that it is guaran-
warrants the purchaser that it con-
r cent. phosphoric acid, 2 per cent.
and 2 per cent. potash; and the law
says, in addition, that it is suitable for the purpose for which it is sold."

"If you believe this evidence, I charge you, as a matter of fact, to answer this issue, 'Yes,' that the plaintiff did warrant the fertilizer to contain 8 per cent. phosphoric acid, 2 per cent. ammonia, and 2 per cent. potash, and that it was suitable for use as a fertilizer of crops."

"If the evidence satisfies you by its greater weight that it did not contain 8 per cent. phosphoric acid, 2 per cent. ammonia, and 2 per cent. potash, or that it was unfit for use as a fertilizer, and you are satisfied of either of these facts by the greater weight of the evidence, I charge you to answer the third issue, 'No.'"

Plaintiff excepted to the judgment, which was entered upon the verdict, and appealed.

A. C. & J. P. Zollicoffer, of Henderson, and McIntyre, Lawrence & Proctor, of Lumberton, for appellant. W. H. Yarborough, Jr., B. T. Holden, William H. Ruffin, and W. M. Person, all of Louisburg, for appellee.

WALKER, J. (after stating the facts as above). [1] When a person buys an article of personal property, he can require an express warranty as to its quality, or he may rely upon the warranty which the law implies in certain sales; but it has been well said that:

"When he takes an express warranty, it will exclude an implied warranty on the same or a closely related subject. Thus an express warranty of quality will exclude an implied warranty of fitness for the purpose intended, but an express warranty on one subject does not exclude an implied warranty on an entirely different subject"

—an illustration of the latter being that an express warranty of title will not exclude an implied warranty of soundness or merchantability. 35 Cyc. 392.

It was held in the early case of Lanier v. Auld, 5 N. C. 138, 3 Am. Dec. 680:

"That the law will not imply what is not expressed, where there is a formal contract (Evans' Essay, 32; 1 Fonbl. 364; 6 Term, 606; Doug. 654), and an express warranty as to soundness and age excludes any implied warranty as to other qualities."

What was said by Justice Brown in Piano Co. v. Kennedy, 152 N. C. 196, 67 S. E. 488, is very pertinent here:

"We have recognized the principle that there can be no implied warranty of quality in the sale of personal property where there is an express warranty, and that, where a party sets up and relies upon a written warranty, he is bound by its terms and must comply with them. 30 Am. & Eng. p. 199; Main v. Griffin, 141 N. C. 43 [53 S. E. 727]. We recognize the further principle, applied by us in that case, that a failure by the purchaser to comply with the conditions of the warranty is fatal to a recovery for breach of the warranty in an action on it, or where, as in this case, damages for the breach are pleaded as a counterclaim in an action by the seller for the purchase money."

"There are numerous well-considered cases that an express warranty of quality excludes any implied warranty that the articles sold were merchantable or fit for their intended use." De Witt v. Berry, 134 U. S. 306, 10 Sup. Ct. 536, 33 L. Ed. 896.

See, also, Main v. Griffin, 141 N. C. 43, 53 S. E. 727; Robinson v. Huffstetler, 165 N. C.

459, 81 S. E. 753; Lumber Co. v. Machine Co., 136 Ga. 754, 72 S. E. 40.

It has been held that an implied warranty cannot be set up, even under a code provision, where the parties, by their contract, have expressly agreed upon a different warranty, whether it be more or less extensive or limited (Jackson v. Langston, 61 Ga. 392; Farrow v. Andrews, 69 Ala. 96), and also that if a specific kind of fertilizer, or other article of a certain description or name, is ordered, there is no implied warranty of fitness, but only one that it is the kind designated (35 Cyc. 409; Rasin v. Conley, 58 Md. 59; Ober v. Blalock, 40 S. C. 31, 18 S. E. 264; Mason v. Chappel, 15 Grat. [Va.] 572; Walker v. Pue, 57 Md. 155; Wilcox v. Owens, 64 Ga. 601). A party who relies upon a written contract of warranty as to quality or description of the property he has purchased is bound by the terms of the warranty. Machine Co. v. McKay, 161 N. C. 586, 77 S. E. 848. He is not only held to the terms of the contract into which he has deliberately entered, but he is not permitted to contradict or vary its terms by parol evidence, as "the written word must abide" and be considered as the only standard by which to measure the obligations of the respective parties to the agreement, in the absence of fraud or mistake, or other equitable element. 35 Cyc. 379. There are numerous cases decided by this court, illustrative of this elementary rule in the law, as to written contracts. Moffitt v. Maness, 102 N. C. 457, 9 S. E. 399; Cobb v. Clegg, 137 N. C. 153, 49 S. E. 80; Basnight v. Jobbing Co., 148 N. C. 356, 62 S. E. 420; Walker v. Venters, 148 N. C. 389, 62 S. E. 510; Medicine Co. v. Mizell, 148 N. C. 384, 62 S. E. 511; Walker v. Cooper, 150 N. C. 128, 63 S. E. 681; Woodson v. Beck, 151 N. C. 144, 65 S. E. 751, 31 L. R. A. (N. S.) 235; Machinery Co. v. McClamrock, 152 N. C. 405, 67 S. E. 991; and especially Fertilizer Works v. McLawhorn, 158 N. C. 275, 73 S. E. 883. There are authorities which hold that there is no implied warranty of quality in the sale of goods, but some of these are reviewed by this court in the late case of Ashford v. H. C. Schrader Co., 167 N. C. 45, 83 S. E. 29, and a warranty was said to be implied in certain excepted instances, but they all relate to contracts which do not contain any express warranty of quality. The subject is fully considered in that case, and further comment, therefore, is not required.

[2, 3] Let us now examine the facts of this case in the light of the foregoing principles. The main inquiry is as to the nature and scope of the special warranty and the rights and obligations of the parties springing therefrom. The warranty is made up of three elements: (1) That the fertilizer shall contain the ingredients in a specified proportion, as stated in the analysis printed on each bag. (2) That the seller should not be held responsible for results in its actual use. (3) That the whole contract is therein expressed, and all other terms are unauthorized. No language could be mere explicit and no contractual obligation and right more definitely fixed. The warranty was drawn for the very purpose of preventing the recovery of such damages as are, in their nature, very speculative, if not imaginary, and out of all proportion to the amount of money or price received by the seller for the fertilizer. If fertilizer companies can be mulcted in damages for the failure of the crop of every farmer who may buy from them, they would very soon be driven into insolvency or be compelled to withdraw from the state, as the aggregate damages, if the supposed doctrine be carried to its logical conclusion, would be ruinous, and the farmers in the end would suffer incalculable harm. In view, then, of the probable results flowing from such a construction of the contract, we should hesitate very long before adopting it, with its disastrous consequences to both parties, which we cannot suppose they contemplated. The court, therefore, erred in charging the jury that if the fertilizer did not contain the ingredients, and in the quantities, as warranted, or if it was not suited to the purpose for which it was sold, they should answer the third issue in the negative, for the special warranty and the provisions against any liability for results excluded any implied warranty as to its suitableness for use in fertilizing crops.

In Allen v. Young, 62 Ga. 617, where the contract and statute of the state were much like ours, it was said:

"The notes given to the company for the price of the fertilizer having upon their face a stipulation that the fertilizer was purchased 'entirely upon the basis of the analytical standard guaranteed by the company, and that I [the buyer] will in no event hold it responsible beyond such standard, nor in any wise for practical results,' the precise right of the purchaser was to receive an article containing the chemical and fertilizing properties enumerated in the guaranty, and these in the proportions and up to the degree of strength held out as a standard."

The same court, in that and other cases, discusses the competency and probative force of evidence as to the effect of the particular fertilizer, when used upon land, in producing crops, and strongly intimates that such evidence is not admissible, where the contract contains a provision that the seller is not to be liable for results, and that, if it is competent, it should be received with caution and in connection with more direct evidence that the fertilizer did not contain the ingredients guaranteed by the analysis, or as much of them as the analysis and certificate required. Hamlin v. Rogers, 78 Ga. 631, 3 S. E. 259; Scott v. McDonald, 83 Ga. 28, 9 S. E. 770; Jones v. Cordele Guano Co., 94 Ga. 14, 20 S. E. 265.

The court said in Hamlin v. Rogers, supra:

"All the seller is required by law to guarantee is that the fertilizer contains * * * the ingredients it is represented to contain. He may or may not guarantee its effect upon crops. * * * Parties have a right to make their

own contracts. Under the limited guaranty contained in this contract and that imposed by law, the defendant could have shown that the fertilizer * * * did not contain the ingredients * * * indicated by the analysis made by the state chemist."

Our statute (Revisal §§ 3945 to 3957) provides for an analysis by the department of agriculture of all fertilizers sold in the state, and makes the certificate of the state chemist prima facie evidence of their contents. We are of the opinion that, notwithstanding the stipulation as to nonliability for results, evidence of the effect of any particular fertilizer upon crops is competent, under certain conditions, to prove that it did not contain the guaranteed ingredients or in the proportion specified in the label put on the bag.

The court, in Jones v. Cordele Guano Co., supra, referring to a similar contract as the one in question, said:

"While it is true that the note sued on in the present case contained an express stipulation that the makers purchased on their own judgment and waived any guaranty as to the effects of the fertilizer on their crops, we think they were nevertheless entitled to show that their crops derived no benefit from the use of the fertilizer in question. It was competent for them to do this, not for the purpose of repudiating or varying the terms of their written contract, or of holding the guano company to a guaranty it had expressly declined to make, but to show that in point of fact the guano did not come up to the guaranteed analysis branded on the sacks, as required by law. In other words, it was the right of the defendants to show that this guano did not contain the chemical ingredients set forth in that analysis. If the guano failed to produce any beneficial effect on the crops under favorable auspices, this fact would at least tend to show it did not contain the fertilizing elements in the proportions specified in the analysis branded on the sacks."

But when there is an offer of such evidence, the kind of soil, manner of cultivation, accidents of season, and other pertinent facts should be first shown, so that a foundation may be laid for admitting testimony of actual production, with a view of disparaging the fertilizers, and the jury should be carefully instructed that they can consider the evidence only for the purpose of showing the absence of the guaranteed ingredients or the represented quantities of each, and not at all for the purpose of assessing damages, either directly or indirectly, because of any loss or diminution of the crops, as the measure of damages depends upon quite a different principle.

[4] The extent of the recovery must be restricted to the difference, not necessarily between the price and the value of the article purchased, but to the difference between the article delivered under the contract of warranty and its value or market price if it had been such as it was warranted to be. Manufacturing Co. v. Oil Co., 150 N. C. 150, 63 S. E. 676, 134 Am. St. Rep. 899, citing Parker v. Fenwick, 138 N. C. 209, 50 S. E. 627; Marsh v. McPherson, 105 U. S. 709, 26 L. Ed. 1139; Manufacturing Co. v. Gray, 129 N. C. 438, 40 S. E. 178, 57 L. R. A. 193. The principle is thus stated in 35 Cyc. p. 468:

"The general rule as to the measure of damages on a breach of warranty is that the buyer is entitled to recover the difference between the actual value of the goods and what the value would have been if the goods had been as warranted, and in the application of the rule it is held that the fact that the goods were actually worth the price which was paid for them is immaterial. The difference between the purchase price and the actual value cannot be regarded as the measure of damages, as in such case the purchaser recovers too small a sum if he has made a bad bargain and paid more than the goods were worth, and too great a sum if he has made a good bargain, paying less than the goods were worth. It is true that in some cases the rule has been stated that the measure of damages is the difference between the purchase price and the actual value of the goods, but in nearly all of these cases the theory undoubtedly is that in accordance with the general rule, if there is no other evidence of the actual value of the goods, the purchase price will be regarded as such value."

The elementary rule, as above stated, is the best rule, leaving the price to be considered, when necessary, in the final adjustment between the parties to ascertain what is due by one to the other on account of the transaction, when there has been a breach of the warranty. We have mentioned this subject for the purpose of showing that no part of the recovery, under this contract, should be assessed for the failure of crops, as there is an express stipulation that plaintiff should not be held liable for any results from the use of the fertilizer, and the charge, in this respect, was erroneous. This court said in Fertilizer Works v. McLawhorn, 158 N. C. 274, 276, 73 S. E. 883:

"The deficiency in value was allowed him in abatement of price. The claim of consequential damages resulting in the alleged shortage in his crop was properly disallowed by the court. Carson v. Bunting, 154 N. C. 532 [70 S. E. 923], where the court holds that the measure of damages is in the abatement of the price, as is also provided by Revisal, 3949."

It must not be understood that we are dealing with a case where a farmer is suing his merchant for a breach of contract in the sale of fertilizers, alleging that they were deficient in quality, and thereby he has sustained a loss or diminution of his crop, in the cultivation of which it was used. The sale in such a case may have been made upon an express or an implied warranty as to the quality of the fertilizer, and does not fall within the principles we have discussed. With reference to such a case, Justice Hoke said in Tomlinson v. Morgan, 166 N. C. 557, 82 S. E. 953:

"The court does not understand that plaintiff seriously contends that a warranty has not been established by the verdict, but it is chiefly urged for error that there is no proper evidence tending to show a breach of the warranty—i. e., that the guano sold was off grade; and, second, that, under our decisions, a loss claimed in diminution of the crop is too remote and uncertain to be made the basis for an award of damages. Undoubtedly, a counterclaim of this character presents such an inviting field for litigation and is so liable to abuse that it should not be entertained unless it is clearly established that there has been a definite breach of the warranty, and satisfactory evidence is offered that

the loss claimed is directly attributable to the breach, and the amount can be ascertained with a reasonable degree of certainty. While the court should always be careful to see that these rules are not transgressed to the injury of a litigant, when the facts in evidence clearly meet the requirements, authority in this state is to the effect that the loss suffered in diminution of a given crop, when it is clearly attributable to a definite breach of warranty as to the quality of a fertilizer, that it is within the contemplation of the parties and capable of being ascertained with a reasonable degree of certainty, may be made the basis for an award of damages"—citing Herring v. Armwood, 130 N. C. 177, 41 S. E. 96, 57 L. R. A. 958; Spencer v. Hamilton, 113 N. C. 49, 18 S. E. 167, 37 Am. St. Rep. 611.

The Tomlinson Case, it has been suggested, is somewhat in conflict with our views, but we think it clearly is not, but entirely consistent therewith. In that case it appeared that there was an express warranty "that the fertilizer was suitable for tobacco," which meant, if properly construed, that if it was used in the cultivation of tobacco it would produce good results and increase the yield. Besides, there was no limited warranty as in our case, and no restriction of liability for results, and it appeared, further, that a member of the plaintiff's firm had said that he had seen as much as he had wanted to see, and he thought there must have been a mistake made in the factory by putting in acid instead of phosphate. These facts show a radical difference between the two cases. If the merchant who buys from the fertilizer company chooses to sell to the farmer with a warranty different from that which has been given to him, and broader in its scope, he may do so, but he cannot thereby increase the liability of the fertilizer company upon its warranty to him. That will remain as fixed by the terms of the contract, and will not be altered by any future conduct or action of the merchant in his dealings with others.

The effect of the judge's instruction upon the third issue, which, by the way, is not in proper form, was to add a term to the contract not inserted therein by the parties, and to charge the plaintiff upon a warranty, for the performance of which he was not bound, and for any breach of which he was therefore not liable.

It has been suggested that the court, in Jones v. Cordele Guano Co., supra, decided that evidence as to the use of the fertilizer upon lands and its effect upon crops was admissible only as corroborative or discrediting testimony, after there had been evidence of an analysis of the fertilizer; but we think it is substantive evidence, and for the reason given by the court in that case for admitting it as corroborative. It has been held to be substantive evidence in Tomlinson v. Morgan, 166 N. C. 557, 82 S. E. 953. Cervantes wisely said, in his Don Quixote, that "the proof of the pudding is the eating," and so by analogy the proof of the fertilizer is the using of it. It is practical instead of scientific proof, but the evidence should be admitted cautiously and with proper and full safeguards, so as, by eliminating the speculative elements, to show clearly the causal connection between the fertilizer used and the loss or diminution of the crop. Unless the foundation for such proof is well laid, it lacks in probative force, as it has not been removed from the realm of speculation and is only conjectural and, of course, unreliable.

We direct that there must be a new trial, because of the errors indicated.

New trial.

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(100 S. C. 248)

## STATE v. TIDWELL. (No. 9035.)

(Supreme Court of South Carolina. March 15, 1915.)

1. JURY ⟸82 — SUMMONING JURORS — NONCOMPLIANCE WITH STATUTE.

Conceding that Civ. Code 1912, § 4026, providing that jurors shall be summoned "as provided by law," refers to Civ. Code 1902, § 2923, providing that the sheriff shall summon each person drawn as juror by reading to him the venire with his indorsement thereon of such person having been drawn or by leaving at his place of abode a written notification thereof and of the time and place of the sitting of the court, where the sheriff mailed a subpœna to each of the 36 men on the venire, 27 of whom acknowledged the receipt of the subpœna and appeared in court, and the sheriff also served as many of the other 9 men as he could find by delivering the subpœna to them, and one of them appeared, the failure to comply strictly with the statute was not ground for quashing the venire, since while jurors ought to be summoned in formal manner, and all named in the venire, who can with reasonable diligence be found, ought to be summoned and to attend, a formal summons is not necessary, if they attend.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 282, 307–309, 331, 332, 348, 359, 367, 380; Dec. Dig. ⟸82.]

2. JURY ⟸70—ADDITIONAL JURORS—STATUTORY PROVISIONS.

Under Civ. Code 1912, § 4023, providing that nothing in that article shall prevent the clerk of the court of common pleas from issuing venires for additional jurors in term time upon the order of the court whenever it is necessary for the convenient dispatch of its business, in which case the venire shall be served and returned and the jurors required to attend on such days as the court shall direct, where the sheriff served by mail or in person all of the 36 men named in the original venire, the court, after the original panel had been exhausted in a homicide case, was warranted in ordering the issuance of a venire for additional jurors.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310–330, 340, 350; Dec. Dig. ⟸70.]

3. JURY ⟸70—ADDITIONAL JURORS—STATUTORY PROVISIONS — "JURORS IN ATTENDANCE"—TALES BOX.

Under Cr. Code 1912, § 82, relative to peremptory challenges, Civ. Code 1912, § 4018, providing that the names on the jury list shall be written on separate ballots and placed in a jury box, which shall be kept securely locked, and that at the same time there shall be placed in a special apartment in such box, to be known as the "tales box," the names of not less than 100 nor more than 400 persons, whose names appear on the list as residing within five miles of the courthouse from which jurors shall be

/n to supply deficiencies arising from any e of emergency during the sitting of the t, section 4023 relative to issuing venires ıdditional jurors in term time, and circuit t rule 25 providing that in the impaneling jury in criminal cases, where the right of ıptory challenge is claimed and allowed, a under 10 years of age shall draw one from ıames of all the jurors in attendance, which having answered, shall be presented to the ɜed, and so on, until, in regular course, the l be exhausted or a jury formed, where, the exhaustion of the regular panel in a cide case, the court directed the issuance venire for 15 additional jurors, it was er- ɔ call one of such additional jurors who ened to be present in court without wait- ıntil all of such additional jurors had been ıoned and given a reasonable time to ap- and without then drawing the names as ded in the rule, as "the jurors in attend- ' within the rule means the jurors in at- nce or who have had notice and a chance tend.

. Note.—For other cases, see Jury, Cent. §§ 310-330, 340, 350; Dec. Dig. ⊂⊃70.]

)MICIDE ⊂⊃169 — EVIDENCE — DECLARA- NS OF DECEASED.

)n a trial for homicide, where accused tes- that, at an interview between him and ɜed a few days before the homicide, de- l manifested a hostile and threatening at- towards him, it was error to admit evi- of deceased's declarations a few minutes such interview as to things that occurred e interview having no reference to his ɜd threats or threatening attitude.

. Note.—For other cases, see Homicide, Dig. §§ 341-350; Dec. Dig. ⊂⊃169.]

MICIDE ⊂⊃183—EVIDENCE—ADMISSIBIL-

ɪn a trial for killing a man claimed to wronged accused's daughter, it was error ıit evidence and permit cross-examination ıused and his daughter as to the lewd life daughter and her stepmother, accused's ınd their illicit intercourse with men oth- n deceased.

Note.—For other cases, see Homicide, Dig. § 387; Dec. Dig. ⊂⊃183.]

rNESSES ⊂⊃405 — CONTRADICTION—AD- IBILITY.

ɪ a trial for killing a man as a result of ting between him, another man, and ac- wife and daughter at a bawdyhouse, the )ny of the proprietor of such house that ɜd did not engage the rooms at her house relevant and incompetent to contradict ıgnter's testimony that he did engage the

Note.—For other cases, see Witnesses, Dig. §§ 1273, 1275; Dec. Dig. ⊂⊃405.]

ıICIDE ⊂⊃237 — PRESUMPTIONS AND )EN OF PROOF—INSANITY.

ıe who pleads unsoundness of mind in ex- f a homicide must prove such unsound- ɾ a preponderance of the evidence or by ɜh evidence as will raise a reasonable about his guilt of the offense charged; ɪnce an instruction that while defendant ınd to prove, by a preponderance of the e, that he was of unsound mind, if upon deration of the entire testimony any rea- doubt remained as to whether or not he ıe, he was entitled to an acquittal, was ɣ refused.

Note.—For other cases, see Homicide, )ig. § 500; Dec. Dig. ⊂⊃237.]

al from General Sessions Circuit Greenville County; T. J. Mauldin,

George W. Tidwell was convicted of manslaughter, and he appeals. Reversed, and new trial ordered.

Defendant's seventh request was as follows:

"That while it is true that the defendant must prove that he was of unsound mind at the time of the act in question by the preponderance of the evidence, yet it is also true that upon a consideration of the entire testimony in the case, the state's as well as the defendant's, if any reasonable doubt remains in the mind of the jury as to whether or not he was sane, then the defendant is entitled to a verdict of 'not guilty.'"

James H. Price and Townes & Earle, all of Greenville, for appellant. Solicitor P. A. Bonham and Cothran, Dean & Cothran, all of Greenville, for the State.

GAGE, J. Verdict below for manslaughter; judgment, imprisonment at hard labor for 12 years; bail refused; appeal here by defendant for a new trial.

The defendant is a man past middle life and hitherto of excellent reputation. The deceased was a young man in the prime of life, and unmarried, and of feigned chastity. The transaction arose out of the adulterous life of the deceased and the defendant's young daughter, 17 years of age, and the vengeance of the father thereabout.

The deceased resided in Greenville, had lucrative employment there in the office of a cotton mill, and had good connections. The defendant resided at Clinton and was a traveling newspaper canvasser; and his daughter lived there with him and her stepmother.

The deceased visited the girl at her Clinton home, and by her account there first wronged her in her father's house, in December, 1913. In the next month he wrote to her a letter, which contained no suggestions of wrongdoing, but, on the contrary, expressed a tender affection for the girl. In the early months of 1914 the girl fell deep into the mire of sin, and her stepmother with her. They met, by appointment, the deceased and another man at a house of prostitution kept by a negress in the city of Greenville. The father got news of the scandal, repaired to the scene, and sought an interview with the deceased, but with no satisfactory result. That interview was at a hotel on Sunday afternoon. On the Thursday following, which was the 12th of March, the defendant sought the deceased at the place of his employment, and shot him to death with a pistol. The conviction was unlawful, and there must be a new trial.

There are 50 exceptions, which were unnecessary, and much incumber the record. The defendant's counsel has grouped the 50 exceptions into 16, and the counsel for the state has stated the alleged errors under four heads. And there are really only four substantial issues, to wit: (1) Ought the

first venire to have been quashed? (2) Ought the juror Rogers to have been presented to the defendant before all the 15 additional jurors had been summoned to appear and before there had elapsed a reasonable time for them to appear? (3) Was incompetent testimony allowed? And this includes: Was there improper cross-examination of the father and daughter? (4) Was the defendant's seventh and refused request a right statement of the law?

[1] These in their order. The first issue must go against the appellant. The venire first sent out by the clerk to the sheriff directed him to serve 36 men to sit as jurors. The service was not made by a delivery into the hands of the 36 men of a subpœna to appear in court; but the service was made "by mail," and that method consisted in sending the subpœna in a letter to the person, and also an acknowledgment of its receipt, which acknowledgment the person was expected to sign and return by mail to the sheriff. Of the 36 men named in the venire 27 signed the acknowledgment, returned the same to the sheriff, and appeared in court to serve as jurors. As many of the 9 others as the sheriff could find were served by a delivery into their hands of the subpœna to appear. One of these appeared, so that 28 men named in the venire were present in court and 8 were absent.

The sole contention is that the sheriff summoned those 27 men in an unlawful manner; that the direction of the statute to summon them, "as provided by law" (Code 1912, § 4026), means the manner prescribed by the Code of 1902 (section 2023). Granting that the sheriff ought to have followed the direction of the Code of 1902, which is not adjudged, his failure to do so was not of substance.

The character of the men named in the venire is not challenged; the successive methods of their selection are not questioned. These are the essential things which dedicate men to jury service. It matters little how they get notice to appear in court, so they are fit and are rightly selected. They ought to be summoned in formal manner, and all named in the venire, who can with reasonable diligence be found, ought to be summoned, and all ought to attend; but a formal summons is not necessary, if they attend. State v. Crosby, Harp. 91.

Out of the 28 men who appeared, as many as 11 were presented to the defendant and sworn as jurors; the others all were challenged by the state or by the defendant, and that exhausted the panel.

[2, 3] The testimony shows that the sheriff served, either by mail or in person, all the 36 men named in the venire who could be found. The court then was warranted to proceed under section 4023 to provide "additional jurors." Upon a proper order to do so, the clerk issued his venire for 15 additional jurors to appear forthwith. But, before the sheriff had "served and returned" the venire, one man specified in it, Rogers by name, who happened to be present in court, was called to the book.

At that same instant the defendant had already exercised nine of his ten peremptory challenges; and he was obliged to accept or to reject the man Rogers; and a rejection, which he did, exhausted his peremptory challenges, so that he was compelled to accept the next name drawn out. And out of this the second issue arises, and it must go against the state. The appellant objected that "it has not been shown to the court that the 15 who were drawn here served, and that these names were not put in the hat and the names drawn out so as to give us the opportunity of having the entire 15 of the venire in court." The question is governed by section 82 of the Criminal Code of Procedure, sections 4018 and 4023 of the Code of Laws, the twenty-fifth rule of court, and by the decided cases.

For accuracy of statement, the panel of 36 jurors will be referred to as the original panel, and the panel of 15 jurors will be referred to as the additional panel, for the statute describes them as "additional jurors."

There is no difference betwixt the character of the men on the two panels; there is no difference in the agency by which the names have theretofore been put into and drawn out of the "jury box"; there is no difference in the agency by which the members of each may be brought into court; there is no difference in the manner by which each panel shall be presented to the accused on his trial. The only differences in the cases are these: One panel is put into the "jury box," and the other panel is put into the apartment of the jury box known as the "tales box"; one panel is summoned by a venire issued before term time and the other by a venire issued in term time.

Manifestly it would not be lawful for a trial court to proceed against objection to select a jury to try the accused out of the original panel, before the sheriff had exercised due diligence to summon all the jurors named in the venire, and before such jurors could have a chance to attend. Such a procedure would open the door for an unfair trial. Thereby only jurors well known to be friendly to one side or the other might be in attendance. The case is not altered, on principle, that the selection is to be made from the additional panel, although that panel is for the "convenient dispatch of business." The statute moreover provides that the "venire shall be served and returned," presumably before or at the appearance of the jurors.

We think the twenty-fifth rule of court does not alter the case. To "draw one from the names of all the jurors in attendance" must mean, in light of reason and the law, jurors in attendance or who have had notice to attend and the chance to attend.

The case at bar illustrates the peril of proceeding to select jurors before the whole panel to be summoned has been served and has had a chance to appear. We are mindful of the rule, long since enunciated, that the right to reject a juror does not include the right to select a jury. But in jury trials, like in most transactions of life, there is a lawful element of that which is called chance, for the lack of better name. With 15 names in the hat, and a boy to draw, who can divine what may come out? If a name pleasing to the defendant, he is entitled by the rule of court and the chance to have it. And if a name menancing to the defendant, and his necessities shut him up to it, he must by the same rule and chance accept it. We are mindful, too, of the practice of trial courts for the dispatch of business to proceed to the selection of jurors before all those named in the additional venire have come into court; but that practice ought to have, and under ordinary circumstances does have, the consent of counsel, except in a pinch like this.

The third issue must go against the state.

[4] The defendant had testified to an interview with the deceased at a hotel on Sunday before the homicide, whereat deceased manifested a hostile and threatening attitude towards defendant. The state called Rickman and Brunson as witnesses. They were not present at the interview, but talked with deceased a few minutes thereafter. These witnesses detailed the declarations of deceased about the colloquy. These declarations had no reference to defendant's testimony about threats or a threatening attitude of deceased at the interview. They referred to what the deceased told defendant about the lewdness of his daughter with other men than himself. They were not admissible, under the rule in Chaffin's Case, 56 S. C. 434, 33 S. E. 454, and they were both irrelevant and incompetent.

[5] The third issue includes the defendant's objection to the state's cross-examination of the father and the daughter. The objection is sustained.

The cross-examination of G. W. Tidwell covers 33 printed pages, and that of Olive Tidwell covers 28 printed pages. Much of it was directed to an exposure of Olive's lewd life with other men. Much of it was directed to an exposure of Mrs. Tidwell's lewd life with other men. There is high warrant for the belief that a father is most anxious about a prodigal child. That this child was lost in the ways of sin was no reason why she should be exposed to the contempt and ridicule of the jury, and was no reason why a father's solicitude about her should be dulled.

The character and life of the wife Mrs. Tidwell had no relevancy to the issues that were being tried; yet not only was the defendant closely questioned about his wife, but a witness Woods was produced to swear to his illicit intercourse with Mrs. Tidwell. The testimony was incompetent.

A witness Bussey testified to his illicit intercourse with Olive, in contradiction to her denial of the fact. The testimony was irrelevant and incompetent.

[6] A witness Gosnell testified that Mary Walker, the negress proprietor of the bawdy-house, had told him that the deceased had not engaged the rooms at her house. This was to contradict Olive, who had sworn that deceased did engage the rooms. This testimony was irrelevant and incompetent.

There is no need to further discuss the testimony, or to point with detail to the errors in it. They are manifest, for they infringe the plainest rules of evidence, and need not be suggested to guide in the next trial of the case.

It is sufficient to say that the testimony which has been referred to, and the cross-examination which has been recited, were sufficient to prejudice the defendant's cause, and were in denial of that fair trial to which he is entitled.

[7] The fourth issue must go against the defendant. Let the seventh request be reported. The true rule is that he who pleads unsoundness of mind in excuse for homicide must prove such unsoundness by a preponderance of the evidence, or by so much evidence as will raise a reasonable doubt about the defendant's guilt of the offense charged. State v. McIntosh, 39 S. C. 107, 17 S. E. 446.

The judgment below is reversed, it is so ordered, and a new trial must be had.

GARY, C. J., and WATTS, J., concur. HYDRICK and FRASER, JJ., concur in the result.

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(100 S. C. 242)

## STATE v. HONDROS. (No. 9034.)

(Supreme Court of South Carolina. March 13, 1915.)

1. SEARCHES AND SEIZURES ⟸7 — SUNDAY LAW—CONSTRUCTION.

Under Cr. Code 1912, § 699, declaring that any one publicly crying or exposing for sale any goods or merchandise upon Sunday shall forfeit the goods, a seizure and forfeiture of 12 boxes of cigars partially filled, aggregating 283 cigars, worth $14.15, was not in violation of Const. U. S. Amend. 4, securing the right of the people in their house and effects against unreasonable searches and seizures.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. ⟸7.]

2. CONSTITUTIONAL LAW ⟸308—"DUE PROCESS OF LAW"—PROSECUTION FOR SUNDAY VIOLATION.

Const. U. S. Amend. 5, and Const. art. 1, § 5, declaring that no one shall be deprived of life, liberty, or property without "due process of law" only saved to a person the right to be brought into court and to have a chance there to establish any fact which by the law of the land will protect him and his property, and are not violated by Cr. Code 1912, § 699 et seq., providing for a forfeiture of goods exposed for

sale on Sunday, and for summons by a magistrate who upon his own view, confession of the party, or proof of one or more witnesses under oath may order forfeiture of the goods by seizure and sale.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 863–866; Dec. Dig. ⟸ 303.

For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

3. CONSTITUTIONAL LAW ⟸84 — SUNDAY LAW—ESTABLISHING RELIGION.

Cr. Code 1912, § 699, providing for the forfeiture of goods exposed for sale on Sunday, does not violate Const. art. 1, § 4, declaring that the General Assembly shall make no law respecting an establishment of religion.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 152–154; Dec. Dig. ⟸ 84.]

4. CRIMINAL LAW ⟸90—JURISDICTION OF MAGISTRATE—"PUNISHMENT."

Const. art. 5, § 21, gives magistrates jurisdiction, to be prescribed by the General Assembly, not to extend to cases where the punishment exceeds a fine of $100 or imprisonment for 60 days. Cr. Code 1912, § 20, gives them jurisdiction of all offenses subject to the penalties of fine or forfeiture not exceeding $100; and section 699 et seq. provides for the forfeiture of goods exposed for sale on Sunday and gives to magistrates authority to summon any offender, and, upon proof, to issue warrant to seize and sell such goods. *Held*, that the magistrate had jurisdiction to forfeit goods exposed for sale on Sunday; the term "punishment" not including a forfeiture.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 172; Dec. Dig. ⟸90.

For other definitions, see Words and Phrases, First and Second Series, Punishment.]

Appeal from General Sessions Circuit Court of Laurens County; F. B. Gary, Judge.

Charley Hondros was convicted in magistrate's court of a violation of the Sunday law and, from an affirmance, he appeals. Affirmed.

The exceptions were as follows:

I. Because his honor F. B. Gary erred in overruling the defendant's exceptions to the judgment of the magistrate and in confirming the said judgment.

II. Because his honor erred in finding that the defendant did publicly cry, show forth, or expose for sale, any wares, merchandise, fruit, herbs, goods, or chattels on the Lord's Day in violation of section 699 of vol. 2 of the Code of 1912 and there was no testimony tending to show that the defendant did at the time charged violate the said section, but he should have held that he only sold two cigars to one of his boarders as an incident to his meal furnished.

III. Because his honor erred in not holding that the magistrate had no jurisdiction to pronounce the sentence of forfeiture of the 12 boxes of cigars for the selling of only two cigars from the showcase, as the said section 699 does not provide that the magistrate could sentence the defendant to pay a fine not exceeding $100 or imprisonment for a term not exceeding 30 days, and that the said section 699 and the punishment laid down in said section of forfeiture is in violation of section 21, art. 5, of the Constitution of 1905.

IV. Because the said section 699 is in violation of article 1 of the amendments to the Constitution of the United States respecting an establishment of religion.

V. Because the said section 699 and the judgment of the magistrate and his honor the circuit judge, in pronouncing a forfeiture of 12 boxes of cigars for selling two cigars, are in violation of section 8, art. 1, and section 19 of article 1 of the Constitution of this state, prohibiting the forfeiture of estates by a conviction, and prohibiting the imposition of cruel and unusual punishments and excessive fines.

VI. Because said section 699 and the judgment of the magistrate and of his honor the circuit judge are in violation of the 5th and 4th amendments to the Constitution of the United States and of section 5, art. 1, of the Constitution of this state, declaring that no law shall be passed or enforced by this state or any other state depriving any person of his property without due process of law or denying persons the equal protection of the law.

VII. His honor erred in not overruling the judgment of the magistrate and in not dismissing the prosecution.

VIII. Because his honor erred in finding that the defendant did publicly cry, show forth, or expose for sale 12 boxes of cigars of the value of $14.15 contained in defendant's showcase, and he should have overruled the judgment of the magistrate in holding that the defendant did publicly cry, show forth, or expose for sale the said quantity of cigars, and his honor erred in dismissing defendant's appeal and in remanding the case to the magistrate for further proceedings.

Ferguson, Featherstone & Knight and F. P. McGowan, all of Laurens, for appellant. R. A. Cooper, of Laurens, for the State.

GAGE, J. Conviction before a magistrate's court for violation of the Sunday laws as written in section 699 of the Code of Laws. Appeal to the circuit court, and the magistrate's judgment there affirmed. Appeal here.

The appeal is totally without merit. The judgment below is manifestly right. The defendant is a native of Greece. It does not appear if he is a citizen of the United States. If he is a citizen of the United States, he ought to obey the laws of the state; if he is not a citizen of the United States, he must obey the laws of this state. The exiles and martyrs who first settled this territory fixed their character upon its laws, and those who now come hither must conform thereto, until at least, unhappily, that character may be changed.

There are eight exceptions; but the appellant has argued upon only five, and four of those five involve issues under the state or federal Constitutions. Let the exceptions be reported.

The following constitutional enactments are invoked:

State: (1) Article 5, § 21, as to a magistrate's jurisdiction; (2) article 1, § 8, as to a forfeiture of estate; (3) article 1, § 19, as to excessive fines; (4) article 1, § 5, as to due process of law; (5) article 1, § 4, as to establishment of religion.

Federal: (6) Fourth amendment, as to unreasonable seizures; (7) fifth amendment, as to due process of law.

The appellant has cited no case and no

text to sustain his contentions about these constitutional enactments. He has simply thrown them in as dragnets, and we are disposed to take them out in like manner. It is sufficient to say the second, third, and sixth cited enactments have no relevancy to the facts of the case at bar.

[1] The seizure and forfeiture here was of 12 boxes of cigars, partially filled, aggregating 283 cigars, worth $14.15. The argument of counsel is that:

"If the magistrate could pronounce a forfeiture of 12 boxes, he could under the same modus operandi, forfeit 1,000 boxes, a power void under the principle of reductio absurdum."

If there be an absurdity, it lies in the contention that the power to do a reasonable thing involves also the power to do an unreasonable thing.

[2] The fourth and seventh enactments only save to a person the right to be brought into court, and to have the chance there to establish any fact which, by the law of the land, would protect him and his property. The statute in question, and the trial for its violation, does not impinge upon those constitutional enactments.

[3] The fifth enactment has over and again been construed, and against the contention of the appellant. City Council v. Benjamin, 2 Strob. 521, 49 Am. Dec. 608; Cain v. Daly, 74 S. C. 480, 55 S. E. 110; State v. James, 81 S. C. 198, 62 S. E. 214, 18 L. R. A. (N. S.) 617, 128 Am. St. Rep. 902, 16 Ann. Cas. 277.

[4] The first enactment has reference to a magistrate's jurisdiction, and the exact contention is that in the case at bar the magistrate went beyond the limit fixed by these words of the Constitution:

"Jurisdiction (to be prescribed by the General Assembly) shall not extend to cases where the punishment exceeds a fine of $100 or imprisonment for sixty days." Art. 5, § 21.

At section 20 of the Criminal Code the General Assembly has fixed the jurisdiction of a magistrate in these words:

"They shall have jurisdiction of all offenses which may be subject to the penalties of either fine or forfeiture not exceeding one hundred dollars," etc.

But the same chapter of the Criminal Code which enacts the Sunday law expressly confers on magistrates—

"power and authority to summon before him any person who shall offend * * * and upon proof * * * the said magistrate shall give a warrant * * * to seize the said goods * * * put on sale, * * * and to sell the same."

It has been held that the word "punishment," as used in the Constitution at article 5, § 21, does not include a forfeiture, such for instance as that prescribed by section 699 of the Sunday statute. State v. Hunter, 79 S. C. 91, 60 S. E. 226. That statute does not make the selling of goods on the "Lord's Day" a crime punishable by fine or imprisonment. It directs the magistrate to proceed against the goods, and to forfeit them to the county. There is no punishment of the vendor by fine or imprisonment imposed by the statute. The vendor is not arrested upon a warrant issued; he is "summoned" before the magistrate, judgment is in rem, and the person of the vendor goes free. The procedure is not that prescribed by section 28 of the Criminal Code. The statute prescribed no other process or procedure by which the sale of goods on the "Lord's Day" may be stopped. Unless a magistrate may proceed to do it, no officer may. That statute confers the jurisdiction, and the Constitution does not limit the jurisdiction; the jurisdiction is therefore lawful to be exercised.

The judgment of the circuit court is therefore affirmed.

GARY, C. J., and WATTS, HYDRICK, and FRASER, JJ., concur.

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(100 S. C. 238)

## STATE v. GRUMBLES. (No. 9038.)

(Supreme Court of South Carolina. March 18, 1915.)

1. EMBEZZLEMENT ⟸47—BREACH OF TRUST—PARTNERSHIP—EVIDENCE.

In a prosecution for breach of trust with fraudulent intent, evidence *held* to take to the jury the question, whether a partnership existed between defendant and prosecutor which would be a defense to the prosecution.

[Ed. Note.—For other cases, see Embezzlement, Dec. Dig. ⟸47.]

2. CRIMINAL LAW ⟸398—PAROL EVIDENCE—"PARTNERSHIP."

"Copartnership" is a factitious relationship between two or more persons, and its existence depends on the agreement between the parties and the agreement may be established by parol.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879–886; Dec. Dig. ⟸398. For other definitions, see Words and Phrases, First and Second Series, Partnership.]

Appeal from Common Pleas Circuit Court of Greenville County.

J. B. Grumbles was convicted of breach of trust with fraudulent intent, and he appeals. Affirmed.

Oscar Mauldin and T. C. Turner, both of Greenville, for appellant. P. A. Bonham, Sol., of Greenville, for the State.

GAGE, J. Indictment and conviction and judgment for breach of trust with fraudulent intent. Appeal by defendant.

[1] There are two exceptions, but only one issue. There was no testimony for the defense, and only one witness for the state upon the issue in the case, and that the prosecutor Chastain. The defendant's contention is that the testimony of Chastain, direct and cross, made a case of partnership betwixt Chastain and Grumbles to buy and trade and sell cows. The exact and practical contention is that the testimony was susceptible of that inference,

and only that inference, and that the court ought to have so held, and to have directed a verdict of not guilty. Of course, if the two men were copartners, there could be no conviction under the indictment. The court submitted to the jury as one of the issues in the case whether or not the testimony of Chastain made out a case of partnership, and the court instructed the jury what constituted a partnership; but the court declined to tell the jury that the testimony certainly made a case of partnership. We think the judgment of the court thereabout is correct.

[2] Copartnership is a factitious relationship betwixt two or more persons; and its existence depends upon the agreement between the parties; and the agreement may be established by parol. There is a lucid statement of the law of partnership in Price v. Middleton, 75 S. C. 108 et seq., 55 S. E. 156. There is no need to repeat it here. Measured by the rules there stated, it is not certain that the relationship which existed betwixt Chastain and Grumbles constituted them partners.

The reporter will annex to this opinion those parts of the testimony which are relevant to the issue. The parts are set out on a separate sheet, hereto attached.

The judgment below is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

R. H. Chastain, a witness for the state, being duly sworn, testified as follows:

Direct examination by Mr. Bonham:

"Q. Mr. Chastain, where do you live? A. Brandon Mills. Q. What is your business? A. Well, I work at the carpenter's trade some and trade cows some. Q. You have got J. B. Grumbles indicted here for fraudulently appropriating to his own use certain moneys of yours amounting to $80.20. It is charged in the indictment that you intrusted him with the collections of these moneys. Now go ahead and state the transaction. A. Mr. Grumbles used those cows, a selling them for a commission, what he got over the principal. Q. Well, now, did the cows belong to you? A. Yes, sir. Q. You turned them over to him to sell for you? A. Yes, sir. Q. Did he or not settle? A. No, sir; he did not. Q. Well, now, did you authorize him to use that money? A. No, sir. Q. Did you loan it to him? A. No, sir. Q. Did you tell him he could appropriate it to his own use? A. No, sir. Each cow he sold he was to settle and take hold of the profits that he made. Q. You put a price on the cows, and he was to settle with you right away? A. Yes, sir; what they cost. Q. And then give you half the verdict? A. Yes, sir. Q. You didn't authorize him to use the money at all? A. No, sir. Q. When you first went into business how much did Grumbles put into that business? A. Not a cent. Q. Didn't he put in $32? A. No, sir. Q. Didn't he agree to sell those cows and you were to take half of the profit and he the other half? A. Yes, sir; every one that he traded. Q. Every one that he traded he was to have half the profit and you half? A. Yes, sir. Q. When you first went into business what was the nature of your relations with him? A. Well, sir, I was to furnish the money to buy the cattle and Mr. Grumble was to sell them. Q. He was to do the work? A. Yes, sir. Q. And he was to get half of what they cost? In other words you were partners? A. No, sir. Q. He put in the work and you put in the money? A. Yes, sir. Q. He put in his work against your money? A. No, sir; not against my money at all. It was the commission what he made there. Q. He put in the work and you put in the money? A. No, sir. Q. Did you ever do any work? A. Yes, sir; I certainly did. Q. What work did you do? A. I went and bought cows. Q. I just want to ask you again positively when you went into business with him if you put in the money? A. Yes, sir. Q. He put in the work, didn't he? A. Yes, sir; he put in the work. Q. And he was to get half the profits and you half? A. He was to get half of the profits of the cows, he bought, providing that he cut out the profits. Q. Listen to me. It is as plain as it can be. When you went into business together you put in the money and he did the work, and you were each to get half of the profits? A. Yes, sir; out of every one that come in. If he got any profit out of what he sold he was to get half, but if he got no profit out of it there was to be nothing. Q. I want you to understand the agreement. You put in the money and he put in the work, and he was to get half of the profits? A. If he got any profit he was to get half, if he got none he wasn't to have none. Q. This was the agreement: That you put in the money and that he do the work, and you were each to get half of the profits? Ain't that the agreement? A. I bought the cows and paid for them, and he was to sell them, and if he made a profit he was to have half of what he made. Q. And you were to get half? A. Yes, sir; I was to get half and him half. Q. And he was to have the possession of them and do all the trading? A. Not all of it. Q. You didn't fix a price on that stuff, did you? A. It was fixed when I bought it. Q. That he was to get just what that was? A. If he got anything out of it. Q. That he was to get just what you paid for it? A. If he got anything out of it. Q. If he sold them for more than that, that was the profit? A. Yes, sir. Q. And he was to sell these cows for you, and if he made a profit he got half and you got half? A. Yes, sir. Q. Who was doing the feeding of these cows all the time? Didn't Grumbles do that? A. I give him that money to buy feed when I went back down home. Mr. Mauldin, do you want the truth in this case?

"Court: You answer his questions. Q. Who paid for the feed for these cows? A. I paid for part of it. Q. Who paid for the other part? A. I don't know, sir. Q. If they got any, Grumbles was responsible for feeding them, wasn't he? A. What I didn't pay for, I reckon."

W. Va. 775)

AHAM GROCERY CO. et al. v. CHASE et al. (No. 2662.)

preme Court of Appeals of West Virginia. March 9, 1915.)

*(Syllabus by the Court.)*

RAUDULENT CONVEYANCES ⊂=255—CREDOR'S SUIT—PARTIES—JOINT DEBTORS.
The codebtors of one of two or more joint ors, who has made a fraudulent conveyance, not necessary parties to a suit by creditors void it.

1. Note.—For other cases, see Fraudulent eyances, Cent. Dig. §§ 741–750; Dec. Dig. 55.]

RAUDULENT CONVEYANCES ⊂=162—SUIT SET ASIDE—FRAUDULENT INTENT.
In a suit by subsequent creditors to set a deed made by their debtor, without conation deemed valuable in law and with into hinder, delay, and defraud his creditors, ht within five years from the date of the it suffices to prove fraudulent intent on art of the grantor alone. Proof of knowlthereof by the grantee is not required.

. Note.—For other cases, see Fraudulent yances, Cent. Dig. §§ 504, 505; Dec. Dig. 2.]

AUDULENT CONVEYANCES ⊂=162—SET D ASIDE—RIGHT—INTENT OF GRANTEE—UNTEER.
mere volunteer participates in the fraud grantor, by his acceptance of a conveymade with intent on the part of the latdefraud his creditors, or by his retention benefit thereof after notice of the intent which it was made.

Note.—For other cases, see Fraudulent yances, Cent. Dig. §§ 504, 505; Dec. Dig. 2.]

UDULENT CONVEYANCES ⊂=209 — IN TO DEFRAUD CREDITORS—EFFECT.
tent to defraud existing creditors, in the on of a voluntary conveyance, vitiates it subsequent creditors.

Note.—For other cases, see Fraudulent ances, Cent. Dig. §§ 632, 633; Dec. Dig. .]

UDULENT CONVEYANCES ⊂=104—FRAUD REDITORS—HUSBAND AND WIFE.
husband's disposition of practically all property, within a period of about two by voluntary conveyances to his wife, wing some debts and contracting others, ulent.

Note.—For other cases, see Fraudulent ances, Cent. Dig. §§ 337–344; Dec. Dig. ]

al from Circuit Court, McDowell

by the Graham Grocery Company and gainst C. B. Chase and others. From for plaintiffs, defendants appeal. Afand remanded.

ier, Taylor & Taylor, of Welch, for nts. Cook, Litz & Harman and G. W. , all of Welch, for appellees.

ENBARGER, J. The decree com- of on this appeal set aside and anso far as inconsistent with alleged f creditors, a deed by which C. B. onveyed to his wife certain real es- the town of Kimball, in McDowell county, deeming it to have been made with intent to hinder, delay, and defraud them.

The grounds of demurrer to the bill, which the court overruled, were: (1) Lack of sufficient allegations of fraud; and (2) nonjoinder of codebtors of the defendant Chase.

[1, 2] As the bill distinctly alleges the conveyance was voluntary and without legal consideration and that the indebtedness, or part of it, existed at the date of the conveyance, and also charges intent on the part of the grantor, in making the conveyance, to hinder, delay, and defraud his creditors and especially the plaintiffs, and avers notice of such intent on the part of Chase's wife, the grantee, the first ground of demurrer obviously fails. It would be a waste of time to cite authority for a proposition so elementary as this. Nor is the other objection well founded. Though there is authority to the contrary (Oliphant v. Hartley, 32 Ark. 465; Bank v. Landauer, 68 Wis. 44, 31 N. W. 160), the weight of authority throughout the country excuses nonjoinder of codebtors, in a proceeding for relief from a fraudulent conveyance made by one of them (Tabb v. Hughes [Va.] 3 S. E. 148; 20 Cyc. 715; Quinn v. People, 146 Ill. 275, 34 N. E. 148). Though Core v. Cunningham, 27 W. Va. 206, does not assert this proposition, the general rule there declared seems to embrace it. The object of the suit is to get rid of a fraudulent conveyance. The conveyance is the wrong complained of, and nobody but the grantor and grantee are interested in the question. Though not wholly foreign to it, the right of contribution among the debtors is a separate and distinct matter, in which the plaintiffs have no interest, and it may be settled without litigation. It is manifestly collateral to the subject-matter of the bill, and persons interested in such a liability or question need not be made parties. Mitchell v. Chancellor, 14 W. Va. 22, 27; Austin v. Richardson, 1 Grat. (Va.) 310.

The three complaining creditors, Graham Grocery Company, First National Bank of Welch, and Fidelity Banking & Trust Company, all united in the bill. The Graham Grocery Company is the holder of a note for $295.31, signed by John R. Black, dated March 18, 1911, payable four months after date, to the order of the Bank of Graham, at the office of discount and deposit of the Fidelity Banking & Trust Company, and irregularity indorsed by C. B. Chase, W. H. Show, and S. K. McFarland. The National Bank of Welch holds a note for the sum of $1,600, signed by Black and Show, dated March 4, 1911, and irregularly indorsed by Chase and McFarland. The Fidelity Banking & Trust Company hold a note for $1,767.50, signed by all the parties as makers and dated March 4, 1911.

The bill alleges that all the notes held by the plaintiffs were given in renewal of older

notes executed originally before the date of the conveyance, September 12, 1908, and the proof shows the note held by the Fidelity Banking & Trust Company was given in lieu of notes bearing dates earlier than that of the conveyance, but the debt due the Graham Grocery Company seems to have been incurred after the date of the deed. The note held by the First National Bank of Welch was given in part renewal of a note for $2,500 executed after the conveyance. Prior to May 1, 1908, all of these parties and three others, W. C. Miller, C. E. Miller, and L. H. Miller, were stockholders in a corporation known as the Miller Mercantile Company. On or about said date, the Miller Mercantile Company was succeeded by the Enterprise Mercantile Company, the stockholders therein being the same as in the other except the Millers, who sold their stock to the other stockholders of the Miller Mercantile Company and retired from the business. For their respective interests, the other stockholders gave them their notes, one for $547.29 to C. E. Miller, one for $678.25 to W. C. Miller, and one for $447.67 to L. H. Miller, all of which were dated May 12, 1908. At the date of the dissolution of the Miller Mercantile Company, an outstanding note for $1,500 made by it and indorsed by all of the stockholders of the corporation, was held by the Fidelity Banking & Trust Company. Between that date and May 16, 1910, this note was largely paid off, and on May 16, 1910, the Miller notes and the balance due on the $1,500 note were all combined into the one for $1,767.50, above described. The $2,500 note was made to obtain money used by the Enterprise Mercantile Company, in discounting its bills.

Though the principle of subrogation no longer avails a subsequent creditor, in an attack upon a conveyance (Edwards Mfg. Co. v. Carr, 65 W. Va. 673, 64 S. E. 1030; Greer v. O'Brien, 36 W. Va. 277, 15 S. E. 74; and McCue v. McCue, 41 W. Va. 151, 23 S. E. 689), the existing indebtedness must be paid in the usual course of business, not merely changed in respect of form.

The three notes given to the Millers for their stock, on which Chase and others were liable, as makers or indorsers, have never been really paid. He and his codebtors, by the execution of a new note, merely changed the character of the indebtedness, by the execution of a single note, in lieu of three, to another party as creditor. In Edwards Manufacturing Co. v. Carr, the existing indebtedness had been paid off in the usual course of business, and new debts, founded upon new considerations, had been subsequently made. The same thing had occurred in Greer v. O'Brien. In that case, Judge Lucas, delivering the opinion of the court, said the husband had divested himself of no property theretofore in his possession, except in the usual course of business, and the record disclosed payment of his existing debts in the same way. Here the antecedent debts have not been paid in any real or substantial sense of the term. Though the original notes were technically extinguished and the payees thereof satisfied, nothing more has occurred than the mere substitution of one creditor for another, and one note for three. That is not payment within the meaning of the decisions relied upon. As to the existing indebtedness, the deed is conclusively fraudulent and void.

[3, 4] To obtain relief from the conveyance and charge their debts on the property, it was incumbent upon the subsequent creditors to establish actual fraud therein; but proof of intent, in the making of the deed, to defraud existing creditors, vitiates it as to subsequent creditors. This is the plain import of the terms of the statute. Section 1 of chapter 74 of the Code, serial section 3829, declares every gift, conveyance, assignment, transfer of, or charge upon, any estate, real or personal, with intent to delay, hinder, or defraud creditors, purchasers, or other persons, of or from what they are or may be lawfully entitled to, void as to such creditors, purchasers, or other persons, their representatives or assigns. This is general and applies to every gift, conveyance, assignment, transfer, or charge made with such intent. It is qualified and limited by the second clause, in favor of purchasers for valuable consideration. As against them, the fraud in the transaction does not vitiate it, unless such purchaser had notice of the fraudulent intent of the grantor. This clause does not save a mere volunteer, a person to whom a conveyance has been made without the payment of any consideration. The general declaration is that fraud in the transaction, any fraud, fraud on the part of the grantor alone, vitiates, and the only limitation upon its operation is the saving in favor of purchasers for value and without notice of the fraud. There is a further saving in section 2 of chapter 74 of the Code, serial section 3830, but not as against fraud. That section does not deal with fraud at all. It deals only with purely voluntary transfers, gifts, and conveyances, on the one hand, and, on the other, with preferences by insolvent debtors. It makes a merely voluntary conveyance, not a fraudulent one, nor one both voluntary and fraudulent, good as against subsequent creditors, and vitiates it only as to existing creditors. It says a voluntary conveyance shall not be void, merely because it is voluntary, as to creditors, or purchasers who shall have purchased after it was made. If, in addition to lack of consideration for the conveyance, there was intent on the part of the grantor to defraud his creditors, it is not merely voluntary. It is fraudulent as well as voluntary, and therefore falls under the condemnation of section 1, chapter 74, and is void as to all creditors, subsequent as well as existing, unless the grantee is a

purchaser for value and without notice of the fraud.

Omission to make any saving in favor of a volunteer, for lack of notice, is justified on the ground that he parts with nothing of value. He gets something for nothing. He becomes a sort of depositary of the property of the grantor, whose sole purpose is to prevent it from falling into the hands of his creditors. He undertakes to hold the property which came to him without consideration and so attempts to defeat the rights of creditors. In so doing, he obviously makes himself a party to the fraud. There is no reason in logic, morals, equity, or justice, why he should be permitted to withhold the property from the creditors, because he had no notice of the fraud. His retention of it, after such notice, is a virtual ratification or adoption of the fraudulent act. Once proved, the fraud is inherent in the thing he accepts, wherefore his acceptance or retention amounts to participation in the fraud. Accordingly, this court has held it immaterial whether a mere volunteer had notice of the fraud on the part of the grantor or not. Laidley v. Reynolds, 58 W. Va. 418, 52 S. E. 405; Duncan v. Custard, 24 W. Va. 730; Mayhew v. Clark, 33 W. Va. 387, 10 S. E. 785; Connoway v. McCann, 30 W. Va. 200, 3 S. E. 590. This view was expressed by Chief Justice Marshall, in Sexton v. Wheaton, 8 Wheat. 229, 5 L. Ed. 603, in the following terms:

"A wife who is herself the instrument of deception, or who contributes to its success, by countenancing it, may, with justice, be charged with the consequences of her conduct."

Analysis of the many cases reviewed by Judge Johnson in Lockhard & Ireland v. Beckley, 10 W. Va. 87, clearly shows it is unnecessary to prove notice, on the part of the grantee, of the fraud of the grantor in a fraudulent and voluntary conveyance.

Some of the observations made in Edwards Mfg. Co. v. Carr, 65 W. Va. 673, 64 S. E. 1030, seem to have been misapprehended by the counsel for the appellants. For the most part, they relate to the pleadings; the bill having charged fraud and notice thereof, and both defendants having denied it. Of course, an admission of fraud in the pleadings would have been fatal. Then there was a subsequent transaction in which Mrs. Carr had participated, but it was held that, if there was any fraud in it, she had had no knowledge of it. Fraud in that, if established, might have been evidence of fraud in the previous transaction, affecting her property. Hence it was important to inquire whether there was or not, and, if so, whether she knew it. Respecting the charge of fraud in the transaction between the husband and wife, the conclusion of the court was stated in the following terms:

"Notwithstanding this, all of the indebtedness existing at the time of the donation made to his wife has been paid. He continued to do business, contracting new debts and paying old ones. It argues intent on his part to continue in business, not to withdraw what property he had from the reach of his creditors and quit, and tends to repel the charge of fraud."

This necessarily implies lack of fraud on his part, which, if established, would have been sufficient. The principles underlying the decision were declared in Greer v. O'Brien and in McCue v. McCue, neither of which puts in the requirement of notice to the wife, when she is a mere volunteer. McCue v. McCue is entirely consistent with the conclusion herein stated. It says the impeaching creditor must cause it in some way to appear that the voluntary conveyance was made or caused to be made with some dishonest intention. It does not say the volunteer must have notice of the dishonest purpose.

In Edwards Mfg. Co. v. Carr, part of the transactions attacked were more than five years old. Such of the observations therein made, respecting notice to the grantee, as applies to them, are founded upon a principle declared in Laidley v. Reynolds, 58 W. Va. 418, 52 S. E. 405, and Scraggs v. Hill, 43 W. Va. 162, 27 S. E. 310, holding that, in an attack upon a voluntary conveyance, after five years, upon the theory of fraud in addition to lack of consideration, the plaintiff must prove actual fraud on the part of the grantor known to the grantee and participated in by him. As the attack upon the conveyance involved here was made within five years from its date, neither the statute of limitations nor these decisions construing it have any application.

[5] Being liable with others for nearly $1,700, purchase money of stock in a mercantile company, Chase conveyed his property in Kimball, McDowell county, to his wife, without consideration, by a deed dated, September 12, 1908. He then owned other real estate in Jefferson county, which he claims was worth $3,000 or $3,500, all of which, except a small lot worth about $100, he likewise conveyed to his wife later, probably less than two years afterward. Between the dates of these conveyances, he had executed another note for $2,500. Show says he exhibited to him, shortly before the conveyance of the Jefferson county property, some sort of a paper purporting to be a charge upon it. These circumstances, independent of the admissions relied upon, are sufficient to sustain the finding of fraudulent intent in the conveyance of the Kimball property. Chase was then liable for some debts which he made no effort to pay. He contracted others and then conveyed away the balance of his property, leaving nothing but a lot worth $100 and his earnings as a laborer to which his creditors could resort. Though these transactions covered a period of about two years, they were all intimately connected and may well be considered together on the question of his intent. The property first conveyed was that most accessible to his creditors. At the time of

that conveyance, he was relying upon some sort of an arrangement made for protection of his other property. Losing faith in the scheme he had devised for its protection, he voluntarily conveyed that property, and so obstructed the rights of all of his creditors. His conduct as a whole was clearly inconsistent with an honest intention toward any of them.

The decree will be affirmed, and the cause remanded for execution thereof.

(75 W. Va. 761)

## MABIE v. MOORE et al. (No. 2701.)

(Supreme Court of Appeals of West Virginia. March 9, 1915.)

*(Syllabus by the Court.)*

1. EQUITY ⇐26—JURISDICTION—ACTION EX DELICTO.

Point 3, syllabus, in Swarthmore Lumber Co. v. Parks, 72 W. Va. 625, 79 S. E. 723, re-examined and approved.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 86, 87; Dec. Dig. ⇐26.]

*(Additional Syllabus by Editorial Staff.)*

2. ATTACHMENT ⇐12—GROUNDS—"CLAIM" ENFORCEABLE IN EQUITY.

A legal or equitable "claim" enforceable in equity by attachment under Code 1906, c. 106, § 1 (Code 1913, c. 106 [sec. 4455]), is a liability of the same general class as debt, and not one sounding in damages merely.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 38, 39; Dec. Dig. ⇐12.

For other definitions, see Words and Phrases, First and Second Series, Claim.]

Appeal from Circuit Court, Randolph County.

Suit by Nancy A. Mabie against J. B. Moore and others. From decree for defendants, plaintiff appeals. Affirmed.

Talbott & Hoover and Arnold & Arnold, all of Elkins, for appellant. C. W. Maxwell, H. G. Kump, and C. H. Scott, all of Elkins, for appellees.

LYNCH, J. By her bill, Nancy A. Mabie seeks to recover of defendants the value of timber wrongfully removed by them from her lands, and damages caused to other timber thereon resulting from such unlawful removal, whereby she suffered injury because deprived of the profitable use and enjoyment of such lands for mill sites for manufacture of the timber thereon into lumber for market in the manner contemplated by her; that being a business in which she was engaged. To impound defendants' property to answer her demand, she sued out an attachment against them as nonresidents, and caused the writ to be levied on property owned by them in the county where the suit was brought. Defendants' demurrer being sustained and her bill dismissed, she has appealed.

[1] The decree specifically assigns, as foundation therefor, the holding in Swarthmore Lumber Co. v. Parks, 72 W. Va. 625, 79 S. E. 723, that:

"Chapter 106, Code, authorizing attachments in equity, confers upon courts of equity no jurisdiction as to causes of action ex delicto."

Plaintiff contends the conclusion reached in that case contravenes the express provisions of the statute, and conflicts with the construction given to it in McKinsey v. Squires, 32 W. Va. 41, 9 S. E. 55.

When viewed in the light of the facts and the statutory provisions on which they were predicated, these decisions are not inharmonious or inconsistent. In the McKinsey Case, the court had jurisdiction independent of the proceedings by attachment. The bill charged defendant had fraudulently conveyed his property in order to defeat or delay recovery by plaintiff upon the cause of action averred, being a breach of a contract of marriage. The relief sought in the Swarthmore Case was predicated upon fraudulent representations by defendant in the procurement of a contract for the purchase of timber; but, because plaintiff failed to show any contractual relation between it and defendant, it could not maintain the suit, though aided by attachment. In neither case did the writ give jurisdiction. It was merely auxiliary to the main purpose of the bill. It impounded defendant's property that its proceeds might be applied to the satisfaction of plaintiff's demand, when established by the court's decree.

It is further argued by plaintiff that because the statute provides for an attachment in an action at law or suit in equity for the recovery of any claim or debt arising out of contract, or to recover damages for any wrong, equity does have jurisdiction upon attachment for any wrong or injury to person or property, if the trespasser is or becomes a nonresident and has attachable property within the state. The inevitable, logical conclusion to be drawn from the argument advanced by plaintiff would be to confer on courts of equity jurisdiction to entertain suits for the recovery of damages for assault and battery, adultery, seduction, or any other wrong to the person or property of another, solely by virtue of an attachment sued out on any of the grounds mentioned in the statute. Such result evidently was not the purpose to be subserved by the enactment. If such was the purpose, wherein does the statute expressly declare it? It must not be inferred, unless the inference is manifest. Being in derogation of the common law, statutes authorizing proceedings by attachment must be strictly construed. Barksdale v. Hendree, 2 Pat. & H. (Va.) 43; Delaplain v. Armstrong, 21 W. Va. 211; Cosner v. Smith, 36 W. Va. 788, 15 S. E. 977; Baking Co. v. Bachman, 38 W. Va. 84, 18 S. E. 382. Wherein, then, is such equitable jurisdiction so conferred? If at all, it is by section 1, c. 106. No other provision enables

urt of equity to maintain a suit where, re its enactment, equity had not jurisdic-

Plainly, it does not enlarge jurisdic- in equity, except as to a debt or claim due. This provision was enacted, re- d, and re-enacted at several different ons of our Legislature, and finally by ct of 1887.

hile different in terms, in effect ours and Virginia attachment proceedings are antially similar; and, excepting so far irely proceedings in rem, they are merely eral as an aid to some other proceed- is a warrant or summons before a jus- a suit in equity, or an action at law. on Attachment, 3.

an early date in Virginia, the only s available for collection of a debt aim against a foreign debtor having rty within the state was by attachment uity. The Revised Code of 1849 au- ed attachments in actions at law the debt or claim was recoverable by action, and in equity only if recover- n equity. Railroad Co. v. Paine, 29 (Va.) 502. The revisors of the Code of in their report, after remarking the lty in understanding how jurisdiction eign attachment in equity arose, and vledging that former acts of the Vir- assembly seemed to imply such juris- as already subsisting, say:

eems to us, however, to be anomalous, ve, and incongruous with the other pro- of law that there should be an attach- n equity in cases of nonresidents, for lue, and the subject of action at law, s to all other attachments for similar nd even for debts not yet due, there are us minute and detailed proceedings at s the law now is, a suit in equity is of y resorted to for the recovery of any mand against a nonresident. It seems here is no good reason for transferring claim, a debt due by bond, for example, rt of equity, and thus subjecting both and defendant, sometimes numerous de- , to the expense and delays of a chan- t. All that the creditor wants, and all tice or the policy of the attachment uires, is to secure a lien on the prop- his debtor. We propose, therefore, in- the present system of attachments nonresidents, to assimilate it to the gs to force an appearance by attach- d against absconding debtors, etc., and all proceedings in all attachments sub- the same." Revisors' Report (1847)

s stated by Judge Moncure in the d:

ginia "soon after that revision was e former equitable remedy by foreign nt was restored in regard to legal de- t concurrently with the legal remedy such cases at the revision."

t, it will be observed, equity assum- liction for the enforcement of con- liabilities against nonresident debt- ttachment long before that remedy lable in actions at law. No addi- thority was conferred on courts of the provisions of our statute, ex- o debts not due. Where formerly equity had exclusive jurisdiction for enforcement of legal and equitable debts and claims due and payable, courts of law have concurrent jurisdiction with it only in certain classes of cases, except as noted.

But it is not to be presumed equitable jurisdiction was so far enlarged as to embrace causes of action at law. We perceive no such intention, either expressly or inferentially, arising out of the statute. It meant only that, where equity had theretofore exercised jurisdiction on either legal or equitable claims or demands, it could invoke the aid of an attachment to compel compliance with its decree or order.

"Nonresidents and foreign corporations may be proceeded against either at law or in equity —at law in the case of a legal cause of action on a claim which is due, and in equity on a legal or equitable cause of suit, whether due or not, provided that, where the debt or other claim is not due, there must be other grounds for attachment than such nonresidence." Sams on Attachment, 91.

Evidently by the last clause is meant the further averment required by the concluding clause of section 1 of our statute, which is a counterpart of the Virginia statute on the same subject. Virginia Code 1887, c. 141, § 1, serial section 2959. Why should the statute do more? The remedy at law is as expeditious and adequate as in equity.

Besides, it will be observed, the final paragraph of section 1, c. 106, limits attachments in equity to legal or equitable debts and claims. Impliedly it excludes claims for damages for a wrong, where recovery therefor is the only basis for the suit. Damages for a tort are not embraced by the Virginia statute, because such a claim is not cognizable in a court of equity. Sams on Attachment, 55. From other discussion of the same subject, the author no doubt meant equity could not entertain a suit to recover damages for a wrong, unless it had jurisdiction on other grounds. In other words, an attachment alone did not confer jurisdiction. It was virtually so held in a case cited by him. Dunlop v. Keith, 1 Leigh (28 Va.) 430, 19 Am. Dec. 755. That was a suit prosecuted in equity for damages growing out of misconduct by Keith as clerk of a court, and not for a debt or claim enforceable in equity, even when aided by attachment. So the court held in that case. To the same effect was McKinsey v. Squires, supra, for, as observed, equity did entertain plaintiff's suit to cancel, and did cancel, defendant's conveyance of his property, fraudulently made to defeat recovery against him for breach of contract of marriage. See 2 Min. Inst. 614. Section 1, read in its entirety, means only that an attachment may be sued out in equity where equity has jurisdiction, and at law where the law court has jurisdiction.

But plaintiff further argues that the word "claim," as used in the statute, embraces damages for a wrong. However, as used in statutes providing that no action shall be

maintained against a city until the claim or demand is presented to the council for allowance, the word "claim" has been construed to include only claims arising out of contract. Mason v. Ashland, 98 Wis. 540, 74 N. W. 357; Perkins v. Keith, 58 Neb. 323, 78 N. W. 630; Barrett v. Mobile, 129 Ala. 179, 30 South. 36, 87 Am. St. Rep. 54; Hunt v. Oswego, 107 N. Y. 629, 14 N. E. 97. Or such as can in ordinary course be adjusted by the financial agents of the city. Harrigan v. Brooklyn, 119 N. Y. 156, 23 N. E. 741. So the word "claim" against a city, in a statute requiring them to be filed with the county clerk, means only a claim originating in contract express or implied. Gregg v. Commissioners, 32 Colo. 357, 76 Pac. 376; Miller v. Mullan, 17 Idaho, 28, 104 Pac. 660, 19 Ann. Cas. 1107. There are cases holding that, to authorize the issuance of an attachment, the relation of debtor and creditor must exist between plaintiff and defendant. Hart v. Barnes, 24 Neb. 782, 40 N. W. 322; Day v. Bennett, 18 N. J. Law, 287. No such relation, however, obtains in the case of mere tort.

[2] Associated, as it is, in the statute with the word "debt," the legal or equitable "claim" enforceable in equity is a liability of the same general class as debt, and not one sounding in damages merely. For only by procedure common to courts of law can damages for trespass, assault and battery, slander, malicious prosecution, and the like, be recovered. Of these equity clearly has no jurisdiction, except where other equitable relief is prayed. Generally, its jurisdiction is limited to debts or claims for the measurement of whose values there is a fixed legal and definite pecuniary standard, and not those having no such standard, which are submitted to the sound discretion of the jury trying the case, excepting always those cases wherein other grounds of purely equitable relief warrant jurisdiction. 2 Min. Inst. 614.

Construing a statute allowing an attachment in actions at law upon a demand, "whether liquidated or not, arising upon a contract or a judgment or decree," requiring plaintiff to specify the amount of his "claim" and the grounds therefor, the court in Saddlesvene v. Arms, 32 How. Prac. (N. Y.) 280, said that the word "claim" is the equivalent of a debt or demand arising out of the express or implied terms of a contract.

On the theory that a tort may be waived, plaintiff, no doubt, could have sought and recovered damages by any appropriate action at law. And, had she averred grounds of equitable cognizance in addition to damages as compensation for the injury done to her lands, she doubtless could also have maintained her bill in equity, aided by an attachment. But, where no such grounds are averred, there is no jurisdiction in equity to recover damages for any tortious act resulting injuriously to the person or property of another, either with or without the purely ancillary proceeding by attachment.

As appellant declined to amend, the decree, for reasons stated, must be, and it is, affirmed.

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(75 W. Va. 771)

## CALABRIA et al. v. COHEN et al.

(No. 2603.)

(Supreme Court of Appeals of West Virginia. March 9, 1915.)

*(Syllabus by the Court.)*

1. TAXATION ⟸748 — TAX SALE — SURVEY — COMPLIANCE WITH STATUTE.

Properly construed section 17, of chapter 31, serial section 1075, Code 1913, does not require the purchaser at a tax sale of an undivided interest in a city, town or village lot, as a condition precedent to obtaining from the clerk of the county court a valid deed for such interest, to have such interest therein or the whole lot, surveyed and a plat thereof made by and returned with the report of the surveyor, and recorded along with the deed. In such cases a report by the surveyor showing and specifying the metes and bounds of the whole lot, for the purpose of description, made and recorded along with the deed to the purchaser will constitute substantial compliance with the statute. Building & Loan Association v. Sohn, 54 W. Va. 101, 46 S. E. 222, point 8 of the syllabus, modified and distinguished.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1494, 1495; Dec. Dig. ⟸748.]

2. TAXATION ⟸783—TAX SALE—PURCHASER — RIGHTS — IMPROVEMENTS — QUESTION FOR COURT.

The fact that valuable improvements have been placed upon such lot between the date of the tax sale and the deed to the purchaser, by purchasers from the former owner, ignorant of such tax sale, will not be ground for invalidating the tax deed for such undivided interest. All questions respecting such improvements are properly addressed to the court in a suit for partition or settlement between the co-owners of such lot.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1551; Dec. Dig. ⟸783.]

Appeal from Circuit Court, Monongalia County.

Bill by Pasquale Calabria and others against Nathan J. Cohen and others. From decree for plaintiffs, defendants appeal. Reversed, and bill dismissed.

Moreland & Guy and Wm. S. John, all of Morgantown, for appellants. Frank P. Corbin, of Morgantown, for appellees.

MILLER, J. The decree appealed from, of November 26, 1913, cancelled, annulled and set aside as without effect, and as a cloud on plaintiffs' title, a certain tax deed, dated January 11, 1912, from John M. Gregg, clerk of the county court of Monongalia County, to defendant Nathan J. Cohen, for a one-half undivided interest in Lot 1, Block A, South Sabraton, Morgan District, in said county, and likewise, also, a certain other deed, dated August 18, 1912, from said Cohen and wife to Louis Schochet, purporting to

convey the same undivided interest in said lot, but upon condition of payment into court by plaintiffs to the use of said Cohen or his assignees, $23.70, being the amount, including interest as fixed by statute, paid out and expended by said Cohen in his endeavor to perfect his title to said undivided interest in said lot, and which sum the decree recites was in fact paid into court by plaintiffs.

Plaintiffs Pasquale Calabria and Mary Casucia Calabria obtained title to said lot by deed from Ande Sabo, dated January 3, 1911, who purchased the same from George C. Sturgiss, by deed dated June 1, 1907, the coal and mining rights being reserved in each of said deeds. The lot was taxed to Sabo for the year 1908, and for the non-payment of the taxes thereon for that year the lot was returned delinquent, and at a sale of delinquent lands on December 14, 1910, a one-half undivided interest therein was sold by the sheriff and purchased by defendant Cohen, and following which sale, as previously stated, Sabo, on January 3, 1911, conveyed the lot to plaintiffs.

[1] The relief sought by the bill and granted by the decree complained of, is predicated on the theory that Cohen, prior to obtaining his deed from the county clerk, failed, as required by section 17, chapter 31, Code 1913, and as a condition precedent to any right thereto, or to any authority of the county clerk to make and execute such deed, and as interpreted by this court in Building & Loan Association v. Sohn, 54 W. Va. 101, 6 S. E. 222, syl. point 3, to "have the quantity or undivided interest so purchased, surveyed and laid off at his or their expense," etc., and as further required by said section, to have "a plat and description thereof * * returned to the clerk of the county court of the county in which the sale was made, and * * *" recorded "in the deed book along with the deed to the purchaser," and that therefore the tax deed and the subsequent deed were properly voided and cancelled by the decree now under review.

The opinion in Building & Loan Association v. Sohn, pointed out and endeavored to harmonize the numerous inconsistencies of the several sections of said chapter 31 of the Code, and point 3 of the syllabus, relied does say:

"In such case," where the purchase is of an undivided interest in a town or village lot "the purchaser must cause a survey and report to be made by the county surveyor, before obtaining a deed; but the provision of section 17 of chapter 31 of the Code, requiring division of land, is not applicable. It applies only to purchasers of separate quantities or parts of lands of land, other than city, village or town

and, it was said, arguendo, in that case, reference to said section 17:

"A part of a tract may be laid off according to the mode prescribed by section 17. A town lot in which an undivided interest has been purchased may be surveyed and a report made, giving a description of the whole lot to be followed by the deed. Thus, in either case, the surveyor may perform a function without going to the extreme of making a partition, and it must be held that this is the meaning of that statute, and that the legislature intended no more than that."

And there are other expressions in the opinion, by way of argument, giving color to the interpretation thereof contended for by plaintiffs.

But it is apparent from the record and opinion in that case, that the question which the court was called upon to decide and intended to decide was whether, when an undivided interest in a city, town or village lot is sold, said section 17 requires the purchaser, as a condition of obtaining his deed, to have the lot partitioned as in case of a tract of land, and according to the literal terms of that section. This was the real question presented by the pleadings and proofs in that case. No question was made as to want of a survey, plat and report. Presumptively there was such survey and report by the surveyor. At all events, as in this case, there was a report, and according to that report in that case it would seem the surveyor was on the ground and made a survey at least. So that everything that was said in that case must be interpreted with reference to and limited by the question presented for decision. Of course no objection could be made to a survey, plat and report. But to interpret the point of the syllabus and the opinion as requiring a survey, plat and report where the sale is of an undivided interest in a city, town or village lot, as a condition to the validity of a deed to the purchaser, would be beyond and outside the question presented for decision, and which was decided or intended to be decided, and it ought not to avail so as to engraft upon the statute other inconsistencies not involved in its terms. As that case holds, though the literal term of the statute would seem to require it, no notice of a town lot could have been intended, so we think, the Legislature could not have intended the absurd thing of requiring a survey and plat of such lot simply for the purpose of description, when by the following section 18 (sec. 1076), the statute, though requiring a "report *or* survey," when a tract of land is sold, in terms provides that when the "purchase be of an entire city, village or town lot, no survey or report thereof need be made." It would be most absurd to require a survey and report in the first instance and not in the latter. The statute ought not to be given any such absurd interpretation. Wherefore we think the language of section 17, requiring a survey and a plat and description to be filed with the clerk, should be limited to that class of sales to which it is properly applicable, namely, to parts or undivided interests in tracts of land, requiring survey and partition, as a prerequisite to a deed to the purchaser, and that it should not be extended to a city, town or village lot,

which cannot be laid off or partitioned by the surveyor, ex parte. By no other interpretation can the whole chapter relating to the subject be harmonized and its different sections rendered consistent with each other. Building & Loan Association v. Sohn, in so far as it may be regarded as involving a different construction of the statute, should be modified and limited, by the views of the statute herein expressed.

[2] But it is contended that the decree should be affirmed because the deed by its terms carries to the grantee not only an undivided interest in the lot but also in valuable improvements placed thereon by plaintiff between the date of the tax sale, and the deed to the purchaser, contrary to the plain intent of the statute, and contrary to equity and good conscience. We do not think this proposition presents any valid ground for overthrowing the deeds. In the case of sales of parts or undivided interests in a tract of land, section 17 requires the surveyor to lay off the part or interest of the purchaser so as not to include the improvements, if it can be avoided. The question presented will properly be addressed to the chancellor in a suit for partition when such suit shall be brought, and we would suppose that the spirit and intent of the statute, and the rules relating to improvements by a cotenant, ought to be observed and enforced in any accounting or in the partition of a city, town or village lot, and so as not to work injustice to the former owner, and particularly so, where as in this case the improvements were placed upon the property by innocent purchasers, between the dates of sale and deed to the purchaser. But this question is not presented for decision, and we must not be understood as deciding it, or as concluding the parties hereby, when the question may be properly presented for actual decision thereof.

These views require a reversal of the decree, and a decree here denying plaintiffs relief, and dismissal of the bill.

(75 W. Va. 381)

## DUNCAN v. JACOB DOLL & SONS.

(Supreme Court of Appeals of West Virginia. Dec. 22, 1914. Rehearing Denied Jan. 19, 1915.)

*(Syllabus by the Court.)*

1. FACTORS ⟸31—CONSIGNMENT CONTRACT—OPERATION AND EFFECT.

A contract, whereby pianos are to be delivered by the owner to a consignee at a certain price, for the purpose of sale by the latter on the installment plan, providing for the taking of lease contracts from the individual purchasers, in the name of the consignor, and the turning over of the same and any rights thereunder to him, together with any cash received, and further providing that the consignor "shall receive all first payments and secondhand instruments taken in exchange, together with all subsequent payments until the agreed consignment price of instrument is fully paid," and containing no provision respecting the disposition to be made of the lease contracts thereafter, entitles the consignor to retain the lease contract and collect all the money due and payable by the purchaser. The language above quoted does not imply that, after a sum equal to the consignment price is paid, the consignee is then to be the owner of the lease contract and entitled to collect from the purchaser the balance of the purchase money. It is employed to designate the shares of the respective parties in the profits on sales, and to secure to the consignor his entire share before the consignee is entitled to participate.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 34–36; Dec. Dig. ⟸31.]

2. FACTORS ⟸44—CONSIGNMENT CONTRACT—CONSTRUCTION—COMMISSION.

Such a contract is one of agency, authorizing sales upon commissions measured by the difference between the consignment price and the price to the purchaser; and for the payment of his commissions the consignee must look directly to the consignor. The relation of debtor and creditor is thereby created between them.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 58, 59; Dec. Dig. ⟸44.]

3. FACTORS ⟸44—CONSIGNMENT CONTRACT—CONSTRUCTION.

A lease contract, taken in the name of the consignee and assigned to the consignor, does not alter the relation of the parties or affect their rights growing out of the agency contract.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 58, 59; Dec. Dig. ⟸44.]

4. TROVER AND CONVERSION ⟸16—CAUSE OF ACTION—RIGHT TO IMMEDIATE POSSESSION.

In order to maintain trover and conversion, plaintiff must have a property in, and be entitled to the immediate possession of the thing alleged to have been wrongfully converted.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. ⟸119–147; Dec. Dig. ⟸16.]

Error from Circuit Court, Marion County.

Action by Cloyd H. Duncan against Jacob Doll & Sons. Judgment for plaintiff, and defendant brings error. Reversed.

R. J. Abbaticchio, of Fairmont, for plaintiff in error. Cloyd H. Duncan, in pro. per.

WILLIAMS, J. From a judgment for plaintiff in trover and conversion, brought to recover the value of a certain lease contract alleged to have been wrongfully appropriated by defendant to its own use, rendered by the intermediate court of Marion county, defendant applied to the circuit court of said county for a writ of error and, being refused, was thereafter granted one by this court.

[1] Plaintiff was engaged in selling pianos consigned to him by defendant, a corporation having its principal place of business in New York, under a written contract between them. Plaintiff's rights in this action depend upon a proper construction of that contract. It provided that defendant should furnish plaintiff with pianos, to be received, stored, cared for, and insured for the benefit of defendant, all at plaintiff's expense. Plaintiff was to receive them as consignee, and was to sell them to individual purchasers on the installment plan. The contract required the plaintiff—"to make a written report to the party of the first part within twenty four (24) hours, of any sale of any of the party of the first part's pianos

consigned to the party of the second part, and to turn over to the party of the first part immediately after a sale has been made all cash received on such sale, together with any leases and any rights thereunder, received by the party of the second part on the sale thereof; all leases are to be made out in the name of the party of the first part, who shall receive all first payments and second hand instruments taken in exchange, together with all subsequent payments until the agreed consignment price of instrument is fully paid; any lease on such sale to bear interest at the rate of 6%, and to be paid by the retail purchaser."

The sales were made in the form of leases to the purchasers. Plaintiff sold a 65-note piano to one Maria Burt, and took from her a lease contract, not in the name of the defendant, as the contract provided, but in his own name, and later indorsed it over to defendant. He avers that defendant later, acting as his pledgee, exchanged an 88-note piano with Maria Burt for the one he had sold her, receiving $100 to boot, thereby entitling plaintiff to $35 more than he was entitled to for the sale of the cheaper piano.

[2-4] The action was brought to recover the value of that lease contract, alleged to be worth $135.90 to plaintiff, and interest thereon. Plaintiff's theory is that, according to the agreement, after defendant receives on any lease contract, taken for the sale of a piano, an amount equal to the price made on consignment to him, he is then entitled, in his own right, to the lease contract and all rights thereunder for any balance due thereon by the purchaser. This is not a proper construction of the agreement. It is certainly not what the parties contemplated. The agreement makes no provision for surrendering the lease contracts to plaintiff at any time. By its terms all moneys received on sales "together with any lease and any rights thereunder," were to be turned over to the defendant. While it is clearly to be implied that plaintiff was to sell pianos on commission, and was entitled to receive, as his commission on sales, all over and above the consignment price to him, he was bound to look to his consignor for them, and did not, at any time, have the right to collect from the purchaser any balances on the lease contracts, in his own name. The lease contracts, and all rights thereunder, belonged to the consignor, who alone had any right of action thereon to recover any money due. Plaintiff was defendant's agent, and for any commissions due him on sales he had a right of action against his principal. The relation between them was one of debtor and creditor. The foregoing construction of the contract is borne out by plaintiff's evidence showing a practical construction by a course of long and continuous dealings between them, during which time there were frequent rendering of accounts by plaintiff to defendant. The fact that the lease contract in this particular instance was taken in plaintiff's name does not alter or affect the rights of plaintiff in the premises. It was taken in that manner in violation of the terms of the contract, and was assigned by plaintiff to defendant. By the assignment defendant acquired the same right to receive the future payments due thereon as if it had been taken in its name in the first instance. Plaintiff has clearly mistaken his remedy. If defendant has collected on the Maria Burt lease more than the consignment price of the piano to plaintiff, he is entitled to it as his commission. He has proven that defendant has collected all that is due on it. Plaintiff, not having shown himself entitled to the paper sued for and to its possession, cannot maintain his action for trover and conversion of it. Philips v. Martiney, 10 Grat. (Va.) 333; Harvey v. Epes, 12 Grat. (Va.) 153; and Haines v. Cochran, 26 W. Va. 719.

An order will be entered here reversing the judgment, setting aside the verdict, and dismissing plaintiff's action without prejudice to his right to bring any other appropriate suit or action to recover the amount of money which he claims.

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(16 Ga. App. 17?)

## BOWEN v. STATE. (No. 6140.)

(Court of Appeals of Georgia. March 30, 1915. Rehearing Denied April 12, 1915.)

*(Syllabus by the Court.)*

1. EMBEZZLEMENT ⟸4 — LARCENY AFTER TRUST—PROOF REQUIRED.

In a prosecution for larceny after trust, based on section 192 of Penal Code 1910, it is only necessary to allege and prove the bailment, the purpose of the trust, and the fraudulent conversion.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 1; Dec. Dig. ⟸4.]

2. CRIMINAL LAW ⟸564—EVIDENCE OF VENUE—LARCENY AFTER TRUST—PROOF OF CONVERSION.

Evidence from which the jury is authorized to infer that the accused was intrusted with money in a particular county, and that he fraudulently converted it to his own use thereafter, is enough to warrant a finding that the conversion took place in that county, when there is no evidence showing that he ever left the county, or tending to establish the fact that the conversion was made beyond its limits.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 726, 1277–1284; Dec. Dig. ⟸564.]

3. CRIMINAL LAW ⟸806 — INSTRUCTIONS — REASONABLE DOUBT—REPETITION.

Where the court in a criminal case fully and properly instructs the jury as to the doctrine of reasonable doubt, it is not necessary that an instruction as to reasonable doubt be repeated in connection with the instructions as to each element constituting the offense, or in connection with each theory of the state or of the accused, or in connection with each salient fact in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1973, 1991; Dec. Dig. ⟸806.]

4. CRIMINAL LAW ⟸783½, 799 — INSTRUCTIONS—ISSUES—ARGUMENT.

The court did not err in confining the jury to the consideration of the precise issues in the case on trial, and excluding from their consider-

ation all matters in evidence and all argument of counsel not bearing upon the actual issues in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1879, 1944–1946, 1986; Dec. Dig. ⇐783½, 799.]

5. EMBEZZLEMENT ⇐44 — LARCENY AFTER TRUST—SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to warrant the verdict, and the court did not err in refusing a new trial.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 67–70; Dec. Dig. ⇐44.]

Error from Superior Court, Fulton County; B. H. Hill, Judge.

T. L. Bowen was convicted of larceny after trust, and brings error. Affirmed.

Albert Kemper, of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., and E. A. Stephens, both of Atlanta, for the State.

WADE, J. T. L. Bowen was tried under an indictment charging him with a violation of section 192 of the Penal Code of 1910, for that he, on the 26th day of June, 1914—

"having been intrusted by Robert L. Edmondson with $150 in money, of the value of $150, and the property of said Robert L. Edmondson, for the purpose of applying said sum of money for the use and benefit of said owner and person so intrusting the same, did, after having been so intrusted, wrongfully, fraudulently, and feloniously convert said sum of money to his, the said T. L. Bowen's, own use, contrary to the laws of said state," etc.

The jury found the defendant guilty, and he made a motion for a new trial, and excepts to the order overruling the motion.

R. L. Edmondson testified as follows:

"I let T. L. Bowen, the defendant, have some money in May and June, 1911, in the county of Fulton, state of Georgia, for the purpose of investing in real estate for me, and he never made the investment that I know of, and I never got the money back. I have demanded the money from him, but he has failed to return me the money I gave him, or to invest it in real estate for me."

It further appears from the testimony of Edmondson, taken in connection with certain documents introduced in evidence, that Edmondson paid over to the defendant, to be applied to the purchase of a lot in the city of Atlanta, known as 32 Brown street, from Dr. Thomas P. Hinman, the sum of $150, and also executed a number of promissory notes payable to the order of Dr. Hinman, which notes were due monthly, and set forth that they were given as part of the purchase price for 32 Brown street; that the defendant represented that this property belonged to Dr. Hinman, and was intrusted with the money by Edmondson for the purpose of applying the same to the use and benefit of Edmondson; that Edmondson was never put in possession of the house and lot, and also never received anything whatever in return for his money, and never received his money back from the defendant. Dr. Hinman testified that the defendant had no authority to receive money from R. L. Edmondson for the sale of any property of his on Brown street or elsewhere in the city of Atlanta; that he owned property on that street, and knew the defendant, who had sold some property for him where the transactions were finally wound up by his attorney, but that Bowen had no authority to receive or receipt for money on any trade for him whatever; that he had not received $150 from Bowen for Edmondson, nor had he received any part of that sum.

There was other testimony, covering the details of the transaction between Bowen and Edmondson concerning lot 32 on Brown street, and tending to show various negotiation between the parties concerning other property, and the defendant in his statement denied having received anything from Edmondson except $25, which, under the testimony of Edmondson, was in addition to the $150 he claimed to have delivered to Bowen to be paid to Dr Hinman.

[1, 5] 1. It is contended that the verdict of guilty was not authorized, because the state failed to prove the corpus delicti, in that the evidence did not disclose that the defendant was intrusted by Edmondson with any money to be applied to Edmondson's use and benefit, or that, after having been intrusted with the amount named in the indictment, he did not apply the money to Edmondson's use and benefit, but wrongfully and fraudulently converted it to his own use. The testimony of Edmondson is to the effect that he intrusted the defendant with the sum of $150, the amount named in the indictment, to be applied to his (Edmondson's) use and benefit in the purchase of certain real estate, and that the defendant never made the investment and Edmondson never received his money back, though he had made demand therefor. There is no testimony to show that the defendant invested the $150 in the purchase of any property whatsoever for Edmondson, nor did he in his statement at the trial even claim that he made or sought to make a purchase of property on Brown street from Dr. Hinman for Edmondson, or a purchase of any other property for Edmondson. The testimony is clear that Edmondson demanded the return of his money, and that the defendant failed to comply with this demand. Demand and refusal were sufficient evidence of conversion, and the evidence of Edmondson, which was evidently accepted by the jury, was ample to establish the corpus delicti. It has often been decided by this court, and also by the Supreme Court, that in a prosecution for larceny after trust, based on section 192 of the Penal Code, it is not necessary to allege or prove that any demand for the property said to have been fraudulently converted was made before the indictment was found, but that it was only necessary to allege and prove the bailment, the purpose of the trust, and the fraudulent conversion. If the fraudulent conversion be

otherwise shown, no demand and refusal need be shown as a basis for a prosecution under this section; but where there is no other evidence of a conversion, demand and refusal, if shown, would sufficiently establish the fraudulent conversion. Edmondson testified that he delivered $150 to the defendant in addition to another sum of $25. The defendant absolutely denied having received the $150; and, since the jury accepted as true the testimony of Edmondson and by their verdict found that he had in fact received the $150, his own statement, at his trial, that he never received the $150 in question would be sufficient evidence of a wrongful and fraudulent conversion without other proof, since it evidenced his intention to retain that which notwithstanding his statement, the jury must have found (under the testimony of Edmondson) he had received. See Keys v. State, 112 Ga. 392, 37 S. E. 762, 81 Am. St. Rep. 63; Birt v. State, 1 Ga. App. 150, 57 S. E. 965; Goodman v. State, 2 Ga. App. 438, 58 S. E. 558; Hagood v. State, 5 Ga. App. 80, 88, 62 S. E. 641.

[2] 2. It is contended that the verdict and judgment should be set aside because the evidence for the state failed to show, beyond a reasonable doubt, that Edmondson intrusted the defendant with $150 in the county of Fulton, state of Georgia, and failed to show that the defendant converted any or all of the money wrongfully, fraudulently, and feloniously in that county. Edmondson testified that he intrusted the money to the defendant in June, 1911, in the county of Fulton, state of Georgia. There is no evidence to show that the defendant ever left the county of Fulton; and, admitting for the sake of the argument, that the venue is where the conversion of the money intrusted to the defendant took place, it is sufficient to say that, since the evidence was positive that the accused was intrusted with the money in Fulton county, Ga., and there was evidence authorizing the finding (as we have indicated above) that the defendant thereafter fraudulently converted this money to his own use, the jury was warranted in finding that the conversion took place in Fulton county. It is said in Keys v. State, supra, that:

"Evidence authorizing a finding that the accused was in a particular county intrusted with money, and that he thereafter fraudulently converted the same to his own use, is sufficient to warrant a finding that the conversion took place in that county, when there is no evidence showing that he ever left the county, or tending to establish the fact that the conversion was made beyond its limits."

Aside from the evidence referred to in the discussion of the first assignment of error and the discussion of this assignment of error, there were various minor circumstances likewise tending to show that the conversion took place within the limits of the county of Fulton, and the venue was amply established.

[3] 3. It is objected that the court erred in failing to charge the jury that the state must prove, beyond a reasonable doubt, that the crime alleged as having been committed by the defendant was so committed in the county of Fulton, state of Georgia. The court fully, clearly, and distinctly charged the jury on the doctrine of reasonable doubt, and added the specific instruction that if they entertained "any doubt about any essential element in the case," they should give the benefit of that doubt to the defendant and acquit him. One of the essential elements in the case was proof of the venue, and this instruction directed the jury to acquit the defendant if they entertained any doubt on this point, as well as on any other "essential" element in the case. It is not necessary for the trial judge to instruct the jury, in connection with each separate and individual element necessary to constitute a crime charged in an indictment, or in connection with each and every theory as to the guilt of the accused which may be urged by the state, or in connection with various matters in proof, that the jury must be convinced of the guilt of the accused beyond a reasonable doubt, or must believe that the particular element, theory, or fact has been established beyond a reasonable doubt, before they would be authorized to convict. It is enough for the court to clearly and distinctly instruct the jury as to the doctrine of reasonable doubt. Vann v. State, 83 Ga. 44, 9 S. E. 945; Carr v. State, 84 Ga. 250 (4), 255, 10 S. E. 626; Harris v. State, 1 Ga. App. 136 (4), 57 S. E. 937; Watts v. State, 9 Ga. App. 500 (2), 71 S. E. 766.

[4] 4. The judge, in his charge to the jury, limited them to the consideration of the issue whether the defendant was intrusted by Edmondson with $150 to be applied to Edmondson's use and benefit, and after having been so intrusted, did not apply this sum to the use and benefit of Edmondson, but fraudulently converted it to his own use. In this connection the court said to the jury:

"These other transactions which have come in in the evidence and were discussed by counsel the court thinks have nothing to do with the issue before you."

It is complained that this instruction was erroneous, and was not sufficiently specific to inform the jury what "other transactions" were referred to, and was therefore calculated to mislead the jury; and, further, that if this part of the charge referred to "other transactions" brought out by the defendant in cross-examination of the witness Edmondson, these transactions constituted a part of his defense, and the court thus deprived the defendant of the full benefit of that defense. There is no precise complaint in this exception that any particular "other transaction" which was a legitimate part of the defense of the accused was, by this charge, withdrawn from the consideration of the jury. It is true counsel says that "if" the other transactions referred to included certain

transactions between Edmondson and the defendant, the court by this charge prevented the jury from taking into consideration these transactions. But considering the fact that the issues actually raised by the contentions of the parties and the evidence in the case were simply and solely whether Edmondson intrusted the defendant with $150 to be applied to his use and benefit, and whether, after being so intrusted, the defendant failed to apply that sum to the use and benefit of Edmondson, and fraudulently converted it to his own use, the court, in eliminating from the consideration of the jury "other transactions," in immediate connection with his clear and concise statement as to the real issues to be determined by them, eliminated only such transactions discussed by counsel and testified about by the witnesses as in no way elucidated or were connected with the issues defined by him. There was much evidence which appears, from an inspection of the record, to have been entirely immaterial, but which the court was compelled to admit when offered, since it was impossible for him to determine in advance whether or not the testimony would be entirely relevant. This testimony, altogether unrelated to the real issues in the case, and not tending to show the one thing or the other in connection with these issues, was the testimony withdrawn from the consideration of the jury by this excerpt from the charge of the court. The simplifying of issues to be passed upon by juries and the removal from their consideration of as much irrelevant matter as possible is to be commended where, as in this instance, the application of the pruning knife removes from the full-grown tree of evidence no live branches, but only dead limbs which uselessly weight it down. The charge of the court as a whole was full and free from error, and the evidence fully authorized the verdict.

Judgment affirmed.

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(168 N. C. 515)

## SMITH v. WESTERN UNION TELEGRAPH CO. (No. 283.)

(Supreme Court of North Carolina. March 31, 1915.)

1. WITNESSES ⟸390—EVIDENCE TO DISCREDIT—PRIOR STATEMENTS.

To discredit plaintiff's witness, all of a prior contradictory statement made by him may be introduced by defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1247; Dec. Dig. ⟸390.]

2. TELEGRAPHS AND TELEPHONES ⟸37 — MESSAGES—DELIVERY OUT OF FREE LIMITS.

The sender of a message being notified by the telegraph company that the sendee is outside the free delivery limits, and refusing to guarantee the extra charge, the company is not liable for failure to deliver.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 23, 24, 29, 30, 32; Dec. Dig. ⟸37.]

3. TELEGRAPHS AND TELEPHONES ⟸68—DELAY—DAMAGES—MENTAL ANGUISH.

While by itself mental anguish is ground of recovery for delay in delivering a telegram, it must be genuine, and not unreal.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 69, 70; Dec. Dig. ⟸68.]

Appeal from Superior Court, Cumberland County; Cooke, Judge.

Action by George W. Smith against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This action was brought to recover damages for failure to deliver a message, addressed to plaintiff at Fayetteville, N. C., by his sister, Mrs. H. C. Freeman, at Lumberton, N. C., at 11:30 a. m. on May 8, 1913, in the following words: "Mother died yesterday. Buried this afternoon." It is admitted by the defendant in its brief that there was some evidence of negligence, sufficient to carry the case to the jury. Plaintiff did not reside in Fayetteville, but three miles from there in the country. The operator received the message, copied it, and delivered it to the messenger at that office, who searched for G. W. Smith and could not find him, but was told that he lived at Victory Mills, three miles away, whereupon he attempted to call him over the phone, but failed to reach him. He returned the message to the operator, who sent a service message to the operator at Lumberton, informing him of the facts, and asking for a guaranty of 75 cents for special delivery charges beyond the free delivery limits. The operator at Lumberton, S. H. Hamilton, carried the service message to the sender's husband and agent, H. C. Freeman, who originally delivered the message for transmission, and asked him if he would guarantee payment of the extra charge for the special service in delivering outside of Fayetteville, which he refused to do, but directed Hamilton to request the operator at Fayetteville to mail the telegram to G. W. Smith, which was done, and the latter received the message by mail the next day, but after the funeral, which took place at 5 o'clock p. m. on the day the first message was sent. H. C. Freeman, witness for the plaintiff, admitted the conversation with Hamilton about the telegram, but afterwards stated that he did not know what was said by them, though he denied having refused to pay the charge for extra service in making a special delivery of the message beyond Fayetteville, and stated that he would have paid it if he had been asked to do so. In order to contradict him, defendant offered as evidence the following written statement made by Freeman on the day of its date:

"Lumberton, N. C., May 15th, 1913.

"This is to certify that I [H. C. Freeman], on May 8th, 1913, about 11:30 a. m., filed a telegram at the Western Union Telegraph office at Lumberton, N. C., for my wife (Mrs. H. C.

Freeman), addressed to G. W. Smith, Fayetteville, N. C., reading as follows: 'Mother died yesterday. Burial this afternoon.' Manager Hamilton, who wrote the message for me, asked me if I could give some address at Fayetteville, and I told him that I knew no other or better address. Mr. Hamilton notified me in person about 1:50 p. m. that the message was undelivered; that Mr. Smith lived three miles in the country, and that it would cost seventy-five cents to have it delivered. I told Mr. Hamilton to have them mail a copy, that we did not expect him to attend the funeral anyway. [We lay no blame on the part of the telegraph company at all, as they did as instructed by us. We sent the message to Mr. G. W. Smith as a matter of respect, and we did not expect him to attend the burial, as interment was made before the arrival of any of the afternoon trains. We regret very much that Mr. Smith has taken such action against the telegraph company, and, if he is suing for mental anguish, we feel sure that he is going to have a very difficult job proving it.]"

Plaintiff objected to the part in brackets, which was excluded by the court, and defendant excepted. There were other exceptions to rulings of the court and the charge, but it is not necessary to state them. The jury found for the plaintiff, and defendant appealed from the judgment upon the verdict.

Rose & Rose, of Fayetteville, and Geo. H. Fearons, of New York City, for appellant. Robinson & Lyon, of Fayetteville, for appellee.

WALKER, J. (after stating the facts as bove). [1] If the defendant's witnesses tes- fied truthfully in this case, the defendant erformed its duty, and is not liable to the laintiff for anything. It transmitted the essage promptly from Lumberton to Fayetville, caused search to be made for the ndee at that place, and, failing to find him, ed the telephone unsuccessfully for the rpose of communicating with him. It then red back to the sender for payment or a aranty of the charge of 75 cents for the ra service in delivering beyond the place which the message was addressed. So far vas within its rights, and there was full ipliance with a correct performance of its y, and the case turns, at this point, upon question whether H. C. Freeman did or not refuse to pay the charges. His tes- ny as to the conversation with Hamilton not very consistent, and it became im- nt to the defendant that every piece of nce fairly tending to impair his credit ld be considered by the jury. The por- of his written statement which he had e deliberately made was excluded by ourt, for what reason we are not advis- It clearly tended to contradict him in t to this vital matter. Surely this ad- n in the excluded part of the state- had that tendency, viz., "We lay no on the part of the telegraph com- it all, as they did as instructed by us," e also think that the whole letter have gone to the jury. 1 Elliott on ce, § 241; Spencer v. Fortescue, 112 N. C. 268, 16 S. E. 898. The part which was excluded was very material, as tending directly to show that the company had acted solely under Freeman's directions in regard to handling the message, and was therefore not guilty of any negligence in failing to deliver it on the day it was sent, and, besides, it had an important bearing upon another phase of the case, in that it tended to show that the conversation between Freeman and Hamilton, near the post office, related to this particular message, and not to the one sent to a Miss Smith in Georgia, as Freeman testified that he thought Hamilton was referring to the latter one. When recalled, he testified:

"I do not really know under what circumstances I authorized the telegraph company to mail the telegram. I had a death in my family at the time. I was at the post office, and, really, there were two telegrams sent. I did not know it at the time, and really did not think about it—whether it was going to Miss Smith in Georgia—and when Mr. Hamilton asked me the question, and I guess I got it right, and he asked me what he should do, and I told him to 'mail it,' thinking it was to the one in Georgia."

It was material for defendant to show that he did know which telegram Hamilton meant, when he asked about the extra charge, and the excluded part of the statement further tended to show, not only that he refused to pay the charge, but why he refused to pay it, because "he sent the message to Smith as a matter of respect, and did not expect him to attend the funeral," and therefore thought that mailing the telegram would answer as well as a quicker delivery. The evidence excluded really showed the contradiction in an intensive form.

[2] It was the duty of the defendant, when it learned that the sendee lived "out of town," to inform the sender of the fact and demand payment, or a satisfactory guarantee, of the charge for the extra service, as it elected. The Chief Justice said, in Bryan v. Telegraph Co., 133 N. C. at page 605, 606, 45 S. E. at page 939:

"The defendant could have sent the message on to the plaintiff, collecting the charges of the special delivery of her, or, if not willing to risk that, it was negligence not to wire back to Mooresville demanding payment or a guaranty of the cost of delivery beyond the free delivery limits."

And again:

"If guaranty or payment of special delivery [charge] had been asked and refused, there was no compulsion on the defendant to deliver beyond the free delivery limits."

We fully recognized, in the following cases, the right of the company, when it discovers that the sendee lives beyond its free delivery limits, to collect in advance the charge for the extra service required in making a special delivery: Bryan v. Telegraph Co., supra; Hood v. Telegraph Co., 135 N. C. 622, 47 S. E. 607; Bright v. Telegraph Co., 132 N. C. 317, 43 S. E. 841. In the Gainey Case, 136 N. C. 265, 48 S. E. 654, we quoted with approval

what was said by the Chief Justice in Bryan v. Telegraph Co., supra:

"The officer at the receiving point could not have given the sender any information which he did not already have. It was his own negligence not to have paid the special delivery charges, if a special delivery was required"—citing Telegraph Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; Telegraph Co. v. Mathews, 107 Ky. 663, 55 S. W. 427; Telegraph Co. v. Taylor, 3 Tex. Civ. App. 310, 22 S. W. 532; Telegraph Co. v. Swearingen, 95 Tex. 420, 67 S. W. 767.

The case of W. U. Telegraph Co. v. Taylor, supra, which has been generally followed by the courts, and which has been approved by this court, held that, where the rules of the company restrict its free delivery limits to the radius of a given distance, in that case one-half mile of its office, it is not legally bound, the special delivery charge not having been paid or arranged, to deliver a message to the addressee at his residence in the country, three miles from the said office. The rule as to delivery limits is a reasonable one, and we have held that it must be complied with, when brought to the attention of the sender, by the prepayment of, or some agreement in regard to, the special delivery charges. Some courts have held, in well-considered opinions, notably Telegraph Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148, that the sendee, if the blank on which he writes his message informs him that there are free delivery limits, must take notice of the fact, and is presumed to have sent the message with the understanding that the sendee resides within them, unless he has provided, in same way satisfactory to the company and in advance, for the payment of the extra toll for a special delivery if the sendee lives beyond the free delivery limits, but we have not gone so far, and deem our rule the more reasonable one, viz., that the company should notify the sender by a service message, if the message cannot be delivered within the limits prescribed for the place to which it is addressed, so that he may furnish a better address, or, if the addressee lives beyond the said limits, provide for the payment of the charge for the extra service required. Hendricks v. Telegraph Co., 126 N. C. 310, 35 S. E. 543, 78 Am. St. Rep. 658. We so held in Gainey v. Telegraph Co., supra, where it was said:

"We have held that, when a message is received at a terminal office to which it has been transmitted for delivery to the person addressed, it is the duty of the company to make diligent search to find him, and, if he cannot be found, to wire back to the office from which the message came for a better address, and likewise it is the duty of the company, when it has discovered that the person for whom the message is intended lives beyond its free delivery limits, either to deliver it by a special messenger or to wire back and demand payment, or a (satisfactory) guaranty of payment, as it may choose to do, of the charge for the special delivery, and, if it fails to deliver without demanding and being refused payment of the charge, it will be liable for its default. It is not liable, though, if the sender of the message, when proper demand is made, refuses to pay the extra charge for a special delivery beyond the limits established for free delivery by the company, provided those limits are reasonable"—citing Hendricks v. Telegraph Co., supra, and 78 Am. St. Rep. 658; Bryan v. Telegraph Co., supra, and Telegraph Co. v. Moore, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515.

This rule is fair to the sender, who may not take special notice of the free delivery regulation at the time, as a very few read what is printed on the back of the blanks, or who may not know where the addressee resides, and it is also fair to the company, as it is thus enabled to perform its full duty with proper compensation. It seems to us that it would be exceedingly inconvenient, if not unfair, to the public, should we take any other view of the matter.

But this only shows how important it was that all the facts regarding the guaranty of the charge for the extra service should have been laid before the jury, and it would appear, in this case, that the denial of the right to have this done greatly prejudiced the defendant, as the written statement squarely contradicted Freeman's testimony, in every material respect, so far as it concerned this question, which was the paramount one in the case.

[3] Mental anguish affords a proper basis for the assessment of damages in telegraph cases, irrespective of physical injury, as this court held as far back as Young v. Telegraph Co., 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883, and Thompson v. Telegraph Co., 107 N. C. 449, 12 S. E. 427; but that means genuine, and not unreal, anguish, and juries should be careful, if not astute, to distinguish between the two. It is necessary, therefore, that they should have all the light possible in order that they may detect that which is spurious, and compensate only that which is real, as it is so easy to be simulated.

For the error indicated, another trial is ordered.

New trial.

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(168 N. C. 496)

## BENNETT v. WESTERN UNION TELEGRAPH CO. (No. 287.)

(Supreme Court of North Carolina. March 31, 1915.)

1. APPEAL AND ERROR ⟹927 — REVIEW — NONSUIT—EVIDENCE.

On appeal from a nonsuit, the plaintiff's evidence must be taken as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. ⟹927.]

2. TELEGRAPHS AND TELEPHONES ⟹66—FAILURE TO DELIVER TELEGRAM—NOTICE TO COMPANY—EVIDENCE OF CONTENTS.

In an action against a telegraph company for failure to deliver a message, where plaintiff, after service of notice upon defendant's counsel to produce the letter in which he notified the company of his demand, in accordance with the contract, was permitted to testify that in

such letter he stated to the company that he would make demand on it for $5,000 for nondelivery of the telegram sent him at R. on the 29th of April, 1912, the refusal of the court to allow the plaintiff to answer the further question whether such letter stated what the telegram was, or what its nature was, was improper.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 61–63; Dec. Dig. ⊂⊃66.]

3. TELEGRAPHS AND TELEPHONES ⊂⊃54—FAILURE TO DELIVER TELEGRAM—NOTICE TO COMPANY—SUFFICIENCY.

A letter to a telegraph company which had failed to deliver a message, stating that the sender "would make demand on it for $5,000 for nondelivery of the telegram sent to him at R. on the 29th of April, 1912," was sufficient notice under the requirement of the contract that the company be notified within 60 days of all claims for damages.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 39–47; Dec. Dig. ⊂⊃54.]

4. TELEGRAPHS AND TELEPHONES ⊂⊃73—FAILURE TO DELIVER TELEGRAM—ACTION—NONSUIT.

Where defendant telegraph company failed to deliver a message calling plaintiff to the bedside of his dying brother, and plaintiff, at the time of the delivery of the message to him, three days too late, orally notified the company that he would sue it for damages, and a month later wrote it, stating that he would make demand on it for damages for nondelivery of the telegram sent him at R. April 29, 1912, in compliance with the contract for transmission of the message, judgment of nonsuit for want of sufficient notice of claim was improper.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 76; Dec. Dig. ⊂⊃73.]

Appeal from Superior Court, Cumberland County; Cooke, Judge.

Action by J. F. Bennett against the Western Union Telegraph Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Shaw & MacLean, of Fayetteville, for appellant. Rose & Rose, of Fayetteville, and Geo. H. Fearons, of New York City, for appellee.

CLARK, C. J. [1] This is an appeal from a nonsuit in an action to recover damages for mental anguish caused by failure to deliver a telegram. The plaintiff left the bedside of his brother, who was quite ill at his home near Bennettsville, S. C., on Sunday afternoon, April 28, 1913. The physicians told him that he might safely leave, but he enjoined the family to wire him if his brother grew worse. Next morning the brother-in-law of the brother phoned to Hamlet and caused the following telegram to be sent, addressed to the plaintiff at Raeford, N. C.: "Come back to see your brother at once. W. H. Pearson." This telegram was filed at 9 a. m., according to the evidence for the plaintiff, which must be taken as true on this appeal.

[2-4] The plaintiff testified that he called that day at the defendant's office in Raeford three times, i. e., at 12 o'clock, at 1 p. m., and again at 3 p. m., and asked for a telegram, but was told there was none for him; he left at 3 p. m., and asked the defendant's agent to forward the telegram, if any came for him, to Aberdeen. This was not done, and he did not receive the telegram till he got back to Hamlet Tuesday night and had learned that his brother had died at 2:30 p. m. that day. The defendant company then presented a bill for 25 cents for the telegram, which the plaintiff says that he paid under protest, saying that he would bring suit for damages. The plaintiff further testified that at Raeford he was 35 miles from his brother's home, and if the telegram had been delivered, he would at once have gone to his brother's bedside either by train, which made connection, or through the county by automobile or with horses. He testified to the close and affectionate relations that existed between him and his brother, and the mental anguish he suffered by reason of being deprived of an opportunity of seeing him again by reason of the nondelivery of the telegram.

On the back of the telegraph blank was the usual requirement that any claim for damages must be presented to the company in writing within 60 days after filing the message. This regulation has been held reasonable and valid in Sherrill v. Telegraph Co., 109 N. C. 527, 14 S. E. 94, and has been often approved since. See citations in Anno. Ed. The plaintiff further testified that on May 29, 1912, he wrote a letter addressed to the defendant's agent at Hamlet, which he posted himself in the post office at Georgetown, S. C. The court would not permit him to testify as to the contents of this letter. He thereupon served notice on the defendant's counsel to produce the letter, and, this not being done, the court permitted him to testify that in said letter he stated to the company that he "would make demands on it for $5,000 for nondelivery of the telegram sent to him at Raeford on April 29, 1912." He was then asked: "Did you tell him [the addressee of the letter] what the telegram was, or what the nature of it was?" On objection by the defendant, this was ruled out, and the plaintiff excepted, as he also did to the nonsuit, which was granted on motion of the defendant. It was error to exclude the question, which was asked to show more fully the contents of the letter, and it was also error to grant the nonsuit. The court seems to have been of opinion that the letter was not sufficient to identify the telegram. But there was no evidence of any other telegram sent from Hamlet to the plaintiff on April 29th, or on any other day. There was also evidence, which must be taken as true, that the defendant had been already put on notice by the plaintiff of his dissatisfaction, at the time payment was collected from him for the telegram. The object of the 60 days' no-

tice, as stated in Sherrill v. Telegraph Co., supra, is to give the telegraph company notice within 60 days before its records may be sent off or the memory of its agents become indistinct. This letter was sufficient to recall the matter to the attention of the agent at Hamlet, and was mailed within the 60 days. Lytle v. Tel. Co., 165 N. C. 504, 81 S. E. 759. Such mailing raised the "presumption that the letter was received, and therefore was duly served." Cogdell v. Railroad, 132 N. C. 855, 44 S. E. 618, citing Bragaw v. Supreme Lodge, 124 N. C. 154, 32 S. E. 544.

The judgment of nonsuit is reversed.

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(168 N. C. 501)

## BARBER-PASCHALL LUMBER CO. v. BOUSHALL. (No. 143.)

(Supreme Court of North Carolina. March 31, 1915.)

1. VENDOR AND PURCHASER ⟸31 — CONTRACTS—VALIDITY.

Defendant owned a tract of land, but was uncertain as to its boundaries, as he informed plaintiff. Plaintiff was desirous of purchasing certain timber land in the vicinity which he assumed was included in defendant's property. *Held*, that a contract of purchase and sale entered into between them was unenforceable, and should be set aside, for there was no meeting of the minds, and defendant could not be considered guilty of negligence.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 35–37; Dec. Dig. ⟸ 31.]

2. VENDOR AND PURCHASER ⟸351 — CONTRACTS—BOND FOR TITLE.

A contract for the sale of land was in the form of a bond for $500, to be void on condition that defendant made conveyance. The down payment was more than $500. *Held* that, where there was no meeting of the minds of the parties because of mistake as to the property to be conveyed, the purchaser's damages were not restricted to the penalty in the bond, and he could recover his down payment, while the defendant was entitled to compensation for the timber cut by plaintiff from the land actually owned by defendant.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1017, 1047–1058; Dec. Dig. ⟸ 351.]

Appeal from Superior Court, Lee County; Connor, Judge.

Action by the Barber-Paschall Lumber Company against J. D. Boushall. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

The contract, dated October 10, 1913, was in the form of a bond for $500, to be void on condition that defendant conveyed to plaintiff by good and sufficient deed a tract of land in Chatham County, N. C., described as follows:

"A certain parcel of real estate situated in Chatham county, state of North Carolina, and bounded by the Foushee lands and Deep river, and commonly known as the McIntosh tract, containing three hundred and seventy one (371) acres, more or less, belonging to American Iron & Steel Company, the estate of J. M. Heck, deceased, Lobdell Car Wheel Company, and J. D. Boushall, trustees; the same to be conveyed by a good and sufficient warranty deed, conveying a good clear title to the same free from all incumbrance," at the contract price of $5,565; $565 being paid down, and the remainder evidenced by the promissory notes of plaintiff, in different amounts, and payable at specified dates to November 1, 1914.

Plaintiff contended and offered evidence tending to show that the tract of land, as sold and described in the written instrument and known as the McIntosh tract, contained from 2,500,000 to 3,000,000 feet of merchantable lumber, which was the main inducement to the purchase; that, acting under the terms of the contract and on representations of defendant, plaintiff moved its mill on the tract, and commenced cutting the timber, when he was stopped by the agent of the American Iron & Steel Company, who claimed that the timber belonged to that company and was not included in plaintiff's contract of purchase; that defendant had failed and refused to comply with his written contract or to make a deed conveying the land described therein, and the deed tendered by defendant was not in accord with the written agreement, and contained but a small portion of the timber referred to, about 97,000 feet, and defendant had no title to that portion of the land on which the remainder of the timber was situated, and plaintiff was thereby greatly damaged.

Defendant contended that he sold, and intended to convey, only that portion of the McIntosh land which was owned by the three parties mentioned, to wit, the steel company, the Lobdell Company, and the Heck estate, this being all that defendant owned, that the contract, in terms, so specified, and that the deed tendered by him, although it contained no reference to the McIntosh place in its description, included all the McIntosh place owned by the three parties specified, described by metes and bounds, and was in all respects a compliance with his written contract, and demanded judgment for specific performance of the contract as written or damages for breach, etc.

It was admitted that the $565 had been paid defendant on the contract price; that plaintiff company before being stopped, had cut the timber situate on the land contained in the deed which defendant tendered, amounting to about 95,000 to 100,000 feet; that defendant, Boushall, had acted in good faith, and no fraud was intended or practiced by him in the transaction. There was verdict for plaintiff assessing plaintiff's damages at $2,290, and, judgment having been entered for this sum, and also the $565 paid by plaintiff on the contract, defendant excepted and appealed.

Pace & Boushall, of Raleigh, and Williams & Williams, of Sanford, for appellant. A. A. F. Seawell, of Sanford, and Siler & Milliken, of Siler City, for appellee.

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⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

HOKE, J. The facts in evidence tended to show that the American Iron & Steel Company owned two adjoining tracts of land in the county of Chatham, known as the Foushee tract and the McIntosh tract, the divisional line between them originally running from Deep river north to a pond on the public road, and, for a part of the distance, along an "old hedge row," and that on the McIntosh place, near this line, was a large body of timber, 2,500,000 or 3,000,000 feet; that, some time after acquiring the land, the precise date not given, the company ran a new line dividing the property and by which the timber was thrown on the Foushee tract and thereafter, on the books of the company, the timber and the portion of land on which it was situated was treated as part of the Foushee tract, and so termed on the company's books. Thereafter the American Iron & Steel Company mortgaged the land known as the Foushee land, as now termed by them, to the Lobdell Car Wheel Company, a corporation of the state of Delaware, and having its principal place of business in said state, and the remainder of the property, to wit, the McIntosh place, as constituted under the new division, was mortgaged by the iron and steel company to the Lobdell Car Wheel Company and J. M. Heck, now deceased, of the city of Raleigh; that plaintiff, desiring to purchase the body of timber heretofore mentioned, and having learned that same was owned by defendant, J. D. Boushall, in 1913 approached said Boushall for the purpose of acquiring the timber and purchasing the land on which the same was situate, and said Boushall, having come into possession and control of the Heck interest, and having assurance that, as to the part of the land mortgaged Mr. Heck, now deceased, his negotiations would be approved by the iron and steel and the car companies, contracted to convey the McIntosh place to plaintiff company under the terms and provisions of the written contract above set forth. It further appeared that during the negotiations defendant, acting honestly in such belief, represented that the timber in question was on the property owned by him, and that his agent, a man living out there, pointed out the "old hedge row" as the dividing line; that plaintiff contracted for the timber under the impression that defendant owned it, and that procuring the timber was a principal inducement to the deal, and the value thereof called for the larger portion of the purchase price agreed upon, and that the descriptive terms, as used in the bond, as understood by plaintiff, covered and was intended to cover the land on which the same was situated. On the other hand, it was admitted that defendant was guilty of no fraud in the transaction, and it also appeared that he acted throughout in the honest belief that his boundaries covered the timber; that he told plaintiff's representatives in the trade that he had no personal knowledge of the lines or boundaries; that the title deeds were in possession and control of the car company, in state of Delaware, and that, while plaintiff was under the impression that his boundaries covered the timber and made the trade in reference to that, he only intended to sell the land that was mortgaged to him, and, in using the descriptive terms of the contract, he understood and intended that they only referred to such land.

Upon these, the facts chiefly relevant and about which there is no substantial conflict in the testimony, we are of opinion that there has been no valid contract between these parties, and that the verdict, establishing a breach and assessing damages on that theory, must be set aside.

[1, 2] It is recognized as a fundamental principle, in the law of contract, that there must be a meeting of the minds of the parties on the same thing at one and the same time. It is true that, when the parties have expressed their agreement, either oral or written, in terms that are explicit and plain of meaning—that is, when their minds have met on the terms of the contract—it may not be revoked or altered by reason of the mistake of "one of the parties alone, resting wholly in his own mind," there being no fraud or misrepresentation by the other, but, where essential terms of an agreement are ambiguous, so much so as to be fairly and reasonably susceptible of different interpretations, and it is clearly made to appear that these terms have been used and intended by one of the parties in one sense and by the other in a different sense, in such case there has been no meeting of the minds on the terms of the contract, and, unless some facts have arisen creating an estoppel or rendering such course altogether inequitable, the agreement or attempted agreement should be set aside, and the parties placed in statu quo. This was held in substantially these terms in Stong v. Lane, 66 Minn. 94, 68 N. W. 765, a case not unlike the one before us, and the principle will be found very generally approved in the decided cases and text-books of approved excellence. Machine Co. v. Chalkley, 143 N. C. 181, 55 S. E. 524; Lumber Co. v. Wilson et al., 51 W. Va. 30, 41 S. E. 137; Silliman v. Gillespie, 48 W. Va. 374, 37 S. E. 669; Conlan v. Sullivan, 110 Cal. 624, 42 Pac. 1081; Chamberlaine v. Marsh's Adm'r, 20 Va. (6 Munf.) 283; Werner v. Rawson, 89 Ga. 619, 15 S. E. 813; Kyle v. Kavanagh, 103 Mass. 356, 4 Am. Rep. 560; Rice v. Dwight Mfg. Co., 2 Cush. (56 Mass.) 80; Fink v. Smith, 170 Pa. 124, 32 Atl. 566, 50 Am. St. Rep. 750; Bingham v. Bingham, 27 Eng. Rep. Repr. Chan. 7, 934; Cooper v. Phipps, Cooper et al., L. R. Eng. & Ir. App. Cases, vol. 21, p. 49; Pomeroy, Eq. Jurisprudence, § 856; Pomeroy on Contracts, §§ 250, 251; 29 A. & E. (2d Ed.) pp. 664, 665; 9 Cyc. 398.

This being the established position, the

case before us, as heretofore stated, is one which, in our opinion, clearly calls for its application, the facts showing that the description in the contract is ambiguous, and that both parties, designing, the one to sell, and the other to buy, the timber, and honestly believing that the defendant owned it, entered into a contract for the land on which it was supposed to be situate, and in the written instrument the plaintiff used and intended to use the descriptive terms as covering the McIntosh place as it formerly was, "the land commonly known as the McIntosh tract," and the defendant intended to confine the contract to that part of the McIntosh place which he controlled, and which was then owned by the three parties mentioned, the iron and steel company, the Lobdell Car Wheel Company, and the Heck estate.

It has been said that culpable negligence of the complaining party will sometimes prevent the operation of the principle, but, as stated in one of these citations (Pomeroy, Eq. Jur. § 856):

"It is not every negligence that will stay the hand of the court, but the best authorities are to the effect that the neglect must amount to the violation of a positive legal duty."

And the qualification, if it applies at all to the case presented, should not prevail in this instance; the evidence showing further that defendant informed plaintiff that he was personally unacquainted with the boundaries, and also that the interest had come to him by devise or descent, and the title deeds were in the keeping of others.

It is true that neither party is asking relief on any such ground; but plaintiff, in his pleadings, asserting the contract to be one way and demanding damages for its breach, and the defendant asserting that it is another way and praying for specific performance, the allegations are sufficiently broad to present the question, and, the evidence clearly showing the mistake, the respective prayers for relief are not of the substance, and the decree must be entered that the contract be set aside, or rather, that there has never been a contract between them. Alston v. Connell, 140 N. C. 485–494, 53 S. E. 292. It is insisted for defendant that plaintiff is restricted in the bond to the sum of $500, that this should be regarded as an agreement for liquidated damages, and that no recovery by plaintiff can exceed this amount, and no greater sum can be considered as a basis for adjustment; but, on the facts presented, the authorities are against this position. The bond is in the old form, in which the sum of $500 is evidently stated as a penalty, and was never intended, in a contract of this character and value, to restrict the plaintiff's recovery in case of breach to such an amount. The decisions are that, where a contract of this kind is established, the plaintiff, at his election, may sue for the damages actually sustained. Rhyne v. Rhyne, 160 N. C. 559, 76 S. E. 469; Noyes v. Phillips, 60 N. Y. 408; Lowe v. Peers, 4 Burr, 228; 11 Cyc. p. 1026.

On the record, it must be adjudged that there has been no contract between the parties; that the verdict, establishing a breach of same and assessing damages for such breach, be set aside. And, it appearing from the pleadings that the plaintiff has paid on the contract the sum of $565, he is entitled to recover this sum and interest thereon from time of payment, and, on repleader by defendant, he is entitled, as an offset to this sum, to the value of the timber as it stood on the ground and which was cut by plaintiff from the part of the McIntosh place owned by the defendant while he was acting under the agreement as he understood it to be.

The plaintiff is entitled to costs in the lower court, thus far accrued, and the costs of appeal will be divided.

Error.

(168 N. C. 507)

## CARTER v. McGILL. (No. 294.)

(Supreme Court of North Carolina. March 31, 1915.)

1. SALES ⟹441—BREACH OF WARRANTY—EVIDENCE.

A chemical analysis is not necessary to proof of breach of warranty of fertilizer as of "standard grade," though this may be the best way.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277–1283; Dec. Dig. ⟹441.]

2. SALES ⟹440—BREACH OF WARRANTY—EVIDENCE.

A purchaser of fertilizer may show breach of warranty of it as of standard grade, by evidence of lack of results to be expected on crops, when used under conditions and circumstances favoring an increased yield, if it be of such grade.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1261–1276; Dec. Dig. ⟹440.]

3. SALES ⟹441—BREACH OF WARRANTY—EVIDENCE.

Evidence that fertilizer is "worthless" is some evidence of breach of its warranty as of "standard grade."

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277–1283; Dec. Dig. ⟹441.]

4. ACTION ⟹5—RIGHT OF ACTION—PENAL ACT.

Revisal 1905, § 3945 et seq., penalizing the sale of fertilizer below its guaranteed grade, does not deprive the buyer of right to general damages for breach of warranty.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 25–27, 31–34, 36–39; Dec. Dig. ⟹5.]

5. TRIAL ⟹350—SUBMISSION OF ISSUES.

An issue of breach of warranty should, on request, be submitted separate from that of damages.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828–833; Dec. Dig. ⟹350.]

Appeal from Superior Court, Cumberland County; Cooke, Judge.

Action by J. W. Carter against W. E. McGill. Judgment for plaintiff, and defend-

ant appeals. Reversed, and new trial granted.

This action was brought to recover the amount due upon a note and agricultural lien given for advances in supplies and so forth, to be made to defendant by the plaintiff in the year 1912, and to be used in the cultivation of his farm of 172 acres in said county. Plaintiff alleged, and there was testimony to show, that the balance due for supplies furnished by him after proper deduction for payments was $1,888.62. Defendant set up a counterclaim, alleging therein that he had paid for all supplies except certain fertilizers, which were furnished by plaintiff with a special representation, upon which he relied and which induced him to purchase the same, that they would be of standard grade, containing certain chemical ingredients, and that this contract of warranty was broken by plaintiff, entailing damage to the defendant in the loss or diminution of his crop and injury to his land in the sum of $6,000. The defendant tendered an issue in these words:

"Did the fertilizer furnished by the plaintiff to the defendant come up to the standard grade?"

The court submitted these issues:

"(1) In what amount, if anything, is the defendant indebted to the plaintiff for wares, goods, and merchandise sold by the plaintiff to the defendant under the lien and mortgage described in the complaint? (2) What was the value of the property seized by the sheriff in the claim and delivery herein at the time of the seizure? (3) In what amount, if anything, is the plaintiff indebted to the defendant on account of the counterclaim set up in the defendant's answer?"

—and charged the jury to answer the first, "$1,388.62," the second issue as they might find the value of the property seized by the sheriff to be, and the third, "Nothing," and the jury rendered their verdict accordingly, answering the second issue, "$663.12."

The plaintiff's witness P. S. Stead, who was salesman for the plaintiff, testified to an additional representation in the sale of the fertilizer, as follows:

"I told him that the fertilizer was all right; that it was good guano for cotton or for anything. I do not remember that he asked me if it was good for corn. I am certain that I told him it was good for cotton. I do not know whether he bought it on my recommendation or not, but he did buy it."

But no notice is taken of this fact, if it be a fact, in the complaint.

Defendant's witness John Campbell testified:

"I used some of the 8-3-3 fertilizer in 1912 which I obtained from Mr. McGill. I used it on some corn. It had no effect on my corn. I used about 600 pounds—three sacks to the acre. The crop was properly cultivated. The land was good for either cotton or corn. I got the fertilizer from Mr. McGill."

He also proved by other witnesses that they used the fertilizers on their lands in the same neighborhood, and then proposed to prove what were the results, but was stopped by plaintiff's objections. The questions were ruled out. He also proved that some of the fertilizer was "dumped into a field," and proposed to show what effect it had upon the land, but this question was also excluded. He finally proposed to show by several witnesses (naming them) that they used the same fertilizer, "and that it was worthless, and had no beneficial results upon the crops where it was used." This was excluded upon objection by plaintiff.

There was certain evidence as to the rules and practice of the Department of Agriculture in making analyses of fertilizers, which appears to be incompetent, but is not material, in the view taken of the case by the court.

There was judgment upon the verdict, and the defendant appealed and assigned errors.

Rose & Rose, of Fayetteville, for appellant. McIntyre, Lawrence & Proctor, of Lumberton, for appellee.

WALKER, J. (after stating the facts as above). [1-3] This case is not exactly like any other one we have had before us upon this and kindred subjects. The only question we will discuss in this appeal is whether the defendant offered any competent evidence of a breach of the warranty that the fertilizer should be of "the standard grade," and we think he did. It may not have been very full or explicit, but we cannot say that there was no evidence. It is not necessary, in order to prove this fact, that there should be a chemical analysis of the fertilizer. This is, perhaps, the best way of establishing the fact, but not the only one. The purchaser of the fertilizer may show a breach by the effect of the use of it upon his crops, provided he first lays the foundation for such proof by showing that it was used under conditions favorable to a correct test of its value, such as land adapted to the growth of the cotton, proper cultivation and tillage, propitious weather or seasons; the general purpose being to exclude any element which would render the evidence uncertain as to the cause of the loss or diminution of the crop or rid it of its speculative character. It may be somewhat difficult in practice to apply the rule, but it can be done by proper attention to the limitations on this kind of evidence, and we have so held, at this term, in Guano Co. v. Live Stock Co., 84 S. E. 774. We have allowed somewhat similar evidence to be considered in the case of flooding lands. Spencer v. Hamilton, 113 N. C. 49, 18 S. E. 167, 37 Am. St. Rep. 611. And this court, in Herring v. Armwood, 130 N. C. 177, 41 S. E. 96, 57 L. R. A. 958, recognized that such evidence might be stripped of its conjectural features and made available as legal proof of the fact that the loss or diminution of crops, in such circumstances, was directly, certainly, and solely traceable to the lack of a fertilizer, and, for the same reason, to its worthlessness

It is not unlike the opinion of an expert, which, if not founded upon a knowledge or finding of the facts to which it relates, is of no value, and those facts must be such as are material to the inquiry, and not uncertain or conjectural. We know by experience that a fertilizer of standard quality will produce good results by stimulating the growth of the plant under favorable conditions, but that, in order to determine whether a failure in results is attributable to its bad quality, or to its being below such grade, the purely speculative elements or quantities in the calculation must be excluded, so as to bring the test to the standard of reasonable certainty. There must be some evidence by which the jury can reason from cause to effect, disregarding those matters which necessarily involve the matter in doubt and prevent a reliable conclusion. If the fertilizer, therefore, is used under conditions and circumstances favoring an increased yield in the crop, provided it is of the warranted grade, and yet the results are not such as should have been expected, there is some evidence that it was of a defective quality, and not up to grade. Herring v. Armwood, supra. In this case defendant offered to prove that the fertilizer was "worthless," and should have been permitted to do so, if he could. The tender of the proof was a broad one, that the fertilizer was worthless, and the addition, "that it had no beneficial results upon the crops," was merely a logical deduction to be made from its worthless character. If it was worthless, this was certainly some evidence that it was "off grade." Tomlinson v. Morgan, 166 N. C. 557, 82 S. E. 953; Guano Co. v. Live Stock Co., supra. The seller and the buyer of fertilizers can protect themselves by proper warranties at the time of the purchase if they see fit to do so. The seller may restrict it, while the buyer may require that it be enlarged, according as their interests may dictate. Unless they do so, they must abide by the contract as made by them.

[4] We need not consider the question as to the measure of defendant's damages, if he is entitled to any, as that matter is not before us. There was a warranty here, and evidence as to its breach, which should have been submitted to the jury, under proper instructions. If the question of damages comes before us, the cases of Spencer v. Hamilton, 113 N. C. 49, 18 S. E. 167, 37 Am. St. Rep. 611, and Herring v. Armwood, 130 N. C. 177, 41 S. E. 96, 57 L. R. A. 958, may have an important bearing. Revisal, § 3945 et seq., which penalizes the violation of its provisions, does not deprive the buyer of his right to general damages for a breach of warranty. Tomlinson v. Morgan, supra.

The question here as to the competency of the evidence, was not presented in Fertilizer Works v. McLawhorn, 158 N. C. 274, 73 S. E. 883; Ober v. Katzenstein, 160 N. C. 439, 76 S. E. 476; or Carson v. Bunting, 154 N. C. 530, 70 S. E. 923. The first two cases were between the manufacturer and the dealer, and the last was an action for the penalty for not branding, and in other respects involved a different question. In the McLawhorn Case, so far as the question may have been mentioned, the evidence was clearly speculative.

[5] The defendant was entitled to have an issue submitted upon his counterclaim, so that the jury might find specifically whether or not there was a warranty and a breach thereof. A cause of action or defense should not be tried upon the issue as to damages merely, where objection is made, but a separate issue should be submitted and the issue as to damages left to embrace that subject alone. Denmark v. Railroad Co., 107 N. C. 185, 12 S. E. 54; Davis v. Railroad Co., 147 N. C. 68, 60 S. E. 722.

New trial.

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(168 N. C. 520)

## HUGHES et al. v. FIELDS. (No. 169.)

(Supreme Court of North Carolina. March 31, 1915.)

1. JUDGMENT ⟸713—CONCLUSIVENESS.
Where judgment was for defendant, and he did not appeal, the verdict, which was against him on some of the issues, must be considered as settling those matters.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234–1237, 1239, 1241, 1247; Dec. Dig. ⟸713.]

2. DEEDS ⟸82—RECORD—NECESSITY.
The title of the owner in fee of lands is good as against all except a bona fide purchaser for value, though her deed was not recorded, and from the record it appeared that title was in another.
[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 217; Dec. Dig. ⟸82.]

3. VENDOR AND PURCHASER ⟸242 — BONA FIDE PURCHASER FOR VALUE.
One claiming to be a bona fide purchaser for value has the burden of proving it.
[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603–605; Dec. Dig. ⟸242.]

4. VENDOR AND PURCHASER ⟸245 — BONA FIDE PURCHASER FOR VALUE—JURY QUESTION.
In a land suit, whether defendant was a bona fide purchaser for value *held*, under the evidence, for the jury.
[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 612; Dec. Dig. ⟸245.]

Appeal from Superior Court, Greene County; Daniels, Judge.

Action by Lila Hughes and husband against Roscoe Fields. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

The following issues were submitted:

1. Did R. L. Davis execute and deliver the deed to Mrs. Elizabeth Anne Fields, as alleged in the complaint? Answer: Yes.

2. Did the defendant, Roscoe A. Fields, purchase the land described in the deed of Jeremiah

Fields, dated April 2, 1906, for value? Answer: Yes.

3. Did the defendant, Roscoe A. Fields, purchase the land described in the deed of Jeremiah Fields, dated February 10, 1911, for value? Answer: Yes.

The superior court rendered judgment in favor of the defendant, and the plaintiffs appealed.

G. V. Cowper, of Kinston, and J. Paul Frizzelle, of Snow Hill, for appellants. L. I. Moore, of Newbern, and J. A. Albritton, of Snow Hill, for appellee.

BROWN, J. This is an action by the plaintiffs to recover a one-half interest in two tracts of land, described in the complaint. It is admitted that the land originally belonged to Jeremiah Fields. He conveyed it by mortgage to R. L. Davis on the 15th of August, 1893, who foreclosed the mortgage, at which sale it was bid off for Elizabeth Anne Fields, to whom, according to the findings of the jury on the first issue, R. L. Davis conveyed it under the power of sale, contained in the mortgage. On the margin of the mortgage record appears the following entry:

"Received of Jeremiah Fields full satisfaction for the within mortgage and the same is hereby canceled. R. L. Davis.

"Witness: C. A. Lassiter, Registrar of Deeds."

It is admitted that on the death of Elizabeth Anne Fields her lands descended in equal shares to the plaintiff Lila and the defendant, Roscoe Fields.

[1] On the 2d day of April, 1906, Jeremiah Fields executed a deed to Roscoe Fields for the recited consideration of $4,000 for one of the tracts of land; and on February 11, 1911, Jeremiah Fields executed a deed to Roscoe Fields for the other tract of land for the recited consideration of $2,500. As the jury have found that the deed by R. L. Davis was executed and delivered to Mrs. Elizabeth Anne Fields, the grantee therein, and as the defendant did not appeal, the judgment being in his favor, that fact may be taken as settled by the finding of the jury.

[2] His honor instructed the jury:

"If you find the facts to be as testified by the witnesses, you will answer the second issue 'Yes,' that the land was purchased for value; and if you find the facts to be as testified on the third issue, you will answer that issue 'Yes.'"

To the foregoing charge the plaintiff duly excepted. It is established by the verdict that Elizabeth Anne Fields was upon her death the owner in fee of the lands in controversy, and, although the deed to her was not registered, her title is good, except as against a bona fide purchaser for value. Hinton v. Moore, 139 N. C. 44, 51 S. E. 787; Norcum v. Savage, 140 N. C. 472, 53 S. E. 289.

[3, 4] We think his honor erred in instructing the jury upon the second and third issues substantially that in any view of the evidence the defendant was a purchaser for value. He should have submitted the matter to the jury under proper instructions as an open question for the jury to determine; the burden of proof being upon the defendant to satisfy them by a preponderance of evidence. It is true that the defendant testified that he had paid for the land, but there are circumstances in evidence from which a jury might infer that he had not paid for it. The note alleged to have been given for the $4,000 contract was paid April 2, 1906, which was due January 1, 1908. On April 18th, 16 days after the note was executed, there is another credit entry of $1,500, and in January, 1907, another payment of $1,600, and in about two months another payment of $1,031.25. Thus he paid off the note nearly a year before it was due.

The evidence shows that the defendant was not a man of means. He contends that he got some of the funds from the sale of his wife's land. Furthermore, he testifies that Jeremiah Fields, to whom the note was payable, gave him the money with which he paid the note. It is hardly to be supposed that Jeremiah Fields handed him the cash and he immediately returned it. If Jeremiah Fields forgave the defendant the debt, then he would not be a purchaser for value. If these credits are fictitious, as contended by the plaintiff, such evidence would tend strongly to prove that the defendant was not a purchaser for value.

The evidence as to the payment of the $2,500 note is more or less like that relating to the payment of the $4,000 note. The witnesses have stated that the wife's money had been used in paying the first note, and, if so, it could not have been used in paying the second. The testimony that the defendant is a purchaser for value is not of that harmonious and consistent character which would justify the charge of the court.

New trial.

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(168 N. C. 512)

## BARNES v. ATLANTIC COAST LINE R. CO. (No. 276.)

(Supreme Court of North Carolina. March 31, 1915.)

1. RAILROADS ⟸400—INJURIES ON TRACK—NEGLIGENCE.

In an action against a railroad for death of plaintiff's intestate on its track, evidence *held* sufficient to go to the jury on the issue of defendant's negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365–1381; Dec. Dig. ⟸400.]

2. RAILROADS ⟸396 — OPERATION —HEADLIGHTS—NEGLIGENCE.

Under Laws 1909, c. 446, requiring that every railroad locomotive operating in the state be equipped with an electric headlight of a certain candle power, the act containing certain provisos in effect extending the time to equip the locomotives, where, in an action against defendant road for death of plaintiff's intestate, it appeared that the locomotive which had struck him was equipped with an oil headlight, the bur-

den of proof rested upon defendant to show that it was not negligent in failing to equip its locomotive with an electric headlight.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1341–1343, 1357; Dec. Dig. ⟸ 396.]

Appeal from Superior Court, Columbus County; Allen, Judge.

Action by Eliza Barnes, as administratrix, against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. No error.

Davis & Davis, of Wilmington, and Schulken, Toon & Schulken, of Whitesville, for appellant. Irvin B. Tucker and H. L. Lyon, both of Whitesville, for appellee.

CLARK, C. J. The defendant introduced no evidence, and the only ground of appeal is for refusal of the motion to nonsuit, and in refusing to set aside the verdict. The action is for the wrongful death of plaintiff's intestate. Revisal, § 59.

[1] The testimony was that the plaintiff's intestate was taking home to his family some potatoes and candy; that he was walking on the railroad at a place where the track is customarily used by the public, and was killed between Fair Bluff and his home February 16, 1910. When last seen he was drunk and staggering along the track. He was killed by the train going east, which was the direction in which he was going, near a trestle inside the limits of Fair Bluff. The mayor of the town testified that he did not hear the train blow after it left Fair Bluff; that he did not hear any crossing blow given by the train after it left Fair Bluff until it reached Barnes' Crossing, 3 miles from the station. Another witness testified that it was a very bright moonlight night; that when the body of the deceased was found his head was between the rail and the guard rail on the north side of track near the west end of the trestle, while his body was lying on the east end of the trestle. The train was equipped with the old-fashioned oil headlight. The position of the body tended to show that the intestate must have been down on the track when struck. One of his hands was cut off, and was found under the trestle. One foot was mashed off, his clothing torn to pieces, and his whole body indicated that it had been rolled along under the train. The little bag of candy he was carrying his children was found under the trestle where his head was found, and the bag with one or two potatoes in it was found near the body, and the other potatoes scattered along the trestle, which was 40 feet across, and further along in an easterly direction along the track for 85 yards. Flesh and blood were on the ties of the trestle, as if he had been rolled from where the head was found. There was a V-shaped cowcatcher, the bottom of which was about 8 inches from the rail. The witness testified that he examined the track, together with defendant's section master, and found no evidence of the intestate having been struck west of the point where his head was found.

The plaintiff contends that the evidence shows that the intestate was very drunk about three-quarters of an hour before he was killed, going along the track in the direction of his home. The plaintiff also contends that the condition of the body and the circumstances above narrated were sufficient to satisfy the jury that the deceased was not walking along the track, but must have been down on it in a helpless condition; that the track was straight for a long distance at that point; and that, if the engineer had been in the exercise of ordinary care, he could have seen the deceased in time to have stopped the train in time to have avoided the killing. The train was running about 20 miles an hour.

There was evidence also that the train was running through a populous section of the town of Fair Bluff over a track which had been used by the public as a walkway for many years, where people were constantly passing and across four road crossings, without giving any alarm, without sounding the signal for crossings, running over the intestate on the trestle in the nighttime without sounding any alarm, without stopping the train, and without knowing, so far as appears, that the intestate was on the track. The plaintiff contends that this evidence was sufficient to show that a proper lookout was not kept; that the intestate was killed as a direct result of the negligence of the defendant; and that the jury should infer from the condition of the body and the attendant circumstances that the intestate was drunk on the track, and that the engineer should have seen him in time to have avoided killing him.

The facts in this case are very similar to those in Henderson v. Railroad, 159 N. C. 581, 75 S. E. 1092, in which the court set aside the nonsuit, holding (Allen, J.) that the plaintiff was entitled to have the evidence considered by the jury. The facts in this case are also very similar to those in Powell v. Railroad, 125 N. C. 370, 34 S. E. 530, in which the court sustained a verdict and judgment for the plaintiff. See citations to the latter case in the Anno. Ed. See, also, Shepherd v. Railroad, 163 N. C. 518, 79 S. E. 968, and cases therein cited; Powers v. Railroad, 166 N. C. 599, 82 S. E. 972; Dallago v. Railroad, 165 N. C. 269, 81 S. E. 318; Holman v. Railroad, 159 N. C. 44, 74 S. E. 577; Norris v. Railroad, 152 N. C. 505, 67 S. E. 1017, 27 L. R. A. 1069.

[2] Furthermore, it was held in Powers v. Railroad, 166 N. C. 599, 82 S. E. 972, that the defendant was negligent in not having its engine equipped with an electric headlight as required by Pell's Revisal, 2617(a), and that

the burden of pleading and proving that it had an electric headlight in use at the time, or that it was exempted from the statute, was upon the defendant. That statute was enacted in 1909 (chapter 446), and the death of the defendant occurred February 16, 1910.

The case was properly submitted to the jury as the triers of the facts.

No error.

(169 N. C. 812)

## STATE v. HOWARD. (No. 201.)

(Supreme Court of North Carolina. March 31, 1915.)

1. LIBEL AND SLANDER ⟸158 — CRIMINAL PROSECUTION—QUESTIONS FOR JURY.

A statement that a woman was no lady, that she was nothing but a crook, while not primarily slanderous, is so ambiguous that it was proper for the court in a criminal prosecution to submit to the jury the question whether, under the circumstances, it was intended to be understood as imputing unchastity.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 443; Dec. Dig. ⟸158.]

2. LIBEL AND SLANDER ⟸155 — CRIMINAL PROSECUTIONS — ADMISSIBILITY OF EVIDENCE.

In a prosecution for slander, where the words spoken were that a woman was no lady, that she was a crook, evidence that the defendant had made improper proposals to her and had stated on other occasions that she had been making money not as a lady, was admissible to show that unchastity was intended to be imputed by the statement.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 430-436; Dec. Dig. ⟸155.]

Appeal from Superior Court, Onslow County; F. A. Daniels, Judge.

Emmitt Howard was convicted of slander of a woman, and he appeals. Affirmed.

Criminal action, tried befort his honor F. A. Daniels, judge, and a jury, at October term, 1914, of the superior court of Onslow county. "On bill of indictment for the slander of Bessie Marshburn, an innocent and virtuous woman."

E. F. Hancock, a witness for the state, testified as follows:

"I know defendant and Bessie Marshburn. Defendant said, about May 1st, where I was, and was talking of going with girls—said he had quit his old girl, Bessie Marshburn; that Luther Mills was going with her now; that neither one of them was worth anything; she was not a lady; she was nothing but a crook, and he could prove it by his brother Enoch."

In apt time defendant objected to this evidence. Exception overruled.

J. D. Marshburn, father of Bessie, testified:

"I went to the defendant and said: 'Emmitt, what sort of confounded report is this you are saying about my daughter being in Wilmington making money not as a lady?' He said he said it to my daughter. I was mad, and went to find out what he had said."

This was objected to, overruled, and exception noted.

Bessie Marshburn, among other things, testified:

"He [defendant] told me he knew something on me. I asked him what it was. 'You were at Wilmington making money not as a lady.' He was at our mail box."

Objection overruled and exception.

And further:

"He asked me to take a walk down the road with him, and I refused. I am a virtuous and innocent woman."

Demurrer to state's evidence overruled, and defendant excepted.

Defendant, among other things, denied making any insulting or derogatory statements of prosecutrix, etc. The court, after stating the terms of the statute, charged the jury, among other things, that, in order to constitute the offense, it was necessary that defendant should utter of and concerning prosecutrix words that amounted to a charge of actual illicit sexual intercourse, and submitted to the jury to determine whether, under all the facts and circumstances, the words spoken by defendant to the witness Hancock, if so spoken, amounted to such charge. The court further allowed the jury to consider the testimony of the other witnesses, in so far as their evidence tended to corroborate the witness Hancock. In apt time the court was requested to charge the jury that in no event could defendant be convicted of the crime charged in the bill. Verdict of guilty. Judgment, and defendant excepted and appealed.

Thad Jones, of Kenansville, and T. C. Wooten, of Kinston, for appellant. Attorney General Bickett and T. H. Calvert, Asst. Atty. Gen., for the State.

HOKE, J. [1] It was chiefly urged for error that the court did not sustain defendant's demurrer to the state's evidence, and that his honor refused to charge, as requested, that in no aspect of the evidence could defendant be convicted, but the position, in our opinion, cannot be sustained. His honor properly charged the jury that, in order to constitute the crime, within the meaning of the law, the words used must amount to a charge of incontinency. State v. Moody, 98 N. C. 671, 4 S. E. 119. And, while our decisions hold that, when the words used have a fixed and unambiguous meaning, they may not, as a rule, be given a criminal significance by means of parol testimony, that the hearers understood the "speaker to mean differently from the common import of such words." Pitts v. Pace, 52 N. C. 558. It is also well established that:

"When the words spoken are ambiguous and fairly admit of a slanderous interpretation, it is then a question for the jury to determine on the sense in which the words were used, and whether they amounted to the slanderous charge to the reasonable apprehension of the hearers." Reeves v. Bowden, 97 N. C. 30, 1 S. E. 549; Lucas v. Nichols, 52 N. C. 32; Simmons v Morse, 51 N. C. 6; McBrayer v. Hill, 26 N. C. 136; Emmerson v. Marvel, 55 Ind. 265; 25 Cyc. p. 542.

A very satisfactory statement of the principle is given in this last citation, 25 Cyc., as follows:

"It is the province of the court to determine what constitutes libel or slander abstractly. Hence, if the language is plain and unambiguous, it is a question of law whether or not it is libelous or slanderous. But if the language is ambiguous and susceptible of two meanings, one defamatory, and the other not, it is for the jury to decide in what sense it was used. However, it is for the court to determine whether or not the language on its face is capable of a double meaning and should be submitted to the jury for construction. It is the duty of the court to say whether a publication is capable of the meaning ascribed to it by the innuendo, but, when the court is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it."

And the position may at times be extended to terms and nicknames having general or local significance and rendering them slanderous to those who hear and so understand them. Sasser v. Rouse, 35 N. C. 142.

In the present case, while the terms used—"that he had quit his old girl, Bessie Marshburn; that Luther Mills was going with her now; that she was no lady; she was nothing but a crook, and he could prove it by his brother Enoch"—may not have, primarily, the criminal significance, they are ambiguous in meaning, sufficiently so to call for the application of the principle, and we are of opinion that his honor made correct ruling in referring the question to the jury.

[2] The testimony of the other witnesses, J. D. Marshburn, etc., was clearly competent in corroboration of the principal witness, Hancock, and in explanation of the sense in which the words were used by the defendant in that conversation. State v. Mills, 116 N. C. 1051, 21 S. E. 563; Brittain v. Allen, 18 N. C. 120.

We find no reversible error, and the judgment is affirmed.

No error.

(168 N. C. 522)

## TATE et al. v. SEABOARD AIR LINE RY.

(No. 118.)

(Supreme Court of North Carolina. March 31, 1915.)

1. HIGHWAYS ⇐160 — OBSTRUCTION — RIGHT TO DAMAGES.

Damages are allowable for the obstruction of a highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 426, 436–443; Dec. Dig. ⇐160.]

2. RAILROADS ⇐246 — OBSTRUCTING HIGHWAY—EXISTENCE—EVIDENCE.

In an action to enjoin and to recover damages for the blocking of a crossing by defendant's trains, its letter during the negotiation with its vendor and in reply to the vendor's statement that a certain way must be left open, stating that the road or outlet referred to was a thoroughfare, which could only be closed by condemnation or by consent of the public road supervisors, was admissible as showing defendant's knowledge of the existence of the crossing and that it could not be obstructed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 758–760; Dec. Dig. ⇐246.]

3. RAILROADS ⇐102—RIGHT OF WAY—CONVEYANCE.

A deed to a railroad is not a waiver of a right of way to a private crossing, and an owner whose land has been severed into parcels may claim and enforce a right to the crossing, notwithstanding his unconditional deed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 306–314, 769; Dec. Dig. ⇐102.]

4. RAILROADS ⇐246 — OBSTRUCTING HIGHWAYS—ESTABLISHMENT—PRESCRIPTION.

A railroad which, together with its predecessor, had maintained a crossing, used as a road or outlet to timber land and by tenants thereof, for 77 years, including 2 years after a conveyance of a lot accepted after it had admitted its knowledge of the existence of the crossing and that it had no right to abolish it and no intention of doing so, was estopped to deny its existence, or to assert for the first time its right to obstruct it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 758–760; Dec. Dig. ⇐246.]

5. RAILROADS ⇐246 — OBSTRUCTING HIGHWAY—STATUTES—"WAY"—"PUBLIC ROAD."

Under Revisal 1905, § 2560, providing that a railroad crossing established roads or ways shall so construct its line as not to impede such ways, the word "ways" embraces recognized and customarily used roads, and ways less than highways; and, under section 2567 (5), providing that a railroad may construct its road across any highway without unnecessarily impairing its usefulness, its duty is not restricted to crossings by "public roads," defined by section 2681 as roads laid out or appointed by act of assembly or order of court, but may include any road used by the public, as a mill road, etc.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 758–760; Dec. Dig. ⇐246.

For other definitions, see Words and Phrases, First and Second Series, Public Road; Way.]

Brown, J., dissenting.

Appeal from Superior Court, Warren County; Ferguson, Judge.

Action for injunction by J. L. and H. H. Tate against the Seaboard Air Line Railway. Judgment for plaintiffs, and defendant appeals. No error.

Murray Allen, of Raleigh, for appellant. T. T. Hicks, of Henderson, and Tasker Polk, of Warrenton, for appellees.

CLARK, C. J. This is an action to enjoin and also to recover damages for the blocking of a "crossing" by the defendant's train near Norlina, N. C. In February, 1912, the defendant purchased 60 acres of land from W. R. Creed & Co. in order to enlarge its yards at Norlina, and soon thereafter constructed five tracks across the same in pursuance of that purpose. The plaintiffs, prior to the purchase of this land by the defendant, had a contract with said W. R. Creed & Co. for handling timber on a 2,400-acre tract of land on the south side of the defendant's track. The planing mill of the plaintiffs, to which the timber on this 2,400-acre tract was to be hauled, is on the north side of defendant's track near the point mentioned in the complaint as A street. The road used for this purpose crossed defendant's track at that point, now called A street. This was not

a public crossing, and has not been accepted by the public road authorities, but has been used ever since the railroad was built; and it is also contended that the contract of the plaintiffs with Creed & Co. entitled the plaintiffs to continue to use this crossing and to have the defendant prohibited from obstructing its use.

The jury responded to the issues that the defendant obstructed the crossing as alleged, and assessed the plaintiffs' damages at $150, and the court, upon the pleadings and findings, forbade and enjoined the defendant from obstructing "the crossing described in the pleadings at the northern terminus of A street, at or near Norlina, by leaving box cars or other obstructions thereon, but this shall not prevent the shifting of the cars thereon to the extent that is allowable by law and that will not constitute an obstruction of the same."

[1] Damages are allowable for obstruction of highway. Sloss v. Johnson, 147 Ala. 384, 41 South. 907, 8 L. R. A. (N. S.) 226, 19 Am. St. Rep. 89, 11 Ann. Cas. 285 and notes.

[2] The defendant excepts to the evidence as to the existence of the right of the plaintiffs to cross the railroad track at that point. The testimony shows that there was a road at that point in 1836, when the Raleigh & Gaston Railroad (the predecessor of the defendant) was built, and that it has been in use ever since, and that during all the time since 1836 it has been a material and necessary crossing for a large number of people, and especially to the tenants, now 39 in number, on the 2,400-acre farm, on the south side of the railroad. When the defendant was negotiating the purchase of this 60 acres from W. R. Creed & Co., the said Creed had contracted with one of the plaintiffs and Mr. Foust to have the timber on this 2,400 acres marketed, and to sell to Tate & Foust a half interest therein. This contract was executed November 21, 1906, and is set out in the record. During the negotiation between Creed & Co. and the defendant in regard to the sale and purchase of the 60-acre tract of land, said Creed & Co. wrote the defendant a letter, in which they stated that it was absolutely necessary, before Creed & Co. would sell said 60 acres to the defendant, that it should be understood that A street must be left open, and that they would not agree to a change in this road and crossing which the defendant had proposed. To this the general manager and vice president, C. H. Hix, who was acting for the defendant, replied:

"The road or outlet to which you refer is a public thoroughfare, and can only be closed by us in one of two ways—condemnation or the consent of the board of supervisors of public roads."

These letters were in evidence and are sent up in the record. It is true that in the deed thereupon made by said W. R. Creed & Co. to the defendant there is no rereference to said crossing; but this evidence was competent to show an admission and knowledge on the part of the defendant of the nature of said crossing and that the purchaser could not abolish or obstruct the same without legal condemnation. This is not the case where the preliminary negotiations between the parties are merged in the final contract or conveyance, which is the final conclusion of the contracting parties. But this is the recognition of a status of the surrounding conditions in the acknowledgment that there was a public crossing at that point which the defendant could not, and would not attempt to, obstruct or abolish.

[3] The duty of railroad companies to so construct their roads as not to interfere with the use of any public road or private way is fully discussed, with the citation of authorities, in Railroad v. Goldsboro, 155 N. C. 360, 361, 71 S. E. 514 (affirmed on writ of error 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721), Cooper v. Railroad, 140 N. C. at page 229, 52 S. E. 932, 3 L. R. A. (N. S.) 391, 6 Ann. Cas. 71, and Wilson v. Railroad, 142 N. C. at page 348, 55 S. E. 257, and additional authorities are set out in the concurring opinion in Herndon v. Railroad, 161 N. C. 659, 660, 77 S. E. 683. In the latter case, Elliott on Railroads, § 1138, is cited:

"The rule, however, is that a deed to a railroad company does not constitute a waiver of a right of way to a private crossing, and the owner whose land has been severed into parcels may claim and enforce the right to a crossing, notwithstanding his unconditional instrument of conveyance."

The correspondence above quoted was competent, as showing that the defendant had knowledge of the existence of this crossing and stated that he knew he could not interfere with it, except by condemnation or the consent of the road authorities of the county.

[4] Besides the defendant and its predecessor had maintained that crossing for 77 years, including 2 years after the deed to it by Creed & Co. of the 60 acres of land in January, 1912, which was accepted after the defendant had expressed its knowledge of the existence of the crossing and that it had no right to abolish it and no intention to do so. Even if this had been a case where the railroad had been freshly constructed, it was required, in crossing "established roads or ways," to "so construct its works as not to impede the passage or transportation of persons or property along the same." Rev. § 2569. And also to "make and keep in constant repair crossings to any plantation road thereupon." Rev. § 2601; Raper v. Railroad, 126 N. C. 566, 36 S. E. 115.

[5] The word "ways," in above-cited Rev. § 2569, is construed to embrace "recognized and customarily used roads and ways less than highways." Goforth v. Railroad, 144 N. C. 571, 57 S. E. 209. This is cited with approval in Herndon v. Railroad, 161 N. C. 660, 77 S. E. 683, quoting Rev. § 3753, which makes it an indictable offense for any railroad to "fail to make and keep in constant

repair crossings to any plantation road thereupon."

A public highway is defined in Rev. § 2681. In Goforth v. Railroad, supra, it is said:

"Revisal, § 2567 (5), does not restrict the defendant's duty to crossings of 'public highways,' which might include any road used by the public as a mill and church road and in going to town, as was this road. Revisal, § 2569, is still more explicit, by placing on the railroad company the duty of not impeding the passage of persons and property by the construction of its road over 'established roads or ways'—that is, as we understand it, recognized and customarily used roads and ways, less than highways. Indeed, we think this would be so, as of common right, independent of any statute, under the maxim, 'Sic utere tuo, alienum non laedas.'"

There is no contention that the correspondence between Creed & Co. and the defendant prior to the conveyance of the 60 acres created this right of way. The deed embraced the contract between the parties, and the preliminary treaty was merged into it. But such preliminary correspondence was competent to show, if it had been necessary, that the defendant was aware of the crossing and expressed its intention not to interfere with it. Certainly the defendant and its predecessor, having recognized the existence of this crossing for 77 years, cannot now be heard to deny its existence, or to assert for the first time, in its answer, the right to obstruct it.

This legislation is simply the assertion of the inalienable right of the public that when the public convenience and the convenience of a corporation (which derives its life from public authority), or of any other enterprise, conflict, the convenience of the sovereign, the people, who create corporations and support all business, is paramount. A railroad company itself is chartered for the public convenience; the right to a profit therefrom being incidental. There is no excuse for such conflict, not only when, as here, the road or way existed before the railroad was built, but on any occasion, for the corporation can always avoid any conflict by putting in a subway crossing, either for itself or for the use of the public. In many countries, and in several of our states, grade crossings by railroads are absolutely forbidden. With our steadily increasing traffic, both on railroads and on the roads and ways of the people, this will soon be a necessity here. The Corporation Commission has long had authority to abolish grade crossings. Rev. 1908, § 1097 (10). When such crossing becomes dangerous or inconvenient to the public it is the operation of the railroad that makes it so, and as the use of the railroad is in subordination to the rights of the public, instead of taking from the people the use of their roads and ways, the railroad company should avoid such interference at their own expense.

No error.

BROWN, J. (dissenting). My views of the rights of the defendant, as founded upon well-recognized principles of law, force me to dissent from the opinion of the court in this case. If we should seek to dispose of the case upon the basis of public convenience and public benefit alone, in my opinion, the result would be contrary to that reached by the majority of the court. A private crossing by its very nature serves the few. The railroad company, in the exercise of its charter rights, and controlled, as it is, by strict public regulation, must serve the entire public. If the rights conflict, certainly the public interest would be better served by the abolishment of the private crossing. But in this case, as I will show, the abolishment of a private crossing is not the real question presented.

The defendant found it necessary to enlarge its freight yards at Norlina in order to better perform its duties to the public as a common carrier. This required the purchase of additional land adjacent to its tracks and at a point where its yards could be enlarged and extended to the greatest advantage. A tract of land belonging to W. R. Creed & Co., containing 60 acres, located at a point south of the town of Norlina, answered the purpose, and negotiations were opened for its purchase. At the conclusion of the negotiations, which were carried on by C. H. Hix, vice president and general manager, for the railroad, and by W. R. Creed for W. R. Creed & Co., a deed in fee simple for this 60-acre tract was executed by W. R. Creed & Co. to Seaboard Air Line Railway. This deed contained no exception, and no attempt was made to reserve a right of way across the land conveyed.

1. There is no evidence of a contract to keep a private way open across this land. As the Chief Justice says:

"The deed embraced the contract between the parties, and the preliminary treaty was merged into it."

This removes all question of a contract to keep open the private way across the land purchased by the defendant and destroys the force of Herndon's Case, 161 N. C. 660, 77 S. E. 683, as authority in support of plaintiffs' contention. In that case there was evidence of an agreement to keep the way open.

2. There is no question in this case of the right of a railroad to close a public crossing. The following admission appears in the record:

"Plaintiffs admit that the said road, the crossing in question, is not a public road and crossing, and has not been dedicated to nor accepted by the county commissioners of Warren, or board of road commissioners or any other road authorities of Warrenton township, in which it is located, and has not been worked nor kept up by said public road authorities."

The cases of Railroad v. Goldsboro, 155 N. C. 360, 71 S. E. 514, and Raper v. Railroad, 126 N. C. 566, 36 S. E. 115, relate exclusively to public ways, and this admission makes them inapplicable to the facts of this case.

3. This is not a way of necessity. The

owner's land was not severed into parcels. Creed & Co. owned no land on the north side of the railroad, and the tract of land sold to the defendant does not divide part of this land from another part. There is not a line of evidence in the record tending to support the application of the principle that "the owner whose land has been severed into parcels may claim and enforce the right to a crossing, notwithstanding his unconditional deed of conveyance," and Elliott on Railroads, § 1138, quoted by the Chief Justice, does not apply.

4. We come, then, to the real question in the case: Can the owner of land in fee simple close a private way extending across it, where it is not a way of necessity and there is no contractual obligation to keep it open? The answer to this question is to my mind so obvious it seems hardly to require the citation of authority. It has been repeatedly answered in the affirmative by this court. It is so answered in Boyden v. Achenbach, 86 N. C. 397, in which Chief Justice Smith says:

"It would be unreasonable to deduce from the owner's quiet acquiescence, a simple act of neighborhood courtesy, in the use of a way convenient to others, and not injurious to himself, over land unimproved or in woods, consequences so seriously detracting from the value of the land thus used, and compel him needlessly to interpose and prevent the enjoyment of the privilege in order to the preservation of the right of property unimpaired."

In the later case of State v. Fisher, 117 N. C. 733, 23 S. E. 158, Mr. Justice Avery says:

"The continuous use by the people living in the neighborhood or in the state for a period of even 60 years does not deprive the owner of his right to resume control; nor does it devolve upon the properly constituted authorities of the county or the town, as the case may be, the duty, with the incidental expense to the public, of its reparation."

It cannot be doubted that upon these authorities the defendant's grantors, Creed & Co., could have closed this way, unless prevented by contract from doing so. Certainly their grantee by unconditional deed of conveyance has the same right. Can it make any difference in the application of this principle that the grantee is a railroad company? In this respect a railroad is not different from an individual owner. In fact, the law looks with more favor upon the title of a railroad to its property, and prohibits the acquisition of title to such property by possession. Revisal, § 388. If the defendant should have desired to use this 60-acre tract for a warehouse, could its right to do so have been denied upon the ground that it would interfere with this private way? Could the defendant have been denied the right of closing this private way across its land before the construction of its side tracks? Its dominion over the property by virtue of its ownership included the right to say that this private way should not be used, and whether it was closed by one obstruction or another, or at the time of or after purchase, makes no difference in the application of this principle. At the time title was acquired there was no crossing on this tract of land. The defendant's right to close the private way arose immediately, and could be exercised whenever the defendant so desired. That it permitted the way to be used for a period of two years could not be deemed a waiver of this right. Revisal, § 388; State v. Fisher, supra. Having the right to close this private way across its land, the defendant certainly has the right to place its cars on its side tracks constructed on this land in shifting and making up its trains, and the plaintiffs, who have no claim of right therein, cannot complain of the incidental interference with a privilege which they exercised at the sufferance of the defendant.

The case of Goforth v. Railroad, 144 N. C. 569, 57 S. E. 209, and the statutes referred to therein, have no application. There is a broader question here than the interference with a private crossing created by the condemnation of a right of way in the exercise of the right of eminent domain. This case involves a property right of vital importance to the citizens of this state, and the defendant should not be charged with inexcusably creating a conflict with the plaintiffs. Whatever may be the law of other states and countries relating to the abolishing of grade crossings, I venture to say that in no state or country has it been held that a railroad company should not only permit the use of its property as a private way by the people in the neighborhood, when such use interferes with the operation of its trains, but should expend thousands of dollars in carrying the private way under the tracks in its freight yards in order to facilitate such permissive use.

I cannot give my consent to a decision that is so opposed to well-established principles of law and justice and the prior decisions of this court as I understand them.

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(168 N. C. 511)

## OUTLAW v. TAYLOR et al. (No. 212.)

(Supreme Court of North Carolina. March 31, 1915.)

REMAINDERS ⇐12 — PERSONAL PROPERTY — CONVEYANCE.

An attempted conveyance of chattels, with a reservation of a life estate to the grantor, is void, as to the remainder, and has the effect of a reservation of the whole estate.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 3; Dec. Dig. ⇐12.]

Appeal from Superior Court, Duplin County; Daniels, Judge.

Action by Lawton Outlaw, administrator, against E. J. Taylor and others, to recover possession of personal property, described in a deed of Calvin H. Herring, plaintiff's intestate, to defendants. From a judgment

on a verdict directed for plaintiff, defendants appeal. Affirmed.

H. D. Williams and Stevens & Beasley, all of Kenansville, for appellants. Geo. R. Ward, of Wallace, and Thad Jones and Gavin & Wallace, all of Kenansville, for appellee.

BROWN, J. It is admitted that the property in dispute belonged to Calvin H. Herring. The defendants claim it under a conveyance from him, the material parts of which are as follows:

"That the said parties of the first part for and in consideration of valuable services rendered to the said parties of the first part by the parties of the second part during the sickness of the said parties of the first part, we give, grant and convey to the said parties of the second part all the personal property of every description that we may own at our death, consisting of horses, mules, cows, hogs, wagons, carts, buggies, farming implements, household and kitchen furniture, and all other personal property not mentioned in this instrument of writing. We hereby reserve to ourselves our lifetime right to the said property hereinbefore mentioned."

His honor correctly held the conveyance void.

It is well settled in this state, by numerous and uniform adjudications, that a reservation of a life estate by the grantor of chattels, in a deed attempting to convey them in remainder, reserves the whole estate, and the limitation in remainder is void. Dail v. Jones, 85 N. C. 221. "The law prescribes no formula for such a reservation," says Justice Ashe in that case. "Any expression in a deed that indicates the intention of the donor to reserve a life estate is sufficient." Graham v. Graham, 9 N. C. 322; Morrow v. Williams, 14 N. C. 263.

No error.

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(168 N. C. 468)

## WEEKS v. CAROLINA TELEPHONE & TELEGRAPH CO. (No. 216.)

(Supreme Court of North Carolina. March 24, 1915.)

TELEGRAPHS AND TELEPHONES ⟸20 — OBSTRUCTION OF STREETS BY WIRES—DAMAGES —LIABILITY.

Plaintiff, a resident taxpayer of a city, obtained a permit under a city ordinance, to move a house along a street. The city had granted to a telephone company a franchise to maintain poles and wires in the street. The company's manager agreed to remove the wires to enable the house to pass, but failed to do so. *Held*, plaintiff, suing for damages caused by being prevented from moving the house because of the wires, was improperly nonsuited.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 13; Dec. Dig. ⟸ 20.]

Allen, J., dissenting.

Appeal from Superior Court, Lenoir County; Rountree, Judge.

Action by Orrin Weeks against the Carolina Telephone & Telegraph Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

G. V. Cowper, Loftin & Dawson, and Rouse & Land, all of Kinston, for appellant. Y. T. Ormond, of Kinston, and G. M. T. Fountain & Son, of Tarboro, for appellee.

CLARK, C. J. This is an action by a resident and taxpayer of Kinston, who had obtained a permit from the city authorities to move a house along the street from one point to another in that town. The city had passed an ordinance regulating the moving of houses which required a permit from the city, and that the mover should bear all expenses of removing the electric light wires for the passage of such house, with a penalty for allowing any building to remain in the same place more than six hours in the day, Sundays excepted.

The city had granted the defendant a franchise to erect the telephone system by an ordinance, under one section of which the defendant obligated itself to observe the ordinances of the city, then in force or thereafter to be enacted, which was its duty any way. The poles were erected under the supervision of the board of aldermen. After the completion of the defendant's system, it appeared before the city council and asked to be permitted to raise the rates of phone rentals, as provided in the franchise, which the board permitted and fixed the rates. It was admitted that at the time of the franchise, and since, it has been usual to move buildings under the permit of the city.

The plaintiff testified that he was negotiating the purchase of a one-story building, and offered to pay $375 for the building, provided the city would grant the permit to move, and that the telephone company would remove its wires to permit the building to be carried from its then location to a vacant lot on which the plaintiff wished to place it. He said that he received from the authorities permit to remove the building, and then applied to the defendant's manager, who told him to go ahead, and he would remove the wires when necessary, and that in consequence he purchased the house.

Under these conditions, the plaintiff testified he began to remove the building. The small wires were actually cut, and the house was moved into the street and reached the first crossing, where the defendant's wires, poles, and cables interfered. At this point the defendant's manager refused to remove the obstructions unless the plaintiff would pay all expenses, which the defendant's manager estimated at a large sum. The defendant offered evidence tending to show that cables would have to be cut at a great expense, while the plaintiff offered evidence tending to show that the building could have proceeded by merely lowering or raising the cable. After expending $500, the plaintiff was compelled to sell the building at the

highest market price, $100, and claims that he sustained a loss of $400, not including the loss of all benefit and profit from the proposed transaction.

The court erred in granting a nonsuit. The town of Kinston was vested with full authority to regulate the use of its streets, and by ordinance had assumed to control the moving of buildings along said street, and had granted this plaintiff a permit to thus move the building. Besides, there was evidence tending to show that the defendant, through its local manager, who was in control of its plant and operations in that town, contracted with the plaintiff to remove the obstructions in the way of his removal of this building.

The full authority of a municipality over its streets and the wide discretion reposed in them is fully recognized in Tate v. Greensboro, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671, and in the cases cited thereto in the Anno. Ed. These hold that such authority will not be reviewed by the courts, unless it has been exercised negligently, willfully, or maliciously.

While we have no direct case in our state as to moving buildings along the streets with the permission of the town authorities, the law is thus summed up 28 Cyc. 909 (c), with citations:

"A citizen has a common-law right to the reasonable use of streets for the purpose of moving buildings, subject to reasonable restrictions which the municipality may impose."

A case in point is Railroad v. Calvert, 168 Ind. 321, 80 N. E. 961, 10 L. R. A. (N. S.) 780, 11 Ann. Cas. 635, with a valuable note containing a summary of the authorities.

In Day v. Greene, 4 Cush. (Mass.) 433, Chief Justice Shaw says:

"That it is often useful and convenient that buildings should be so removed is found by experience. * * * And therefore it seems highly proper that the power to authorize and regulate it should exist somewhere."

This is cited as a correct statement of the law. 1 Dillon, Mun. Corp. (4th Ed.) § 395.

In Indiana R. Co. v. Calvert, 168 Ind. 333, 80 N. E. 965, 10 L. R. A. (N. S.) 785, 11 Ann. Cas. 639, it is said:

"The mere fact that appellant enjoys contract rights in the streets is not controlling. The regulation operates on the property, and it must always be understood that those who enter into such contract relations with the public as render their property reasonably subject to control do so with a knowledge that the police power is an inalienable and continuing authority."

In the note referring to this case it is said:

"It was held that, for the purpose of moving a building, the plaintiff had the right, upon compliance with the terms of the ordinance, to cut the wires of the electric light company."

A reasonable use of the streets for the purpose of moving buildings is proper and necessary. Even if it were conceded that the city could barter away this right which it held in trust for its citizens, it has not done so in this case. Its ordinances recognize such right by requiring a permit, and the franchise granted to the defendant required it to observe the city ordinances. In Moore v. Power Co., 163 N. C. 302, 79 S. E. 597, it was held, in reference to the city's power over its streets, that a municipal corporation "cannot transfer * * * to a quasi public corporation, for its convenience and profit, this superior right, which it [the city authorities] can exercise only for the public benefit."

The defendant, like all other public service corporations, exercises its rights and powers in subordination to those of the public. The poles and wires of the defendant are unsightly, and the wires, being above ground, expose the defendant to interruption of the service from storms and electrical disturbances. It is strange that such companies do not avoid this by placing their wires underground. But if they prefer to keep them above ground, to save the expense of their proper installation in pipes underground, they must not interfere with the superior rights and privileges in the streets of the citizens or with those rights held by the authorities in trust for the people. Railroad v. Morehead City, 167 N. C. 118, 83 S. E. 259. Besides there was evidence of an express agreement and contract between the plaintiff and the defendant's manager upon which he could base an action for the defendant's subsequent interference with the removal of the house after agreeing that the wires should be removed for it. The defendant contends on its evidence that its manager agreed only to remove the "wires," but said nothing about removing "cables." The defendant also contends that its manager at Kinston, in charge of its plant and operations, was the "local manager," and did not have authority to make such contract. This matter should have been submitted to the jury under proper instructions, and should not have been decided by the court itself by granting a nonsuit.

Reversed.

BROWN, J., did not sit. HOKE, J., concurs in result. ALLEN, J., dissents.

(168 N. C. 478)

## LEA et al. v. ATLANTIC FIRE INS. CO.

(No. 255.)

(Supreme Court of North Carolina. March 31, 1915.)

1. INSURANCE ⟸131 — FIRE INSURANCE — ORAL CONTRACTS.

Unless prohibited by statute, an oral contract of fire insurance will be upheld.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 203–209; Dec. Dig. ⟸131.]

2. INSURANCE ⟸132 — FIRE INSURANCE — "BINDING SLIP"—"BINDER."

The memorandum of an agreement for insurance, called a "binding slip" or "binder," and intended to give temporary protection pending investigation of the risk and issuance of a for-

mal policy, constitutes a valid contract, unless prohibited by statute.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 210; Dec. Dig. ⊂⇒132.]

3. INSURANCE ⊂⇒132—FIRE POLICIES—PAROL CONTRACT.

That a standard form of policy has been adopted by statute does not invalidate a parol contract of insurance evidenced by a binder; the purpose of the statute not being to preclude a party from having insurance before the policy was issued, but merely to protect the insured by providing a plain intelligible policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 210; Dec. Dig. ⊂⇒132.]

4. INSURANCE ⊂⇒665—FIRE POLICIES.

Evidence *held* to show the creation of a parol contract of insurance and the issuance of a binder pursuant to the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707–1728; Dec. Dig. ⊂⇒665.]

5. INSURANCE ⊂⇒92 — FIRE POLICIES — AUTHORITY OF AGENT.

Evidence *held* to show that defendant's agent was authorized to enter into a parol contract of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 122; Dec. Dig. ⊂⇒92.]

6. INSURANCE ⊂⇒186 — FIRE POLICY — PAYMENT OF PREMIUMS.

An arrangement by the agent for an insurance company, who was also cashier of a bank, that the amount of the premium should be charged against insured's account at the bank, does not invalidate the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 896–898; Dec. Dig. ⊂⇒186.]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by J. T. Lea and J. W. Adcock, copartners doing business as Lea & Adcock, against the Atlantic Fire Insurance Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is an action to recover upon two contracts of insurance. The record discloses that the plaintiffs, Lea & Adcock, were, in December, 1913, and January, 1914, doing a leaf tobacco business at Fuquay Springs, N. C.; that they owned a large quantity of leaf and scrap tobacco then in the Banner Warehouse; that on the 17th of December, 1913, they applied to Howard & Aiken, agents of the defendants, for $3,000 of insurance on said stock of tobacco, and that on the 9th day of January, 1914, plaintiffs likewise applied to said agents for $2,500 additional insurance on said stock of tobacco in the Banner Warehouse; that when application was made to the said agents for the said insurance the said agents agreed with the plaintiffs that they would insure said stock of tobacco; and that they did execute the two paper writings spoken of as "Binders," in words and figures as follows, to wit:

"$3,000.00 on stock of tob. Lea & Adcock. Atlantic, Raleigh, 12 mos. 12/17/13.
"Howard & Aiken, Agts."

"$2,500.00 on Lea & Adcock stock tob. 12 mos. Atlantic, Raleigh, 1/9/14.
"Howard & Aiken, Agts."

On the 26th of January, 1914, and before policies of insurance had been issued and delivered to the plaintiffs, a fire broke out in a neighboring warehouse, called the Farmers' Warehouse, which fire spread to the Banner Warehouse and consumed it, together with the stock of tobacco therein. The next day after the fire the plaintiffs notified the defendants of the fire and of their loss, and demanded payment for the same. The defendant declined and refused to make payment. The premiums upon the policies referred to in the binders had not been actually paid by the plaintiffs at the time of the fire, but credit had been extended to the plaintiffs, the amounts due thereon had been charged up by the defendants' agents, Howard & Aiken, against the plaintiffs, Lea & Adcock. Mr. Howard, of Howard & Aiken, was cashier of the Fuquay Bank, and all premiums of Lea & Adcock, by a previous agreement, were charged. "A debit slip was returned the same as checks, and were cashed and returned and charged to Lea & Adcock's account." This arrangement had been in force between the parties for several years. In September, 1913, the plaintiffs had taken out other insurance in the defendant company, and the premium amounted to $33. The slip which was charged up by Howard, the cashier, against Lea & Adcock on the September policy was offered in evidence as tending to show the said arrangement. It was for $33. Mr. Chamberlain, who was in charge of the plaintiffs' business, testified that all of the plaintiffs' insurance was under that arrangement, which arrangement had been in force for many years.

Both Howard and Aiken, agents of the defendant, were examined as witnesses. Mr. Howard, who is cashier of the bank, confirms the statement that the binders were issued by him as agent for the defendant, and "that a slip in each case would be placed in the bank against Lea & Adcock for the premium, and that this would be a debit ticket and would be returned and canceled as a voucher." He says that this agreement was effective when the binders were issued, and that when credit was extended to Lea & Adcock, Howard & Aiken became responsible to the company with respect to remitting to them; that he looked after the financial end of the matter, but that Mr. Aiken, his partner, usually filled out the policies for tobacco. It appears in December that Mr. Aiken, who usually did this work, was absent, and that Howard did not have the time to fill out the policy until the fire occurred. Mr. Howard explains about the blank policies, about 50 of these blank policies were in his possession as agent of the defendant, all signed up by the president and secretary of the defendant. He states that they were in the usual form, signed by G. H. Dortch, secretary, and by Chas. E. Johnson, president, and

that they were sent to his firm from the Raleigh office; that he had them in his possession when he gave both binders; *that his firm delivered the policies to the insured and did not have to send to Raleigh for the policies.* He states that that is the only way that Howard & Aiken ever did business for the defendant, and that it was the usual and customary way of issuing policies; that they would report to the company that they had issued a policy, but would never report that they had given a binder because the policy was to follow soon afterwards; that during the life of their agency Howard & Aiken issued *one hundred and six* policies for the defendants in this way, and that the premiums during their five-month agency amounted to over $1,000 net to the defendant; that it was not customary to notify the company of the issuing of any memorandum slip; and that they did not make a daily report of any binding slips. He further states that the policy issued by the defendant in September, 1913, was deposited in the Bank of Fuquay for safe-keeping.

Mr. Aiken, the partner of Mr. Howard, says that the memorandum slip for the policy dated September 18th was not reported to the defendant; "we never reported a binder, we reported only the policy." He says that the tobacco companies had printed forms of binders, which was a kind of preliminary insurance to take effect before the policy could be written, and that binders issued upon the tobacco of these companies were never reported to their general agents. This witness further states that on one occasion he asked Mr. Busbee, the general agent of the defendant, for a printed form of binder, as it was not always convenient to write out the policy immediately. Mr. Busbee stated that he would send one, but never did. The defendant required us to make daily reports when we issued a policy, but not as to binders. Blank forms of policies duly signed up by an officer of the defendant, identified by this witness, being 50 in number, and a large lot of stationery, which was furnished to the agents, including books, etc., were identified by this witness and offered in evidence.

A jury trial was waived, and by consent his honor found the facts in the form of answers to issues as follows:

1. Did the defendant through its duly authorized agents, Howard & Aiken, on the 17th of December, 1913, insure the plaintiffs' stock of tobacco in the Banner Warehouse at Fuquay Springs in the sum of $3,000 for a period of twelve months? Answer: Yes.

2. Did the defendant through its duly authorized agents, Howard & Aiken, on the 9th day of January, 1914, insure the plaintiffs' stock of tobacco in the Banner Warehouse at Fuquay Springs in the sum of $2,500 for a period of 12 months? Answer: Yes.

3. If so, was said insurance of $5,500 in force on the 26th day of January, 1914? Answer: Yes.

4. Was said stock of tobacco so totally destroyed by fire on the 26th day of January, 1914? Answer: Yes.

5. In what sum is defendant indebted to plaintiffs on account of said insurance? Answer: $5,500, with 6 per cent. interest from May 21, 1914 (60 days after proof of loss).

6. What was the value of the tobacco of the plaintiffs destroyed by fire at date of fire, January 26, 1914? Answer: $11,184.54.

Judgment was entered in favor of the plaintiffs, and the defendant excepted and appealed.

A. B. Andrews, Jr., and James H. Pou, both of Raleigh, for appellant. Winston & Biggs, of Raleigh, for appellees.

ALLEN, J. There are several exceptions to the admission of evidence, but all of them were taken to preserve and present the contentions of the defendant: (1) That a standard form of policy of insurance having been adopted by statute, neither a parol contract of insurance nor a written memorandum of the contract, known as a binder, is valid; (2) that there is no evidence of a parol contract, and no evidence of a delivery of the binder; (3) that there is no evidence that Howard & Aiken, agents of the defendant, had authority to make a contract of insurance, and if we are against the defendant on these positions, the evidence offered to prove these facts was competent.

[1, 2] 1. Is a parol contract of insurance or a memorandum of the contract, called a binder, valid, although a standard form of policy has been adopted by statute? In the absence of a statutory prohibition the great weight of authority is in favor of the validity of a parol contract of insurance. 19 Cyc. 600; Vance on Insurance, 155; Com. Marine Ins. Co. v. Union Fire Ins. Co., 19 How. 318, 15 L. Ed. 636; Ins. Co. v. Colt, 20 Wall. 567, 22 L. Ed. 423; Phenix Ins. Co. v. Ryland, 69 Md. 437, 16 Atl. 109, 1 L. R. A. 549; Home Ins. Co. v. Adler, 71 Ala. 524; Fire Ins. Co. v. Wilcox, 57 Ill. 182; Campbell v. Ins. Co., 73 Wis. 108, 40 N. W. 661; Walker v. Ins. Co., 56 Me. 378; Floars v. Ins. Co., 144 N. C. 235, 56 S. E. 915. In the last case this court said:

"It seems to be well established that, in the absence of some statutory inhibition, an oral contract of insurance, or to insure, will be upheld if otherwise binding, except, as suggested by one author, in the case of guaranty insurance"...

—and this position is fully sustained by the other authorities cited. The memorandum of the agreement or binder is also well recognized and established as a valid contract of insurance. Vance on Insurance, 160; 19 Cyc. 395; Lipman v. Ins. Co., 121 N. Y. 457, 24 N. E. 699, 8 L. R. A. 719; Kerr v. Ins. Co. (D. C.) 124 Fed. 835; 1 Cooley, Ins. Briefs, 535, 16 A. & E. Ency. 851; Karelsen v. Ins. Co., 122 N. Y. 545, 25 N. E. 921; Putnam v. Ins. Co., 123 Mass. 324, 25 Am. Rep. 93; Gardner v. Ins. Co., 163 N. C. 367, 79 S. E. 806, 48 L. R. A. (N. S.) 714. In Vance on Insurance, 160, the author says:

"The binding slip is merely a written memorandum of the most important terms of a preliminary contract of insurance, intended to give temporary protection pending the investigation of the risk by the insurer, or until the issue of a formal policy"—

—and this was cited with approval in Gardner v. Ins. Co., supra, as was also Lipman v. Ins. Co., 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719, which holds a binder to be a valid contract of insurance. In 19 Cyc. 595, the custom of issuing binders is referred to, and their legal effect is stated as follows:

"It is usual, however, to issue to the person contracting for insurance some sort of a receipt or memorandum, which is sometimes called a binding slip, evidencing the making of the contract, although not specifying its terms and conditions. Such binding slip or memorandum is evidence of a present contract of insurance between the parties, and the insurance takes effect and is in force from the time the binding receipt or memorandum is delivered to the person contracting for the insurance."

Also Chief Justice Parker says in Hicks v. Ins. Co., 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424:

"It is usual for the company to issue a policy of insurance evidencing the contract between the parties; but the policy accomplishes nothing more than that. For when the contract is entered into between the agent and the owner, whether the binder be verbal or in writing, it includes within it the standard form of policy, and the contract is a completed one. * * * So that all this plaintiff had to do in order to recover in this action, aside from showing a loss by fire and compliance on her part with the conditions of the contract, was to prove the making of the contract. This was accomplished by proving the conversation between her assignor and the agent; for the conversation disclosed the sum for which the property was to be insured, the amount of premiums, and the period of insurance, and the statute provided for all of the other conditions of the contract of insurance."

[3] If, therefore, a parol contract, or one evidenced by a binder, would be legal and enforceable in the absence of statutory regulation, does the fact that a standard form of policy has been adopted render them invalid? We think not. As we said in Blount v. Fraternal Ass'n, 163 N. C. 170, 79 S. E. 300, "The statute does not purport to deal with the validity of the contract of insurance, but with the insurance company," and it was never intended to furnish the opportunity or temptation to a company to change the form of the contract and thereby escape liability. In Armstrong v. Ins. Co., 95 Mich. 139, 54 N. W. 637, which is approved in Gazzam v. Ins. Co., 155 N. C. 337, 71 S. E. 437, Ann. Cas. 1912C, 362, the court, having under consideration a statutory form of policy, said of the effect of deviating from its terms:

"In construing this statute we must consider the purpose which the Legislature had in view. It was not to subserve any public policy. Contracts of insurance, so far as the public are concerned, stand upon no different basis than other contracts. The object was to protect policy holders and to provide a policy fair to the insured and the insurer, and avoid litigation. It was undoubtedly well known to the Legislature that policy holders do not usually examine and scrutinize their policies with the same care that they do other contracts which they make, involving their ordinary business transactions. The statute imposes a penalty upon an insurance company for issuing such a policy, but imposes none upon the insured. In using the word 'void,' the Legislature certainly did not contemplate that an insurance company might insert a clause not provided for in the standard policy, receive premiums year after year upon it, and when loss occurs, say to the insured, 'Your policy is void, because we inserted a clause in it contrary to the law of Michigan.' Such a result would be a reproach upon the Legislature and the law. The law, so construed, instead of operating to protect the insured, would afford the surest means to oppress and defraud them, and thus defeat the very object the Legislature had in view."

In 16 A. & E. 851, the author says:

"This preliminary contract is of the greatest importance, for if the applicant could not be made secure until all the formal documents were executed and delivered, the beneficial effect of the insurance system would be greatly impaired; and a clause in the state insurance law or in the charter of an insurance company, providing that policies shall be executed in a certain manner, does not affect the power of the insurer to make these preliminary arrangements. Such a contract remains in force until it is superseded by the issuance of a regular policy, or until the risk is rejected by the insurer, and the insurer is liable for any loss in the meanwhile."

Also in Floars v. Ins. Co., 144 N. C. 235, 56 S. E. 915; Vance on Insurance, and Hicks v. Ins. Co., 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424, are cited in support of the proposition "that the enactment of a statute which establishes a standard form for a policy, the statute being only affirmative in its terms, will not invalidate an oral contract," and, further, that "the law will read into the contract the standard policy as fixed by the statute."

[4] 2. We are also of opinion that there is evidence of a parol contract to insure and of a delivery of the binder. Mr. E. H. Howard, one of the agents of the defendant, says with reference to the parol contract, "I agreed to insure that tobacco for them," and with reference to the binders, "That agreement was effective when the binders were issued." S. W. Chamberlain, who was a bookkeeper of the plaintiffs and had charge of taking out insurance for them, testified:

"I saw Mr. Howard and asked him about $3,000 insurance. I told him that I wanted it on leaf tobacco in the Banner Warehouse; it was then known as the Banner Warehouse, Lea & Adcock Stock of Tobacco. He agreed to issue the insurance for me. He gave me a binder at that time. On January 9th I applied to Mr. Howard and told him I wanted $2,500 additional insurance on leaf tobacco or tobacco of Lea & Adcock in the Banner Warehouse. He said all right and gave me the binder."

If this evidence is believed, there was an oral agreement to insure and a delivery of the binder to Mr. Chamberlain, the bookkeeper and agent of the plaintiffs. This seems to be recognized in the brief of appellant in which, referring to the last binder, it is said, "This slip, like the other, was delivered to the witness, Chamberlain who retained possession of the same."

[5] 3. The evidence as to the authority of Howard & Aiken, agents of the defendant, to issue the policies of insurance is ample. It was in evidence that it was the custom of the defendant to send its policies of insurance in blank to the agents, and that they were filled up and signed by them; that these polices were ready for delivery without being sent back to the principal office, and that about 100 policies had been issued by these agents in that way which were accepted by the defendant, and that about 50 of them were in the hands of the agent at the time of the trial. The witness, Howard, one of the agents, testified:

"I see the blank forms of policies now shown me, purporting to be the Atlantic Fire Insurance Company of Raleigh, N. C., in the usual form, signed by G. H. Dortch, secretary, and Charles E. Johnson, president, countersigned by blank; those policies were sent to us from—those blanks I mean, were sent us from the Raleigh office. I had those in my possession, and had them in my possession at the time I gave those binders. There are 50 of them here, 50 in a batch, these run from 51 to 75. When we gave a binder, and followed it by issuing a policy, we delivered some of the policies; a good many of them told us to keep them in the bank. I delivered the policy to the insured; did not have to send it to Raleigh. It was already signed by the president and the secretary and was countersigned by Howard & Aiken, giving it effect, and I at once turned it loose. As to whether that was the usual and customary way in the course of business of Howard & Aiken, agents of the Atlantic Fire Insurance Company, will say that's the only way, the only way we did it. They sent us the policy signed by the president and the secretary before getting any application, and all we did was to countersign it. After we countersigned one of those policies, we reported to the company that we had issued a policy. I do not know exactly how many policies for the Atlantic Fire Insurance Company we issued as agents for that company during the life of our agency, 100 or more, 106 I think. The premiums we remitted during the fire months amounted to little over $1,000. That was all the net premium to them."

It is well settled that such circumstances are evidence of authority in the agent to issue the policy, and that the company is affected with notice of the making of the contract. Grabbs v. Insurance Co., 125 N. C. 397, 34 S. E. 508.

[6] The plan adopted for the payment of premiums by charging them against the plaintiff in his account with the bank, of which the agent of the plaintiff was cashier, and then having them remitted to the defendant by its agent, does not come under the condemnation of Folb v. Ins. Co., 133 N. C. 180, 45 S. E. 547, which holds that the insured cannot pay his premiums by satisfying a private debt due him by the agent of the company.

Upon a review of the whole record we find no error.

No error.

BROWN, J., took no part in the decision of the court.

(168 N. C. 499)

## CLIFTON v. MUTUAL LIFE INS. CO. OF NEW YORK. (No. 220.)

(Supreme Court of North Carolina. March 31, 1915.)

1. INSURANCE ⟸360—FORFEITURE OF POLICY—NONPAYMENT OF PREMIUMS.

The payment of premiums, as prescribed in the policy, is necessary to keep it in force. Even acceptance of a partial payment will not keep the policy alive for such proportional part of the year as the amount paid is to the whole amount due.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 918, 916–922, 924; Dec. Dig. ⟸360.]

2. INSURANCE ⟸392—FORFEITURE OF POLICY—NONPAYMENT OF PREMIUMS—WAIVER.

The unconditional and unqualified acceptance of a past-due premium on a life insurance policy is a waiver of the implied condition that nonpayment of premiums will cause the policy to lapse.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1041–1056, 1058–1070; Dec. Dig. ⟸392.]

3. INSURANCE ⟸668—FORFEITURE OF POLICY—WAIVER—QUESTION OF LAW.

In an action on an insurance policy, where the facts are undisputed upon which plaintiff bases a claim that the defendant waived the forfeiture of the policy for nonpayment of premiums, the question is one of law for the decision of the court.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732–1770; Dec. Dig. ⟸668.]

4. INSURANCE ⟸392—FORFEITURE OF POLICY—WAIVER.

In an action to recover on an insurance policy, alleged by the defendant to have been forfeited by nonpayment of premiums, where plaintiff's intestate had received premium notices while ill, but had not paid the money, and where his father, as he grew sicker, requested his cousin to send the premium to the company, which was done, the company advising plaintiff's intestate that it could not accept the money in payment of the premium until he furnished a certificate of good health, which letter went unanswered, the cousin advancing the money for a second premium, for which defendant company gave no receipt, but retained both sums until requested to return them after the defendant's death, which it did, there was no waiver of the forfeiture of the policy for nonpayment of premiums by unqualified acceptance of past-due premiums.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1041–1056, 1058–1070; Dec. Dig. ⟸392.]

5. EVIDENCE ⟸185—LETTERS—CARBON COPIES—ADMISSIBILITY.

In an action on an insurance policy, where the defendant gave plaintiff due notice to produce certain letters admissible in evidence, which the plaintiff failed to do, the introduction in evidence of carbon copies, proved by the person who wrote the letters, was proper.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 642–660; Dec. Dig. ⟸185.]

Appeal from Superior Court, Duplin County; Daniels, Judge.

Action by W. D. Clifton, as administrator, against the Mutual Life Insurance Company of New York. Judgment for defendant, and plaintiff appeals. No error.

This is a civil action to recover on a policy of insurance issued on the life of the plaintiff's intestate by the defendant. The following issues were submitted to the jury without objection:

(1) Did defendant waive the forfeiture of the policy of insurance sued on? Answer: No.
(2) If so, what amount is due the plaintiff on said policy? Answer.

The court charged the jury, if they found the facts to be as testified to by all the witnesses, to answer the first issue, "No." The plaintiffs appealed.

Langston, Allen & Taylor, of Goldsboro, Gavin & Wallace, of Kenansville, and J. F. Thomson, of Goldsboro, for appellant. J. O. Carr, of Wilmington, and Jas. H. Pou, of Raleigh, for appellee.

BROWN, J. [1] It is elemental law that the payment of the premium is requisite to keep the policy of insurance in force. If the premium is not paid in the manner prescribed in the policy, the policy is forfeited. Partial payment, even when accepted as a partial payment, will not keep the policy alive even for such fractional part of the year as the part payment bears to the whole payment. American & English Encyclopedia, vol. 19, p. 48.

[2, 3] The insurer may waive such conditions, and the unqualified, unconditional receipt of a past-due premium is a waiver. Where the facts upon which a waiver is based are undisputed, a question of law is presented for the decision of the court. Where the facts are in dispute and admit of different inferences, the matter of waiver should be submitted to the jury with proper instructions.

[4] All the evidence in this case tends to prove these facts: The insured took out a policy of insurance for the sum of $2,000 on his life, and paid the first premium. He neglected to pay the second premium, and undertook, ten days after it became due, to arrange for the premium to be distributed quarterly, which was agreed to by the defendant. At this time the insured was in South Carolina. Nothing was then said about sickness. Shortly after his request for a quarterly distribution of the premium, insured went home sick, and grew steadily worse, and although he had received two premium notices, one 30 days before the premium fell due, and the second a day or two after it fell due, calling his attention to the necessity of paying the premium, neglected to send the money. After he grew desperately sick, his father, or some one, found the premium notice and saw that the time had passed, and asked his cousin, L. D. Dail, to send the premium to the company. Dail sent a money order and inclosed with it the premium notice, without any letter of explanation. Defendant received this notice and money order, and immediately advised the insured that it could not accept the money as payment of the premium until he furnished a certificate of good health, blank for which defendant sent insured, as the time for the payment of the premium (including the days of grace) had expired. Insured continued to grow worse, and never furnished a health certificate. Defendant held the money so deposited in suspense, and gave no receipt for the second premium. The money for the second premium was advanced by Dail, not at the request of Paul H. Kornegay, but at the request of Peter H. Kornegay, his father. After the death of Paul H. Kornegay, Peter H. Kornegay wrote to the defendant and requested a return of the money. It was offered to him, first, in a check, which could not, under the circumstances, be cashed; and afterwards, on the 1st of August, it was paid over to him by Mr. Barker, defendant's district manager, who took a receipt for the same; and shortly thereafter Mr. Peter H. Kornegay repaid Mr. Dail.

We agree with his honor that there is no evidence of a waiver of the conditions of the policy. The defendant had a right to receive the premium and hold it, awaiting the return of the health certificate. That not being forthcoming, the defendant properly returned the premium after the death of the insured. Receiving the premium under such circumstances is no evidence of a waiver. Melvin v. Piedmont Ins. Co., 150 N. C. 398, 64 S. E. 180, 134 Am. St. Rep. 943; Sexton v. Insurance Co., 157 N. C. 142, 72 S. E. 863; Wilkie v. Natural Council, 151 N. C. 527, 66 S. E. 579; Page v. Junior Order, 153 N. C. 404, 69 S. E. 414.

In Hay v. Insurance Co., 143 N. C. 257, 55 S. E. 623, the Chief Justice very pertinently says:

"It is always sad when one who has made payments on his policy deprives his family of expected protection by failure to pay at a critical time. But insurance is a business proposition, and no company could survive if the insured could default while in good health, but retain a right to pay up when impaired health gives warning. It is a warning of which the company also has the right to take notice when asked to waive a forfeiture. It is the insured's own fault when he does not make a payment as he contracted."

The doctrine laid down in the text-books and by the decisions of other states is in line with the decisions of this state, as are also the decisions of the Supreme Court of the United States. Klein v. Insurance Co., 104 U. S. 88, 26 L. Ed. 662; Insurance Co. v. Statham, 93 U. S. 24, 23 L. Ed. 789.

[5] The plaintiff excepted to the introduction of carbon copies of certain letters. The defendant had given plaintiff due notice to produce the originals. The letters were written to the insured by the defendants' agent McIntosh. The plaintiff had failed to produce the originals; consequently the carbon copies, which were duly proven by the

person who wrote the letters, were competent. We have examined the other exceptions in the record, and think they are without merit.

No error.

(100 S. C. 165)

## STATE ex rel. LINDSEY v. TOLLISON. (No. 9023.)

(Supreme Court of South Carolina. March 9, 1915.)

1. STATES ⟸39 — LEGISLATURE — JOURNAL — CORRECTION.

The minutes of the proceedings of February 24th in the bound volume of the Senate Journal showed the appointment of plaintiff and two others as members of the board of registration of A. county, as well as various other appointments. The daily journal of that date, as published and laid on the members' desks, contained nothing relative to the confirmation of any appointments. In the bound volume in the minutes of February 28th appeared a resolution reciting that certain recommendations for the appointment of officers to be made by the Governor and confirmed by the Senate had not been sent to the Senate for confirmation, and therefore requesting the governor before adjournment to send appointments to the office of supervisor of registration for certain counties, including A. county. The minutes for February 29th showed the adoption of a resolution advising and consenting to the appointment of defendant as supervisor of registration for A. county. *Held*, that the Senate had the right and power, while in session, to correct its own journal, and by the resolutions of February 28th and 29th it, in effect, declared that the record of the 24th was a mistake, and corrected such mistake; and hence the journal, without resort to extraneous evidence, showed that plaintiff's appointment was not confirmed.

[Ed. Note.—For other cases, see States, Dec. Dig. ⟸39.]

2. STATES ⟸39 — LEGISLATURE — JOURNAL — CONSTRUCTION AS A WHOLE.

In determining from its journal what was or was not done by the Senate, the journal must be considered as a whole, as any other record would be.

[Ed. Note.—For other cases, see States, Dec. Dig. ⟸39.]

Appeal from Common Pleas Circuit Court of Anderson County; John S. Wilson, Judge.

Action in the nature of quo warranto by the State, on relation of P. N. Lindsey, against E. T. Tollison. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 80 S. E. 1118.

The decree below was as follows:

This is an action to decide the title to the office of supervisor of registration for Anderson county. The plaintiff claims to have been appointed by the Governor and confirmed by the Senate the 24th of February, 1912; that he was duly commissioned by the Governor; that defendant is in possession of the office and refuses to surrender the same. The defendant denies that the plaintiff was ever confirmed by the Senate, and alleges that he is holding over under appointment by Governor Ansel in 1910 until his successor is duly appointed, confirmed, and qualified. The whole question turns upon this: Can the entry in Senate Journal for 1912, page 951, purporting to show that P. N. Lindsey was confirmed as supervisor of registration for Anderson county on that day, be attacked, and it be shown by extraneous evidence that this record is incorrect? It might not be competent to impeach this record but for the fact that at pages 986, 990, and 991 of the same journal it appears that the Senate took action which plainly indicates that they had not confirmed P. N. Lindsey as supervisor of registration for Anderson county February 24, 1912. In the face of these contradictory entries in the journal, it is necessary to resort to outside evidence to settle the question. I think such evidence is admissible, and it is abundantly proved to my satisfaction that P. N. Lindsey was never confirmed by and with the advice and consent of the Senate, as supervisor of registration for Anderson county. Therefore it is ordered, adjudged and decreed that E. T. Tollison is the lawful supervisor of registration for Anderson county, holding until his successor is duly appointed, confirmed, and qualified. It is further ordered that the complaint be dismissed, and that the plaintiff pay the costs.

Kurtz P. Smith, of Anderson, for appellant. Bonham, Watkins & Allen, of Anderson, for respondent.

HYDRICK, J. Section 202 of the Civil Code of 1912 provides that a board of registration, composed of three members, shall be appointed in each county by the Governor, by and with the advice and consent of the Senate, and that:

"Their term of office shall be for two years from the date of their appointment, and they shall continue in office until their successors shall have been appointed and shall qualify."

In January, 1910, the defendant, Tollison, was appointed a member of the board for Anderson county, his appointment was confirmed by the Senate, and he was duly commissioned.

Plaintiff alleges that in February, 1912, he was appointed to succeed Tollison; that his appointment was confirmed by the Senate on February 24th; and that he was duly commissioned on February 26th, and is entitled to the office, which defendant unlawfully withholds from him.

Defendant denies that plaintiff's appointment was confirmed by the Senate, and alleges that the statement which appears in the bound volume of the Senate Journal for 1912, purporting to be a part of the record of the proceedings of the Senate of date February 24th, and showing confirmation of his appointment, is false, and does not represent the action of the Senate, and that it was inserted there by mistake or fraud, without the knowledge or consent of the Senate.

[1] The evidence, which was all taken subject to objection, was as follows: A bound volume of the Senate Journal for 1912, in which it appears, at page 951, as a part of the minutes of the proceedings of February 24th, that the appointment of plaintiff and the two other members of the board was confirmed. It also appears, on pages 952 and 953, that at the same time 27 other appointments to different offices in 11 other counties were confirmed. A copy of the daily

journal of the Senate of date February 24th, which was published and laid on the desks of the members the next day, was also in evidence, and nothing appeared therein relative to the confirmation of any appointments, as it does in the bound volume. At page 986 of the bound volume it appears that the Senate adopted the following resolution, on February 28th:

"Whereas, it has been called to the attention of the Senate that certain recommendations for the appointment of officers to be made by the Governor, to be confirmed by the Senate, *have not yet been sent to the Senate for confirmation:* Therefore, be it resolved by the Senate that the Governor be requested to send to the Senate as early as possible before it adjourns sine die tomorrow, February 29th, appointments to the office of supervisor of registration for the counties of Newberry, Lexington, Cherokee, Beaufort, and *Anderson.*" (Italics added.)

At page 990 of the same volume it appears that the following resolution was unanimously adopted by a "yea" and "nay" vote:

"That the Senate, being in session, hereby advises for appointment as supervisors of registration for: [Here follows a list of counties, with the names for each, and among them is] Anderson—E. T. Tollison."

The resolution concludes:

"And the Senate consents to the same as supervisors of registration, * * * and requests that the Governor appoint the same," etc.

The Senate Journal for 1914 was also in evidence, and at page 180 it appears that the following resolution was adopted:

"Whereas, an error appears in bound Senate Journal of 1912 on 24th February, page 951, showing that P. N. Lindsey was confirmed as supervisor of registration for Anderson county, in the absence of the Senator of Anderson county, he being absent from 14th to 28th February, sick at his home in Anderson county: Therefore, be it resolved by the Senate, in executive session, that said error is hereby corrected by striking from the list of appointments for Anderson county on 24th February, 1912, the name of P. N. Lindsey as supervisor of registration, and that this resolution be printed in to-day's journal."

Eight members of the Senate of 1912 and the clerk of that body were examined. They agree that it is an invariable custom of the Senate to pass over, or take no action upon, appointments to office in a county in the absence of the Senator from that county, and that the Senator from Anderson was absent, on account of sickness, for some time during the latter part of February, and returned to the Senate only a few days before it adjourned sine die on February 29th. None of them believed that any action was taken by the Senate as to the appointments for Anderson county during the absence of the Senator from that county, and some of them distinctly remembered that, on consideration of the appointments for that county, after his return to the Senate, on his motion, some of them were confirmed, and one was not confirmed. More specifically, the Senator from Anderson, Hon. G. W. Sullivan, testified, in substance, that in January, 1912, the Anderson delegation unanimously recommended in writing to the Governor for reappointment the old members of the board of registration, to wit, W. L. Anderson, Wood Fant, and E. T. Tollison; that he was absent from the Senate from February 14th until February 28th (the journal shows that indefinite leave of absence was granted him on February 15th); that on February 28th, at his request, the Senate considered the appointments to the board of registration for Anderson county, the appointees being W. L. Anderson, Wood Fant, and P. N. Lindsey, and, on his motion, the appointment of Anderson and Fant was confirmed, and that of Lindsey was not confirmed.

Mr. M. M. Mann, the clerk of the Senate, testified, in substance, that after Senator Sullivan's return to the Senate, he asked for consideration of the appointments for Anderson county; that he (the clerk) took them out of a drawer in his desk and read them out; that some were confirmed, and one was not confirmed; that if these appointments had been previously passed upon, they would not have been in his desk, but would have been sent with the others to the printer; that mistakes frequently occur in the journal, in different ways which he explained; that some are detected and corrected, and others are never detected; that he was satisfied the statement in the bound volume, at page 951, showing confirmation of Lindsey's appointment, was a mistake; that the appointments for Anderson county were passed over and not considered on February 24th, on account of the absence of the Senator.

The circuit court found and concluded as follows:

"The whole question turns upon this: Can the entry in Senate Journal for 1912, page 951, purporting to show that P. N. Lindsey was confirmed as supervisor of registration for Anderson county on that day, be attacked, and it be shown by extraneous evidence that this record is incorrect? It might not be competent to impeach this record but for the fact that at pages 980, 990, and 991, of the same journal it appears that the Senate took action which plainly indicates that they had not confirmed P. N. Lindsey as supervisor of registration for Anderson county February 24, 1912. In the face of these contradictory entries in the journal it is necessary to resort to outside evidence to settle the question. I think such evidence is admissible, and it is abundantly proved to my satisfaction that P. N. Lindsey was never confirmed by and with the advice and consent of the Senate, as supervisor of registration for Anderson county."

The court below went further than was necessary to the decision of this case in holding that the contradictory entries in the Senate Journal for 1912 made it necessary to resort to other evidence to decide the question before it.

In several cases this court has considered the admissibility in evidence of the journals of the Senate and House of Representatives, which are kept and published in pursuance of the requirements of the Constitution and statutes. In State v. Platt, 2 S. C. 150, 16 Am. Rep. 647, which was followed in State v.

Hagood, 13 S. C. 46, it was held that the court might go behind an act which had been duly enrolled and ratified by the two houses in joint assembly, signed by the President of the Senate and the Speaker of the House, and approved by the Governor, and deposited with the Secretary of State, and consult the journals to determine whether the terms of the act so ratified and approved were substantially different from those of the bill which had met the approval of the two houses, and, finding a substantial difference in each case, the acts were declared invalid as to the difference. In State v. Chester, 39 S. C. 307, 17 S. E. 752, these cases were overruled, and it was held, quoting the syllabus:

"Where an original bill and an act duly ratified and approved show on their face that the bill originated in the House of Representatives, received three readings in both houses, and the act was duly signed by the President of the Senate and the Speaker of the House of Representatives, and approved and signed by the Governor, and deposited with the Secretary of State, the court cannot look to the journals of the two houses to show that the bill did not originate in the lower house, did not receive three readings in both houses and was not duly ratified, the true rule being that such an act is sufficient evidence that it passed the General Assembly, and it is not competent to impeach such an act by the journals of the houses, or any other evidence, other than evidence of such prerequisites as the organization of the houses, the presence of a quorum, and the record of votes upon the journals when so required by the Constitution."

In State v. Smalls, 11 S. C. 286, it was held that the journal of the Senate was competent and the best evidence to prove what matters were pending therein at a particular time.

In the Bond Debt Cases, 12 S. C. 203, 289, it was held that the court would look to the journals to ascertain whether the prerequisites prescribed by the Constitution for the valid enactment of statutes of a certain character, such as those increasing the public debt, had been complied with, and that, where the Constitution provided that no law creating a public debt shall take effect until it shall have been passed by the vote of two-thirds of the members of each branch of the General Assembly, to be recorded by yeas and nays on the journals of each house respectively, no such law would be valid, unless a record of a two-thirds vote by yeas and nays affirmatively appeared upon the journals of both houses.

In State v. Aiken, 42 S. C. 224, 20 S. E. 221, 26 L. R. A. 345, nothing was decided touching the journals as evidence. The court merely referred to the Platt and Hagood Cases as having been overruled by the Chester Case in discussing the doctrine of stare decisis.

The weight of authority in other states is that the journals of the Legislature must be received as importing absolute verity, and cannot be impeached, even for mistake or fraud, but, as will be seen from the cases above cited, this court has never decided whether, under all circumstances, they must be so received, and, as the decision of that question is one of grave importance, and as it is unnecessary to the decision of this case, no opinion thereon should be expressed. Nor is it necessary to decide whether the Senate of 1914 could correct the journal of the Senate of 1912.

[2] There can be no doubt, however, that the Senate of 1912 had the right and power, while in session, to correct its own journal, and that, in determining what was or was not done by the Senate, the journal must be considered as a whole, as any other record would be. Turley v. Logan County, 17 Ill. 151; McCulloch v. State, 11 Ind. 424; State v. Moffitt, 5 Ohio, 358; People v. Burch, 84 Mich. 413, 47 N. W. 765; Detroit v. Bentz, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59.

This being so, let us consider alone the evidence afforded by the bound volume of the journal of 1912. When that is done, the resolutions of February 28th and 29th, above quoted, show clearly that the record of the 24th, showing confirmation of Lindsey's appointment, was a mistake. The resolution of the 28th says, in plain and unmistakable language, that at that date the appointments to the office of supervisors of registration for Anderson county had not been sent to the Senate for confirmation. Surely the Senate and its officers knew what had been done and what had not been done touching the matter of appointments. It was their duty to know, and it must be presumed that they did know. If these appointments had not been sent in on the 28th, it is impossible for them to have been confirmed on the 24th. It must be conceded that, if the Senate had, on the 28th, in so many words, corrected the journal of the 24th, the journal as corrected would have been of controlling effect, and, while it did not undertake to do so in totidem verbis, for the reason perhaps, that as the journal then appeared, it showed no such confirmation as afterwards appeared in the bound volume, yet the declaration of fact in the resolution of the 28th that these appointments had "not yet been sent to the Senate for confirmation" and the request that they be sent in for that purpose shows beyond all doubt that they had not been confirmed on the 24th, and that the record of that date was a mistake. This conclusion is fortified by the resolution of the 29th, which advises and consents to the appointment of "Tollison." Just here it must be kept in mind that Lindsey's allegation and contention is that he is Tollison's successor in office. No question is made as to the appointment and confirmation of the other two members of the board. If the appointment of Lindsey as Tollison's successor had already been confirmed, these resolutions which appear to have been adopted upon mature deliberation, and that of the 29th in the most solemn manner, by a yea and nay vote, spread upon the journal, were simply absurd.

No other construction can be given them, and no other conclusion can be drawn from them than that they are tantamount to a declaration that the record of the 24th is a mistake, and in effect, a correction of the mistake.

For these reasons, the judgment is affirmed.

GARY, C. J., and FRASER and GAGE, JJ., concur.

WATTS, J. This is an appeal from an order of his honor, Judge Wilson, wherein he holds that E. T. Tollison is a supervisor of registration for Anderson county, and that P. N. Lindsey, while appointed to that position, was not confirmed by the Senate, and is not a supervisor of registration.

The decree of his honor sets out the facts of the case and should be reported. The appellant appeals from this order, and alleges error in his honor's rulings. The practical question raised by the appeal is: Did his honor err in allowing the introduction of outside testimony to contradict and impeach the entry in the Senate Journal for the state of South Carolina for 1912, page 951, which showed on that day, February 24, 1912, P. N. Lindsey was confirmed by the Senate as supervisor of registration for Anderson county? His honor allowed this entry to be attacked and shown by extraneous evidence that the record was incorrect, and allowed various Senators to testify over objection from their recollections and memory that the journal entry was incorrect, and that the Senate had attempted on January 16, 1914, to correct the entry of the journal of February 24, 1912, although the Senate of 1912 had adjourned sine die, and the Senate of 1914 was composed of different members. The Constitution of 1895, art. 3, § 22, provides:

"Each house shall keep a journal of its own proceedings, and cause the same to be published immediately after its adjournment," etc.

The object of this was, and the practice is, for each day's proceedings to be published in order that the Senate can next day, or within a reasonable time at least, correct any errors or mistakes made. It is absurd to say that one Senate can correct the journal of a preceding Senate. The journal of the Senate as to what occurred in this matter was the highest and best evidence of the action of the Senate, and his honor was in error in admitting the evidence of the Senators to impeach and contradict the entry in the journal. If there was a false entry in the journal of the Senate, it was the duty of the members of the Senate to correct the same before the session of the Senate adjourned. To allow such incompetent testimony as was allowed in this case would be to destroy the very object of the Constitution and acts of Legislature in providing for the journal and keeping in permanent form a record of their proceedings for the benefit of the public. The journals of both houses are competent evidence before the court, and the force and effect of the same have been construed by the court in the following cases: Bond Debt Cases, 12 S. C. 290; State v. Hagood, 13 S. C. 46; State v. Smalls, 11 S. C. 286; State v. Chester, 39 S. C. 307, 17 S. E. 752; State v. Aiken, 42 S. C. 224, 20 S. E. 221, 26 L. R. A. 345.

His honor was in error in admitting the evidence he did to vary and contradict the journal, and in deciding against the appellant, and in dismissing the complaint. He should have held that Lindsey was duly appointed by the Governor and confirmed by the Senate.

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(100 S. C. 230)

## STATE v. BYRNES. (No. 9032.)

(Supreme Court of South Carolina. March 13, 1915.)

1. JURY ⟹59—JURY OFFICER—BIAS.

A town's chief of police is not to be held to have such bias against defendant, charged with disorderly conduct, as to disqualify him from making up the jury list; he not having witnessed his disorderly conduct, but merely started him to the guardhouse for refusal to give bond.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 268–272; Dec. Dig. ⟹59.]

2. DISORDERLY CONDUCT ⟹1—ELEMENTS OF OFFENSE—DISTURBING PERSONS.

One is guilty of disorderly conduct if his language, considering the time and place, was calculated to produce disorder and to disturb the public peace and quiet.

[Ed. Note.—For other cases, see Disorderly Conduct, Cent. Dig. §§ 1–7, 9–13; Dec. Dig. ⟹1.]

3. DISORDERLY CONDUCT ⟹9—SUFFICIENCY OF EVIDENCE.

Evidence that it was near midnight in the heart of a town, that several persons were near, and that an officer a block away heard defendant's profane language, warrants the jury in concluding it was calculated to produce disorder and disturb the public peace and quiet.

[Ed. Note.—For other cases, see Disorderly Conduct, Cent. Dig. § 1; Dec. Dig. ⟹9.]

4. DISORDERLY CONDUCT ⟹2—CONDUCT IN ONE'S OWN HOUSE.

That one's profanity of a loud and boisterous nature was uttered in his own house does not prevent his being guilty of disorderly conduct; the "castle" being given for defense, and not for offense.

[Ed. Note.—For other cases, see Disorderly Conduct, Cent. Dig. §§ 1, 2, 9; Dec. Dig. ⟹2.]

5. DISORDERLY CONDUCT ⟹13 — DEFECTIVE VERDICT—REMEDY.

If the verdict on a prosecution for disorderly conduct, "Guilty as to loud and boisterous language and profanity," was defective, because not expressly finding the language disturbed the peace, the remedy was by motion, before judgment, to set it aside and for a new trial.

[Ed. Note.—For other cases, see Disorderly Conduct, Cent. Dig. § 20; Dec. Dig. ⟹13.]

Appeal from General Sessions Circuit Court of Darlington County; Frank B. Gary, Judge.

T. J. Byrnes was convicted, and appeals. Affirmed.

The exceptions, the charge, and the verdict are as follows:

The exceptions:

I. That his honor, the presiding judge, erred in refusing to sustain appellant's first ground of appeal, to wit: (1) That the mayor erred in refusing a motion to quash the verdict, in that venire was illegally drawn: (a) In that the chief of police, who furnished the list of venire from which the jury was drawn, was an interested party as a prosecuting witness.

II. That his honor erred in refusing to sustain the second ground of appeal, to wit: (2) That there was no testimony to show any disorderly conduct on the part of the defendant, T. J. Byrnes: (a) In that there was absolutely no proof that any one was disturbed. (b) In that there was absolutely no proof that any disorderly conduct, if any, took place on the streets of Hartsville, but, if any, the same was within the private place of business of said T. J. Byrnes.

III. In that his honor erred in refusing to sustain defendant's third ground of appeal, to wit: (3) That the arrest of the said T. J. Byrnes was absolutely illegal: (a) In that the testimony showed that he was arrested within his own place of business without a warrant. (b) In that the testimony shows that there was no breach of the peace or disorderly conduct in the presence of the party making the arrest.

IV. In that there was no testimony upon which to base conviction.

V. In that the testimony showed, if anything, that the said T. J. Byrnes was protecting his castle.

VI. In that the verdict acquitted defendant of the charge of disturbing the peace and quiet of the town, and it being no offense to talk loud, etc., unless the peace is thereby disturbed or breached, there is nothing upon which to base the sentence.

Notice was served that defendant would ask the Supreme Court to consider the following exceptions, not presented on circuit:

I. Error in the mayor to charge as follows, to wit: "To render a verdict of guilty in this case, it is not necessary that each and every allegation of the information be proven to your satisfaction beyond a reasonable doubt, but it suffices that if the town satisfies you, by evidence beyond a reasonable doubt, that the defendant is guilty of either loud and boisterous language or profanity, or otherwise riotous and offensive conduct"—(a) in that it removed the jury from the consideration as to whether or not any person was disturbed by said conduct. (b) In that it withdrew from the jury the consideration of the charge as made out in the warrant, the same being by loud and boisterous language, profanity, drunkenness, and otherwise riotous and offensive conduct.

II. Error in charging: "In other words, every citizen in the town of Hartsville is guaranteed, under the terms of this ordinance, peace and quiet by day and by night"—(a) in that said charge was highly prejudicial to the defendant and a charge upon facts. (b) In that the ordinance does not guarantee to each and every citizen peace and quiet by day and by night, but the same only gives cause for arrest and trial of any one who violates the same.

III. In that said charge would lead the jury to believe that the town of Hartsville was a guarantor of peace and quiet.

The charge:

Mr. Foreman and Gentlemen of the Jury: The defendant, T. J. Byrnes, is charged with disorderly conduct in the town of Hartsville, on April 5, 1913, in that by loud and boisterous language, profanity and otherwise riotous and offensive conduct he did disturb the peace and quiet. It is against the law, Mr. Foreman and gentlemen of the jury, in the town of Hartsville, to disturb the peace and quiet in any of the ways alleged in this bill of information. It is therefore your duty to inquire whether, from the evidence presented, all the evidence in the case, the defendant, T. J. Byrnes, is guilty as charged. To render a verdict of guilty in this case, it is not necessary that each and every allegation of the information be proven to your satisfaction beyond a reasonable doubt; but it suffices if the town satisfies you by evidence beyond a reasonable doubt that the defendant is guilty of either loud and boisterous language or profanity or otherwise riotous and offensive conduct. The facts of the case are entirely for you, Mr. Foreman and gentlemen of the jury, and not for the court, nor for counsel on either side. The defendant comes into court presumed to be innocent, and he is entitled to that presumption until it is rebutted by testimony and the town satisfies you beyond a reasonable doubt of his guilt.

To constitute a breach of peace, it is not necessary to disturb more than one person. In other words, every citizen in the town of Hartsville is guaranteed under the terms of this ordinance peace and quiet by day or by night.

If this evidence satisfies you of the defendant's guilt, and that he is guilty beyond a reasonable doubt, write "Guilty," and sign your name as foreman; but if it fails so to satisfy you, write "Not guilty," and sign your name as foreman. By reasonable doubt is meant just exactly what the words imply—not a fanciful, whimsical, capricious, or suppositious doubt, but a doubt founded in reason, arising out of the testimony, such a doubt as can reside in the mind of a reasonable man. As our Supreme Court has said: "It is a strong substantial doubt arising out of the testimony."

In accordance with the law as I have undertaken to give it to you, write your verdict.

The jury rendered the following verdict:

Guilty as to loud and boisterous language and profanity. O. D. Lee, Foreman.

E. Earle Thornwell, of Hartsville, for appellant. L. M. Lawson and J. M. Spears, both of Darlington, for the State.

GAGE, J. Conviction before the mayor and a jury at Hartsville, for violation of a city ordinance. Appeal to the circuit court, and there the judgment of the mayor's court was affirmed. Appeal here.

The arrest warrant charged:

"That T. J. Byrnes, in said town, county, and state, on April 5, 1913, unlawfully did disturb the peace and quiet of the town of Hartsville, by loud and boisterous language, profanity, and drunkenness, and otherwise riotous and offensive conduct, and thereby violated the ordinance in such case made and provided, against the peace and dignity of said town and state."

The verdict was:

"Guilty as to loud and boisterous language and profanity."

The six exceptions which were before the circuit court are repeated here, and in addition thereto there are yet three more exceptions to the judgment of the circuit court—nine all told. Let them be reported.

The issues made, however, are not so many. The appellant's counsel, in a lucid and strong argument, has discussed four issues, and we shall deal with only four. They raise these inquiries:

(1) The selection of the jury was unlawful?

(2) There was no evidence of disorderly conduct?

(3) The rights of the castle justified the conduct?

(4) The charge of the magistrate was unlawful?

[1] The town of Hartsville has three policemen—Kirkpatrick, the chief, and Gilbert and Falsom. In the instant case Falsom swore out the arrest warrant. The procedure for the selection and impaneling of a jury is prescribed by sections 59 and 29 of the Criminal Code and section 1395 of the Civil Code. The exact issue made here is that Kirkpatick, who selected the 18 names from which the jury was to be chosen, had a bias which disqualified him for that service; and for authority the appellant cites Abbeville v. Gooseby, 93 S. C. 371, 76 S. E. 977. The bias suggested is that:

"Kirkpatrick was the man who knew the circumstances. He was the man upon whom the town relied largely in making its case."

The testimony does not establish that contention. On the contrary, it shows that Officer Gilbert was on duty on the midnight in question; that he heard the language of defendant; that he repaired to the place of its utterance; that he arrested defendant; that he then "went and saw the chief, and he said his bond would be $15"; that "finally the chief came up and insisted upon him giving bond."

It is true the chief pulled defendant out of the door and started with him to the guardhouse; but that was not for the disorderly conduct, but for defendant's refusal to give bond. The chief had not been a witness to the disorderly conduct, and that was the gravamen of the offense.

There is therefore no reason to hold that Kirkpatrick had such bias against the defendant about the offense for which he was held to trial as to disqualify him from making up the jury list.

[2, 3] On the second issue, if the witness Gilbert is to be credited, there was proof of disorderly conduct:

"Counsel agreed that there was a wide difference in the profanity testified to by witnesses. Counsel also agreed the same as quoted by one witness is too indecent to present to this court."

If that be true, there was testimony tending to show profanity, and of its truth the jury was the judge. But the contention of the appellant is "that there was no proof that any one was disturbed." It is true that a neighbor of the defendant testified he was not disturbed. If, however, the language of the defendant, considering the time and place, was calculated to produce disorder, and was calculated to disturb the public peace and quiet, then such language was unlawful.

The testimony is that the time was near midnight, that the place was in the heart of the town, and that there were four or five persons at or near the place—that the officer heard the language a block away. If all that be true, then the jury was warranted to conclude that the words were calculated to produce disorder and to disturb that quiet and peace which society is entitled to enjoy. Georgetown v. Scurry, 90 S. C. 349, 73 S. E. 353.

[4] And the case is not altered that the defendant uttered the profane and boisterous language within his own house. The "castle" is given to a man for defense, and not for offense. It would be a hurtful and unreasonable doctrine to hold that a man may utter profanity of a loud and boisterous nature from his own storeroom, and yet be not amenable to the public therefor. If the utterer does remain in the room, the utterance does not; and it is the offense.

There yet remains to consider the charge of the mayor to the jury. Let the charge be reported. The exception is to the charge, and not to the form of the verdict. The sufficiency of the verdict was not gainsaid before the mayor, or before the circuit court, or here. The warrant imputed to the defendant: (1) Loud and boisterous language; (2) profanity; (3) drunkenness; and (4) it charged that such conduct disturbed the peace and quiet of the town.

The mayor, when the whole charge is considered, submitted, three issues to the jury, to wit: (1) Did the defendant utter loud and boisterous language? (2) Did he use profane language? (3) Did that conduct disturb the peace? He did not submit the issue of drunkenness. He told the jury that the town guaranteed peace and order to society. The charge is free from error.

[5] The jury expressly found the first and second issues against the defendant. They did not find against him the offense of "drunkenness," though the warrant had also charged it. They did not expressly find that the defendant's boisterous and profane language disturbed the peace. The defendant's remedy for relief from such a verdict, if it was defective, was a motion before judgment to set it aside and for a new trial. The defendant has never contended, and does not now contend, that the verdict was defective because it did not answer the issues tendered by the warrant and the charge.

The judgment of the circuit court is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(100 S. C. 294)

## CAMP v. ATLANTA & C. A. L. RY. CO.

(No. 9038.)

(Supreme Court of South Carolina. March 29, 1915.)

1. EVIDENCE ⟸127 — PERSONAL INJURIES — COMPLAINTS OF PAIN.

Complaints of bodily pain after a personal injury may be proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377–382; Dec. Dig. ⟸127.]

2. NEGLIGENCE ⟸136 — ACTIONS — ISSUES — PROOF.

Where there is evidence to sustain any one of the several specifications of negligence in the complaint, the case is for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. ⟸136.]

3. MASTER AND SERVANT ⟸286—INJURY TO SERVANT — NEGLIGENCE — QUESTION FOR JURY.

In an action by an employé for injuries by a timber falling on his foot while loading timbers in a car, evidence *held* to require submission of the issue of the employer's negligence to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. ⟸286.]

4. MASTER AND SERVANT ⟸256—INJURY TO SERVANT—EMPLOYERS' LIABILITY ACT.

A complaint in an action for injuries to a railroad employé, which alleges that the company's line extended from a point in the state to a point in a sister state, that the road was an interstate road and engaged in interstate commerce, that the employé was a bridge carpenter on the road and was working with a bridge force at the time of the accident complained of, states a cause of action, under the federal employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657–8665]).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809–812, 815; Dec. Dig. ⟸256.]

5. MASTER AND SERVANT ⟸291—INJURIES TO SERVANT—QUESTION FOR JURY.

Where, in an action for injury to a railroad employé, the issue was whether the work, at the time of the injury, was interstate or intrastate commerce, the court must charge the law as to both, and leave it to the jury to determine whether the state or federal law applies.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136–1146; Dec. Dig. ⟸291.]

Appeal from Common Pleas Circuit Court of Oconee County; J. W. De Vore, Judge.

Action by Thomas N. Camp against the Atlanta & Charlotte Air Line Railway Company. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

M. C. Long and E. L. Herndon, both of Walhalla, for appellant. J. P. Carey, of Pickens, for respondent.

FRASER, J. This action was brought by the plaintiff to recover damages for personal injury caused by a heavy piece of timber falling on his foot and crushing it. It seems: That the plaintiff was "scratch foreman" on a trestle force engaged in repairing trestles. That, before his force left Greenville, it was directed by the officer in charge of the force to load timbers in a car known as a gondola car. That the gondola car was a car with very high sides, and it was necessary to raise the timbers up over the sides, and then for those on the inside of the car to pull them into place, and, in lowering the timber to the bottom of the gondola, a piece of timber fell on the plaintiff's foot and crushed it. At the close of all the evidence, the defendant moved for a nonsuit and also for the direction of a verdict. The trial judge directed a verdict. The plaintiff asked to be allowed to amend his complaint, and this was refused.

There are six exceptions, but they raise three questions:

[1] 1. The plaintiff complains of error in excluding the testimony of a witness that, between the time of the accident and the trial, the plaintiff had complained of pain in his injured foot. The exception that raises this question must be sustained. The case of Gosa v. Southern Ry. Co., 67 S. C. 359, 45 S. E. 810, is full authority for the admission of the testimony.

[2, 3] 2. The second question is: Was there any evidence of negligence to go to the jury? There were several specifications of negligence, but, if there was any evidence to sustain one of them, the case should have been sent to the jury. The respondent's argument states:

"The circuit judge directed a verdict in this case for the defendant on the ground that the plaintiff was outside of the scope of his employment when injured, and there was no negligence."

The complaint alleged plaintiff was instructed by defendant, its agents and servants, having authority to give such orders, to assist in loading the car. There was evidence to sustain the allegation. It is true that plaintiff alleged "that it was outside of the regular duties of this plaintiff," but there was evidence that the officer who gave the order was authorized to require any work outside of regular duties. There was evidence that, while the gondola car was safer than a flat car in transportation of lumber, it was dangerous in loading. The injury was alleged to have been done in the loading. There was therefore some evidence of negligence, and the case should have been sent to the jury.

[4, 5] 3. The plaintiff offered to amend the complaint in order to bring the case within the federal statute. The motion was refused, and this refusal is made the ground of exception. The amendment was unnecessary. The complaint alleged that the defendant's line of railroad extended from Charlotte, in the state of North Carolina, through the state of South Carolina, to Atlanta, in the state of Georgia, said railroad being an interstate road and engaged in interstate commerce,

and plaintiff was employed as a bridge carpenter upon defendant's said line of railroad, and was working as such with bridge force No. 1, Charlotte division, in the yard of defendant, at Greenville, S. C. There was full allegation of interstate employment and no allegation of proof of intrastate business. Besides this, if the allegation of the complaint that the plaintiff was engaged in work on a trestle used by a road in interstate commerce did not allege interstate business, still the answer specifically alleged the interstate employment, and then, if it was a question of fact as to whether the commerce was interstate or intrastate, his honor should have charged the law as to both and left it to the jury to say which law applied according as they found the facts. The exception that raises this question cannot be sustained.

The judgment is reversed, and a new trial ordered.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

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(100 S. C. 265)

## HOLDEN et al. v. CANTRELL et al.
(No. 9004.)

(Supreme Court of South Carolina. Feb. 25, 1915.)

1. EXCEPTIONS, BILL OF ⟸8—SETTING FORTH OBJECTIONS—MOTION FOR NEW TRIAL—RECORD.

Under rule 5 (85 S. E. v), exceptions should state the grounds of the motion for new trial and the requests to charge, or so much as appellant wishes to have the court consider, and then state in the record that the exceptions correctly stated the grounds of motion and requests to charge.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 10; Dec. Dig. ⟸8.]

2. APPEAL AND ERROR ⟸671 — REVIEW — STATEMENT OF FACTS.

The court will not consider statements of facts appearing only in the exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867–2872; Dec. Dig. ⟸671.]

3. EXCEPTIONS, BILL OF ⟸13, 20—INCORPORATION OF TESTIMONY.

Exceptions are objectionable when they incorporate at length the testimony to which objection is made, and are argumentative in form.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 13, 21–28; Dec. Dig. ⟸13, 20.]

4. BOUNDARIES ⟸35—EVIDENCE—SURVEYOR.

In a boundary suit, testimony of plaintiff's surveyor that, if the boundary line claimed by defendant were projected, it would cut off property concededly belonging to plaintiff, is admissible.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 153–155, 157–159, 163, 165, 177–183; Dec. Dig. ⟸35.]

5. BOUNDARIES ⟸35—EVIDENCE—PHYSICAL OBJECTS OUTSIDE DISPUTED GROUND.

Where, in a boundary suit, plaintiff testifies as to physical objects outside the land in dispute, which was in form a triangle, to show the true boundary line, and a plat agreed upon by surveyors as correctly representing the lines as claimed by the respective parties, and showing the physical objects testified to by plaintiff, testimony of the surveyors as to the location of the physical objects was properly received.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 153–155, 157–159, 163, 165, 177–183; Dec. Dig. ⟸35.]

6. BOUNDARIES ⟸3—CONFLICTING ELEMENTS—QUANTITY.

Though quantity, as a matter of description, is ordinarily one of the lowest in the scale of importance, there may be circumstances in which it would be controlling.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3–41; Dec. Dig. ⟸3.]

7. BOUNDARIES ⟸35—EVIDENCE—ACREAGE.

In an action involving the boundary line of two tracts of land, which were part of an original tract containing three tracts, testimony as to the acreage of the three tracts is not error.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 153–155, 157–159, 163, 165, 177–183; Dec. Dig. ⟸35.]

8. BOUNDARIES ⟸35—EVIDENCE—SURVEYORS.

In a boundary case, admission of testimony of surveyor that he could not run a straight line 52 chains long through hilly woodland without aid of an instrument is not error, as it was a fact which needed no testimony to prove it.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 153–155, 157–159, 163, 165, 177–183; Dec. Dig. ⟸35.]

9. TRIAL ⟸114—ARGUMENT OF COUNSEL—TESTIMONY OF WITNESSES IN OTHER SUIT.

Where witnesses in a boundary suit had been witnesses in a former suit between the same parties, references made in examination of witnesses and argument of counsel to the other suit, mostly as to whether the witness had or had not gone over the disputed line before or after that suit, the result not being mentioned, were not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 275–278, 296; Dec. Dig. ⟸114.]

10. APPEAL AND ERROR ⟸688—RECORD—ARGUMENT OF COUNSEL.

An assignment of error to the argument of counsel in commenting on absence of a pencil sketch cannot be considered, when the record does not show what the comment was, that objection was taken to it, or that the court made or was requested to make a ruling on it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2894–2896; Dec. Dig. ⟸688.]

11. APPEAL AND ERROR ⟸499—RECORD—PUNITIVE DAMAGES.

Under circuit court rule 77 (73 S. E. vii), the point that there was no evidence to support a verdict for punitive damages is not reviewable, where the record does not show that a motion for nonsuit or direction of the verdict on that issue was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295–2298; Dec. Dig. ⟸499.]

12. EVIDENCE ⟸274 — DECLARATIONS — FORMER OWNER.

In a boundary suit, the declarations of a former owner in possession, accompanying and explaining acts of ownership, and tending to show the character and extent of his possession, are admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1121–1134; Dec. Dig. ⟸274.]

13. WITNESSES ⟸160 — TRANSACTIONS WITH DECEDENT.

In a boundary suit, testimony of a former owner as to a conversation of a third person

with his father, then the owner of the land, is not obnoxious to Code Civ. Proc. 1912, § 438, as it was not a transaction between the witness and the deceased, and it was not against a defendant who sustained any of the relations to the deceased mentioned in the statute.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 696, 697; Dec. Dig. ⊂⇒160.]

14. APPEAL AND ERROR ⊂⇒1067—BOUNDARIES ⊂⇒41—INSTRUCTIONS—RULES FOR DETERMINING BOUNDARY.

In a boundary suit, instructions stating the rules laid down for guidance of juries in such cases should be given when requested, and the failure to give such instructions is reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. ⊂⇒1067; Boundaries, Cent. Dig. §§ 205-207; Dec. Dig. ⊂⇒41.]

Appeal from Common Pleas Circuit Court of Oconee County; J. W. De Vore, Judge.

Action by Alice M. Holden and others, by their guardian ad litem, Alice M. Holden, against Levi R. Cantrell and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Defendants' requests to charge were as follows:

(1) Where the lines of a tract of land have been run and acquiesced in, and can be found, they constitute the true boundaries, which must not be departed from or made to yield to any less certain and definite matter of description or identity. 5 Cyc. 914.

(2) Lines actually surveyed and marked and capable of identification will, according to well-settled principles of law, control calls for courses and distances in the determination and location of a boundary; likewise the call for quantity or a certain number of acres must yield to marked lines. 5 Cyc. 915.

(3) A statement of the quantity of land supposed to be conveyed and inserted in a deed by way of description must yield to natural or permanent objects called for in the conveyance. 5 Cyc. 920; Wash v. Holmes, 1 Hill, 12; Sumter v. Bracey, 2 Bay, 515; Lynn v. Thomson, 17 S. C. 129.

(4) Lines actually run and marked on the ground are the best evidence of the true location of the survey. Alexander v. Gossett, 29 S. C. 421, 7 S. E. 814.

(5) The settled rule is that monuments, whether natural objects or artificial marks, are allowed to dominate courses and distances. Crampton v. Prince, 83 Ala. 246, 3 South. 519, 3 Am. St. Rep. 718.

(6) Where the owners have a fence where they consider the true line and each claiming only to the true line, wherever that may be, they are not bound by the location of the fence, but must conform to the true line when it is ascertained. Battner v. Baker, 108 Mo. 311, 18 S. W. 911, 32 Am. St. Rep. 606.

(7) If the boundary between contiguous lands is uncertain, the owners of the adjoining tracts may agree upon a certain line as a boundary, and such boundary is binding upon them and their successors in title, especially so when it is followed up by actual occupation. Watrous v. Morrison, 33 Fla. 261, 14 South. 805, 39 Am. St. Rep. 139.

(8) Where parties by mutual agreement and for that express purpose meet and fix a boundary line, and thereafter acquiesce in the line, such line will be considered the true line between them, where there is no fraud or misrepresentation. Jones v. Pashby, 67 Mich. 459, 35 N. W. 152, 11 Am. St. Rep. 589.

(9) A boundary line, whose commencement is given, must be continued in the same direction, if possible, unless the contrary be shown. Richardson v. Moodie, 2 Brev. 442; Martin v. Simpson, Harp. 454.

(10) A preponderance of the evidence is all that is necessary to establish a boundary line, and that may be by either direct or circumstantial evidence.

(11) When adjoining lands are called for in a conveyance, the true boundary of the adjoining tract is the true dividing line between the tract undertaken to be conveyed and the adjoining tract.

J. R. Earle and W. J. Stribling, both of Walhalla, for appellants. E. L. Herndon and R. T. Jaynes, both of Walhalla, for respondents.

HYDRICK, J. This is the second appeal in this action for damages for trespass. See 88 S. C. 281, 70 S. E. 815. Plaintiff and defendant Levi Cantrell own adjacent lands—parts of the same original tract, which was a square mile, and was divided into three tracts. Plaintiff's land extends entirely across the eastern side of the square. The western side is divided into two tracts (owned by Alexander and Cantrell) by an irregular line extending from a point on the western side of the square to the plaintiff's line. The description in the mesne conveyances are very indefinite; the calls being mostly for artificial marks, most of which have been obliterated by time, and but few courses and distances are given. Hence the difficulty in locating the dividing line between plaintiff and defendant, which is the issue in the case. The land in dispute—18 acres—lies within a triangle made by lines A, B, and D on the plat made by the surveyors. Lines A and B meet at the apex, an admitted corner between plaintiff and Cantrell on the northwest line of the original tract. D. is the base of the triangle, and is a continuation of the eastern end of the line between Cantrell and Alexander. Plaintiff claims to line A and defendant to line B.

In 1880 Gen. Ervin, a surveyor, surveyed and platted the lands now owned by defendant Cantrell, then belonging to the estate of Moses Cantrell. This survey was ex parte, and was made for the purpose of partitioning the lands of the estate of Moses Cantrell. The testimony is conflicting as to whether lines B and D were old marked lines when Ervin made his survey, or were then for the first time established and marked by him. At the first trial a copy or pencil sketch of Ervin's plat was produced by defendant and put in evidence; but it was lost or misplaced, and was not produced at the second trial. Line A extends from the admitted corner S. 32° E. by a post oak, admittedly on the line between Cantrell and Alexander, and thence S. 30° E. by a shoal on a branch to the southeast line of the original tract. Line B extends from the admitted corner S. 42° E. to its intersection with line D at a corner

either found or made by Ervin, and marked on the plat "Pine Stump—Ervin."

Plaintiff's testimony tended to show that she and her predecessors in title always claimed and exercised acts of ownership to line A, and that line B was first run and marked by Ervin, and that it was never agreed to or acquiesced in by her or her grantors as the true line. Defendant's testimony tended to show that he and his predecessors in title claimed and exercised acts of ownership to line B, and that lines B and D were evidenced by old marks, when Ervin made his survey, and that plaintiff's predecessors in title, or at least some of them, acquiesced in line B, which is referred to in the testimony as the Ervin line, as the true boundary.

[1-3] Respondent objects to the consideration of a number of appellant's exceptions on the ground that they are too general. Exceptions 18 and 19, before they were amended by leave of this court, were defective in form, in that they merely referred to the grounds of the motion for a new trial made on circuit and the defendant's requests to charge, which are set out elsewhere in the record, and not in the exceptions. Under rule 5 (35 S. E. v) these exceptions would not have been considered in that form. Fowler v. Harrison, 64 S. C. 313, 42 S. E. 159. This does not mean that the grounds of the motion and the requests should have been set out twice in the record. They should not. The correct method would have been to incorporate them, or so much of them, or so much of the matter therein contained, in the exceptions, as appellant wished to have this court consider, and then state in the record that the exceptions correctly stated the grounds of motion and requests to charge. Stanford v. Cudd, 93 S. C. 367, 76 S. E. 986. But the record should have contained the statement last mentioned, for this court will not consider statements of fact appearing only in the exceptions. The other exceptions are not obnoxious to the objection made. Most of them are commendably concise and specific, and might have been made even more so, without being objectionable. Some of them, as amended, are objectionable, because they incorporate at length the testimony to which objection was made, and are argumentative in form, making them needlessly long and complicated. There are entirely too many exceptions. Many of them raise the same question. In Simpson v. Cox, 95 S. C. 382, 79 S. E. 102, we indicated the manner in which exceptions should be prepared.

[4, 5] The parties agreed upon a survey, each side appointing a surveyor. While the surveyors do not agree in their testimony as to which is the true line, they concur in the plat in evidence, and agree that it correctly represents the lines contended for by plaintiff and defendant respectively, and the physical objects represented thereon. There is shown on this plat at the base of the triangle, but outside of it, an old field, in which is the site of a house, known as the Crow house, also the line of an old fence which inclosed the field and house and a part of the land in dispute, running across the base of the triangle. Plaintiff's testimony tended to show that this house was built and the field cleared and fenced by her predecessors in title more than 50 years ago, and that she and they have had possession thereof ever since. The plat also shows a shoal on a branch outside of the triangle, but near the field. As heretofore stated, plaintiff's testimony tended to show that she and her predecessors in title claimed to line A, which crossed the branch at the shoal. There was therefore no error in allowing plaintiff's surveyor to testify to the location of these physical objects, even though some of them were not on the land in dispute. Nor was there error in allowing him to testify that, if line B (claimed by defendant) were projected from the "Pine Stump—Ervin," at the base of the triangle, it would cut off from plaintiff's land, not only the Crow house and a part of the old field inclosed by the fence, but also other fields which have been in possession of her and her grantors for more than 50 years, as to most of which her title is undisputed. This testimony was relevant, because it tended to prove that Line B was not the true boundary. The correct location of disputed lines is often determined by reference to physical objects not directly on them, or within the disputed area.

[6, 7] For the same reason, there was no error in allowing plaintiff's surveyor to testify to the acreage of the three tracts into which the original tract had been cut, as claimed by the respective owners, even though one of them was not involved in this litigation. While quantity, as matter of description, is ordinarily one of the lowest in the scale of importance, yet there may be circumstances in which it would be entitled to controlling influence. At any rate, the plaintiff was entitled to have the jury consider it, and give it such weight as they deemed it worthy of.

[8] We see no error in allowing plaintiff's surveyor to testify that he could not run a straight line 52 chains long through hilly woodland without the aid of an instrument—a fact which needed no testimony to prove it. This was brought out presumably to explain the slight bend in the line claimed by plaintiff at the post oak, where it intersected the line between Cantrell and Alexander.

[9] The record affords no foundation for the assignment of error in allowing reference to be made in the examination of witnesses and in the argument of counsel to the suit between plaintiff and Alexander, which presumably involved the location of the line between them. Some of the witnesses who testified in that suit also testified in this. Reference to their testimony in that case, and as to

when they had gone over the disputed lines in this case, or had done other things, whether before or after the trial of that case, was natural and not improper or prejudicial, especially as nothing was said about what was the result in that case.

[10] Nor does the record disclose any foundation for the assignment of error in allowing plaintiff's counsel to comment upon the absence of the pencil sketch of the Ervin plat at the second trial. It does not appear what the comment was, or that any objection was made to it, or that the judge made, or was requested to make, any ruling upon the subject.

[11] Under rule 77 of the circuit court (78 S. E. vii), the point is not available to defendants that there was no evidence to support a verdict for punitive damages, as it does not appear in the record that a motion for nonsuit or direction of the verdict on that issue was made.

[12] There was no error in admitting evidence of the declarations of former owners of plaintiff's land, made while they were in possession thereof, accompanying and explaining acts of ownership, and tending to show the character and extent of their possession. Turpin v. Brannon, 3 McCord, 261; Martin v. Simpson, 4 McCord, 262; Leger v. Doyle, 11 Rich. 109, 70 Am. Dec. 240; Ellen v. Ellen, 16 S. C. 132; Levi v. Gardner, 53 S. C. 24, 30 S. E. 617; Holden v. Cantrell, 88 S. C. 283, 70 S. E. 815.

[13] There was no error in admitting the testimony of William Holden, a former owner of plaintiff's land, as to a conversation had at the Crow house, between his father, then the owner of plaintiff's land, and Moses Cantrell, then the owner of defendant's land, in which they said where the line was. The testimony was not obnoxious to section 438 of the Code of Procedure for two reasons: (1) It was not as to a transaction or communication between the witness and the deceased, Mr. Cantrell. The conversation was between the father of the witness and Mr. Cantrell. (2) It was not against a defendant who sustained any of the relations to the deceased mentioned in the statute. Jones v. Plunckett, 9 S. C. 392; Cantey v. Whitaker, 17 S. C. 527; Brice v. Miller, 35 S. C. 537, 15 S. E. 272; Rapley v. Klugh, 40 S. C. 134, 18 S. E. 680. These cases also show that his honor erred in excluding the testimony of the defendant James Cantrell as to what Josiah Holden told him about the line while he was the owner and in possession of the plaintiff's land, since plaintiff does not bear to Josiah Holden any of the relations mentioned in the sketch.

[14] Defendant requested certain instructions which will be reported. They were refused on the ground that they involved the facts. This was error. Most of them contained only propositions of law—rules which have been laid down by this court for the guidance of juries in determining disputed boundaries. While most of these rules are not inflexible, and may be subject to modifications, dependent upon the peculiar facts of particular cases, yet, as general rules, they were correctly stated in the requests. The application of some of them was involved in the case of Connor v. Johnson, 59 S. C. 115, 133, 37 S. E. 240, 248, where the court said:

"While it is true that a question of location is largely a question of evidence, and cannot therefore be reduced to any definite or fixed rule (Coats v. Mathews, 2 Nott. & McCord, 99), yet there are certain general rules of location which, from a very early period in our judicial history (Bradford v. Pitts, 2 Mill, Const. 115), have been recognized by our courts, down to the decision under the former appeal in this case (53 S. C. 90 [30 S. E. 833]), where these rules are thus stated: 'In locating lands the following rules are resorted to, and generally in the order stated: First, natural boundaries; second, artificial marks; third, adjacent boundaries; and, fourth, courses and distances.' But in every one of the cases recognizing these general rules, which we have consulted, the courts have invariably also recognized the doctrine that these general rules are not inflexible, but may be modified by the circumstances of the case."

From the facts hereinbefore stated, it will be seen that it was important that the jury should have been instructed in the general rules by which they should be governed in determining the location of the line in dispute. As they were not so instructed, after proper request, we think the error was prejudicial, and that it calls for reversal of the judgment.

Judgment reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

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(100 S C. 302)

## GARNER v. WESTERN UNION TELEGRAPH CO. (No. 9040.)

(Supreme Court of South Carolina. March 29, 1915.)

1. TELEGRAPHS AND TELEPHONES ⟸38—DELAY IN DELIVERY—DIRECTIONS—DELIVERY BY MAIL.

The addressing of a telegram to the addressee "R. F. D. 1" is a direction to the telegraph company to use the mail for its delivery, and the company is not liable for delay thereby occasioned.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 33; Dec. Dig. ⟸38.]

2. TELEGRAPHS AND TELEPHONES ⟸38—DELAY IN DELIVERY—DIRECTIONS—DELIVERY BY MAIL.

The fact that the company attempted to make a personal delivery, but failed to do so, did not render it liable if the delivery by mail was not thereby delayed.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 33; Dec. Dig. ⟸38.]

Appeal from Common Pleas Circuit Court of Union County; Thos. S. Sease, Judge.

Action by Almond Garner against the West-

ern Union Telegraph Company. Judgment for the defendant on directed verdict and plaintiff appeals. Affirmed.

Barron & Barron, of Union, for appellant. John Gary Evans, of Spartanburg, and J. Ashby Sawyer, of Union, for respondent.

FRASER, J. This is an action for damages for failure to promptly deliver the following telegram.

"August 20th, 1913.

"To Almond Garner, R. F. D. 1, Union, S. C.: Grandma Woods died this afternoon—funeral tomorrow afternoon 4:30.

"[Signed] D. B. Cameron."

The record shows that the telegram was delivered to the defendant at Durham, N. C., at 5:40, received at Union at 6:13, that, after some effort to deliver it personally, it was mailed to plaintiff at 7:40, and received by him about 11 o'clock on the 21st, but too late to enable him to attend the funeral.

This action was brought for negligence and willfulness. At the close of the evidence the defendant moved for the direction of a verdict on the ground that the sender had chosen the United States postal authorities as his agents of delivery, and there was no evidence of any negligence of willfulness or any failure on the part of the defendant to promptly deliver the telegram to the postal authorities.

His honor Judge Sease granted the motion, and directed a verdict in favor of the defendant. From the judgment on the verdict so directed, the plaintiff appealed, on several exceptions, but states in his argument that there is only one question, and that is: Was there any evidence to carry the case to the jury?

[1] The appellant claims that it was a question of fact as to whether the sender of the telegram had chosen the postal authorities as agents of delivery, and that question should have been submitted to the jury. This case cannot be distinguished from Hinson v. Telegraph Co., 91 S. C. 338, 74 S. E. 752, Ann. Cas. 1914A, 114, where the telegram read:

"Charlotte, N. C., 16 May, 1909.

"Blanche Hinson, Lancaster, S. C., Route No. 1, Care Bill Vick. Mrs. Yarborough died at 8:30 p. m. C. P. Deal."

In the Hinson Case there was testimony that the sender was informed that the Lancaster office would be closed, as it was Sunday, and he then directed it to be mailed.

In this case the sender testified:

"Q. You then directed the telegram to be sent to R. F. D.? A. That is the way it is directed. * * * Q. Then, Mr. Cameron, if the telegram was sent to R. F. D., it was in accordance with your instructions as shown on the face of the telegram? A. Yes, sir."

Route No. 1 may or may not mean postal route. R. F. D. has only one meaning. In the Hinson Case the doubtful address was supplemented by extrinsic evidence. Here the explicit directions were simply confirmed.

[2] Appellant claims that, inasmuch as the respondent undertook to make personal delivery, it is to be punished for its failure. The defendant was not required to make personal delivery, and, unless it caused injury by those efforts, it is not responsible.

The judgment is affirmed.

GARY, C. J., and WATTS, HYDRICK, and GAGE, JJ., concur.

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(100 S. C. 350)

## ATLANTIC COAST LINE R. CO. v. DAWES. (No. 9036.)

(Supreme Court of South Carolina. March 18, 1915.)

1. EVIDENCE ⟸244 — DECLARATIONS OF AGENT—AUTHORITY.

Where by the rules of a railroad company, its station agent was under no duty to report encroachments by abutting owners upon its right of way in a suit by the road to recover possession of part of its right of way encroached upon by defendant, evidence was inadmissible contradicting the agent's denial that he had requested defendant to move her fence off the right of way, and that defendant denied it was misplaced.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916–936; Dec. Dig. ⟸244.]

2. EVIDENCE ⟸244—ADMISSIONS—AUTHORITY OF AGENT.

Where by the rules of plaintiff railroad company, its roadmaster's duties were limited to ascertaining the boundary lines of the company's property and reporting encroachments thereon, evidence that he had been asked by defendant's agent to fill a certain hole, and that he had replied that it was not on the railroad's right of way, but on her own property was inadmissible on behalf of defendant in a suit by the railroad to establish title to such part of the right of way, a principal not being bound by the declaration of the agent without authority in the premises.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916–936; Dec. Dig. ⟸244.]

3. EVIDENCE ⟸244—ADMISSIONS—MAP—EXPLANATION.

In a suit by plaintiff railroad to recover possession of a part of its right of way, alleged to have been encroached upon by defendant, where defendant offered in evidence a plat of plaintiff's right of way which had been put in evidence in a previous suit between plaintiff road and another party, and which showed that the right of way by the scale of the plat was less than claimed in suit by the plaintiff road, the explanation of the roadmaster of the road, who was present when the plat was drawn, who had procured data for it, and who knew the purpose for which it was made, that there had been no attempt to draw it to scale was improperly excluded from evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916–936; Dec. Dig. ⟸244.]

4. EVIDENCE ⟸263 — ADMISSIONS — COUNTER DECLARATIONS.

Where, in an action by a railroad to recover possession of part of its right of way alleged to have been encroached upon, the defendant introduced in evidence a plat of the right of way used in a previous suit between the railroad and the township, it was error to exclude from evidence another plat of the right of way made

earlier by a real estate agent of the company, dead at time of suit, proved to have been his by his handwriting, the second plat being a counter declaration to the first plat introduced by defendant; the purpose of the introduction of such plat being to show the location of plaintiff's right of way.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1022–1027; Dec. Dig. ⟸263.]

Appeal from Common Pleas Circuit Court of Sumter County; Hayne F. Rice, Judge.

Action by the Atlantic Coast Line Railroad Company against Mary A. Dawes. Judgment for defendant, and plaintiff appeals. Reversed.

L. W. McLemore, Mark Reynolds, and Purdy & Bland, all of Sumter, for appellant. L. D. Jennings and J. H. Clifton, both of Sumter, and E. J. Best, of Columbia, for respondent.

HYDRICK, J. Plaintiff sued to recover possession of a strip of land about 18 feet wide, extending across defendant's lot adjoining its right of way, opposite the passenger station at Sumter, alleging that the strip is a part of its right of way, and sought incidentally to require defendant to remove some structures thereon, alleged to be of a temporary nature, and to enjoin further trespassing thereon. Defendant denied the allegations of the complaint, and pleaded estoppel and adverse possession. Defendant has owned her lot since 1888. Her mother, Mrs. Epperson, owns an adjacent lot, which also adjoins the right of way. Defendant resides in Pennsylvania, and her mother has had control of her lot, as her agent, possibly ever since she has owned it. For many years—ever since defendant has owned the lot, and for some time before—it has been inclosed on the side next the right of way by a fence, which was on the line now claimed by defendant. About 1901 or 1902, several small wooden structures were erected by defendant, or her tenants, on the strip in question. They extend up to the line of the old fence. They are variously spoken of as stores, shops, shacks, and shanties. They are of cheap construction, and of no considerable value, and are used as negro restaurants and fruit stands. The plaintiff's roadmaster testified that he knew when these structures were being erected, and that he reported the section thereof to the office of the company to whom it was his duty to report such encroachments on the right of way, and that, as soon as the land was needed for railroad purposes, the company took steps to have them removed. The jury were instructed that, if the right of way extended into defendant's lot, plaintiff was entitled to recover so much of the strip in question as the evidence showed to be within the right of way, unless defendant had established one or the other of her affirmative defenses by the greater weight of the evidence. In accord with the principle declared in Mrs. Epperson's Case, 85 S. C. 134, 67 S. E. 235, the jury were further told that merely inclosing a part of the right of way by a fence was not sufficient to put the company on notice of adverse possession, but that there must be, in addition thereto, proof of notice to the company that the fence was an assertion of an adverse or hostile possession. The jury found for defendant.

[1] The first assignment of error charges the admission of incompetent evidence in allowing Mr. Brand, a witness for plaintiff, to be contradicted by Mr. Epperson. Mr. Brand was station agent of the railroad company at Sumter from about 1881 until about 1890, and is now vice president of the company. When he was on the stand, defendant asked him, for the purpose of laying the foundation for the contradiction if he had not, in the city of Sumter, between 1886 and 1890, asked Mr. Epperson to take a message to his wife to the effect that the fence inclosing her lot and the defendant's lot was on the right of way, and that he had been instructed by the company to request her to remove it, and if Mr. Epperson did not tell him, in reply, that his wife said that the fence inclosed her own and defendant's property, and that she would not remove it. This was the evidence relied upon by defendant as notice to the company of her adverse possession. Mr. Brand denied the conversation, and said that, as station agent, he had nothing to do with such an encroachment on the right of way as the one in question; that it came under the roadmaster's duties; that such a request would not have been made through him, and was not, in fact, so made, and that he had no authority, directly from the company nor under his general duties, to make it; and that, in fact, he did not make it. At first the court ruled the proposed contradiction incompetent, but defendant then introduced in evidence certain rules of the company, which the testimony of Mr. Brand tended to show were in effect while he was the station agent. Rule 890, which prescribed the duties of station agents, and rules 837 and 1000, which prescribed the duties of roadmasters, were as follows:

"Rule 890. They will have charge of the company's books, papers, buildings, sidings and grounds, and will be held responsible for the safety and care of all property intrusted to the company in the transaction of its business, and for the deportment of employés at their stations."

"Rule 837. You will promptly report any encroachment upon the land of the company by fences, buildings or roads belonging to other persons."

"Rule 1000. They must familiarize themselves with the boundary lines of all company property and will promptly report any encroachment upon the land of the company by fences, buildings or roads belonging to other parties."

Upon the introduction of these rules, the court allowed the contradiction. This ruling

was erroneous. Standing alone, rule 890 cannot be construed to give station agents authority over encroachments upon the right of way at places other than the station grounds, and it is questionable whether it can properly be construed to give them such authority over an encroachment like the one in question, unless it affected the buildings, sidings, or grounds at the station, so as to interfere with the proper discharge of their duties in some way, such as the receipt and delivery of freight or baggage, or with the ingress and egress of passengers or others having business at the station. The encroachment in question was not of such a nature, nor was it at the station, which was located, at that time, several hundred yards distant and across two streets from the present station and the property in question. But when this rule is construed in connection with rules 837 and 1000, it is clear beyond controversy that it was the duty of the roadmaster, and not that of the station agent, to report the encroachment, and the roadmaster, Mr. Bruner, testified that he, in fact, did report it. So that, upon the construction of the rules alone, it cannot be said that Mr. Brand had any authority to deal with this encroachment. But added to this we have his positive testimony that he had no such authority. The contradiction was therefore improperly allowed, for it is well settled that the declaration of an agent, touching a matter not within the scope of his authority is not binding upon his principal. Piedmont Mfg. Co. v. Railroad Co., 19 S. C. 353; Waldrop v. Railroad Co., 28 S. C. 158, 5 S. E. 471; Schlapbach v. Railroad Co., 35 S. C. 517, 15 S. E. 241; Guess v. Railway Co., 40 S. C. 450, 19 S. E. 68.

[2] The next assignment of error is in allowing plaintiff's witness, Mr. Bruner, the roadmaster, to be contradicted by Mrs. Epperson. He was asked if Mrs. Epperson had not requested him to fill a certain hole in the right of way, as now claimed by plaintiff, in front of her property, and possibly also in front of defendant's property, and if he had not replied that it was not on the right of way, but on her own property, and that he would not fill it. He denied the conversation, and against objection the court allowed Mrs. Epperson to contradict him. The cases above cited show that this was error, as there was no testimony tending to show that Mr. Bruner had any authority from the company to bind it by any such declaration. Under rules 837 and 1000, above quoted, his duty was limited to ascertaining the boundary lines of the company's property and reporting encroachments thereon. This certainly does not directly or by implication vest in him authority to waive the company's rights to its property by his declarations with regard thereto.

[3, 4] The defendant introduced a certain plat of the plaintiff's property in Sumter obtained from some of its officers in settling a dispute between the company and the city of Sumter touching another matter. On this plat the right of way is shown by scale as being of less width than that now claimed by plaintiff. In reply, plaintiff sought to prove by Mr. Bruner, who assisted in making the plat, that it was not made for the purpose of accurately locating the right of way to which the company was entitled by law, but merely to show the open space available, at that time, for the rearrangement of its tracks. The court erred in excluding this explanation of the plat. It matters not that Mr. Bruner did not make the plat, or that his own measurements and figures did not appear thereon, though he said that some of them did. He testified that he was present when it was made, and assisted in procuring the data for it, and that he knew the purpose for which it was made. A plat made for a particular purpose, or to show a specific location, may not be, and often is not, accurate with regard to other matters shown thereon. These are often sketched in without accurate measurement or location. Therefore the purpose for which the plat in question was made was very material in determining its reliability as evidence upon the question at issue. This plat appears to have been made in 1901, and plaintiff sought to rebut the inference which defendant sought to draw from it by introducing a plat made in 1897 of the company's property and rights of way in and near the station and yards at Sumter by Mr. Britt, who was, at that time, a civil engineer and real estate agent of the company. This plat showed the right of way as now claimed by plaintiff. Mr. Bruner testified that Mr. Britt was dead, that he knew his handwriting, and that the blueprint offered showed that it was his work, and that Mr. Britt had given him a blueprint of the plat. The court erred in excluding this plat. If the plat of 1901 was competent as a declaratory act of the company, tending to show that it did not then claim to the extent that it does now for its right of way, clearly the plat of 1897 was admissible as a counter declaration that it was then claiming to the extent that it now claims, and also as corroborating the testimony of Mr. Bruner, which was erroneously excluded, as to the purpose for which the plat of 1901 was made.

In this view of the case, the questions presented by the remaining exceptions are academic and need not be considered.

Judgment reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(16 Ga. App. 195)

LOFTIN v. STATE. (No. 6116.)

(Court of Appeals of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

CRIMINAL LAW ⟸1091 — APPEAL — BILL OF EXCEPTIONS—SUFFICIENCY.

The Court of Appeals cannot consider a bill of exceptions which contains merely a recital of the history of the case and specifies the parts of the record to be transmitted, but which does not set forth any complaint as to any ruling of the lower court or assign error thereon. Under such circumstances the judgment must be presumed to have been correct, and must be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2806, 2815, 2816, 2818, 2819, 2823, 2824, 2828–2833, 2843, 2931–2933, 2943; Dec. Dig. ⟸1091.]

Error from City Court of Carrollton; James Beall, Judge.

Proceeding between Al Loftin and the State. From the judgment, Loftin brings error. Affirmed.

Hood & Strickland, of Carrollton, for plaintiff in error. C. E. Roop, of Carrollton, for the State.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 194)

CHRISTOPHER v. STATE. (No. 5918.)

(Court of Appeals of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

CRIMINAL LAW ⟸1175—INDICTMENT AND INFORMATION ⟸196—OBJECTION—WAIVER OF RIGHT—VARIANCE.

Even if the failure to properly punctuate a criminal accusation were a good ground for demurrer, the accused in the present case waived his right to object by his failure to demur. Construing the accusation without reference to its punctuation, there was no such variance between the allegations and the proof as required the grant of a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3179–3182; Dec. Dig. ⟸1175; Indictment and Information, Cent. Dig. §§ 628–635; Dec. Dig. ⟸196.]

Error from City Court of Americus; W. M. Harper, Judge.

Dunaway Christopher was convicted of crime, and brings error. Affirmed.

W. F. Weaver, of Reynolds, for plaintiff in error. Zach Childers, Sol. of Americus, for the State.

RUSSELL, C. J. The motion for a new trial in the present case rests upon the general grounds that the verdict is contrary to law, contrary to evidence, and without evidence to support it. There was no demurrer to the accusation, which charged the accused with the offense of larceny from the house, and the only point upon which the plaintiff in error relies is an alleged fatal variance between the allegations of the accusation and the proof relative to the theft of a pair of pants.

The contention of counsel for plaintiff in error is that the indictment charges the accused with having entered a pair of pants with intent to steal, instead of alleging the entry of the storehouse of the prosecutors and the taking and carrying away of the pants with that intent. Even if the manner in which the accusation is punctuated might have caused some confusion as to the nature of the charge, the proper time to have corrected this was by demurrer before arraignment. Every defendant has the right, if he requires it by timely demurrer, to be tried upon an accusation perfect both in form and in substance. Merely formal defects are waived when the defendant goes to trial without objection, and punctuation must be treated as a matter of form, and not of substance, especially when the charge can be clearly understood if all the punctuation be omitted.

Omitting the effect of punctuation, as the plaintiff in error did by his failure to demur, the proof indubitably sustained all of the material allegations establishing the offense charged, and the plaintiff in error cannot complain that the jury, perhaps in the abundance of their humanity, only found him guilty of a lower grade of the offense.

Judgment affirmed.

BROYLES, J., not presiding.

(16 Ga. App. 196)

YOUMANS v. STATE. (No. 6261.)

(Court of Appeals of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸598 — CONTINUANCE — ABSENCE OF WITNESS—DISCRETION.

Upon the call of his case the defendant announced ready, although a witness upon whose absence the motion for a continuance was later based was not present in court; and upon this announcement the court set the case for a subsequent day during the term. A motion for continuance was thereafter made, because of the absence of this witness; but, as the indictment had been found at a previous term of the court, the motion did not fall within the provisions of section 986 of the Penal Code of 1910. For this reason, and especially since it was not made to appear that the witness had ever been subpœnaed, the trial judge did not abuse his discretion in overruling the motion for a continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335–1341; Dec. Dig. ⟸598.]

2. SEDUCTION UNDER PROMISE OF MARRIAGE.

The evidence in behalf of the state is not subject to any other inference than that the female yielded to the defendant's solicitation for sexual intercourse by reason of persuasion and a pending engagement to marry her and a repetition of the promise of marriage. See Wilson v. State, 58 Ga. 329; Pough v. State, 7 Ga. App. 610, 67 S. E. 695.

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence supports the verdict, and the discretion of the trial judge in overruling the motion for a new trial will not be disturbed.

Error from Superior Court, Pierce County; J. W. Quincey, Judge.

Gus Youmans was convicted of crime, and brings error. Affirmed.

Jas. R. Thomas, of Jesup, for plaintiff in error. M. D. Dickerson, Sol. Gen., of Douglas, and S. F. Memory, of Blackshear, for the State.

RUSSELL, C. J. Judgment affirmed.

(16 Ga. App. 83)

## RYAN v. PROGRESSIVE RETAILER PUB. CO. (No. 5668.)

(Court of Appeals of Georgia. March 18, 1915. Rehearing Denied April 12, 1915.)

*(Syllabus by the Court.)*

1. ACCORD AND SATISFACTION ⟸11—COMPROMISE AND SETTLEMENT ⟸5—UNLIQUIDATED OR DISPUTED CLAIM—WHAT CONSTITUTES—ACCEPTANCE OF CHECK.

Where the amount of a debt is unliquidated, or disputed, and the debtor tenders his check for a less amount, containing the statement that it is "in full of all demands against" the maker, and the creditor accepts the check, indorses it, and collects and retains the money, there is a valid accord and satisfaction, although the creditor, at the time of receiving the check, protests to the debtor that he does not accept it in full payment, but accepts it "only as a credit on account."

(a) This ruling is not altered by the fact that, in a letter sent to the debtor on receipt of the check, the creditor, after stating that he accepts it, "only as a credit on account," adds: "Please advise promptly or stop payment on the check, if this is not satisfactory," and that, after holding the check for two weeks without any reply from the creditor, he cashes it and uses the money.

(b) It is immaterial that the creditor, after receiving the check, erases therefrom, without the consent of the debtor, the words "in full of all demands against" the maker.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75–82; Dec. Dig. ⟸11; Compromise and Settlement, Cent. Dig. §§ 10–16; Dec. Dig. ⟸5.]

2. ACCORD AND SATISFACTION ⟸10—"UNLIQUIDATED" CLAIM.

A claim is "unliquidated" or disputed when there is a bona fide contention that the debtor is not liable for the full amount. (Quoting Words and Phrases—Liquidated.)

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 67–74; Dec. Dig. ⟸10.]

3. ACCORD AND SATISFACTION ⟸27 — BONA FIDE DISPUTE—QUESTION OF FACT.

Whether there is such a bona fide contention is ordinarily a question for the jury.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 31, 59, 83, 97, 110, 135, 150; Dec. Dig. ⟸27.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by H. C. Ryan against the Progressive Retailer Publishing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

G. Scott Candler and Dean E. Ryman, both of Atlanta, for plaintiff in error. C. L. Pettigrew, of Atlanta, for defendant in error.

BROYLES, J. Ryan, an advertising solicitor in St. Louis, sued the Progressive Retailer Publishing Company, of Atlanta, for salary and commissions. The contract between them was evidenced by certain letters written by both parties. The case was submitted to the trial judge upon an agreed statement of facts. The plaintiff claimed there was due to him $177, this total amount being composed of $2 as commissions, and the remainder as salary, with interest thereon. The defendant, in its answer, contended that it owed the plaintiff nothing, and pleaded an accord and satisfaction. The trial judge found for the defendant, and the plaintiff excepted.

[1] 1. In Bass Dry Goods Co. v. Roberts Coal Co., 4 Ga. App. 520, 61 S. E. 1134, this court held that:

"Where the aggregate amount of an account is in dispute, but the debtor concedes a liability for a part thereof, and tenders that sum in payment, on the condition that it shall be in full settlement, the creditor, by retaining and using the money, check, or other thing of value so tendered, extinguishes the whole account, notwithstanding he protests, at the time, that the remainder of his claim is still due and owing."

In that case Judge Powell, after quoting from Chicago Railway Co. v. Clarke, 178 U. S. 353, 30 Sup. Ct. 924, 44 L. Ed. 1099, said:

"In such cases, if the debtor tenders the sum as to which he is willing to concede a liability, on condition that it is to be accepted in full settlement, the creditor must decline the tender, and not retain and use the money, check, or other thing of value offered in full settlement."

He cites also, in support of that ruling, Redmond v. Atlanta & Birmingham R. Co., 129 Ga. 140, 58 S. E. 874; Walker v. O'Neill Mfg. Co., 128 Ga. 835, 58 S. E. 475; Walker v. Wadley, 124 Ga. 286, 52 S. E. 904; Jenkins v. National Building Association, 111 Ga. 732, 36 S. E. 945; Hamilton v. Stewart, 105 Ga. 300, 31 S. E. 184; Id., 108 Ga. 472, 34 S. E. 123. In Jenkins v. National, etc., Ass'n, supra, it is held:

"When a debtor pays to a collecting agent a given sum of money upon the express condition that the same is to be accepted by the principal of the latter in full settlement of all demands against the debtor, it is the duty of the creditor, within a reasonable time after being informed of the condition on which the payment was made, to notify the debtor whether or not his offer of settlement is accepted, and, if not, to return to him the money received."

Justice Cobb in that case said:

"In Hamilton v. Stewart, 105 Ga. 300 [31 S. E. 184], it was held that, where a debtor remitted to a creditor less than the amount of the debt as claimed by the creditor, upon the distinct understanding that the same was to be received in full discharge of the debt, if the creditor did not, within a reasonable time after the money was received, repudiate the offer and return the money remitted to him, all liability on the debt would be discharged. When the case was before the court a second time (108 Ga. 472 [34 S. E. 123]), the necessity for the return of the money within a reasonable time was emphasized, and it was intimated that a bare refusal to accede to the proposition to accept the amount in full discharge would be unavailing to

the creditor in the absence of a return of the money."

And in the Hamilton Case, supra, Justice Cobb, in addition to what has been quoted above, said:

"Nothing could be clearer than the proposition that, where one person delivers to another property, to be retained upon a condition stated, the party receiving it cannot retain the property and repudiate the condition. In the case of Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034 [20 L. R. A. 785], it appeared that the plaintiff had sent a bill of $670 to the defendant, and that the latter declined to pay the bill rendered, but sent a check for $400, stating that it was to be in full satisfaction of plaintiff's claim. Plaintiff retained the check, but sent another bill for the same amount as the first bill, on which he credited the amount of the check as part payment. The defendant at once notified plaintiff that he had sent the check on condition that it should be received in full payment of his bill, and that plaintiff must either keep it on that condition, or immediately return it. It was held that the debt, which was unliquidated, was satisfied by the retention of the check, since its acceptance involved the acceptance of the condition also. A similar ruling was made in the case of Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715 [51 Am. St. Rep. 695]. In the case of Petit v. Woodlief, 115 N. C. 120, 20 S. E. 208, it was held that: 'Where a draft for part of an indebtedness was sent by letter, both draft and letter stating that it was to be in full payment of the debt, the creditor, by converting the draft into money, elects to accept the compromise, and the debt is thereby discharged in full.'"

See, also, Walker v. O'Neill Mfg. Co., supra; Wilcox v. Rogers, 13 Ga. App. 410, 79 S. E. 219.

The decision in Stewart v. Stephens, 7 Ga. App. 453, 67 S. E. 190, relied upon in the brief of counsel for the plaintiff in error, is not in conflict with the above ruling; for in that case, when the creditor, Stephens, drew his draft on the debtor for a less amount than he claimed was due him, and the debtor honored the draft, and Stephens received the money, there was nothing said by the debtor about it being a payment in full satisfaction of Stephens' claim; and it was expressly ruled that, because of such omission, there was no valid accord and satisfaction.

"It is elementary law that a debtor has the right to attach to a tender such lawful condition as he pleases. And, therefore, where a sum of money is tendered in satisfaction of the claim, and the tender is accompanied with such acts and declarations as amount to a condition that, if the money is accepted it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such condition, an acceptance of the money offered constitutes an accord and satisfaction, in the absence of fraud, imposition, or mistake. And this is so wholly irrespective of the grounds upon which defendant declines to pay, and proposes to deny his liability for, the balance."

"The acceptance is an assent de facto, and the creditor is bound by it. Nor is it necessary that there be express words of assent to the proposition. On the contrary, the rule applies with full force and effect, although the creditor protests at the time that the amount paid is not all that is due, or that he does not accept it in full satisfaction of his claim. Where the tender or offer is thus made, the party to whom it is made has no alternative but to refuse it or accept it upon such condition. If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary."

"When a claim is disputed or unliquidated, and the tender of a draft or check in settlement thereof is of such character as to give the creditor notice that it must be accepted in full satisfaction of the claim, or not at all, the retention and use thereof, by the creditor, constitutes an accord and satisfaction, and it is immaterial that the creditor does not return a receipt in full, or that he sends receipt 'on account,' or protests that he does not accept the tender in full satisfaction of the claim. If he is not willing to accept the check in full payment, it is his duty to return it without using it."

The above quotations are from 1 Corpus Juris, 561, 562, 563, which cites, in support of what is there said, numerous authorities from practically all of the states, and including many from Georgia.

We have no hesitation in deciding that the plaintiff in error had no right to erase from the check received by him from his debtor the words "in full of all demands against this company." This action of his, without the knowledge or consent of his debtor, did not change, in any respect, the status of their litigation. "The erasure or alteration of the condition expressed in a check by the creditor, without notice to, and assent by, the debtor, will not prevent its acceptance from constituting an accord and satisfaction, since, if the creditor were allowed to accept it for a different purpose than that allowed, it would be to allow him to make a contract with defendants without their knowledge and consent." This is quoted from 1 Corpus Juris, 564, and in support of this statement the following cases are therein cited: Worcester Color Co. v. Henry Wood's Sons Co., 209 Mass. 105, 95 N. E. 392; Smith v. Bronstein, 107 N. Y. Supp. 765; Kerr v. Sanders, 122 N. C. 635, 29 S. E. 943; Hull v. Johnson, 22 R. I. 66, 46 Atl. 182; Hussey v. Crass (Tenn. Ch.) 53 S. W. 986; Gribble v. Raymond, etc., Co., 124 App. Div. 829, 109 N. Y. Supp. 242. In the case last cited the ruling was as follows:

"There is accord and satisfaction where plaintiff asserted that, under his contract of employment, he was entitled to commissions, not only on orders taken by him personally, but on those sent in by his customers, and defendant asserted the contrary, and on that basis drew and delivered a check, reciting that it was in full for commissions; and plaintiff, having reason to believe that it was not the full amount to which he was entitled on the contract as claimed by him, but knowing that defendant claimed it was in full, accepted and used it, striking out, unknown to the defendant, the recital that it was in full."

[2] 2. There is considerable uncertainty in the text-books, and in the decisions of the courts, as to when a claim is "liquidated" or "unliquidated."

"The word 'liquidated,' in the sense of the rule that payment of a lesser sum is a discharge as to the remainder where the amount in dispute is unliquidated, but that it is not a discharge when it is liquidated, means that the amount due has been ascertained and agreed on by the parties, or fixed by operation of law. The rule does not apply where there is a bona fide dis-

pute as to the amount actually due." Treat v. Price, 47 Neb. 875, 883, 66 N. W. 834, 836.

"A demand is not liquidated, even if it appears that something is due, unless it appears how much is due; and, when it is admitted that one of two specific sums is due, but there is a general dispute as to which is the proper amount, the demand is regarded as 'unliquidated,' within the meaning of that term as applied to the subject of accord and satisfaction." 5 Words and Phrases, 4174, citing Lestienne v. Ernst, 5 App. Div. 373, 39 N. Y. Supp. 199, 200, citing Nassoiy v. Tomlinson, 148 N. Y. 326, 331, 42 N. E. 715, 51 Am. St. Rep. 695; Ives v. Jefferson County Sup'rs, 18 Wis. 166, 168; Clark v. Dutton, 69 Ill. 521, 523; Greenlee v. Mosnat, 116 Iowa, 535, 90 N. W. 338, 339.

"A claim is not liquidated when the balance due is fairly disputed." Pollman, etc., v. City of St. Louis, 145 Mo. 651, 657, 47 S. W. 563, 564.

"Where there is a controversy over a set-off, and the balance due the plaintiff is fairly in dispute, the claim cannot be treated as liquidated, although items of the plaintiff's claim are not disputed." Ostrander v. Scott, 161 Ill. 339, 345, 43 N. E. 1089, 1091.

"An account is to be considered as liquidated after a demand of payment, with knowledge of what is claimed upon the part of the debtor, and without objection by him; or after it has been rendered to him without objection to it on his part within a reasonable time." Henderson Cotton Mfg. Co. v. Lowell Mach. Shops, 86 Ky. 668, 676, 7 S. W. 142, 145.

These decisions are cited in 5 Words and Phrases, 4174, and Justice Beck quotes from them approvingly in Redmond v. Atlanta & Birmingham R. Co., 129 Ga. 138, 58 S. E. 874.

In Hargroves v. Cooke, 15 Ga. 321, 332, the Supreme Court held that:

"A debt or demand is liquidated when agreed on by the parties, or fixed as to the amount, by operation of law."

And Judge Lumpkin, who wrote the decision in that case, said:

"When is a debt said to be liquidated—a distinction so prominently preserved throughout the whole of our legislation? I answer, whenever the amount due is agreed upon by the parties, or fixed by operation of law. A debt may be in writing, and not liquidated, or vice versa, it may be liquidated, though not in writing. Open accounts are raised by one party only. The merchant, the mechanic, and all others with whom we deal, may charge what they please. It is an ex parte affair. The account is open till agreed to by the other party. It may be scaled by showing that the goods or work is overcharged. A shopkeeper may produce a written order for every item in his customer's bill. Still this does not liquidate it. On the other hand, there may be no written proof. Still, if the debtor has acknowledged the justice of the account, it is no longer the act of one party, but the agreement of both; it is liquidated. The case of Lawson v. Nisbet, so often cited, sufficiently illustrates what is meant by liquidation, by operation of law. It is the collection of money by an agent, the payment of a debt by a security, and such like cases, where the liability is for a fixed and precise sum, or nothing at all."

So we must consider the claim in the instant case as one which is unliquidated and in dispute.

[3] 3. Whether or not there was a bona fide dispute between the parties is ordinarily a question for the jury. In Carlton v. Western & Atlantic R. Co., 81 Ga. 531, 7 S. E. 623, the Supreme Court held, that:

"It should have been left for the jury to determine whether the wages as well as the damages were in dispute, and whether the settlement covered all."

See, also, Beaver v. Porter, 129 Iowa, 41, 105 N. W. 346; Greenlee v. Mosnat, 116 Iowa, 535, 90 N. W. 338; Laroe v. Sugar Loaf Dairy Co., 180 N. Y. 367, 73 N. E. 61; Cornell v. Taylor, 137 App. Div. 496, 122 N. Y. Supp. 157; McCormick v. Shea, 47 Misc. Rep. 613, 94 N. Y. Supp. 485. In the latter case it was held, that, where the question as to whether there was an accord and satisfaction depends on whether or not the claim was liquidated, and there is some evidence of dispute and difference as to the respective obligations of the parties, it should be submitted to the jury, and the determination of the question by the court is error.

The learned trial judge in this case, sitting as a jury, determined this question in favor of the defendant, and, the evidence being sufficient to support the verdict, his judgment overruling the motion for a new trial is affirmed.

(16 Ga. App. 190)

## MOTT v. STATE. (No. 5818.)

(Court of Appeals of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

1. LICENSES—OCCUPATION TAX — REGISTRATION.

In section 960, Pol. Code 1910, which, among the "specific and occupation taxes" required by section 916 to be levied and collected each year, imposes "upon every itinerant doctor, dentist, optician, veterinary surgeon, osteopathist, or specialist of any kind traveling and doing business in this state, the sum of ten dollars for each county in which they may practice or do business," the proviso at the end of this clause, "that the provisions of this section shall not apply to persons whose fixed place of business is in any county of this state, and who have paid the professional tax required by section 918," is qualified by the additional proviso that if any such person "shall peddle or sell any drug, medicine, remedy, appliance, spectacles, glasses, or other goods, in connection with the practice of his profession, he or they shall be subject to the tax required of peddlers or traveling vendors of patent or proprietary medicines, nostrums, etc., by section 946, to wit: Fifty dollars in each county where they may sell or offer to sell any such articles." And section 978 requires that "before any person shall be authorized to open up or carry on said business, they shall go before the ordinary of the county in which they propose to do business and register their names, the business they propose to engage in, the place where it is to be conducted, and they shall then proceed to pay their tax to the collector." Failure so to register, or, after registration, to pay the tax, is declared to be a misdemeanor. See, also, Penal Code 1910, § 469.

2. LICENSES ⟸11—OPTICIANS—FAILURE TO REGISTER.

The foregoing Code sections are applicable where one who is an optician and eye specialist and is also a member of a firm engaged in the business of manufacturing and selling eyeglasses

at a fixed place of business in the county in which he resides and has his office, and who has complied with the laws as to payment of taxation and registration of business in that county, travels to other counties in the state, stopping a short time in each at a place advertised by him, at which he examines and tests eyes without charge and takes orders for glasses to be made and delivered by his firm, and sends to the firm the orders, with his prescriptions for the glasses, and the firm sends the glasses directly from its place of business to the persons ordering them, who send the price of the glasses to the firm, or in some instances pay it to him in person, though he does not himself, in any instance, deliver the glasses at the time or place of taking the order.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 18–20, 21; Dec. Dig. ⟸11.]

3. LICENSES — OPTICIANS — FAILURE TO REGISTER.

The agreed statement of facts authorized a conviction of the offense of failing to register under section 978, supra.

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Kennon Mott was convicted of failing to register under Pol. Code 1910, § 978, and brings error. Affirmed.

R. W. Durden, and Frank H. Harris, both of Brunswick, and Ernest Dart, of Jacksonville, Fla., for plaintiff in error. J. H. Thomas, Sol. Gen., of Jesup, for the State.

WADE, J. Judgment affirmed.

BROYLES, J., not presiding.

(16 Ga. App. 195)

GAILLIARD et al. v. STATE. (No. 5991.)

(Court of Appeals of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸878—VERDICT ON SEVERAL COUNTS—SENTENCE.

The evidence was sufficient to authorize the verdict finding the defendants guilty of robbery by force, as charged in the first count of the indictment; and, this being true, the mere fact that the indictment contained also a count charging robbery by sudden snatching afforded no obstacle to the court's imposing a single sentence upon the count which was sustained by evidence. The rule announced in Driver v. State, 112 Ga. 229, 37 S. E. 400, and in Douglas v. Town of Kestler, 14 Ga. App. 612, 81 S. E. 803, has no application in this case, for the verdict finding the defendants guilty of "robbery by force" is not a general verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098–2101; Dec. Dig. ⟸878.]

2. CRIMINAL LAW ⟸786 — INSTRUCTIONS — STATEMENT OF ACCUSED.

Under the ruling of this court in McCullough v. State, 10 Ga. App. 403, 73 S. E. 546, a trial judge may charge the jury in a criminal case that they may believe the statement of the accused in preference to the evidence "provided they believe it to be true."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1895–1901, 1960, 1984; Dec. Dig. ⟸786.]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Joe Gailliard and others were convicted of robbery, and bring error. Affirmed.

Robert L. Colding and David S. Atkinson, both of Savannah, for plaintiffs in error. Walter C. Hartridge, Sol. Gen., of Savannah, for the State.

RUSSELL, C. J. Judgment affirmed.

BROYLES, J., not presiding.

(16 Ga. App. 228)

HICKS v. STATE. (No. 6271.)

(Court of Appeals of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

1. GAMING ⟸85, 87, 94, 96—ACCUSATION—REQUISITES—EVIDENCE—BURDEN OF PROOF.

In an accusation of gaming, it is not necessary to specify the particular game played or to identify the players, but, if the game be identified by confining the charge to a particular game, not only is evidence thereby restricted to proof of the game specified, but the burden devolves upon the state of proving that the game in which the accused was engaged was the precise game charged in the accusation.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 220–223, 228, 235–240, 261, 266, 274–283, 285; Dec. Dig. ⟸85, 87, 94, 96.]

2. CRIMINAL LAW ⟸1158, 1186 — APPEAL — FINDING—EVIDENCE.

Where the testimony presents an issue of fact, the jury or the court trying the case without a jury, is the sole arbiter, and, if its finding is supported by any evidence, the finding will not be disturbed, unless an error in the trial induced or contributed to the result. Upon review the sufficiency of the evidence adduced to support the particular finding is a matter of law, and a finding without sufficient evidence to support it is, for that reason, contrary to law. In the present case the judgment finding the accused guilty was without evidence to support it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061–3066, 3070, 3071, 3074, 3215–3219, 3221, 3230; Dec.Dig. ⟸1158, 1186.]

3. CRIMINAL LAW ⟸1114, 1134 — APPEAL — REVIEW—SUFFICIENCY OF EVIDENCE.

In determining whether the evidence adduced on the trial was sufficient to authorize the verdict, a reviewing court cannot go outside of the brief of the testimony, as approved by the trial judge, or incorporate as a fact his opinion or conclusion that certain demonstrative evidence was sufficient to establish a particular fact. In testing the sufficiency of the evidence to support a particular finding, a court of review should be guided by such conclusions as are naturally, reasonably, and legally supported in fact, and cannot merely adopt the conclusions of the trial court. It cannot derive assistance from conclusions based upon matters not disclosed by the record, for they cannot with propriety be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2918, 2921, 2986–2998, 3056, 3067–3071; Dec. Dig. ⟸1114, 1134.]

Broyles, J., dissenting.

Error from City Court of Hazlehurst; J. R. Grant, Judge.

Charlie Hicks was convicted of gaming, and brings error. Reversed.

Gordon Knox and Newton Gaskins, both of Hazlehurst, for plaintiff in error. S. D. Dell, Sol. pro tem. and J. Mark Wilcox, Sol., both of Hazlehurst, for the State.

RUSSELL, C. J. 1. On the first point which presents itself, to wit, that the date of filing entered on the accusation (December 29th) was subsequent to the date of the trial (December 28th), we cannot consider the statement of the trial judge, written below the signature of his certificate to the bill of exceptions, that the accusation was actually filed on December 28th, before the trial, for it is well settled that the power of a trial judge over a bill of exceptions is exhausted with the signing of the certificate, and that any subsequent statement, qualifying or contradicting the statements of the bill of exceptions which he has certified to be true, is ineffectual and cannot be considered by a reviewing court. It is to be inferred, however, that the defendant waived the formal filing of the accusation prior to the trial, or perhaps consented to go to trial without it.

[1, 2] The record, then, raises merely the single question whether the evidence was sufficient to support the judgment finding the accused guilty of playing and betting at a game of "skin." A verdict supported by some evidence and approved by the trial judge is never disturbed by this court, unless some error was committed which may have caused an unfavorable finding against the plaintiff in error, or contributed to it by prejudicing him before the jury. But a verdict or finding without any evidence to support it is contrary to law. The sufficiency of the evidence in any case to support a particular finding is always a matter of law, and a finding adjudged by the court to be unsupported by evidence is contrary to law. In the present case a single witness for the prosecution testified that he saw the accused, with others, engaged in a game of cards, and that some had cards and some had money; and the evidence would have authorized a verdict of guilty if the state had preferred a general charge of gaming. The state was not required to specify the game in which the defendant was engaged, but having selected a specific game, and having based the charge thereon, it devolved upon the state to prove, beyond a reasonable doubt, that the defendant played the game of "skin." If the state had charged generally that the defendant played and bet for money or other thing of value at a game played with cards, without specifying the particular kind of game played, one of the results of the trial might have been to enable the accused to interpose a plea of former jeopardy to any charge of gaming laid prior to the accusation upon which he was tried, whereas the state, in restricting the charge in the accusation to the single game of "skin," retained the right to prosecute him under a different accusation for engaging in any unlawful game other than the game known as "skin," not barred by the statute of limitations.

Authorities are abundant in support of the proposition that the state, having charged the defendant with having played a specific game, was confined in its proof to evidence in support of that charge. Judge WADE and myself are of the opinion that the evidence is insufficient to show that the game in which the defendant was shown by the testimony to have been engaged was the game commonly known as "skin." The burden was upon the state to show affirmatively that the game in which the defendant was playing was "skin"; and, if there was any doubt upon the subject, the state failed to carry the burden resting upon it. Even if a consideration of the evidence induces the conclusion that the defendant might have been playing skin, an acquittal nevertheless would be the only proper legal result. On the contrary, however, the expert witness, introduced by the state as a connoisseur on the game of "skin," testified, upon a résumé of the facts stated by the only eyewitness, that he could not say that the game described by the witness was the game of "skin." The eyewitness did not attempt to denominate the game, and apparently was unfamiliar with the nomenclature or details of the different games played with cards. He merely stated what he saw the players do and the position of the cards. According to the testimony of the expert witness, if the cards were in the position detailed by the eyewitness, and if what he said he saw actually took place, the game which was being played was not the game of "skin." The majority of the court, therefore, think the evidence was so insufficient that the conviction of the accused is contrary to law.

[3] The learned trial judge incorporates in his statement approving the brief of the evidence the statement that "the game of 'skin' was more fully demonstrated to the court than the description in the above brief;" but we are not able to consider this statement. To any statement which the trial judge might have made purporting to relate facts or occurrences which transpired, we would unhesitatingly give credence, not only in obedience to the law, but also on account of our personal knowledge of the unquestioned personal integrity of the judge who presided in this case; but, in reaching a conclusion as to the sufficiency of the evidence as a basis for its decision, a court of review must act upon its own conclusions, as deduced from the evidence obtained from the only source provided by law—the brief of the testimony as approved by the trial judge. It was within the power of the trial judge in the present case to have required the recitals of the brief of evidence as to the details of the demonstration to be made more full—to be made exact—and it may be that, if that had been done, we should have reached the same con-

clusion that he did. But since we are not permitted to draw conclusions, except from the evidence as recorded, and cannot merely adopt the conclusion of the trial judge on demonstrative evidence undisclosed, we cannot with propriety even consider the result of his conclusions or permit ourselves, in discharge of the responsibility resting upon us, to be in any wise influenced thereby. In testing the sufficiency of the evidence to support a particular finding, a court of review should be guided only by such conclusions as are naturally, reasonably, and legally supported in fact, and cannot adopt the conclusions of the trial court as such. It cannot derive assistance from conclusions based upon matters not disclosed by the record.

Judgment reversed.

BROYLES, J. (dissenting). The evidence that the accused was playing the game of cards known as "skin," as alleged in the accusation, is not entirely satisfactory to me, but a very important part of that evidence being demonstrations by witnesses with packs of playing cards, the trial judge, who, sitting as judge and jury, saw those demonstrations, was in a much better position than we are to determine that question of fact; and he, sitting as a jury, having determined it, and, as trial judge, having approved the verdict, and no error of law being complained of, in my opinion his discretion in refusing to grant the motion for a new trial should not be interfered with. Moody v. State, 1 Ga. App. 775 (10), 58 S. E. 262; Sims v. State, 1 Ga. App. 776 (3), 778 (3), 57 S. E. 1029; Scott v. State, 6 Ga. App. 567 (2), 65 S. E. 359.

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(16 Ga. App. 191)

## SHEALEY v. STATE. (No. 5864.)

(Court of Appeals of Georgia. April 13, 1915.)

INDICTMENT AND INFORMATION ⊂⊃176 — PLEADING AND PROOF—VARIANCE.

Evidence tending to show the commission of the offense at a time subsequent to the date of the affidavit upon which the accusation was founded is inadmissible, and upon proper objection should be excluded.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 548; Dec. Dig. ⊂⊃176.]

Error from City Court of Oglethorpe; R. L. Greer, Judge.

West Shealey was convicted of carrying a pistol without a license, and brings error. Reversed.

Jere M. Moore, of Montezuma, for plaintiff in error. Jule Felton, Sol., of Montezuma, for the State.

RUSSELL, C. J. On November 26, 1913, D. D. Mitchell made an affidavit charging the defendant, Shealey, with the offense of carrying a pistol without a license on the 18th day of November, 1913. On the 29th of November Shealey was committed upon this warrant. The defendant was tried in the city court of Oglethorpe upon an accusation dated April 16, 1914; the jury found him guilty; and exception is taken to the judgment refusing a new trial. It is unnecessary to refer to the general grounds of the motion for a new trial, for there was sufficient evidence to have warranted the verdict if the evidence had been admissible. However, in another ground of the motion for new trial complaint is made that the court erred in admitting, over the defendant's objection, testimony to the effect that the offense charged was committed on the 13th day of April, 1914; and we are of the opinion that the objections were well taken, and that the testimony in question should have been repelled. Without this testimony the evidence was doubtless insufficient to authorize a conviction; but, even if there was other testimony which would have authorized the conviction of the accused, a new trial should nevertheless have been granted, because it is not within the power of the court, in such a case, to know whether a verdict rests upon the legal or upon the illegal testimony. Aside from its merits upon other grounds, the defendant's objection to the testimony of the two witnesses named Brady, upon the ground that testimony tending to show his guilt at a time subsequent to the date of the affidavit upon which the accusation was based was inadmissible, was well taken. That such testimony is inadmissible is ruled in Chambers v. State, 85 Ga. 220, 11 S. E. 653, and in Turner v. State, 89 Ga. 424, 15 S. E. 488. It is well settled, of course, that the prosecution is not restricted in its proof to the precise date alleged in the indictment or other criminal accusation, but may prove the commission of the alleged offense at any time within the statute of limitations. But the rule prescribed in section 30 (4) of the Penal Code, as well as the decisions of this court in Hollingsworth v. State, 7 Ga. App. 18, 65 S. E. 1077, Holmes v. State, 7 Ga. App. 570, 67 S. E. 693, and Johnson v. State, 7 Ga. App. 50, 66 S. E. 148, holding that the state may introduce evidence of any violation of the statute under which the accused may be charged, which occurred within two years prior to the date of the filing of the accusation, is subject to the qualification that the date of the offense must be prior also to the affidavit upon which the accusation is founded. The cases which are relied upon by counsel for the state merely reiterate the well-settled rule that the state is not restricted in its proof to the specific date designated in the indictment or other accusation, as the day upon which the offense was committed, and the point now presented was not raised in any of them.

An accusation in a city court must be based upon an affidavit charging the offense, and the proof must conform to the affidavit as well as to the accusation. In other words,

the accusation must follow the affidavit, and the proof must follow and conform to both. The state can prove that the crime was committed at any time prior to the time of the filing of the accusation only when the time mentioned is also prior to the time of the making of the affidavit upon which the accusation depends. The dependence of the accusation upon the affidavit was not dealt with in any of the cases to which counsel for defendant in error refers, and there is therefore no conflict between what was ruled in those decisions and what is now ruled. In the Chambers Case, as well as in Turner's Case, supra, the judgment was reversed because it did not plainly appear whether the offense was committed prior to the date of the affidavit upon which the accusation was based or subsequently thereto. In the case at bar the evidence was objected to upon the ground that it was uncontradicted that the transaction which disclosed the guilt of the accused occurred subsequently to the making of the affidavit which was the basis of the accusation upon which he was being tried. If a verdict cannot be supported when it is doubtful whether the offense was committed prior to the making of the affidavit upon which an accusation depends, a fortiori the conviction cannot be supported where the only proof of the commission of the offense relates to a time subsequent to the making of the affidavit, and to matters to which, in the very nature of things, the original affidavit could not have referred. It is not conceivable that an affidavit made on the 26th day of November, 1913, could relate to the commission of an offense on the 13th day of April, 1914. The court erred in not sustaining the objections to the testimony, and in refusing to correct this error upon the motion for a new trial.

Judgment reversed.

BROYLES, J., not presiding.

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(16 Ga. App. 193)

SHEALEY v. STATE. (No. 5865.)

(Court of Appeals of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

CARRYING WEAPONS.

The ruling in this case is controlled by the decision of this court in the case of Shealey v. State, 84 S. E. 839, this day decided.

Error from City Court of Oglethorpe; R. L. Greer, Judge.

West Shealey was convicted of carrying a concealed weapon, and brings error. Reversed.

Jere M. Moore, of Montezuma, for plaintiff in error. Jule Felton, Sol., of Montezuma, for the State.

RUSSELL, C. J. Judgment reversed.

BROYLES, J., not presiding.

(168 N. C. 499)

HAM et al. v. HAM et al. (No. 142.)

(Supreme Court of North Carolina. March 31, 1915.)

1. WILLS ⟸542 — CONSTRUCTION — VESTING OF ESTATES—"OR."

Testator devised described real estate to his four sons, to be equally divided between them, but should either die before attaining full age, "or without children surviving him," his or their share should go to the others that were living, but not to any of his other children, and devised other real estate to the four sons, and should either die before attaining full age, "or [without] leaving children" surviving, his or their share should be divided equally between those that were living. *Held*, that the word "or" must be construed as "and," and hence the share of each son became absolute on attaining full age.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1165–1168, 1177, 1302–1309; Dec. Dig. ⟸542.

For other definitions, see Words and Phrases, First and Second Series, Or.]

2. WILLS ⟸548 — CONSTRUCTION — ESTATES ACQUIRED.

Testator devised real estate to his four sons, to be equally divided between them, but should either die before arriving at full age or without children surviving him, "then his or their share" should "go to the others that are living, but not to any of my other children." He devised other real estate to the same sons, and provided that should either die before arriving at full age "or [without] leaving children surviving him * * * his or their share" should be taken and divided equally between those that were living. He made ample provision for his other children. *Held*, that the word "others" referred to the sons, while the word "other" referred to the other children of testator; and where all the sons attained full age, each acquired an absolute share which did not pass to the children of a deceased son on the death of other sons without issue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1182, 1183; Dec. Dig. ⟸548.]

3. WILLS ⟸551 — CONSTRUCTION — ESTATES ACQUIRED.

Testator devised real estate to his sons, to be equally divided between them, but should either die before attaining full age or without children, his share should go to the others that were living, and devised other real estate to them, and should either die before attaining full age "or leaving children surviving him," his share should be taken equally between those that were living. *Held*, that the word "without" was clearly omitted in the quoted phrase, and the court must construe the will as if the word was inserted, and, so construed, the will showed that the children of any son should take by descent from their father, and not as purchasers under the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1186–1190; Dec. Dig. ⟸551.]

4. WILLS ⟸455—CONSTRUCTION—MEANING OF LANGUAGE—INTENT OF TESTATOR.

In construing a will, the language thereof governs unless there are clear indications of a contrary meaning to be found in the will considered as a whole, and the court may not speculate as to testator's intent, and can only interpret a will fairly and according to established rules of law, and without supplying omissions by reading into the will something that testator did not insert.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 972, 973, 976; Dec. Dig. ⟸455.]

Appeal from Superior Court, Wayne County; Connor, Judge.

Action by Ransom Ham and others against Mary J. Ham and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

This case, for the recovery of land, involves the construction of the will of Haywood D. Ham, Sr., who died on May 31, 1859. He devised his home place, containing 175 acres, to his wife, Penny Ham, for life, and all the rest of the land of which he died seised and possessed to his four sons, Matthew J. Ham, George D. Ham, Erastus Ham, and Haywood D. Ham, Jr., "to be equally divided between them, but should either the said Matthew, George, Erastus or Haywood die before arriving at the age of twenty-one, or without children surviving him, then his or their share shall go to the others that are living, but not to any of my other children." The other tract of 175 acres he then devised to his said four sons, subject to the life estate of his wife, upon substantially the same limitations, though there is a slight difference in phraseology, the last devise being in these words, "Should either of my sons, Matthew, George, Erastus or Haywood, die before arriving at the age of twenty-one, or leaving children surviving him, then and in that case, his or their share shall be taken and divided equally between those that are living," the words, "but not to my other children," being omitted from this clause of the will. It is alleged in the complaint that, by other clauses of the will, "the testator made ample and equitable provision for all of his other children, and his widow, Penny Ham, is dead." The said four sons attained to the age of 21 years, and all died without leaving a child, except Matthew J. Ham, who left children. When the four sons were of age, the lands devised to them in their father's will was partitioned equally among them, and each of them took possession of the share allotted to him. The partition was made under the following clause of the will of Haywood D. Ham, Sr.:

"Whenever the said Matthew, George, Erastus or Haywood D., shall arrive at the age of 21, the one so attaining age may by petition have a division of the land that I have given them, have his share set apart in severalty and the balance to be cast back and remain and continue to be held by the others as tenants in common and as each one arrives at the age of 21, he may file a petition and have his share allotted to him, and so may each one as he attains the age of 21 continue to do."

George D. Ham died on June 30, 1887, and his share was divided among the other three surviving brothers, Matthew J. Ham, Erastus Ham, and Haywood D. Ham, Jr. Matthew J. Ham died on April 13, 1893, leaving children, who are the plaintiffs. Erastus Ham died November 6, 1893, leaving a will, in which he devised his interest in the said lands, both his original and accrued shares, to his brothers and sisters of the whole blood, who sold and conveyed it to Haywood D. Ham, Jr., who died on May 26, 1914, leaving a will in which he devised to certain of the defendants his original share in the lands of his father, which was devised to him, and as allotted to him in the division among the four sons, and that part of said lands which was allotted to Erastus Ham in the original partition, and also in the division of the share of George D. Ham, he claiming to have purchased the same from the devisees of Erastus Ham, the said Haywood D. Ham, Jr., having conveyed the part allotted to him in the division of the share of George D. Ham to the children and heirs of Matthew J. Ham, who conveyed to Haywood D. Ham, Jr., the part allotted to them in the division of the share of Erastus Ham, which seems to have been an exchange of the said interests. Plaintiffs further allege in their complaint that they are the owners and entitled to the possession of the land described in the complaint, being a part of that willed by Haywood D. Ham, Sr., to his four sons, and which were devised by Haywood D. Ham, Jr., in his will to certain of the defendants. The defendant Mary J. Ham is the widow of Haywood D. Ham, Jr., deceased, and is in possession of all the said lands; defendants Nancy Hill and Mary A. Casey are sisters of the four sons, Matthew, George, Erastus, and Haywood, who are the devisees under the will of Haywood D. Ham, Sr.; the defendants Carrie Harrell, Bertha Casey, Will Casey, Lou Pearl Edwards, Eva Casey, and S. J. Casey are the children of Ellen Casey, deceased, another sister of the said devisees, the said sisters being the children of Haywood D. Ham, Sr.; and Curtis Howell and Rachel Howell are grantees of Haywood D. Ham, Jr., as to three acres of said land. The prayer of the complaint is that plaintiffs be declared to be the owners of the land therein described, and entitled to the immediate possession thereof, and for costs. Defendants demurred to the complaint, upon the ground that under the will of his father and the deeds executed to him, Haywood D. Ham, Jr., was seised and possessed of the said lands at his death, and by his will they were devised to certain of the defendants, who thereby became and are now the owners thereof. The court held that, upon the death of Matthew J. Ham, leaving surviving him the plaintiffs as his children and heirs at law, the share of the said Matthew J. Ham, in the division of the lands of Haywood Ham, Sr., descended to the plaintiffs as the heirs at law of said Matthew J. Ham, together with an undivided one-third interest in the share of George D. Ham in the said division of the lands of Haywood Ham, Sr.; that upon the death of Erastus Ham, his share in the division of the said lands of Haywood Ham, Sr., passed by the will of Erastus Ham and subsequent deeds to Haywood D. Ham, Jr., in fee, together with the one-third interest of Erastus Ham in George D. Ham's

share in said division of the lands of Haywood D. Ham, Sr.; that upon the death of Haywood D. Ham, Jr., there being no survivors of the brothers, the share of Haywood D. Ham, Jr., in the division of the lands of Haywood Ham, Sr., together with the share which passed to him from Erastus Ham and the one-third interest in George D. Ham's share in said division, passed under the will of Haywood D. Ham, Jr., to the defendants, and thereupon sustained the demurrer. Plaintiffs appealed from the judgment.

W. S. O'B. Robinson & Son, of Goldsboro, W. A. Thompson, and Langston, Allen & Taylor, of Goldsboro, for appellants. Dortch & Barham, W. W. Peirce, and M. T. Dickinson, all of Goldsboro, for appellees.

WALKER, J. (after stating the facts as above). The plaintiffs are the children and heirs at law of Matthew J. Ham, and claim to be the owners of the land in dispute under the will of their grandfather, Haywood D. Ham, Sr., upon the ground that they are the last survivors of the four sons mentioned in said will, within the meaning and intent of the testator, as expressed therein, or as clearly to be implied from the language used by him.

[1] It has been settled by several cases decided by this court, and many in other jurisdictions, that the word "or" last used in the sentence, "but should either of the said Matthew, George, Erastus or Haywood die before arriving at the age of twenty-one, *or* without children surviving him," should be read as "and," so as to require both contingencies to occur before the limitation over should take effect, and to occur during minority; this construction being necessary to save the inheritance to the child or children of any son who should die under age, according to the undoubted intention of the testator. There are two cases decided by this court which are typical of all those upon the subject. The first is Dickenson v. Blount, 5 N. C. 380, in which it appeared that the testator devised certain land to his grandson William S. Stewart, in fee, with the limitation that if he died before he arrived at lawful age, or leaving issue, the land should go to his other grandson John Spier, in fee. Judge Taylor said:

"According to a literal construction of the will, the occurrence of either event would vest the estate in John Spier; but it is evident that such was not the testator's intention, and this intention ought always to be effectuated when it does not contravene the rules of law. He could not have intended that the issue of William Spier Stewart should be deprived of the estate, if their father died under age; for that would operate to take all from those who appear to have been the principal objects of his bounty, yet such would be the effect of a literal interpretation of the will. His intention seems to have been that the fee should remain absolute in William S. Stewart on the happening of either event, either his leaving issue or attaining to lawful age; or, in other words, that both contingencies, to wit, his dying under age, and without leaving issue, should happen before the estate vested in John Spier. To give effect to this intention, it is necessary to construe the disjunctive *or* copulatively; and there are various, clear, and direct authorities which place the power of the court to do this beyond all doubt."

And in Turner v. Whitted, 9 N. C. 613, construing a similar devise and approving Dickenson v. Blount, supra, the court said:

"Many cases have established the propriety of so construing it [or] in wills of this kind, otherwise the property would be carried over, if the first devisee died under the age of 21, though he had left issue, when the intent of the devisor was that both events should happen, the dying under 21 *and* without issue, before the estate should go over. So that, at the age of 21, it was intended that the daughter should have the power of disposing of the estate absolutely, and of making what provision she pleased for her issue, if she should have any; but in the event of her dying before 21, that her issue should not be deprived of the inheritance."

So in Hilliard v. Kearney, 45 N. C. 221, Judge Pearson puts this case:

"A gift to A. if he arrives at the age of 21, but if he dies without leaving a child, the property is to go to B.; the intermediate period is adopted, and the gift is absolute at his age of 21" (citing Horne v. Pillans, 2 M. & K. 22).

He says, in another part of the opinion:

"It should be borne in mind that this is not a limitation to several children with a condition that if one or more should die under the age of 21, and unmarried, their shares should go to the survivors or survivor, which is a very common limitation in wills, and a very reasonable one, for the ownership is restrained only until the child has discretion or marries, and should be settled in the world. The restraint being a reasonable one, it is probable the testator intended to apply it to all of the children under like circumstances, and the court might incline, in the absence of express words, to imply a succession of survivorships from the fact that the same reason was applicable to all."

The rule is well expressed in Parker v. Parker, 5 Metc. (Mass.) 134:

"We think this is one of the cases in which the word 'or' will be construed to mean 'and,' in order to carry the testator's intention into effect. The manifest object of the testator was, we think, that if the son, who was the first object of his bounty, should die without leaving children to take after him, and whilst he was under age, so that he could not make any disposition of the property, on account of the incapacity of nonage, then the testator intended to make disposition of it himself. But if the son should leave no children, but still if he should arrive at an age at which the law would allow him to dispose of real estate by his own act by deed or will, then it was intended that the gift to him should be absolute, and the devise over would fail."

The court in Doebler's Appeal, 64 Pa. 9, after stating and commenting on the rule, added that:

"This construction has been so conclusively settled as to have become one of the landmarks of the law not now to be shaken."

See, also, Soulle v. Gerard, Cro. Eliz. 525; Janney v. Sprigg, 7 Gill (Md.) 197, 48 Am. Dec. 557, 566, and note, 19 Ann. Cas. 924, 925; 30 Am. & Eng. Enc. (2d Ed.) 692; Alston v. Branch, 5 N. C. 356; Lindsey v. Burfoot, 5 N. C. 494; Arrington v. Alston, 6 N.

C. 322; Gregory v. Beasley, 36 N. C. 26; Hilliard v. Kearney, 45 N. C. 221; Cheek v. Walker, 138 N. C. 447, 50 S. E. 853; China v. White, 5 Rich. Eq. (S. C.) 426; Lumpkin v. Lumpkin, 108 Md. 470, 70 Atl. 238, 25 L. R. A. (N. S.) 1160, and note; 1 Underhill on Wills, pp. 447, 504; Phelps v. Bates, 54 Conn. 11, 5 Atl. 301, 1 Am. St. Rep. 92; 2 Fearne on Rem. § 235. Chancellor Kent said in Jackson v. Blanshan, 6 Johns. (N. Y.) 54, 5 Am. Dec. 188, a case like this one, "It is now to be hoped that the question on the construction of those words in a will will never hereafter be revived," so sure was he that it had been settled and closed by the courts for many years. We, therefore, conclude, on this branch of the case, that the share of each of the sons would have vested absolutely and unconditionally in him when he arrived at the age of 21 years, whether he had children or not, and the same would have been the result if he had children during his minority. Matthew D. Ham was the only son who had children, but his share became absolute when he attained to full age, and the same was the result as to all of the brothers, for they had arrived at full age and died without children, and the share of each vested absolutely on his coming to full age.

[2] The next question is whether the plaintiffs acquired any interest in the land by reason of the fact that they survived the other brothers of their father, who died without children, upon the theory that they fall within the class intended to take under these words of the will, "then his, or their, share shall go to the others that are living, but not to any of my other children." But we are unable to agree with this view. Both authority and reason are against it. We would be perverting the language of the will should we so construe it, and it would be necessary to write words into the instrument which are not there. It is clear that the testator used the words, "shall go to the *others that are living*," in the passage above quoted, in the sense of the survivors of the brothers, which would not include the children of a deceased brother, because the word "others" plainly refers to them, the brothers, when read with what precedes it, and it is immediately followed by the expression, "but not to any of my *other* children" (italics ours), which demonstrates that the word "other" meant only children, and they could only be the sons, as it referred to the children before mentioned in the will. That this is the plain, natural, and grammatical construction is hardly arguable. This brings the case directly within the following authorities: It appeared in Threadgill v. Ingram, 23 N. C. 577 at pp. 580, 581, that a testator had bequeathed all his personal property to his four children, to be equally divided between them when his son A. arrived at the age of 21 years; and if one or two or three should die under age, or *without issue*, all the property to go to the surviving ones forever. A daughter died before her arrival at full age, leaving no children, but after A. had attained 21 years. It was held that her share went over to the survivors then living, and that a child of a sister, who had died after attaining full age, was not entitled to any part of it. Judge Daniels added:

"Must not the representative deduce his title by averring that his principal was the survivor? Could the representative have any pretense of claim without such averment? We think he could not. * * * How could a person claim as heir to a survivor, if the ancestor was not in esse at the death of the first taker, so as to acquire the character of survivor? The thing appears absurd. It seems to us that no other presumption can arise in this case, but that the testator intended a personal benefit to the survivors, and that the superadded words which he has made use of do not repel that presumption."

And the language of Judge Pearson, in Hilliard v. Kearney, 45 N. C. 221, is equally emphatic:

"The argument fails, because there are no words showing an intention to give a preference to such of the daughters as died leaving children, except to the extent of making the shares absolute at their deaths. * * * There is this further objection: If the words 'other sisters' do not refer to the death of one, so as to be confined to the survivors, and is allowed to take in the others also, there is nothing to exclude such as had died without a child, which is absurd."

To the same effect are Threadgill v. Ingram, 23 N. C. 577; Zollicoffer v. Zollicoffer, 20 N. C. 574; Lowry v. O'Bryan, 4 Rich. Eq. 262, 57 Am. Dec. 727. In Spruill v. Moore, 40 N. C. 284, 49 Am. Dec. 428, the testator gave property to his daughters, naming them, as the sons are named in this will, and annexed this condition to the gift:

"If either of my * * * daughters should die without lawful issue, then and in that case, the survivors or survivor of my said daughters shall have all the said negroes and their increase forever."

The court, through Chief Justice Ruffin, said:

"There is no doubt that each of the daughters took a vested interest in the slaves, subject to be divested upon her death without leaving issue, and to go over as long as there was one or more of them who could take by survivorship."

One of the daughters died leaving a child, and, holding that a child could not represent the parent as a survivor, the court said:

"Although one may regret the exclusion of Mrs. Moore's child, yet the court cannot help it. * * * It is clear that the testator contemplated and intended to provide for the happening of the death of more than one of his daughters without issue, from the fact that the limitation over is, first, to the survivors, and, then, to the survivor in the singular. It is conclusive that the survivorship, as to the original portions, at least, was to continue on until a sole survivorship should happen, after which, of course, there was to be an end of the matter, as there could be no one else to take."

That case is almost identical with the case at bar in its facts, as the wording of the limitations in the two wills is practically the same, and one of the four daughters

died leaving a child to survive her, while here Matthew J. Ham left several children, but the plurality of issue can make no difference in the construction of the two wills. Holcomb v. Lake, 24 N. J. Law, 686, is a very instructive case upon the subject, and a strong authority in favor of our construction. The court there said:

It is suggested that "this is an *unreasonable* construction, because when the testator made his will both his daughters were married and had children, and that he could not have intended that if one should die before John, the other should take the whole estate, to the exclusion of her deceased sister's children, which would be the effect in such a case of this construction. But the answer to this is the word 'surviving' is here in the will, put here by the testator; he meant something by it, and that something was that such of his children who survived *somebody* should take, and such as did not survive should not take."

And it was further said, referring to Lessee of Westbrook v. Romeyn, Baldwin's R., 196, Fed. Cas. No. 17,428:

"There Abraham Van Campen conveyed lands to his son Moses, and to the heirs of his body lawfully begotten, or to be begotten; and in default of such issue, *then* to the *surviving* sons and daughters of Abraham in certain shares. And the court said, 'The word *then* denotes the time when the interest vests in them to be at his [Moses'] death, as well as the persons to take, that is, those who shall then be the survivors of Moses.' That 'as a general rule, words of survivorship relate to the time or event when the thing devised is to be distributed or enjoyed, and not to the time when the will took effect by the testator's death.'"

The case of Milsom v. Audrey, 5 Vesey, 465, is, if possible, even more analogous, and the words "survivors" and "survivor" were there construed according to their strict literal meaning, although such construction led to intestacy. It has been held that the shares of the third of the four nephews, who had died without issue, belonged exclusively to the survivor of them all, excluding the children of one who had previously died. Lee v. Stone, 1 Mees. & Wels. (Exch.) 673; Leeming v. Sherratt, 24 Eng. Ch. Rep. (2 Hare) 14; Prendergast v. Walsh, 58 N. J. Eq. 149, 42 Atl. 1049. We find the following clear statement of the doctrine in 1 Underhill on Wills, § 351:

"The question arises, in disposing of the shares of those who die *without issue*, whether the children of deceased legatees shall participate, or whether it is to go only to the actual *survivors of the original class*. The plain and strict signification of the word 'survivor' is one who outlives others, and in the above devise the word should receive its strict meaning, *excluding the children, and also the next of kin of those who have died before distribution*. This natural meaning will be given to the words, and those only will take as survivors who are living at the death of the others without issue, in the absence of anything in the will clearly showing that the testator has employed the word with any other intention. This rule of construction is applied to a limitation to survivors, though the testator has in fact expressly provided that the children of a deceased legatee shall take, by representation, the share which *their* parent had enjoyed. Though they may take *this*, they cannot take the share of one who has died without issue, for *that* goes to those only who survive the legatee so dying."

It appears from the will that the testator intended that there should be successive survivorships as between his four sons mentioned in the devises, for he directs that, at the death of each under age, or without leaving children to survive him, "then his *or their* share shall go to the others that are living"; and it may be that in the event named, his will was that the last survivor should take the interests of those who had thus died, though it is not material to decide whether it would go only to the last two survivors, instead of the last survivor, as Erastus, who was one of the last two survivors, devised his share to certain persons, who conveyed to the last survivor, Haywood D. Ham, Jr., but we are sure that there are no words in the will under which these plaintiffs, as children of Matthew J. Ham, can take as survivors, and this is sufficient to dispose of the case, without regard to the manner in which the last survivor of the four sons acquired the sole interest in the property that did not, under the terms of the will, go to the other brothers.

[3] We attach no importance to the difference of phraseology in the two devises. The word "without" was clearly omitted before the words, "leaving children surviving him," in the second devise, or the word "before" is implied, so that it should be "before arriving at the age of twenty-one," or "before," or "without leaving children surviving him," for if the son left children, the testator manifestly intended that they should take by *descent* from their father, though they could not take, as purchasers, under the will. Whitfield v. Garris, 134 N. C. 24, 45 S. E. 904.

The plaintiffs rely on the use by the testator of the words, "but not to any of my other children," which are annexed to the first gift to the four sons, but it is evident that these words were intended merely to free his meaning of any doubt, and to express more clearly his desire that none of his other children, for whom he had amply provided, should further participate in his bounty *under the will*, and thereby prevent the *surviving* sons from taking, however much "the other children," might get, by will or descent, from a brother whose interest had become indefeasibly vested in him.

[4] We may regret that we are forced to the conclusion that plaintiffs can take nothing, under the will, as survivors of the four sons, but the meaning of the testator is so obvious that we could not decide otherwise. There is no rule of higher obligation in the construction of wills than this—that the language of the testator must govern, unless there are clear indications of a contrary meaning to be found in the instrument, considering it all together. We must take care how we indulge in speculations as to the in-

tention of testators, our province being not to make wills for them as we may think they ought to be, but to interpret fairly and according to established rules of law such as they have made for themselves. A testator must be his own interpreter when he expresses himself in language free from obscurity, and which, as he employed it, conveys a certain and definite meaning, to the exclusion of any other. It may be that if the testator could have anticipated what has actually happened, he would have provided for such a contingency, but he does not appear to have done so, and it is not our duty, or our privilege, to supply the omission by reading into his will something that he did not see fit to put there. Holcomb v. Lake, supra; Bartholomew's Estate, 155 Pa. 314, 26 Atl. 550; Bender v. Bender, 226 Pa. 607, 75 Atl. 859, 131 Am. St. Rep. 1088.

We are unable to see any clear indication in this will that the testator did not intend to do just what he, in fact, did, according to the plain meaning of the language he has used, viz., confine his bounty to his surviving son or sons, irrespective of the issue of any deceased child. Mrs. Penny Ham, the widow of the testator, died in 1884, as admitted in this court, but this cannot affect the result, and only makes the case stronger, if possible, against the plaintiffs. See Holcomb v. Lake, 24 N. J. Law, 690.

It is unfortunate that a case of this kind should be tried on demurrer, but we can now see no facts, not stated in the record, which could possibly change the views we have expressed.

Affirmed.

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(168 N. C. 568)

## STANLAND et al. v. ROURK et al.

(No. 274.)

(Supreme Court of North Carolina. April 7, 1915.)

NEGLIGENCE ⟸18—FIRES—STATUTORY LIABILITY.

A person setting fire to his woods without giving two days' written notice, as required by Revisal 1905, § 3346, to adjacent property owners, is liable for damages caused by the fire to adjacent property, unless the right of notice is waived, though on the day of the setting out of the fire an oral notice is given.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 23; Dec. Dig. ⟸18.]

Appeal from Superior Court, Brunswick County; Allen, Judge.

Action by Minnie C. Stanland and others against Peter Rourk and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

There was evidence on part of plaintiffs tending to show that defendants, on or about March 17, 1911, set fire to their woods, adjoining a large body of land owned by plaintiffs as tenants in common, without giving the written notice required by the statute; that the fire was communicated to the lands of plaintiffs, doing considerable damage.

Defendants resisted recovery, insisting, chiefly, that H. G. Hewett, one of plaintiffs, had waived the giving of notice, and that such waiver on his part would prevent recovery for the damages caused, both as to him and his cotenants.

The jury rendered the following verdict:

"(1) Did the defendants give the plaintiffs two days' notice in writing of their intention to burn their own land? Answer: No.

"(2) Did the defendants set fire to and burn the lands of the plaintiffs? Answer: Yes.

"(3) What damages are plaintiffs entitled to recover by reason of the said burning? Answer: $350.00.

"(4) Did H. G. Hewett waive his rights to damage? Answer: No."

Judgment. Defendants excepted and appealed.

Robert Ruark, of Wilmington, for appellants. Cranmer & Davis, of Southport, for appellees.

HOKE, J. (after stating the facts as above). Our statute on this subject (Revisal 1905, § 3346) provides that:

"If any person shall set fire to any woods, except it be his own property, or, in that case, without first giving notice in writing to all persons owning lands adjoining to the woodlands intended to be fired, at least two days before the time of firing such woods, and also taking effectual care to extinguish such fire before it shall reach any vacant or patented lands near to or adjoining the lands so fired, he shall, for every such offense, forfeit and pay to any person who shall sue for the same fifty dollars, and be liable to any one injured in an action, and shall morecver be guilty of a misdemeanor."

The evidence of plaintiffs tends to show that Dan Hewett, one of plaintiffs, and tenant in common with the others, had especial charge and control of plaintiffs' property, adjoining the lands of defendants, on which the fire was set out, and that, on the morning of March 17, 1911, one Gaston Bennett, acting for defendants, came to Dan Hewett's store and told him the Rourks were going to burn their woods that afternoon, and he told Bennett it was then too late to fire woods, and that it was too dry, and forbade their doing it. About 4 o'clock he discovered woods were burned; fire having been set out by defendants, and great damage done to them.

There is no substantial denial of these facts, and, the testimony thus showing that defendants set fire to woodland adjoining plaintiffs' property, doing considerable damage thereto, and without giving the written notice required by the statute, plaintiffs have a clear right of action against defendants, unless such right has been in some way waived. On this question there was evidence on the part of defendants tending to show a waiver by H. G. Hewett, one of plaintiffs, and evidence contra on part of plaintiffs; and his honor, being of opinion that a waiver by H. G. Hewett, if established, would only

affect his own interest, submitted the issue in the form presented, and the jury have decided the question in plaintiffs' favor. This being true, we are not called on to determine when and to what extent a waiver by one tenant in common would bar the right of action by his cotenants.

On the facts and circumstances of this case, the court is inclined to concur in his honor's view (38 Cyc. p. 101), but, the jury, as stated, having found against the fact of waiver, the question of law is not presented.

On careful perusal of the record, we find no reversible error, and the judgment in plaintiffs' favor must be affirmed.

No error.

(168 N. C. 563)

## RING v. MAYBERRY. (No. 325.)

(Supreme Court of North Carolina. April 7, 1915.)

1. APPEAL AND ERROR ⟸843—SCOPE OF REVIEW—FORM OF INJUNCTION.

Where a grantee covenanted to build and maintain a stairway for use in connection with a building on an adjoining lot of the grantor, and after the destruction of a building on his lot by fire he was proceeding to put up a new building without erecting the stairway, if, as contended, the grantors' remedy was by a mandatory injunction to compel the building of the stairway and not by a preventive injunction against the construction of the building, this objection was obviated by a modification of a temporary restraining order to permit the erection of the building, provided space was left for the stairway until the final hearing of the suit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3341; Dec. Dig. ⟸843.]

2. COVENANTS ⟸68—COVENANTS RUNNING WITH THE LAND—BURDENS ON PROPERTY.

A covenant by a grantee to build and maintain a stairway for use in connection with a building adjoining a building on the lot conveyed was one running with the land and good against assignees in fee, as the acceptance of the deed containing the covenant was equivalent to the grant of an easement by the grantee.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 65, 66; Dec. Dig. ⟸68.]

3. EVIDENCE ⟸433—OMISSION OF COVENANT FROM DEED—PAROL EVIDENCE.

If a covenant by a grantee to maintain a stairway for the use of an adjoining building was omitted from a deed through mutual mistake, it could be corrected by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1990–2004; Dec. Dig. ⟸433.]

4. INJUNCTION ⟸150—TEMPORARY INJUNCTION—RELATIVE INCONVENIENCE FROM DENIAL OR GRANTING OF INJUNCTION.

In a suit to prevent the erection of a building without providing a stairway, as required by a covenant in a deed, where less inconvenience or detriment would be caused by requiring space to be left open for a stairway until the determination of the facts than by a denial of a temporary restraining order, an order so requiring was properly made.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 335; Dec. Dig. ⟸150.]

Appeal from Superior Court, Surry County; Lyon, Judge.

Action by J. W. Ring against J. S. Mayberry. From a judgment modifying and continuing a temporary restraining order, defendant appeals. Affirmed.

A. E. Holton, of Winston-Salem, and J. H. Folger, of Mt. Airy, for appellant. J. F. Hendren, of Elkin, and W. F. Carter, of Mt. Airy, for appellee.

CLARK, C. J. The plaintiff obtained a temporary restraining order to prevent the defendant from completing a brick store in Elkin, N. C., on the allegation that the defendant is under obligation to build a stairway between the defendant's building and one adjacent thereto owned by the plaintiff, and that he was proceeding to erect the building without any provision for such stairway. At the return of restraining order, the court modified the order so as to authorize the defendant to proceed with the construction of said building, "provided he shall, in the construction of the same, leave a space between the buildings of plaintiff and defendant, as described in the petition, sufficiently wide for the construction of the stairway, claimed by plaintiff, leading from the sidewalk to the second story of the plaintiff's said building, if on final hearing it shall be decreed that said stairway shall be built." And the restraining order, as thus modified, was continued to the hearing.

According to the affidavits for the plaintiff, he sold to one R. L. Poindexter the lot on which this building is now being erected with an agreement that said Poindexter should build a stairway from the sidewalk up to the second story of the building which has been erected by plaintiff on the lot and along the wall of plaintiff's building, at his (Poindexter's) cost; that plaintiff and his heirs and assigns should have the perpetual use of the said stairway for the benefit of plaintiff's building; that subsequent to this transaction R. L. Poindexter orally contracted to sell and convey said lot to the defendant, who entered into the same agreement as to the building of the stairway as had been made between R. L. Poindexter and the plaintiff; that the defendant, in completing the building, put up a stairway as agreed upon, but, the building and stairway being destroyed by fire in 1913, the defendant is now proceeding to put up the building without erecting said stairway.

When the building was put up by the defendant, the stairway was constructed, and at the request of R. L. Poindexter the plaintiff executed a deed to the lot to the defendant. The plaintiff avers that this deed contained a covenant that the building should contain said stairway for the use of the adjoining lot, and the plaintiff has no way of reaching the second story of his building, except by the stairway agreed to be built and maintained. The plaintiff further avers that the defendant, who received from him said deed, has failed to record the same, and that.

if this deed does not contain the said covenant, it was omitted by mutual mistake, and he asks, in that event, for the correction of the deed. The stairway was maintained by defendant and was used by the plaintiff for 14 years prior to the fire, without any objection on the part of the defendant, and without demanding any compensation for its use.

[1] The defendant contends that the remedy of the plaintiff is a mandatory injunction to compel the building of a stairway and not a preventive injunction against the construction of the building. This objection has been obviated by the modification which was made in the order permitting the erection of the building, leaving open a space for said stairway until the determination of the facts at the hearing.

[2] The defendant further contends that the plaintiff has shown no right to such order, and that the temporary injunction should have been dissolved. But this was a covenant running with the land. Aside from the express averment of the creation of the easement, the acceptance of the deed containing a covenant on the part of the grantee is equivalent to the grant of an easement by the defendant. Such covenants run with the land and are not at all unusual. They are good even against assignees in fee, where the intention to create them is clear. 11 Cyc. 1045b, 1058, 1059, 1091e, 1092; Norfleet v. Cromwell, 64 N. C. 1.

[3] If there were such covenant to maintain the stairway, and the same was omitted from the deed through the mutual mistake of the parties, it can be corrected by parol evidence. Adams, Eq. 348, 349, note; 2 Pomeroy, Eq. Jur. §§ 853, 857, 859, 866, 870. The evidence shows that this stairway was maintained by the defendant for use of the plaintiff for 14 years up to the fire.

[4] In a proceeding of this nature, much will depend upon whether the greater inconvenience will be suffered by denying or granting the restraining order to the hearing when the facts can be determined. High on Inj. (4th Ed.) § 13.

We think that, in view of the modification of the order made by the judge in continuing the injunction to the hearing, there was less inconvenience and detriment in requiring the space to be left open for the stairway until such determination of the facts, and the judgment is affirmed.

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(168 N. C. 548)

## MOTSINGER v. SINK. (No. 321.)

(Supreme Court of North Carolina. April 7, 1915.)

1. MALICIOUS PROSECUTION ⇐71—SUFFICIENCY OF EVIDENCE—"MALICE."

Evidence that defendant had plaintiff arrested three consecutive times on the same general charge, and that defendant was either discharged or found not guilty each time, is sufficient to take to the jury the question of defendant's malice in instituting the prosecutions, since "malice" does not necessarily mean ill will, anger, resentment or a revengeful spirit, but simply a wrongful act knowingly and intentionally done without just cause or excuse.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 160–167; Dec. Dig. ⇐71.

For other definitions, see Words and Phrases, First and Second Series, Malice.]

2. MALICIOUS PROSECUTION ⇐68 — DAMAGES —EXEMPLARY DAMAGES—ACTUAL MALICE.

To entitle plaintiff in malicious prosecution to punitive damages, he must show particular or actual malice or reckless indifference.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 157; Dec. Dig. ⇐68.]

3. MALICIOUS PROSECUTION ⇐23—ELEMENTS —WANT OF PROBABLE CAUSE.

To show malicious prosecution there must be not only malice but want of probable cause, which cannot be inferred from malice.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 39; Dec. Dig. ⇐23.]

4. MALICIOUS PROSECUTION ⇐19—ELEMENTS —"PROBABLE CAUSE."

In determining whether there was probable cause for the institution of a prosecution, the facts, as they appear to the prosecuting witness, must be considered, not the facts as they actually were, since "probable cause" is reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious man in believing that the person is guilty.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 25; Dec. Dig. ⇐19.

For other definitions, see Words and Phrases, First and Second Series, Probable Cause.]

5. MALICIOUS PROSECUTION ⇐71 — SUFFICIENCY OF EVIDENCE—PROBABLE CAUSE.

In an action for malicious prosecution of plaintiff on charges of false pretenses, evidence *held* sufficient to take to the jury the question whether defendant had probable cause to believe that plaintiff knew that the horse which he, as agent, sold to defendant, was mortgaged at the time.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 160–167; Dec. Dig. ⇐71.]

6. FALSE PRETENSES ⇐4—ELEMENTS.

To constitute the offense of "false pretenses," there must be a false representation of an existing fact calculated to deceive, and which does deceive, and is intended to deceive, by which one obtains value from another without compensation.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 1; Dec. Dig. ⇐4.

For other definitions, see Words and Phrases, First and Second Series, False Pretense.]

Appeal from Superior Court, Forsyth County; C. C. Lyon, Judge.

Action by Charlie Motsinger against Samuel A. Sink, for malicious prosecution. Judgment for the defendant on nonsuit, and plaintiff appeals. Reversed, and new trial granted.

The plaintiff, as an employé of one W. H. Ziglar, traded a horse to the defendant, upon which it is alleged one W. N. Cundiff held a chattel mortgage, given by the man from whom Mr. Ziglar had purchased the horse. A civil action had been brought by the de-

fendant against the plaintiff and others, and, after the termination of this action, the defendant, on the 19th day of April, 1913, caused a warrant to be issued by P. V. Critcher, judge of the recorder's court at Lexington, N. C., charging the defendant with disposing of mortgaged property in that "he assisted, aided, and abetted in the disposition and sale of the horse, knowing him to be mortgaged, with the intent to hinder, delay, and defraud the rights of the mortgagee," contrary to the provisions of section 3435 of the Revisal. Four days thereafter the plaintiff was arrested on this warrant by the sheriff of Forsyth county, and was held in bail in the sum of $200 for his appearance before the court at Lexington for trial on this charge. The trial was had on May 17, 1913, and at the close of the evidence a nol. pros. was entered by the solicitor for the state, and the plaintiff was discharged. On the same day, and after his discharge on that warrant, another warrant was issued, at the request and upon the affidavit of the defendant, by said P. V. Critcher, judge of the recorder's court, at Lexington, N. C., charging this plaintiff with the crime of false pretense, in that it was alleged that he had sold this horse to the defendant, Sink, knowing it was mortgaged, with intent to cheat and defraud him. The plaintiff was arrested on this warrant and held to bail in the sum of $250 for his appearance at the court in Lexington on May 19, 1913. The trial was had on that date, and at the close of the evidence for the state a motion was made by counsel for the defendant that the warrant be quashed, which motion was granted, and the defendant again discharged. On the same day, and after his discharge, the defendant similarly obtained a third warrant charging this plaintiff with a false pretense in the sale of the horse, and alleging substantially the same facts as in the second warrant. Upon this warrant the plaintiff was again arrested for the third time, on the 27th of June, 1913, and was required to give bail in the sum of $200 for his appearance at the court in Lexington to answer this charge. There were several continuances of the case on account of the serious illness of the plaintiff, which necessitated his being confined in the hospital for many weeks, and finally it was tried on the 8th day of October, 1914, when the plaintiff was adjudged "not guilty," and for the third time he was discharged. On the same day that he was discharged the last time, he brought this suit for malicious prosecution. These facts were testified to by the plaintiff, and he also swore that he was not guilty of any of the offenses with which the defendant had him charged. He also offered evidence which tended to show that he was a man of good character; that he had been put to considerable expense in counsel fees and otherwise, in attending these trials; and that he had suffered humiliation and mental anguish on account of being charged by the defendant with the crimes set out in the warrants. He also offered in evidence certified copies of the warrants, with the judgments of the court thereon, and rested his case. The defendant moved to nonsuit for that, as he contended, the plaintiff had failed to show that the prosecution for these various offenses was either malicious or without probable cause. The court sustained the motion to nonsuit, and dismissed the action.

The only exception and the only assignment of error in the record is directed to the ruling on this motion and to the order dismissing the action.

Louis M. Swink, of Winston-Salem, for appellant.

WALKER, J. (after stating the facts as above). [1] There is sufficient evidence in this case for the jury upon the question of malice. The meaning of that word, as used in defining what is malicious prosecution, is not necessarily ill will, anger, resentment, or a revengeful spirit, but simply a wrongful act knowingly and intentionally done the complaining party, without just cause or excuse. Stanford v. Grocery Co., 143 N. C. 419, 55 S. E. 815; Downing v. Stone, 152 N. C. 525, 68 S. E. 9, 136 Am. St. Rep. 841, 27 Ann. Cas. 753. It may be no more than the opposite of good faith.

Hale on Torts, 354, says that:

"Any prosecution carried on knowingly, wantonly, or obstinately, or merely for the vexation of the person being prosecuted, is malicious. Every improper or sinister motive constitutes malice, in this sense."

And Cooley on Torts, 338, says that:

"Legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive, and it is not essential that actual malevolence or a corrupt design be shown." Holder v. Manufacturing Co., 135 N. C. 392, 47 S. E. 481, and cases cited.

[2] If the object be to recover punitory or vindictive damages, particular or actual malice must be shown, something more than a mere injurious act committed without just or lawful excuse. Standford v. Grocery Co., 143 N. C. 419, 55 S. E. 815. The primary object of an action for damages is to recover compensation for the actual loss or injury sustained. The liability for punitive or exemplary damages, however, being for the purpose of punishment, or as an example, rests primarily upon the question of motive. And the jury are not at liberty to go beyond the allowance of a compensation, unless it be shown that the act was done willfully, maliciously, or wantonly, or was the result of a reckless indifference to the rights of others, which is equivalent to an intentional injury: and, when there is no proof that the injury was so inflicted, exemplary damages should not be allowed. Joyce on Damages, § 119; Wood v. Bank, 100 Va. 306, 40 S. E. 931; Gilreath v. Allen, 32 N. C. 67. The wrongful injury gives the right of action for com-

pensation, and the malicious or wicked motive adds to it such other damages, sometimes called smart money, as the jury may reasonably award, as an example to others or in vindication of the law. Holmes v. Railroad Co., 94 N. C. 318; Kelly v. Traction Co., 132 N. C. 369, 43 S. E. 923. This question is fully discussed in the above-named cases, with a citation of the authorities, and further comment on this branch of the law is unnecessary. It is clear that, within the principles stated, there is evidence here of what may be called legal malice sufficient to sustain the action for compensation in damages, if not of express or actual malice. We therefore pass to the other points.

[3] There must not only be malice, but a want of probable cause, for both must concur and are essential to every suit for a malicious prosecution. Malice may be inferred by the jury from a want of probable cause, but the converse is not true, that a want of probable cause may be likewise inferred from malice. Kelly v. Traction Co., supra; Newell on Malicious Prosecution, p. 265, § 3; Stewart v. Sonneborn, 98 U. S. 187, 25 L. Ed. 116; Sutton v. Johnstone, 1 T. R. 493; Foshay v. Ferguson, 2 Denio (N. Y.) 617; Murray v. Long, 1 Wend. (N. Y.) 140; Wood v. Weir, 5 B. Mon. (Ky.) 544.

[4] It should be borne in mind, when passing upon the question of probable cause, in such an action as this one, that those facts and circumstances alone, which were known to the prosecutor in the criminal action at the time he instituted the prosecution, are to be considered in determining whether he had a probable cause for the course he pursued in respect thereto. It is not the innocence of the plaintiff in the civil action, defendant in the other, nor facts tending to prove the same, that bear upon this question, for as Judge Daniel says in Swaim v. Stafford, 25 N. C. 289:

"The question of probable cause rested only on those facts and circumstances which were known to the prosecutor at the time he made his affidavit for the warrant."

See, also, Newell, p. 265, note, and cases; Foshay v. Ferguson, 2 Denio (N. Y.) 617; Delega v. Highly, 3 Bing. (N. C.) 950.

In Stacey v. Emery, 97 U. S. 645, 24 L. Ed. 1036, the court said, quoting from Justice Washington in Munns v. Dupont, 3 Wash. C. C. 37, Fed. Cas. No. 9,926:

" 'If malice is proved, yet if probable cause exists, there is no liability. Malice and want of probable cause must both exist,' to justify an action. He then defines probable cause in these words: 'A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.' Chief Justice Shaw defines it in similar language: 'Such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that the person is guilty.' Ulmer v. Leland, 1 Me. [Greenl.] 135 [10 Am. Dec. 48]. In Foshay v. Ferguson, 2 Denio [N. Y.] 617, the rule is laid down by Chief Justice Bronson, in the same language, with this addition: 'And such cause will afford a defense to a malicious prosecution, however innocent the plaintiff may be.' In that case there was evidence to justify a finding that the prosecution had been from a bad motive. This rule is so clear that it is not necessary to multiply authorities."

And in Delega v. Highley, 32 Eng. C. L. 398 (3 Bing. N. C. 950), which was an action brought for a malicious charge before a magistrate, the defendant pleaded that he had caused the charge to be made upon reasonable and probable cause, stating what the cause was. Upon special demurrer, the plea was held insufficient in not alleging that the defendant, at the time of the charge, had been informed of or knew the facts on which the charge was made.

"If the defendant," said Chief Justice Tindal, "instead of relying on the plea of not guilty, elects to bring the facts before the court in a plea of justification, it is obvious that he must allege, as a ground of defense, that which is so important in proof under the plea of not guilty, viz., that the knowledge of certain facts and circumstances which were sufficient to make him or any reasonable person believe the truth of the charge which he instituted before the magistrate, existed in his mind at the time the charge was laid, and was the reason and inducement of his putting the law in motion. Whereas it is quite consistent with the allegations in this plea that the charge was made upon some ground altogether independent of the existence of the facts stated in the plea; and that the defendant now endeavors to support the propriety of the charge, originally without cause, by facts and circumstances which have come to his knowledge for the first time since the charge was made."

So, also, the converse of this doctrine is true: If a defendant prove that, at the time of the arrest, he had reasonable cause to believe the plaintiff guilty, this cannot be rebutted by proof that afterwards he turned out to be entirely innocent. Foshay v. Ferguson, 2 Denio (N. Y.) 617. It may be important to inquire if the plaintiff was guilty of the offense charged against him, in the sense that, if he was, there could be no malicious prosecution (Galloway v. Stewart, 49 Ind. 156, 19 Am. Rep. 677), but the authorities are generally agreed that, if he was innocent, it can make no difference, where defendant acted upon the existence of such facts and circumstances as would constitute probable cause, and did not know of his innocence. Mr. Newell, in discussing this matter, says in his work on Malicious Prosecution, at page 252, §§ 1, 2:

"Reasonable or probable cause is defined to be such a state of facts in the mind of the prosecutor as would lead a person of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty. It does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution. In order to maintain the action for malicious prosecution, it is very clear that the plaintiff must aver and prove that the suit complained of was commenced and prosecuted without reasonable or probable cause, and that it was malicious. The groundlessness of the suit may, in many instances, be so obvious and palpable that the existence of malice may be inferred from it. The question of probable cause applies to the nature of the suit; and the point of inquiry is whether the defendant had proba-

ble cause to maintain the particular suit upon the existing facts known to him"—citing Wills v. Noyes, 29 Mass. (12 Pick.) 324, opinion by Chief Justice Shaw.

See Jones v. Phelps, 11 Ad. & El. 483, 489; Foshay v. Ferguson, supra; Harpham v. Whitney, 77 Ill. 32; Bacon v. Towne, 4 Cush. (58 Mass.) 217, 50 Am. Dec. 765.

The existence of probable cause does not therefore depend upon the plaintiff's actual guilt, for he may be ever so innocent, and yet if the defendant, in starting the prosecution, acted upon reasonable grounds and probable cause, he would not be liable even if he was inspired by malice and defendant was also innocent of the accusation.

[5] Applying these principles to the facts of this case, we find that there is an issue of fact raised by the pleadings and conflict of testimony. Plaintiff introduced in evidence the several affidavits and warrants in the criminal prosecutions before the recorder of Lexington, in which it is alleged that he made the false representation to the defendant that there was no lien or incumbrance on the horse. This evidence was offered for the purpose of showing that he had been prosecuted by the defendant for the crime mentioned in the papers, and perhaps it should have been confined to that purpose, but not deciding that question, and conceding that it should have been considered as proof upon the question of plaintiff's actual guilt and as tending to show probable cause, the defendant, testifying in his own behalf, denied his guilt, and stated that he did not know that the horse had been mortgaged and did not hear of it until after the sale; that he was acting as employé of Mr. Ziglar, who owned the horse, the mortgage having been made by a man from whom Ziglar had bought the horse. This evidence carried the case to the jury, and the nonsuit, under the statute, was improper. The questions raised by this evidence were whether the plaintiff had made the false representation with the intent to cheat defendant, and, if so, whether the defendant was deceived thereby.

[6] In order to constitute a false pretense, indictable under our statute, there must be "a false representation of a subsisting fact, calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing, or in words, or in acts, by which the defendant obtains value from another without compensation." State v. Phifer, 65 N. C. 321. The definition thus given in that case has been frequently approved by this court in subsequent cases, to be found in the Annotated Edition of the report. If the defendant did not know of the mortgage, how could he have had an intent to deceive by a false representation in regard to it, and, if he made no false representation about the mortgage, how could he be guilty of a false pretense, or how could the defendant have been deceived to his prejudice? The mere existence of the mortgage at the time of the sale did not make the latter a false pretense, unless the defendant was misled by something done or said by the plaintiff to his prejudice, and which induced him to part with his money. If the false representation was intentionally made to deceive, and defendant was influenced thereby to part with his money, there was probable cause, but the defendant appellant is entitled to have the question submitted to the jury, with proper instructions as to the elements comprised in the offense or false pretense. In Ross v. Langworthy, 13 Neb. 492, 14 N. W. 515, which is somewhat like our case in its facts, the court said:

"Probable cause is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused was guilty. Boyd v. Cross, 35 Md. 197; Cooper v. Ufterback, 37 Md. 282. The question of probable cause is one of law and fact, composing two distinct inquiries, the one for the jury to say what facts are proved, and it is for the court to say whether those facts constitute probable cause. Turner v. O'Brien, 5 Neb. 547, 548; Johns v. Marsh, 9 Rep. 143; Boyd v. Cross, 35 Md. 194. Probable cause does not depend upon mere belief, however sincerely entertained. Because, if that were so, any citizen would be liable to arrest and imprisonment without redress, whenever any person, prompted by malice, saw fit to swear that he believed the accused was guilty of the offense charged. The law, therefore, has imposed an additional ground, viz., such knowledge of facts as would induce a reasonable man to believe that the accused was guilty. Nothing short of this will justify the institution of a criminal charge against another. Cooley on Torts, 182. The defendant's own testimony shows very clearly that the object he had in causing the plaintiff's imprisonment was to aid him in collecting his debt, and not to vindicate public justice. The rule of law is that a prosecution instituted for any other purpose than that of bringing the party to justice shows a malicious motive. Johns v. Marsh, 9 Rep. 143; Mitchell v. Jenkins, 5 B. & Ad. 594. The reason is the prosecution was not instituted to vindicate the law and punish crime, but as a means of coercing the accused to comply with the wishes of the prosecutor."

If the plaintiff did not make the false representation, but was a mere agent of the owner, Mr. Ziglar, in making this sale, and knew nothing about the mortgage, we do not perceive how there could have been probable cause. If a man buys property which is subject to a lien, of which the seller is ignorant, and there is no deceitful misrepresentation as to the fact, and no fraudulent concealment of it, the buyer takes it at his own risk. He can protect himself by a warranty, and unless he is, in some way, deceived in regard to it, or otherwise taken advantage of or imposed upon, there is no criminal offense committed. The case should have gone to the jury, and at the next trial the defendant may be able to show by better proof that he had probable cause for what he did, or the plaintiff may acquit himself altogether of wrongdoing in the premises, and show that the defendant acted unreasonably and without probable cause. The evidence now is not very full, explicit, or satisfactory, but

we cannot say that there is no evidence of plaintiff's cause of action.

New trial.

(168 N. C. 570)

## McRAINEY v. VIRGINIA & C. S. RY. CO. (No. 279.)

(Supreme Court of North Carolina. April 7, 1915.)

1. RAILROADS ⟸482—ACTIONS FOR FIRE—PRIMA FACIE CASE.

Plaintiff, suing a railroad company for damages by fire, establishes a prima facie case, entitling him to have the issue of negligence submitted to the jury, where his evidence tends to prove that the fire originated from an engine of the company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1730–1732, 1734–1736; Dec. Dig. ⟸482.]

2. APPEAL AND ERROR ⟸866—JUDGMENT OF NONSUIT—EVIDENCE—REVIEW.

The court on appeal from a judgment of nonsuit can only determine whether there is any evidence which a jury ought to consider, giving the evidence the interpretation most favorable to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467–3475; Dec. Dig. ⟸866.]

3. NEGLIGENCE ⟸134, 136—EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

Negligence may be proved by circumstantial evidence, and, while it must do more than raise a possibility or conjecture, plaintiff is entitled to have it submitted to the jury, where, after a fair consideration of it, the more reasonable probability is in favor of negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267–270, 272, 273, 277–353; Dec. Dig. ⟸134, 136.]

4. RAILROADS ⟸484—FIRES—ACTIONS—EVIDENCE.

In an action for damages by a fire charged to have been started by defendant's engine and to have spread to plaintiff's property, evidence *held* sufficient to go to the jury on the question of the railroad's negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740–1746; Dec. Dig. ⟸484.]

Appeal from Superior Court, Robeson County; Cooke, Judge.

Action by John D. McRainey against the Virginia & Carolina Southern Railway Company, for damages by a fire set by defendant's engine. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial ordered.

Sinclair & Dye, of Fayetteville, for appellant. McLean, Varser & McLean, of Lumberton, for appellee.

ALLEN, J. [1] In actions against railroad companies to recover damages caused by fire, the plaintiff makes out a prima facie case which entitles him to have the issue of negligence submitted to the jury upon offering evidence tending to prove that the fire which caused him damage originated from the engine of the defendant (Hardy v. Lumber Co., 160 N. C. 116, 75 S. E. 855, 42 L. R. A. [N. S.] 759) and therefore the only question presented by this appeal is whether there is any evidence that the fire of which the plaintiff complains originated from the defendant's engine and passed to his land, causing him damage.

[2] We have no power to pass upon the weight of the evidence nor to determine whether it is sufficient to satisfy the jury; our duty being confined to the single inquiry as to whether there is any evidence which a jury ought to consider, giving the evidence the interpretation most favorable to the plaintiff, as we are required to do upon judgments of nonsuit.

[3] Negligence may be proven by circumstantial evidence, and, while it must do more than raise a possibility or conjecture, the plaintiff is entitled to have it submitted to the jury, if, after a fair consideration of it, the more reasonable probability is in favor of the plaintiff's contention. Henderson v. Railroad, 159 N. C. 583, 75 S. E. 1092.

In Fitzgerald v. Railroad, 141 N. C. 535, 54 S. E. 393, 6 L. R. A. (N. S.) 337, which was approved in the last case cited, the court stated the rule as to the proof required, as follows:

"It is very generally held that direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances, and it is well established that, if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. Thus in Shearman & Redfield on Negligence, § 58, it is said: 'The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence to rebut the presumption. It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's default, but this is going too far. If the facts proved render it probable that the defendant violated its duty, it is for the jury to decide whether it did so or not. To hold otherwise would be to deny the value of circumstantial evidence. As already stated, the plaintiff is not required to prove his case beyond a reasonable doubt, though the facts shown must be more consistent with the negligence of the defendant than the absence of it. It has never been suggested that evidence of negligence should be direct and positive. In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence, and, as that fact is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly on the fact of negligence—a kind of evidence which might not be satisfactory in other classes of cases open to clear proof. This is on the general principle of the law of evidence which holds that to be sufficient and satisfactory evidence which satisfies an unprejudiced mind.'"

[4] Applying this rule, we are of opinion there was some evidence as to the origin of the fire which ought to have been submitted to the jury. The fire occurred on the 6th of May, 1911, and there is evidence that the train passed the place where it was first seen at 10:45 a. m.; that the fire was not

seen until 2 o'clock; that there was combustible matter on the right of way of the defendant; that the fire was where the railroad crosses the swamp; that when the witness who first went to the fire reached it the fire had burned up the swamp 200 or 300 yards; that it burned slowly in the swamp and finally passed through it and onto the land of the plaintiff; that the wind was blowing from the railroad towards the plaintiff's land; that the fire had burned on the right of way of the defendant, and then continuously to the plaintiff's land; that the fire widened as it passed from the right of way, and one witness stated without objection "that the fire looked like it started on the right of way," and another witness "that it widened after it left the railroad track something like 20 yards wide burning on the right of way—that is, when it left the right of way, the wind carried it directly away from the railroad." There was no evidence of any other fire near the place of the burning on that day, and the only reference to any other fire, except that in the engine of the defendant, was as to a small fire in a part of the woods five or six days before.

From these circumstances, the inference may be drawn that the engine of the defendant set out the fire, and, although the fact that the fire was not discovered for more than three hours after the engine passed weakens the force of the evidence, it is not of sufficient import to justify withdrawing it from the jury.

In Caton v. Toler, 160 N. C. 105, 75 S. E. 929, the fire smoldered in some stumps for 24 hours before being communicated to the plaintiff's land, and the case was submitted to the jury upon the question of the defendant's liability, which was answered, however, in favor of the defendant; and in Deppe v. Railroad, 152 N. C. 81, 67 S. E. 262, the time between the passing of the defendant's train and the discovery of the fire was variously estimated to have been from three-quarters of an hour to an hour and three-quarters.

We refrain from discussing the evidence further, as the case is to be tried before a jury, and an argument in support of the position that there is some evidence might be understood as an expression of opinion as to its weight.

New trial.

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(168 N. C. 537)

## FOWLE v. McLEAN et al. (No. 42.)

(Supreme Court of North Carolina. April 7, 1915.)

1. LOGS AND LOGGING ⇐3—SALE OF STANDING TIMBER—FEE-SIMPLE ESTATE.

A deed conveying standing timber and giving the grantee power to cut and remove the same within a specified time creates a fee-simple estate, defeasible as to timber not cut and removed within the time.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6–12; Dec. Dig. ⇐3.]

2. JUDGMENT ⇐780—LIEN — PROPERTY SUBJECT TO—TITLE TO STANDING TIMBER.

An estate created by deed conveying standing timber, with a right to cut and remove the same within a specified time, is, while it exists, subject to the lien of a docketed judgment and to the ordinary methods of enforcing collection of the same as in other cases of realty.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1341, 1343–1349; Dec. Dig. ⇐780.]

3. MORTGAGES ⇐155—FRAUDULENT CONVEYANCES—"PURCHASER FOR VALUE."

A mortgagee in a mortgage to secure a present loan is a "purchaser for value," within Revisal 1905, §§ 961–964, defining what conveyances shall be void as to purchasers, and the same rule applies to a mortgage to secure a past indebtedness, except as to an estate or interest existent in the property conveyed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 355–359; Dec. Dig. ⇐155.

For other definitions, see Words and Phrases, First and Second Series, Purchaser for Value.]

4. MORTGAGES ⇐151—LIEN—PRIORITY.

A judgment duly docketed becomes a lien on standing timber subsequently acquired by the judgment debtor as soon as he acquires it, so as to be prior to a mortgage thereafter made by the debtor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 307, 309–311, 314–329, 332–336; Dec. Dig. ⇐151.]

5. JUDGMENT ⇐773 — LIEN—COMMENCEMENT—RELATION BACK.

A judgment will not be held to relate back to the first day of the term, so as to give it priority over a mortgage made since the term began to one taking it in good faith.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1333; Dec. Dig. ⇐773.]

6. PRINCIPAL AND SURETY ⇐198—CONTRIBUTION BETWEEN SURETIES—ENFORCEMENT.

A surety paying the debt after it has been reduced to judgment may preserve the judgment lien as against the principal and cosureties by taking an assignment to a third person as trustee for him and use the assignment to enforce his right against the principal or to compel contribution by cosureties.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 633–635; Dec. Dig. ⇐198.]

7. PRINCIPAL AND SURETY ⇐194—CONTRIBUTION BETWEEN SURETIES.

A surety paying a debt reduced to judgment is entitled to contribution from solvent cosureties, so as to place them all on an equality, where the principal debtor and other sureties are insolvent.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 605–623; Dec. Dig. ⇐194.]

Appeal from Superior Court, Beaufort County; Bond, Judge.

Action by S. R. Fowle against A. D. McLean, trustee, and others. From a judgment for plaintiff, defendants appeal. Modified.

The facts agreed upon are as follows:

"This cause coming on to be heard before the undersigned judge on the return to an injunction heretofore issued, the following facts are, by consent, found, and are agreed upon by the parties hereto as the facts in the case:

"(1) It is found as a fact that on November 11, 1911, summons was issued in favor of McKeel-Richardson Hardware Company against Washington Lumber Company, W. F. Harrell,

L. I. Moore, and J. R. Kessenger, and that service of summons was made on Washington Lumber Company and on W. F. Harrell on November 13, 1911, and on the defendant L. I. Moore on November 11, 1911, and on J. R. Kessenger November 29, 1911.

"It is further found as a fact that a duly verified complaint was filed in the office of the clerk of the superior court of Beaufort county on November 22, 1911, and that judgment by default final was taken against the Washington Lumber Company and W. F. Harrell at the December, 1911, term of the superior court of Beaufort county on the relief demanded in the complaint.

"It is further found as a fact that judgment by default final was taken against defendants Moore and Kessenger on June 12, 1912, and was docketed and indexed in the office of the clerk of the superior court of Beaufort county on said date. It is agreed between the parties to this controversy that the complaint in the suit of McKeel-Richardson Hardware Company v. Washington Lumber Company, Harrell, Moore, and Kessenger, and that the judgments in said action which were rendered at the December, 1911, term, and at the June, 1912, term, shall constitute a part of the case on appeal.

"It is further found as a fact, and is admitted by the parties, that the judgment which was rendered at the December, 1911, term of the superior court was duly docketed, indexed, and recorded, and that the judgment which was rendered at the June, 1912, term, was docketed, indexed, and recorded, and that said June term of court convened on May 27, 1912, and adjourned June 13, 1912.

"It is found as a fact that Harrell and Kessenger conveyed to A. M. Dumay, as trustee, to secure certain indebtedness, certain property or timber rights, a copy of one of the deeds to Harrell and Kessenger being set out herein and made a part of the statement of this case, it being further found as a fact, and agreed by all parties, that all of the deeds to Harrell and Kessenger are in the form similar to the copy set out herein; that the said deed from Harrell and Kessenger to A. M. Dumay, trustee, which was dated the 1st day of June, 1912, was duly filed for registration in the office of the register of deeds of Beaufort county on June 7, 1912.

"It is further found as a fact that A. M. Dumay, under the powers of sale contained in the deed of trust to him, advertised the timber rights which had been conveyed to him by Harrell and Kessenger, and sold the same to S. R. Fowle, plaintiff in this action, for full value.

"It is further found as a fact that the plaintiff, Fowle, purchased the property from A. M. Dumay, trustee, without notice in fact of the judgments which had been rendered in the case of McKeel-Richardson Hardware Company v. Washington Lumber Company et al., except such notice as was imposed upon him by law.

"It is further found as a fact that execution issued at the instance of the plaintiff in the suit of McKeel-Richardson Hardware Company v. Washington Lumber Company et al. against L. I. Moore, Washington Lumber Company and J. R. Kessenger; that the same was returned 'indulged by order of the plaintiff'; and that on December 16, 1912, 12 days after the issuance of the execution, L. I. Moore furnished A. D. McLean the money and requested him to pay the same to the plaintiff, and to take an assignment of the judgment from the plaintiff McKeel-Richardson Hardware Company to A. D. McLean, as trustee for L. I. Moore.

"It is further found as a fact that the defendant Harrell is not now a resident of the state of North Carolina, and has no property therein sufficient to satisfy an execution issued in the case of McKeel-Richardson Hardware Company v. Washington Lumber Company et al.; and it is a fact that J. R. Kessenger is dead, and that he left no estate on which an execution could issue.

"It is further found as a fact that Harrell is a citizen of the state of Georgia and receiving a salary of about $200 per month."

It appears from perusal of pleadings and judgment, in case of Hardware Co. v. Lumber Co., Harrell, and Moore et al., made a part of the case agreed, that the individual defendants, Harrell, Moore, and others, were liable as indorsers on the notes of the lumber company, and that said company was principal and primarily liable for the debt on which the judgment was rendered.

His honor, being of opinion that, on the facts presented, the judgment had been paid and satisfied by reason of the transaction between defendant Moore and the hardware company, the original creditor, and the lien thereof had been extinguished, entered judgment that present defendants be perpetually enjoined from issuing execution on said judgment or taking steps to enforce collection from the timber rights acquired by plaintiff from Harrell and Kessenger, and defendant excepted and appealed.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellants. Ward & Grimes, of Washington, N. C., for appellee.

HOKE, J. [1, 2] There are numerous decisions in this state to the effect that standing timber is to be considered as realty, and that a deed conveying such timber to the grantee, and giving power to cut and remove same within a specified period, creates a fee-simple estate in realty, not absolute, but defeasible as to all such timber as is not cut and appropriated within the time, and as the correct deduction from the position it was held, at the last term, in Williams v. Parsons, 168 N. C. 83, 83 S. E. 914, that such an estate, while it exists, is subject to the lien of a docketed judgment and to the ordinary methods of enforcing collection of the same, as in other cases of realty. Speaking to the subject in Williams Case, the court said:

"(1) We have held in numerous cases that these deeds for standing timber, as ordinarily drawn, convey a fee-simple interest in such timber as realty, determinable as to all such timber as is not cut and removed within the time specified in the deed, and that, while such estate exists, it is clothed with the same attributes and subject to the same laws of devolution and transfer as other interests in realty"—citing Bateman v. Lumber Co., 154 N. C. 248, 70 S. E. 474, 34 L. R. A. (N. S.) 615; Hornthal v. Howcott, 154 N. C. 229, 70 S. E. 171; Midyette v. Grubbs, 145 N. C. 88, 58 S. E. 795, 13 L. R. A. (N. S.) 278; Lumber Co. v. Corey, 140 N. C. 467, 53 S. E. 300, 6 L. R. A. (N. S.) 468; Hawkins v. Lumber Co., 139 N. C. 160, 51 S. E. 852.

"(2) This being true, we now see no reason why the sheriff's deed did not convey to plaintiff the interest of W. S. Morrison, at least the equity of redemption existent at the time the judgment was docketed, in January, 1907, and giving him the present right to enter and cut the timber for the remaining period of time

as against every one whose interests are now before the court. Mayo v. Staton, 137 N. C. 670, 50 S. E. 331; Revisal 1905, § 629."

And in the recent case of McKinney v. Street, 165 N. C. 515, 81 S. E. 757, the court held, in a well-sustained opinion by Associate Justice Brown:

"The rule of court, afterwards enacted into a statute (Revisal, §§ 574, 575), that all judgments entered during a term shall relate * * * to the beginning of the term, and be deemed to have then been entered, is to prevent advantage being taken by litigants who may have been fortunate enough to have first secured his judgment, and unseemly endeavor to get first to the ear of the court, and will not apply to a judgment obtained during a term of court subsequent by a day or a fraction of a day to the registration of a deed to lands, so as to affect the rights of an innocent * * * bona fide purchaser for value."

[3] Again, it is well established in this state that a mortgage to secure a present loan is to be considered a purchaser for value, within the meaning of both 13 Elizabeth, c. 5, and 27 Elizabeth, c. 4, Rev. §§ 961–964, and the same principle obtains in reference to mortgages and deeds of trust to secure a past indebtedness, except as to an estate or interest existent in the property conveyed. Sykes v. Everett, 167 N. C. 600–706, 83 S. E. 585; Branch v. Griffin, 99 N. C. 174–184, 5 S. E. 393, 398; Brem v. Lockardt, 93 N. C. 191; Moore v. Ragland, 74 N. C. 343; Potts v. Blackwell, 57 N. C. 58; s. c., 56 N. C. 449.

[4] On perusal of the facts presented, it appears that judgment by default final, in favor of the creditor, was taken at December term, 1911, of the superior court of Beaufort county against the lumber company, the principal debtor, and W. F. Harrell, one of the indorsers, and same was duly docketed and indexed, and judgment by default final against the other two individual defendants, Moore and Kessenger, on June 12, 1912, the term of court having commenced May 27, 1912, and same was duly docketed and indexed; that the property, this timber interest, was acquired by Kessenger and Harrell in February, 1912; that these owners mortgaged the same to Dumay on 1st day of June, 1912; that the mortgage was registered June 7, 1912; that same was thereafter duly foreclosed by sale under provision of the deed and plaintiff, Fowle, purchased for full value and without notice, and, applying the principles heretofore stated, it follows that the creditor's judgment, obtained and duly docketed in December, 1911, constituted a valid lien against the estate and interest of Harrell, a half owner of the timber, and that the judgment against Kessenger, owner of the other half interest, having been rendered after he had conveyed his interest to a purchaser for value and without notice, the same will not constitute a lien on such interest by relation to the first day of the term, and, as to that interest, the plaintiff is the owner, freed from any claim or lien by reason of the judgment.

[5] This being the status of the matter as to the judgment and lien existent in favor of the creditor, the question recurs as to the effect of the transaction between the defendant Moore and said creditor, and by which Moore, having advanced the money in payment of the claim, took an assignment of the judgment to McLean, trustee, for the purpose of preserving and enforcing collection according to the rights of the parties.

In 2 Black on Judgments, § 995, it is stated to be the general rule on this question:

"That payment of a judgment by one of two joint defendants operates as a satisfaction and extinguishment of the judgment, and the defendant cannot take an assignment of it or be subrogated to the rights of the creditor as against his codefendant or keep the judgment alive in any manner or for any purpose"—citing, among other cases. Dunn v. Beaman, 126 N. C. 764, 36 S. E. 174, and Towe v. Felton, 52 N. C. 216.

And substantially the same statement is given in 23 Cyc. p. 1470, as follows:

"Under this rule it is not competent for one joint defendant, on payment of a judgment, to take an assignment of it, so as to wield it against his codefendant; and it is none the less extinguished by the payment, although such assignment be made."

Whether this should be regarded as the proper rule in this jurisdiction, where the rights of parties on legal and equitable principles are now administered in one and the same court, it is not necessary to determine, for it has long been recognized with us and so held in numerous decisions that a surety, on paying a judgment, may preserve the lien as against the principal by taking an assignment to a third person for his benefit, and it has been expressly held that he may do this also as to his cosureties and use it to collect the proportionate part that may be due him in enforcing an equality of obligation between them. Peebles v. Gay, 115 N. C. 38, 20 S. E. 173, 44 Am. St. Rep. 429; Rice v. Hearne, 109 N. C. 150, 13 S. E. 895; Barringer v. Boyden, 52 N. C. 187.

In many of the courts of this country, most of them, the principle prevails without resorting to an assignment. See case of Nelson v. Webster, 72 Neb. 332, 100 N. W. 411, reported with a very full and learned note on this subject in 68 L. R. A. 513, 117 Am. St. Rep. 799. But in this state the rule is that an assignment to a third person must be taken in order, as stated, to preserve the lien of the judgment. Tripp v. Harris, 154 N. C. 296, 70 S. E. 470, 35 L. R. A. (N. S.) 348, and cases cited.

In Jones v. McKinnon, Adm'x, 87 N. C. 294, in which it was held that a surety could only keep a judgment alive as against a principal, and in several other cases, as in Towe v. Felton, Adm'r, in which like intimation was given, the suits were regarded and dealt with as actions at law in which only the enforcement of strictly legal rights was permissible, but, if these cases were ever sound, they should not now prevail, and we

think the position announced in Peebles v. Gay and that line of cases is more in accord with our present more liberal system of procedure, in which both legal and equitable rights are administered in same action and in one and the same court. Speaking to this question in the Peebles Case, the court, among other things, said:

"Upon general principles of equity a surety, paying the debt of his principal, was entitled to be substituted to all the rights of the creditor in the premises, as to collaterals, and could enforce the same in a court of equity. This is the doctrine of subrogation, and in it is included the right of the surety, on payment of the judgment, to have an assignment of the same to a trustee for his benefit. Indeed, it was early laid down by our court that the only way for a surety to preserve the lien of the judgment against his principal in his own favor was, upon payment by him of the same, to have the judgment assigned to a trustee for his use. If he permitted the judgment to be satisfied without an assignment, the remedy of subrogation was lost. * * *"

And again:

"In some jurisdictions these equitable rights are administered without an actual assignment. 2 Brandt on Suretyship, 309. Upon the same principle of equity and natural justice the right of one surety to compel contribution of another exists, and might have been enforced in a court of equity, as also might the right of one surety to the benefit of an indemnity given by his principal to another surety. * * * And it is broadly stated in Brandt on Suretyship, supra, that: 'A surety who pays his principal's debt is entitled to be subrogated to all the rights and remedies of the creditor against the cosureties in the same manner as against the principal.' This is founded in reason and justice, and up to the adoption of our present Constitution was enforced in the courts of equity. Article 4, § 1, of the Constitution, abolished the distinction between actions at law and suits in equity, leaving such rights and remedies to be enforced in the one court, which theretofore had administered simple legal rights."

[6, 7] In reference to the amount to be recouped by the surety in this instance, under our former system, a surety was liable for his aliquot proportion, to be ascertained by the number of cosureties, and without regard to their solvency or the availability of their property, but in a court of equity and the principles now regarded as controlling, the liability of sureties is made dependent on the principle of equality arising out of a common risk, and, in case of insolvency or nonresidence, these rights are adjusted by reference to the number of sureties who are solvent or have property available to process within the jurisdiction of the court. Powell v. Matthis et al., 26 N. C. 83, 40 Am. Dec. 427; Brandt on Sureties (3d Ed.) § 314. From the facts in evidence, it appears that the principal is insolvent; that the cosurety, Kessenger, is also insolvent and has died, leaving no property available to the payment of the judgment or any part of it, and, under the principles heretofore stated, we are of opinion, and so hold, that the defendant Moore, in taking an assignment of the judgment to a trustee, has preserved the right to enforce collection to the extent of one-half the amount against the timber interest formerly belonging to his cosurety, Harrell, the same having been conveyed, subject to the lien of the judgment. The judgment below will be modified in accordance with this opinion, and defendant Moore allowed execution for one-half the debt against the timber interests of Harrell in the property which became subject to the liens. The costs of appeal will be divided.

Modified.

(168 N. C. 531)

## LLOYD v. TOWN OF VENABLE. (No. 317.)

(Supreme Court of North Carolina. April 7, 1915.)

1. EMINENT DOMAIN ⟸9 — DELEGATION OF POWER—NECESSITY OF LEGISLATIVE AUTHORITY.

As Priv. Laws 1911, c. 315, incorporating the town of Venable, provides merely that taxes shall be used in defraying the expenses of the town and in repairing streets and sidewalks and keeping them in good order without authorizing the condemnation of land for streets, and as there is no provision in the general law for the condemnation of land for streets by cities and towns, such town had no authority to condemn land for a street, as a municipal corporation has no such authority unless conferred upon it by the Legislature expressly or by necessary implication.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 27–34; Dec. Dig. ⟸9.]

2. EMINENT DOMAIN ⟸270 — REMEDIES OF PROPERTY OWNERS—TAKING WITHOUT CONDEMNATION.

As a town, though it had no authority to condemn land for streets, could contract for the purchase of land necessary for street purposes, where it authorized its agents or servants to enter on plaintiff's land and lay out a street, plaintiff could waive the wrongful entry and the want of power to condemn and sue for just and reasonable compensation for the property taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 706–716, 741; Dec. Dig. ⟸270.]

3. EMINENT DOMAIN ⟸270 — REMEDIES OF PROPERTY OWNERS—TAKING WITHOUT CONDEMNATION.

Where an owner of land appropriated for a street by a town having no power of eminent domain sued for compensation for his damages, he consented to the taking of the land so as to entitle him to maintain such suit.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 706–716, 741; Dec. Dig. ⟸270.]

4. EMINENT DOMAIN ⟸270 — REMEDIES OF PROPERTY OWNERS—RECOVERY OF COMPENSATION.

The right to just compensation for property taken for a public purpose exists even though no express provision may be found in the Constitution authorizing it or requiring it to be made and extends to property taken by a municipal corporation having no power of eminent domain where the owner consents to the taking.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 706–716, 741; Dec. Dig. ⟸270.]

5. EMINENT DOMAIN ⟸297—ASSESSMENT OF COMPENSATION—EVIDENCE.

In an action for compensation for land appropriated by a town for a street, a question

asked a witness as to an offer by him to buy plaintiff's land was competent, if at all, only to contradict him or to impeach his estimate of the value of the land.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 807; Dec. Dig. ⊂⊃297.]

6. EMINENT DOMAIN ⊂⊃307 — ACTION FOR COMPENSATION — INSTRUCTION — STATING CONTENTIONS OF PARTIES.

In an action for compensation for land taken for a street it was proper for the court in its charge to state the contentions of the parties.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 820–824; Dec. Dig. ⊂⊃307.]

7. TRIAL ⊂⊃233—ISSUES—SUFFICIENCY OF ISSUES SUBMITTED.

Where the issues submitted are sufficient to present all controverted matters to the jury, this is all that is required.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 527–530; Dec. Dig. ⊂⊃233.]

8. EMINENT DOMAIN ⊂⊃96—ASSESSMENT OF COMPENSATION—MEASURE OF DAMAGES.

The owner of land part of which was appropriated by a town for a street was entitled to the value of what was taken and to any diminution in value of the remainder.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 245–249; Dec. Dig. ⊂⊃96.]

Appeal from Superior Court, Orange County; Foushee, Judge.

Action by B. H. Lloyd against the Town of Venable. Judgment for plaintiff, and defendant appeals. Affirmed.

Jno. W. Graham and Alexander H. Graham, both of Hillsboro, for appellant. A. H. Koonce, of Chapel Hill, and Bryant & Brogden, of Durham, for appellee.

WALKER, J. [1-3] This action was brought by plaintiff to recover damages of the defendant for having taken and appropriated a part of his land in the town for the purpose of opening a street. The town of Venable (now Carrboro) was incorporated by Private Laws of 1911, c. 315. There is no provision in its charter for condemning land for streets, though there is a provision that the taxes shall be used in defraying the expenses of the town, "and in repairing streets and sidewalks and keeping them in good order." Nor is there any provision in the general law for the condemnation of land for streets by cities and towns, the provision in regard to streets being substantially the same in the general law as in the charter of defendant. The first position of defendant is that the common-law remedy of trespass for the taking of property for public purposes is superseded by the statutory remedy, and for this contention he cites numerous cases. McIntire v. Railroad, 67 N. C. 278; Land v. Railroad, 107 N. C. 72, 12 S. E. 125; Dargan v. Railroad, 131 N. C. 625, 42 S. E. 979; Abernethy v. Railroad, 150 N. C. 107, 63 S. E. 180. But in all those cases provision had been made for condemnation, including compensation. It was therefore very correctly held that the remedy of the statute was exclusive. But, when no such remedy is given, the landowner, where property has been taken for the laying out of streets, may resort to his common-law action for compensation; otherwise he would be without remedy. "The right of eminent domain," as said in 15 Cyc. 567, "is one which lies dormant in the state until legislative action is had pointing out the occasion, mode, conditions, and agencies for its exercise, and the right to exercise the power must be conferred by statute, either in express words or by necessary implication. The power should not be gathered from doubtful inferences, but should be unmistakably expressed," or, as above stated, clearly and necessarily implied. There is no inherent power residing in a municipality to condemn property for its uses. 4 McQuillin on Mun. Corporations, § 1459. We have held, approving the principle as stated in 1 Lewis on Eminent Domain, § 240, that:

"The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. If the act is silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that the Legislature intended that the necessary property should be acquired by contract. Thus the authority to construct and maintain booms or bridges does not carry with it the right to condemn property. If the act makes no provision for compensation, it is presumed that the Legislature did not intend that the power of eminent domain should be exercised." Commissioners v. Bonner, 153 N. C. 66, 68 S. E. 970.

The subject is fully discussed by Justice Hoke in that case, and many cases are cited in support of the doctrine. The following authorities may be added:

"It requires legislative action, embodied in the form of a statute, to confer a right to appropriate private property, for the Constitution does not either create or execute the right of eminent domain. It is only called into exercise by the ruling power, and with us that is the Legislature, acting under the Constitution and in accordance with its terms." Elliott on Roads and Streets (Ed. of 1890) 148.

"While it is true the Legislature, in the charter of the city of Waycross, granted power to the municipality to lay out and open streets, * * * it did not grant power to take or damage private property for the purpose, or to provide by ordinance for assessing or otherwise ascertaining the amount of compensation." B. & W. R. Co. v. Waycross, 94 Ga. 102, 21 S. E. 145.

"The right which a municipality has to take or damage private property for public use is no greater, because it has an element of sovereignty in it, than is that of any other corporation having the eminent domain power. No milder or more liberal rule of interpretation of the Constitution will be indulged in where the taking or damaging is done by a municipality than is to be applied to all alike." Jackson v. Williams, 92 Miss. 301, 46 South. 551.

"No principle of law is better settled than that a municipal corporation can only exercise the right of eminent domain when conferred upon it by the Legislature, expressly or by necessary implication, since a municipal corporation has no more right than any other corpora-

tion to condemn property." McQuillin on Mun. Corp. § 1459.

There is no express or implied authority in defendant's charter to condemn land for streets, and the entry upon the plaintiff's property was therefore unlawful; but as the town authorities could contract for the purchase of the land necessary for its purposes, and as it authorized the entry, the plaintiff can waive the tortious entry and the want of power to condemn, and recover a just and reasonable compensation for the property taken, and this remedy is based upon the reason that there is an implied assumpsit by the town that, as it has taken the property of the plaintiff and applied it to its own use and has received and enjoyed the benefit of its use and appropriation, it should pay therefor its reasonable value, and the law, recognizing its duty, implies a promise on its part to do what, in equity and good conscience, should be done. Referring to a similar case, the court said in United States v. Lynah, 188 U. S. 445, 465, 23 Sup. Ct. 349, 355, 47 L. Ed. 539, 546:

"The government may take real estate for a post office, a courthouse, a fortification, or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited, as well as of many others. The action which was taken, resulting in the overflow and injury to these plaintiffs, is not to be regarded as the personal act of the officers, but as the act of the government. That which the officers did is admitted by the answer to have been done by authority of the government, and, although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the government did, acting under its direction, resulted in an appropriation, it is to be treated as the act of the government. South Carolina v. Georgia, 93 U. S. 4, 13, 23 L. Ed. 782, 784; Wisconsin v. Duluth, 96 U. S. 379, 24 L. Ed. 668; United States v. Great Falls Mfg. Co., 112 U. S. 645, 5 Sup. Ct. 306, 22 L. Ed. 846."

See, also, Boise Valley Constr. Co. v. Kroeger, 28 L. R. A. (N. S.) page 968, where an elaborate and valuable note on this question will be found; Smith v. Chicago, 107 Ill. App. 270, 280.

The taking in this case was by the town, although the actual work of laying out and opening the street may have been performed by its agents or servants, who acted in pursuance of its direction. As we construe the verdict, in the light of the evidence and the charge of the court, the plaintiff consented to the taking of his land, but reserved the right to just and adequate compensation for the loss and injury to him. Whether he did so or not, his present action implies such a consent on his part, and he will not be heard to assert the contrary, nor do we understand that he does so, but he is now willing to the appropriation if proper compensation is allowed.

[4] The right to a just compensation for property taken by the sovereign or by any corporation possessing a part of the sovereign power springs from our sense of natural justice and "is a principle so salutary to the citizen and concerns so nearly the character of the state" that this court, in Railroad Co. v. Davis, 19 N. C. at page 460, declared it to be an essential restriction upon the exercise of the power of eminent domain, even though no express provision may be found in our Constitution authorizing it or requiring it to be made, when property is so taken for a public purpose, and we have adhered to this rule ever since. State v. Hainey, 84 S. E. 385, at this term. By analogy, the owner who consents to a taking of his property, when no legal right or power to do so exists, should receive the same measure of justice as in the other case where the power does exist. The owner's consent, express or implied, will have the force and effect of a transfer to the defendant of the property taken, to the extent as held in White v. Railroad Co., 113 N. C. 621, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639, upon substantially similar facts. This ruling should not be open to objection by the defendant, as it is permitted thereby to acquire the right of using the street in the exercise of its corporate functions and for the benefit of the public it represents, which it could not have done without the plaintiff's consent, and it cannot well be argued that it should not make fair recompense in money for the benefit it has thus received. The defendant very properly did not contest the plaintiff's right to compensation in its brief, or in the argument before us, but mainly relied upon the position that the town had the right of condemnation, and that his remedy therefore was special and must be sought in proceedings instituted for that purpose, and not by a separate civil action. This position we have held to be untenable, and for the reasons given. 4 McQuillin on Mun. Corp. § 153.

[5-8] We have not been able to discover any error in the charge as to the damages. The court instructed the jury to consider the benefits derived by the plaintiff from the opening of the street, and in this respect gave the defendant the full advantage of any deduction on that account, as if it had the right to condemn and had proceeded regularly in doing so. The question asked the witness C. G. Cates, as to his offer to buy the lot, was competent, if at all, only to contradict him or to impeach his estimate of the value, and for this purpose it was admitted. 2 Lewis, Em. Dom. (3d Ed.) § 666; Abbott's Proof of Facts (3d Ed.) p. 875; Hine v. M. R. Co., 132 N. Y. 477, 30 N. E. 985, 15 L. R. A. 591; Sherlock v. Railroad Co., 130 Ill. 403, 22 N. E. 844; Atkinson v. Railroad Co., 93 Wis. 362, 67 N. W. 703. It was proper to state the contentions of the parties, and we do not see that either party was given any

advantage over the other; but the charge, on the contrary, appears, in all particulars, to have been full, clear, and impartial. Clark v. Railroad Co., 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749; State v. Cox, 153 N. C. 638, 69 S. E. 419; Jeffress v. Railroad Co., 158 N. C. 215, 73 S. E. 1013; State v. Blackwell, 162 N. C. 672, 78 S. E. 316; State v. Fogleman, 164 N. C. 458, 79 S. E. 879. The issues were sufficient to present all controverted matters to the jury, which is all that is required. Tucker v. Satterthwaite, 120 N. C. 119, 27 S. E. 45; Lumber Co. v. Lumber Co., 135 N. C. 744, 47 S. E. 757; Alford v. Moore, 161 N. C. 382, 77 S. E. 343. The jury found against the defendant as to its agreement with the plaintiff, and therefore the question of estoppel, which has been discussed in the briefs, does not arise. The other exceptions do not require any separate comment. It seems to us that the court laid down the correct rule in regard to the measure of plaintiff's compensation. He is entitled to the value of what was taken, and to any diminution in value of the remainder, or, what is the same thing, to the difference in value before and after the street was opened. 15 Cyc. 687; Liverman v. Railroad Co., 114 N. C. 695, 696, 19 S. E. 64; Brown v. Power Co., 140 N. C. 333, 52 S. E. 954, 3 L. R. A. (N. S.) 912.

We have not discussed the question whether defendant was entitled to a deduction for benefits received by plaintiff from the opening of the street, as this part of the charge was favorable to defendant, and the plaintiff did not appeal. The court subtracted from the total damages, as assessed by the jury, the amount of benefits derived by the plaintiff, to wit, $164, permitting judgment only for $400, the reduced amount. The verdict seems to be fair, at least to the defendant.

No error.

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(168 N. C. 530)

THOMPSON et al. v. BATTS et al. (No. 69.)

(Supreme Court of North Carolina. April 7, 1915.)

WILLS ⊂⊃497—CONSTRUCTION—DESIGNATION OF DEVISEE OR LEGATEE—"CHILDREN."

A testator provided that his residuary estate should be equally divided between his wife and children, with the exception of two of the children, "hereby giving to my granddaughter L. half share of my personal estate." The will also contained a devise for life to a daughter, who was then dead, with remainder to her children, and a provision in another item that, where an estate was left for life, with remainder to children, the testator meant that those who might die leaving issue before his death should be represented by such issue and take their share, but that, should any die without issue, such as survive should take. *Held* that, as it clearly appeared that the testator understood the distinction between children and grandchildren, the word "children," in the item disposing of the residuary estate, did not include grandchildren, the children of a deceased child.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1080–1086; Dec. Dig. ⊂⊃497.

For other definitions, see Words and Phrases, First and Second Series, Child.]

Appeal from Superior Court, Wilson County; Ferguson, Judge.

Action by T. J. Thompson and others against Mrs. Nancy Batts and others. From the decree, certain defendants appeal. Affirmed.

See, also, 84 S. E. 347.

W. A. Finch and H. G. Connor, Jr., both of Wilson, for appellants. F. A. & S. A. Woodard, of Wilson, and Jacob Battle, of Rocky Mount, for appellees.

ALLEN, J. The determination of the plaintiffs' appeal leaves open only one question on the appeal of the defendants, and that is whether the word "children," as used in the fourteenth item of the will of Alfred Thompson, includes grandchildren. This question was very fully considered and the authorities reviewed by Justice Connor in Lee v. Baird, 132 N. C. 755, 44 S. E. 605, in which he says:

"Certainly the use of the words 'all of my children' by the testatrix is free from ambiguity, and the uniform current of authority in this and other courts sustains the proposition that they will not be construed to include grandchildren, unless from necessity, which occurs when the will would be inoperative unless the sense of the word 'children' were extended beyond its natural import, and when the testator has clearly shown by other words that he did not use the term 'children' in the ordinary actual meaning of the word, but in a more extensive sense; that this construction can only arise from a clear intention or necessary implication, as where there are no children, but are grandchildren, or where the term 'children' is further explained by a limitation over in default of issue."

The only fact appearing upon the record which might lead to a different conclusion is that there is a devise to Elmira Eatman, one of the children of the testator, who was dead at the time of making the will, for life, with remainder to her children; but it appears in the seventeenth item that provision was made for such contingencies, as the testator there says:

"In all cases where I have left the estate for life, remainder to children, I mean that those who may die leaving issue before my death shall be represented by such issue and take their share, but should any die without issue, such as survive shall take."

It also appears, as was said in Mordecai v. Boylan, 59 N. C. 366, that "the testator clearly shows by his will that he understood the distinction between children and grandchildren," because in the fourteenth item, after providing "that the residue of my estate, both real and personal, shall be equally divided between my wife and children, except George W. Thompson and T. J. Thompson," he also says, "hereby giving to my granddaughter,

Lena Thompson, half share of my personal estate."

We are therefore of opinion that grandchildren were not included among the devisees under the designation "children."

Affirmed.

(168 N. C. 573)

## GUTHRIE v. CITY OF DURHAM.

(No. 316.)

(Supreme Court of North Carolina. April 7, 1915.)

1. PARTIES ⇐51—MAKING OF NEW PARTIES MULTIPLICITY OF ACTIONS.

Where plaintiff sued defendant city for injuries received from falling into an excavation opened by a property owner, the city's motion to join such owner as defendant was improperly denied, for, although the making of new parties defendant, where they are not necessary parties, is within the discretion of the trial court, nevertheless multiplicity of actions is to be avoided, and the fact that the city, having recourse over against the property owner, has not the same interest as he to defend, renders it but just that he should have opportunity to be heard against the plaintiff.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 77–82; Dec. Dig. ⇐51.]

2. INDEMNITY ⇐13—JOINT TORT-FEASORS—INDEMNITY FROM ONE PRIMARILY LIABLE.

In an action against a city for injuries by a fall into an excavation opened by a property owner, the city had a right of action over for indemnity against such owner; for, although the general rule is that there is no contribution between joint tort-feasors, nevertheless there are two exceptions: (1) Where the party claiming indemnity was only technically or constructively at fault; and (2) where both parties, though at fault, were not guilty of the same fault, that of the party from whom indemnity is claimed having been the primary and efficient cause of the injury, in the present case the owner's fault having been the creation of the nuisance, and the city's fault having been its failure to abate it in the exercise of its duty to care for the public streets.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29–35; Dec. Dig. ⇐13.]

Hoke and Allen, JJ., dissenting.

Appeal from Superior Court, Durham County; Daniels, Judge.

Action by William Carr Guthrie against the City of Durham. From a denial of its motion to make one Lloyd a party defendant, the defendant appeals. Reversed.

Charles Scarlett and Victor S. Bryant, both of Durham, for appellant. Fuller & Reade, of Durham, for appellee.

CLARK, C. J. This is an appeal from the refusal of the court to grant the motion of the defendant to make A. E. Lloyd a party defendant.

The plaintiff, who was an infant 11 years of age at the time of the injury complained of, brings this action against the city of Durham for damages caused by its alleged negligence in permitting a dangerous excavation, immediately adjoining one of its streets, to be insufficiently guarded and protected, alleging that this negligence resulted in injuries to the plaintiff. A. E. Lloyd, who was owner of the lot upon which the excavation was done, in excavating the foundations for his building, desiring an entrance through the sidewalk to his basement, excavated under the width of the sidewalk for the whole extent of his lot. It appears from the answer that Lloyd erected a plank fence across the sidewalk and along the edge of the street to prevent those using the sidewalk from falling into the excavation. This fence was 4½ feet or 5 feet high. On Sunday, August 2, 1914, there was a heavy rainfall, which caused the dirt sustaining this fence to give way. Those in charge of the work were engaged in making the fence more secure when the plaintiff rode up on his bicycle and leaned against the fence. When warned to leave, he did not do so, but leaned against the fence, which gave way, tumbling him and his bicycle into the excavation, and in falling his arm became entangled in the bicycle and was broken.

The city of Durham, upon the allegations set up in its answer, moved to have A. E. Lloyd made a party. Upon notification of said motion, Lloyd appeared, and asked to be made a party, that he might make his defense, but the court declined the motion, and the defendant excepted.

[1] The making of new parties defendants where they are not necessary is a matter within the discretion of the trial judge, and his refusal is not reviewable. Aiken v. Mfg. Co., 141 N. C. 339, 53 S. E. 867. But in this case, if there should be a recovery against the defendant, the city of Durham, A. E. Lloyd would be liable to the city, and it could recover in an action against him. It is the policy of the law to determine a controversy in one action, rather than several, when it can be done. Besides, A. E. Lloyd is entitled to a day in court, and it is but just that he should have an opportunity to defend the suit against the city in order to defeat a recovery, or to reduce the amount for which he must answer over, by setting up his defense in his own way and through his own counsel. The city has not the same interest in defeating the action, or in reducing the amount, if it can recover over against a solvent party. This has been fully discussed and settled in several cases. Dillon v. Raleigh, 124 N. C. 184, 32 S. E. 548; Brown v. Louisburg, 126 N. C. 701, 36 S. E. 166, 78 Am. St. Rep. 677; Raleigh v. Railroad, 129 N. C. 265, 40 S. E. 2; Gregg v. Wilmington, 155 N. C. 18, 70 S. E. 1070.

The discussion in Gregg v. Wilmington, supra, is very full and elaborate, citing authorities from the federal Supreme Court and several states, as well as those from North Carolina. Walker, J., says: "The Code contemplates this method of trial to avoid circuity and multiplicity of actions."

[2] It is true that there is no contribution between tort-feasors and that ordinarily, where there is a recovery against one joint

tort-feasor sued alone, he cannot recover of the other tort-feasors. But there is an exception when, as in this case, Lloyd is primarily liable, if there was negligence, and the city secondarily so. In the Gregg Case Walker, J., points out that the exceptions to the rule that there is no contribution among joint wrongdoers is subject to two exceptions:

"(1) Where the party claiming indemnity has not been guilty of any fault except technically or constructively, as where an innocent master is held to respond for the tort of his servant, acting within the scope of his employment; or (2) where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury. Very familiar illustrations of the second class are found in cases of recovery against municipalities for obstructions to the highways caused by private persons. The fault of the latter is the creation of the nuisance; that of the former the failure to remove it in the exercise of its duty to care for the safe condition of the public streets. The first was a positive tort, and the efficient cause of the injury complained of; the latter the negative tort of neglect to act upon notice, express or implied" —citing many cases.

The fact that the plaintiff could sue both the city of Durham and Lloyd does not determine that they are both liable in the same degree. It is true that the city gave Lloyd the permit to make the excavation, and was charged with the duty of supervising his operations to prevent injury to the public, and, if it neglected to do so, it is liable to the plaintiff. But the primary liability is upon Lloyd, because his negligence, if any, was antecedent to that of the city if it was negligent in not giving efficient supervision.

Upon the facts set out in the answer, the defendant, the city of Durham, was entitled to have Lloyd made a defendant, and he was a fortiori entitled to have his motion to be allowed to come in and defend the action granted.

Reversed.

HOKE, J. (dissenting). On the facts presented, while A. E. Lloyd may be a desirable, he is not a necessary, party, and under our decisions, as I interpret them, where this is true, the question of making him a party is referred to the discretion of the trial court. Aiken v. Mfg. Co., 141 N. C. page 339, 53 S. E. 867. Although there may be a condition of primary and secondary liability as between Lloyd and the city of Durham, the negligent acts of both having concurred in producing a single injury, the authorities are that, with or without concert between them as to plaintiff and his cause of action, they are considered as joint tort-feasors, and, unless the court below otherwise orders, he has the election to sue and proceed against them together or separately, as he may be advised. Hough v. Southern Railway, 144 N. C. 692, 57 S. E. 469; Clark v. Patapsco Guano Co., 144 N. C. 64, 56 S. E. 858, 119 Am. St. Rep. 931; 38 Cyc. 490 et seq.; 28 Cyc. 1463.

There is nothing in Gregg v. Wilmington that necessarily militates against this view. In Gregg's Case all the persons involved in the alleged tort were made parties defendant, and the question chiefly presented was as to the effect and interdependence of certain issues on the rights of the respective parties. Whether the plaintiff could, at his election, have proceeded against one or all of the defendants, was not directly involved.

In the opinion, however, and as to the nature of plaintiff's demand, it was said, among other things:

"That in an action against a city and its licensee for injury caused by the negligent act of the latter, of which the city had notice, their liability, as between them and the plaintiff, would be joint and several. * * *"

Under this principle and the authorities apposite, I am of opinion that the ruling of the lower court should be affirmed.

ALLEN, J., concurs in this opinion.

(168 N. C. 561)

POWELL et al. v. POWELL et al. (No. 277.)
(Supreme Court of North Carolina. April 7, 1915.)

1. DEEDS ⟸133 — CONSTRUCTION — AFTER-BORN CHILDREN.

The common-law rule, that in a conveyance to children only those who are living at the time of the making of the deed take, does not apply where a conveyance is not direct to children, but there is an intermediate life estate, in which case after-born children take.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368–371; Dec. Dig. ⟸133.]

2. DEEDS ⟸133 — CONSTRUCTION — AFTER-BORN CHILDREN.

A deed to a grantee for life, and on his death to his children and their heirs and assigns forever, passes title to after-born children.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368–371; Dec. Dig. ⟸133.]

Appeal from Superior Court, Robeson County; Cooke, Judge.

Action by Stinson Powell and others against Junius M. Powell and others. From the judgment, plaintiffs and certain of the defendants appeal. Reversed.

This is a proceeding for the partition of land, and the only question presented for decision depends upon the construction of a deed executed on the 27th day of September, 1889, by William W. Powell to his son, William C. Powell, and to the children of William C. Powell, which reads as follows:

"This deed, made this the 27th day of Sept., 1889, by William W. Powell, party of the first part, to William C. Powell and his children, parties of the second part, all of said county and state, witnesseth: That the said William W. Powell, in consideration of the natural love and affection he has for the said William C. Powell and for his children, and for the sum of one dollar to him paid, the receipt of which is hereby acknowledged, has sold and conveyed, and by these presents does bargain, sell, and convey, unto the said William C. Powell during

the term of his natural life, and after his death to the children of the said William C. Powell, their heirs and assigns, forever, the following tracts of land in said state and county: [Description of land omitted.] To have and to hold said land unto the said William C. Powell during the term of his natural life, and after his death to his children and to their heirs and assigns forever, and in the event any child of William C. Powell shall die during the lifetime of the said William C. Powell, leaving a child or children who shall be living at William C. Powell's death, then the surviving child or children of said deceased child of William C. Powell shall have and hold to themselves, their heirs and assigns, forever, the share or portion that their ancestors would have taken under this deed, if she or he had survived William C. Powell.

"In testimony whereof, the said William W. Powell has hereto set his hand and seal the day and year first above written.

"William W. Powell. [Seal.]"

There were six children born to William C. Powell prior to the execution of said deed, and four born thereafter.

The plaintiffs contend that all the children of William C. Powell who were alive at the time of his death took the remainder in fee simple in and to said land in equal shares, and the infant defendants, Athesia Powell and Quessie Powell, and their guardian ad litem, W. Lennon, make the same contention as the plaintiffs. The defendant Junius M. Powell and wife contend that only those children of William C. Powell who were alive and in being at the time of the execution of the deed from William W. Powell to William C. Powell, to wit, on September 27, 1889, took the remainder in fee simple in and to said lands, subject to the life estate of their father, William C. Powell.

His honor rendered judgment, holding that only those who were alive and in existence at the date of the execution of the deed of William W. Powell took any interest under said deed, and the plaintiffs and the infant defendants excepted and appealed.

E. J. Britt, of Lumberton, for plaintiffs.

ALLEN, J. [1, 2] The doctrine is well established at common law that, in a conveyance to children, only those children take who are living at the time of the execution of the deed, because a grantor, a grantee, and a thing granted are necessary requisites of a valid deed, and this principle has not been modified with us, except in favor of a child en ventre sa mere (Heath v. Heath, 114 N. C. 549, 19 S. E. 155), but the rule is otherwise when the conveyance is not direct to the children and there is an intermediate life estate. Chief Justice Pearson says in Dupree v. Dupree, 45 N. C. 168, 59 Am. Dec. 590:

"A bequest or use limited to the children of A. passes only to such children as A. has at the time (and we will suppose a child en ventre would be included); but a bequest or use limited to the children of A., after an estate to her for life, remains open, so as to take in all the children she may have at her death. And this class of cases is put on the ground that by reason of the life estate it does not become necessary to fix the legal ownership until the death of the taker of the first estate."

And this seems to be the generally accepted doctrine. In 24 Am. & Eng. Ency. 394, the author says:

"Where a remainder is given to a class, as, for instance, the children of a designated person, it will be held a vested remainder, unless the terms of the instrument creating it clearly show that the ascertainment of the individuals composing the class is to be postponed until the determination of the precedent estate. But such a remainder, though vested, will open to let in members of the class who may be born during the continuance of the precedent estate."

Also in Tiffany on Real Property, § 122:

"Where there is a remainder to a class of persons, as to children, grandchildren, issue, or brothers and sisters, all the members of the class living at the time of the testator's death, or, in case of conveyance inter vivos, at the time of the delivery of the instrument, take prima facie vested remainders; the benefit of the provision being, however, extended to others of the same class who afterwards come into being before the determination of the particular estate, the shares of those previously born being in that case proportionately diminished."

And in 2 Reeves, Real Property, § 879:

"Where a remainder in fee is given to a fluctuating class of persons, and there are no words of survivorship or other qualification, it vests in the existing members of the class, and opens to let in other members as they come into being or are ascertained."

In 13 Cyc. p. 663, the same principle is declared:

"Where property is conveyed to a certain person and his children, it has been determined that no title will pass to after-born children. But where a deed creates an estate for life, with remainder over to the children, the remainder will vest in children already born, subject to be opened at the birth of each succeeding child."

See, also, Adams v. Ross, 30 N. J. Law, 505, 82 Am. Dec. 237, and Coursey v. Davis, 46 Pa. 25, 84 Am. Dec. 519, to the same effect.

We are therefore of opinion, as an intermediate life estate is conveyed in the deed under consideration, that children born after the execution of the deed take with those born prior thereto.

Reversed.

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(168 N. C. 566)

## WITTE v. ATLANTIC COAST LINE RY. CO. et al. (No. 284.)

(Supreme Court of North Carolina. April 7, 1915.)

1. TRIAL ⟹252—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action against railroad company for the death of a man who was struck by a runaway team which had become frightened at a switch engine in defendants' yard, where the complaint alleged negligence in the construction of the yard and in failing to establish proper rules to govern it, and also in the operation of the engine, and there was no evidence of negligent construction, or that rules were necessary, it was error to submit the three grounds of negligence together, so that the jury might

infer that they could find against the defendant on the first two grounds.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. ⊂⊃252.]

2. RAILROADS ⊂⊃274 — CONSTRUCTION — STATIONS.

A railroad must provide station facilities reasonably sufficient in the particular location in view of the demands of the traffic at that point.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 868–872; Dec. Dig. ⊂⊃274.]

Appeal from Superior Court, New Hanover County; Allen, Judge.

Action by Sarah C. Witte, administrator of Geo. C. Witte, deceased, against the Atlantic Coast Line Railway Company and another. Judgment for the plaintiff against the Railway Company on separate trial as to it, and the Railway Company appeals. Reversed, and new trial granted.

This is a civil action, tried upon these issues:

(1) Was the plaintiff's intestate killed by the negligence of the defendant, Atlantic Coast Line Railroad Company, as alleged in the complaint? Answer: Yes.

(2) Was the plaintiff's intestate guilty of contributory negligence, as alleged in [by] the defendant, Atlantic Coast Line Railroad Company? Answer: No.

(3) What damage, if any, is the plaintiff entitled to recover? Answer: Five thousand ($5,000) dollars.

From the judgment rendered, the defendant appealed.

Davis & Davis, of Wilmington, for appellant. E. K. Bryan, of Wilmington, for appellee.

BROWN, J. It appears in evidence that the plaintiff's intestate went to the defendant railroad's freight warehouse on business; that, as he was leaving, walking along a plankway, one of the horses attached to a wagon belonging to the Schloss Company became frightened at the noise and steam issuing from the defendant railroad company's switching engine moving up and down near the freight warehouse in the freight yards. The horses ran away, and in the endeavor to control them the bit of one of the horses broke. The driver lost control of the horses, and they turned around and ran in the opposite direction, overtook the intestate, who was very deaf, ran into him, and killed him.

By consent the case has been tried separately as to the defendant railroad company, with the result set out in the issues. The case has not been tried as to the other defendant. There are a great many exceptions in the record which, in the view taken by the court, it is not necessary to consider.

[1] One of the allegations of negligence upon which the plaintiff bases his right to recover is that the defendant railroad company, some years ago, negligently and carelessly constructed its freight warehouses, and negligently laid out and arranged its tracks in its shifting yards so that it was hazardous for employés and patrons of the said railroad company, and other persons who were rightfully upon its premises, from runaway teams which may become frightened and unmanageable. The plaintiff further alleges that the defendant railroad has negligently failed to make any sufficient rules to guard against such occurrences; or, if it has made any such rules, its servants and employés violate the same.

His honor charged the jury as follows:

"Now, was the railroad company negligent in having various switching tracks around its warehouses, and having them all together, and in not having certain rules, if you find that they did not have such rules, by which the switching could be regulated with reference to the getting freight out of the depot, and was its engineer negligent in running by this team at the time when he did run by, and in blowing off steam and making the noise? Under all the circumstances, was that negligence, and, if so, did that negligence cause the horses to run away, and did they run over and kill the deceased?"

We think that there is no evidence in this record tending to prove that the warehouse and freightyard tracks were constructed and laid out in a negligent manner. There is no evidence that they were laid out differently from the manner in which other freightyards are laid out. There is no evidence that it is customary among railroads to have rules and regulations governing the use and operation of moving trains in their freightyards, or regulating the ingress and egress of patrons visiting the freight warehouses. The evidence shows that these yards and warehouses were constructed and laid out a great many years ago; in fact, at the time when the railroad was first built. We think it was error in his honor to have interwoven this ground of negligence along with the alleged negligence of the engineer in operating the train. From such charge the jury may have inferred that they had a right to find against the defendant railroad company, because of the alleged improper construction and laying out of their freightyards.

[2] The stational facilities of railroads must be reasonably sufficient, and must necessarily be constructed according to the particular location. Terminal yards are necessary to a railroad in order to facilitate its business of transportation. It would seem to be impossible to so construct them as to guard absolutely against dangers from runaway teams; but, whether that be true or not, there is no evidence in this case that the defendant company has been guilty of any negligence in arranging its freight stational facilities. Whether depots, station buildings, yards and other stational facilities are sufficient must, it is evident, depend in a great measure upon the demands of traffic at the place where they are located, the custom and usage of the railroad company's business and matters of similar nature; for it is evi-

dent that facilities sufficient in one locality and under the same circumstances would not be sufficient in other localities and under different circumstances and conditions.

New trial.

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(168 N. C. 555)

## HERRING v. ATLANTIC COAST LINE R. CO. (No. 281.)

(Supreme Court of North Carolina. April 7, 1915.)

MASTER AND SERVANT ⟸100—EMPLOYÉ'S RELIEF DEPARTMENT — ACCEPTANCE OF BENEFITS—RIGHT OF ACTION.

Payment to an injured employé of benefits from a relief fund maintained by the employer does not bar a recovery for the injury, where the employé was compelled to enter the relief department, and the employer paying the benefits was entitled only to a credit therefor, for a contract to accept benefits in full is invalid, under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657–8665]), and Revisal 1905, § 2646.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 166–170; Dec. Dig. ⟸ 100.]

Brown and Walker, JJ., dissenting.

Appeal from Superior Court, Pender County; Allen, Judge.

Action by A. L. Herring against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Davis & Davis, of Wilmington, for appellant. C. E. McCullen, of Burgaw, and E. K. Bryan, of Wilmington, for appellee.

CLARK, C. J. This is an appeal from a verdict and judgment for personal injuries sustained by the plaintiff while working as a brakeman on defendant's train in its yards at Wilmington. While there are some exceptions to the evidence, and to the charge, they do not require serious consideration. The appeal substantially rests upon the defense that the plaintiff was a member of the defendant's relief department, and that, having received benefits thereunder, he is estopped to maintain this action. The jury find that the plaintiff was injured by the negligence of the defendant, that he was not guilty of contributory negligence, and that he received $146 of benefits under the relief department which should be deducted from the $5,000 damages as found by the jury, and the court rendered judgment accordingly for $4,854.

The evidence and the charge excepted to come within the ruling of this court in King v. Railroad, 157 N. C. 44, 72 S. E. 801, 48 L. R. A. (N. S.) 450, and the cause was tried by the learned judge below, strictly in accordance with that decision. It will serve no purpose to review and elaborate that case. The plaintiff was compelled, according to the rules of the defendant company then in force, to enter the relief department, and, in taking the benefits that were paid him, the defendant became entitled to no more than a credit therefor. The gross inadequacy of such benefits, $146, as compared with the extent of his injuries, $5,000, certainly, when taken in connection with the evidence in the case and the charge, is conclusive of the plaintiff's right to maintain this action and to sustain this recovery.

In Railroad v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, and Railroad v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911, it was held that the contracts of these relief departments are invalid, beyond being a payment on account. In paragraphs 2 and 3 of the complaint, being taken in connection with the answer of the defendant to those two paragraphs, it is admitted that the defendant was engaged in interstate commerce. It is unnecessary to go into the question as to the particular service in which the plaintiff was engaged at the time, shifting cars, whether any of the cars were destined for points beyond the state, as in Railroad v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, and other cases cited in Ingle v. Railroad, 167 N. C. 640, 83 S. E. 744.

The United States Supreme Court, in cases above cited, held that the relief department contracts, even where the employés entered therein willingly, were invalid by virtue of the federal statute. Our statute (Pr. Laws 1897, c. 56, now Revisal, § 2646) is identical with the federal statute in this particular, and besides, in this case, all the employés of the defendant were compelled to enter the relief department. It is not necessary to consider whether the decision of this court in Barden v. Railroad, 152 N. C. 318, 67 S. E. 971, 49 L. R. A. (N. S.) 801, in which we held that such contracts were invalid, shall now be reinstated. For taking King v. Railroad, supra, as still in force in every respect, this case has been tried in accordance therewith, and the verdict and judgment are fully sustained by it. Besides, we learn that the defendant company, in consequence of the decision of the United States Supreme Court in McGuire's and Schubert's Cases, above cited, have now abandoned the operation of their relief department as a defense to actions by employés for damages sustained from the negligence of the company or of fellow servants of the injured employé.

No error.

BROWN, J. I am constrained to dissent from the conclusion reached by the court in this case for the reasons given in my dissenting opinion in Barden v. Railroad Co., 152 N. C. 318, 67 S. E. 971, 49 L. R. A. (N. S.) 801, and also in my opinion in King v. Railroad, 157 N. C. 44, 72 S. E. 801, 48 L. R. A. (N. S.) 450.

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I see no evidence whatever in this case of fraud and undue influence, which brings the case within the principle laid down by the majority of the court in the King Case. There is no evidence that the plaintiff was injured while engaged in interstate commerce; certainly there is no finding of fact to that effect. Therefore the provisions of the federal act invalidating relief department contracts have no application. Neither has a similar act enacted by the Legislature of this state, for the reason that the injury occurred before the ratification of the act.

This whole question has been fully discussed in the cases I have cited; and, as they cannot well arise in the future, it is useless to discuss this matter any further.

WALKER, J., concurs in this opinion.

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(168 N. C. 544)

## BEAUFORT COUNTY LUMBER CO. v. COTTINGHAM et ux. (No. 289.)

(Supreme Court of North Carolina. April 7, 1915.)

1. CONTEMPT ⟸20 — DISOBEYANCE OF ORDER.

Where the court granted defendants a continuance upon conditions precedent, which they neglected or refused to perform, while yet accepting the continuance, they were in contempt, and liable to punishment.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 58–62; Dec. Dig. ⟸20.]

2. ACTION ⟸25 — LAW AND EQUITY — DISTINCTION.

The peculiar powers and jurisdiction of courts of equity persist, although both legal and equitable remedies are administered by the same court.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 124–145, 147–149, 153, 156–159, 313; Dec. Dig. ⟸25.]

3. CONTEMPT ⟸80 — PUNISHMENT — DENIAL OF PRIVILEGES AS LITIGANT.

In an action for specific performance of a contract, where defendants accepted a conditional order for a continuance without complying with the conditions, they were punishable by having their answer stricken out and judgment entered against them pro confesso on the complaint, under the general rule that a party in contempt in equity will not be allowed to oppose the relief sought by denial of the bill or by alleging any defense.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 261–266; Dec. Dig. ⟸80.]

4. CONTEMPT ⟸66—APPEAL—REVIEW—DISCRETION OF COURT.

The action of a court of equity, in striking out defendants' answer as punishment for contempt for accepting an order for continuance while failing to perform its conditions, was within the sound discretion of the court, reviewable only in case of abuse.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213–215, 223–237; Dec. Dig. ⟸66.]

Appeal from Superior Court, Robeson County; Cooke, Judge.

Action by the Beaufort County Lumber Company against A. J. Cottingham and wife. From judgment entered upon the complaint after granting of motion by plaintiff to strike out their answer, defendants appeal. Affirmed.

McLean, Varser & McLean, of Lumberton, for appellants. B. F. McLean and G. B. Patterson, both of Maxton, and W. H. Neal, of Laurinburg, for appellee.

BROWN, J. In this action, plaintiff seeks to require defendants, owners of certain land, to perform specifically the provisions of an extension clause for the cutting of the timber, contained in a deed executed by the defendants to the plaintiffs, conveying the timber thereon to plaintiff. The complaint alleges that the deed conveying the timber was dated April 14, 1906, but was not delivered and did not go into effect until May 30, 1906, from which last date the time for cutting the timber began to run; that by mutual mistake the original date of the deed was not changed; that under the terms of the contract plaintiff had five years from May 30, 1906, within which to cut the timber, and a further period, not exceeding seven years after the expiration of the five years, upon paying defendants a sum equal to 6 per cent. of the consideration expressed in this deed for each year in which they shall exercise said rights after the expiration of the term of five years. The complaint further alleges that plaintiff has tendered the said sum of money within the time required, and notified defendants of its purpose to avail itself of the extension clause; that the defendants refused to receive said money, and denied the plaintiff's rights thereunder, and are proceeding to cut said timber themselves. The court made the following findings and judgment:

"That heretofore the plaintiff was allowed to amend its complaint, which amended complaint was filed November 6, 1914, and the defendants filed their answer thereto, and the cause was set for trial at this term of court, and upon the defendants' motion at this term, as appears from an order entered in this case at this term, a continuance was allowed the defendants upon terms set out in said order, and the defendants accepted the terms therein set out, and the said terms were precedent to a continuance, and the defendants were allowed the remainder of the term to comply therewith after having so accepted the same, and at the end of said term it appeared that defendants had not given the bond required in said order, and had not offered any reasonable excuse for not so doing; and, since it appears to the court that the plaintiff consented to the continuance, and the court ordered the same upon the giving of said bond, and that but for the requirement of the giving of said bond the court would not have ordered said continuance, nor would the plaintiff, through its counsel, have consented thereto, and that the defendants have obtained said continuance upon the acceptance of terms which they now refuse to comply with, it is therefore, on motion of McLean, Varser & McLean, attorneys for the plaintiff, ordered, adjudged, and decreed that the answers filed in this cause by the defendants be and they are hereby stricken out, and the said amended complaint is hereby taken pro confesso, and the allegations therein are found to be true; and it is further ordered, adjudged, and decreed that on or about the 14th

day of April, 1906, the plaintiff agreed to purchase the timber described in the complaint, and in the second paragraph thereof, and that on the 30th day of May, 1906, the deed described in the record in Book of Deeds 5B, page 412, office of the register of deeds of Robeson county, was delivered to the plaintiff, and that the 30th day of May, 1906, is the true date of said deed, the same having been omitted therefrom by the mutual inadvertence and mistake of the parties, and the 14th day of April, 1906, having been left in said deed by the same mistake and inadvertence, and that the plaintiff has stood ready and willing at all times to pay the sum of money and all other sums of money due under and by virtue of the terms of said deed to the defendants, or into this court, and that within the proper time as provided in said deed and before the extension period therein set out began, the plaintiff tendered to the defendants the sum of money equal to 6 per cent. of the consideration expressed in said deed for the year first after the expiration of the first term of five years therein, which sum of money was refused by the defendants.

"And it is further ordered, adjudged, and decreed that the plaintiff pay into the office of the clerk of the superior court of Robeson county the sum of $180 for the first year beginning May 30, 1911, and $180 for each year thereafter as long as the plaintiff may desire to avail himself of said extension not to exceed seven years after the expiration of the first term of five years provided in said deed, and that all accrued payments be paid into the office of the clerk of the superior court, and that all future payments thereunder, instead of being paid to the defendants, shall be paid to the clerk of this court in this action, and that this judgment shall operate as an extension of said deed for the period of seven years upon the payment of the money above provided as set out in said deed.

"It is further ordered and adjudged that the plaintiff recover of the defendants all costs herein taxed by the clerk of this court," etc.

[1] It is well settled that the defendants, having refused or neglected to obey an important order of the court, although they accepted its benefits, were in contempt and liable to punishment. The court administered punishment by striking out the answer and giving judgment pro confesso upon the allegations of the complaint.

[2, 3] It is contended that the court had no power to make such order, that every defendant has a vested right to make a defense to an action begun against him, of which he cannot be deprived. This action is equitable in its nature, and the relief demanded has always been obtainable solely in a court of equity. The plaintiff seeks specific performance of the contract, and an injunction against the destruction of the timber. While the technical difference between actions at law and suits in equity have been abolished, and both are administered by the same court, the powers and jurisdiction of the courts of equity are preserved. One of the well-settled rules that has always existed in the English chancery is that a party in contempt will not be allowed to oppose the relief sought by the plaintiff by contradicting the allegations of the bill or bringing forward any defense. Vowles v. Young, 9 Ves. Jr. 173. It was the opinion of Lord Eldon in that case that a party to a suit who is in contempt cannot be heard. 2 Comyn Dig., Chancery Process, D8; Clark v. Dew, 1 Russ. & Myl. 103. Chancellor Kent holds that the rule in the English chancery is the rule here, saying:

"For I take this occasion to observe that I consider myself bound by those principles, which were known and established as law in the courts of equity in England at the time of the institution of this court." Manning v. Manning, 1 Johns. Ch. (N. Y.) 527.

"The court has power," says the Court of Appeals of New York, "when and while a defendant in an equity action is in contempt for disobeying its order, to refuse to hear him." Walker v. Walker, 82 N. Y. 260; Brinkley v. Brinkley, 47 N. Y. 41; Saylor v. Mockbie, 9 Iowa, 209; O'Conner v. Railway Co., 75 Iowa, 617, 34 N. W. 795; Haskell v. Sullivan, 31 Mo. 435. In this case a party to an action was summoned as a witness and failed to attend. The court said it was no error to strike out his pleading and enter judgment against him. In Brisbane v. Brisbane, 34 Hun (N. Y.) 339, it is held that:

"The power possessed by a court of equity to strike out a defense, in an action brought therein, because of a refusal to obey its orders, was not taken away by * * * the Code of Civil Procedure, but still exists."

See, also, Gross v. Clarke, 87 N. Y. 272.

In 31 Cyc. page 632, it is said: "Pleadings are frequently stricken out as a penalty for disobedience to orders of court." In the notes the Editor cites cases from nearly every state in the Union to sustain the text, among them Crump v. Thomas, 89 N. C. 241.

[4] The power to strike out the answer, having thus been demonstrated as existing in the courts of equity of this day, the use of it was a matter in the sound discretion of the court, and we see no abuse of such power under the circumstances of this case. The answer having been stricken out, the case stands as if no answer had ever been filed. Therefore the allegations of the bill of complaint are taken to be true pro confesso, and the plaintiff is to be awarded such relief as the allegations of the complaint warrant. An examination of the complaint in this case discloses that, taken to be true, the facts alleged fully warrant the judgment of the court.

Affirmed.

(168 N. C. 557)

## FOURTH NAT. BANK OF FAYETTEVILLE v. WILSON. (No. 286.)

(Supreme Court of North Carolina. April 7, 1915.)

1. TRIAL ⊂⊃365—VERDICT—SPECIAL VERDICT—CONSTRUCTION—REFERENCE TO CHARGE.
A special verdict that the holder of a note had given notice of nonpayment may be shown to mean notice of the character and of the time required by Negotiable Instruments Act, by reference to the charge, where that is in accordance with those requirements.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 871–874; Dec. Dig. ⊂⊃365.]

2. BILLS AND NOTES ⊂⊃510 — ACTIONS AGAINST INDORSER—ADMISSIBILITY OF EVIDENCE—NOTICE.
In an action by a bank against the indorser of a note, the custom of the bank as to the character and time of sending their notices of nonpayment is admissible.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1746–1759; Dec. Dig. ⊂⊃510.]

3. APPEAL AND ERROR ⊂⊃1068 — HARMLESS ERROR—CHARGE—CURE BY VERDICT.
Exceptions to a portion of a charge on an issue which was immaterial under the special verdict cannot be sustained.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225–4228, 4230; Dec. Dig. ⊂⊃1068.]

4. TRIAL ⊂⊃193—INSTRUCTIONS—OPINION OF JUDGE.
A portion of the court's charge, which was clearly susceptible of interpretation that the court was stating plaintiff's contention, is not erroneous as an expression of the judge's opinion adverse to defendant.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436–438; Dec. Dig. ⊂⊃193.]

Appeal from Superior Court, Cumberland County; Cooke, Judge.

Action by Fourth National Bank of Fayetteville against John E. Wilson. Judgment for the plaintiff, and defendant appeals. Affirmed.

Civil action to recover balance due on note of Cherokee Lumber Company, payable to plaintiff bank, on the back of which appeared name of defendant. It was, among other things, admitted that plaintiff, for full value and before maturity, discounted the note signed by Cherokee Lumber Company, the same maturing October 3, 1911, and that at the time this was done, the name of defendant appeared on the back of the note and no part of same was paid at maturity, and that the note, with accrued interest, is still due, subject to a credit of $300; of date December 4th; that the bank was located in Fayetteville, N. C., and defendant resided at Dunn, N. C., and the two towns were connected by railway and daily mail. Defendant, in his answer, claims that he was indorser of the note and, as such, entitled to notice of dishonor and that same was not given. Plaintiff replied, setting up the facts of the transaction, as claimed by him, and alleging that defendant was, in reality, surety on the note and, as such, not entitled to notice, and, further, that, even as indorser, due notice had been given. On issues submitted, the jury rendered the following verdict:

"1. Is the plaintiff the Fourth National Bank of Fayetteville, N. C., the holder in due course of the note marked 'Exhibit A?' Answer: Yes.
"2. Did the defendant's name appear upon said note when the same was acquired by the plaintiff? Answer: Yes.
"3. Did the defendant, John E. Wilson, execute the said note? Answer: Yes.
"4. If so, did he execute the same as surety? Answer: Yes.
"5. Was due notice given to the defendant of the nonpayment of the said note? Answer: Yes."

Judgment on the verdict for plaintiff and defendant excepted and appealed.

Clifford & Townsend, of Dunn, for appellant. Broadfoot & Broadfoot and Rose & Rose, all of Fayetteville, for appellee.

HOKE, J. (after stating the facts as above). We have given this case our most careful consideration, and are of opinion that no reversible error has been shown. In Barden v. Hornthal, 151 N. C. 8–10, 65 S. E. 513, speaking to the law as it existed prior to the time when the Negotiable Instruments Act became effective, March 8, 1899 (see Revisal 1905, § 2345) the court said:

"Viewed in that aspect, our decisions are to the effect that when a third person writes his name on the back of a negotiable instrument before delivery to the payee, and with a view to give additional credit to the maker, it is open to the original parties, and as between themselves, to show the intent and exact nature of the obligation assumed, whether as joint promisor and guarantor or as first and second indorser, etc.; and, in the absence of such qualifying testimony, the law will presume that such person signed his name as comaker, and in any event as surety, that being the relationship of the defendant alleged in the complaint" (citing Lilly v. Baker, 88 N. C. 151; Tredwell v. Blount, 86 N. C. 33; Hoffman v. Moore, 82 N. C. 313; Baker v. Robinson, 63 N. C. 191; Good v. Martin, 95 U. S. 90, 24 L. Ed. 341).

The statute in question evidently was intended to make some change in the former law in the respect suggested (Perry v. Taylor Bros., 148 N. C. 362, 62 S. E. 423), and in sections 2212 and 2213 it is provided as follows:

"Section 2212. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.
"Sec. 2213. Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties; (2) if the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer; (3) if he signs for the accommodation of the payee he is liable to all parties subsequent to the payee."

On the facts as presented, it would seem to be the purpose of the statute to fix the

status of this defendant as indorser and to exclude parol evidence to the contrary in this and all cases coming under the statutory provision, "Unless he clearly indicates by appropriate words his intention to be bound in some other capacity." There is conflict of authority, however, as to the effect and extent of this statutory change (see Daniel on Negotiable Instruments [6th Ed.] pp. 806, 807, annotations by T. H. Calvert, more particularly notes 32 and 33), and we are not called on to determine the question, in this case, for the reason that the jury, under a correct charge, has found that due and proper notice has been given, and defendant is liable, therefore, whether indorser or surety.

[1] The jury having found that defendant was surety, the verdict on this, the next issue, does not, in itself, fix the time and character of the notice given, but it is well understood that a verdict may, in proper instances, be given significance by reference to the pleadings, evidence, and the charge of the court (State v. Murphy, 157 N. C. 615, 72 S. E. 1075; Richardson v. Edwards, 156 N. C. 590, 72 S. E. 482), and, on examination of the record, it appears that the charge of his honor on this issue is in exact accord with the statutory requirement as to notice of dishonor for nonacceptance or nonpayment of negotiable instruments (Revisal, § 2254).

[2] There is pertinent evidence tending to show that the proper notices were mailed to defendant's address and the custom of the bank as to the character and time of sending their notices was clearly competent on this issue as to notice. Vaughan v. Railroad, 63 N. C. 11; Ashe v. De Rossett, 53 N. C. 240; Union Bank v. Stone, 50 Me. 595, 79 Am. Dec. 631; Mathias v. O'Neill, 94 Mo. 520, 6 S. W. 253; Wigmore on Evidence, § 93; 1 Greenleaf (16th Ed.) 14J.

[3, 4] The exceptions to the charge of the court on the fourth and fifth issues, the fourth as to suretyship and fifth as to notice, to the effect that the same, in certain aspects, amounted to an expression of opinion by the trial judge adverse to defendant, may not be sustained. As we have seen, the verdict on the fourth issue has become immaterial since the jury, in response to the fifth issue, has established notice sufficient to fix and hold defendant as indorser. And there is nothing to show that the error on the fourth issue, even if it existed, had any effect or bearing on the fifth. As to his honor's charge on the latter issue, the portion objected to is clearly susceptible of the interpretation that his honor was stating the contention of the plaintiff, and should not, in our opinion, be held for reversible error.

On the record, as stated, we find no sufficient reason for disturbing the results of the trial, and the judgment in favor of plaintiff must be affirmed.

No error.

(100 S. C. 359)

## MEDLIN v. ADAMS GRAIN & PROVISION CO. (No. 9014.)

(Supreme Court of South Carolina. March 1, 1915.)

1. EVIDENCE ⟸148 — SOURCE — TELEPHONE CONVERSATION.

In an action for damages for breach of contract in failing to deliver hay, where plaintiff testified that, upon receipt of a defective lot of hay, he put in a long-distance telephone call for defendant, that some one responded, that he made complaint as to the quality of the hay, and that the party with whom he was talking stated that he had the office of defendant company and showed familiarity with the transaction, such evidence was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 438; Dec. Dig. ⟸148.]

2. SALES ⟸418—FAILURE TO DELIVER—DAMAGES.

For breach of a contract to sell and deliver goods, the measure of damages is the difference between the contract price and the market price at the time of the breach of contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174–1201; Dec. Dig. ⟸418.]

3. TRIAL ⟸296 — INSTRUCTIONS — ERROR CURED.

In an action for failure to deliver hay contracted for, where the court erroneously charged that the measure of damages was the difference between the contract price and the highest market price of the same article at the time suit was brought, the error was harmless, when corrected in other portions of the charge, stating that the measure of damages was the difference in the value of the article furnished and the article purchased at the time and place agreed upon for delivery, and where the verdict of the jury showed that they were not misled by the error; their judgment being greatly less than it would have been, had they fixed the damages under the court's erroneous charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec. Dig. ⟸296.]

Appeal from Common Pleas Circuit Court of Marlboro County; Frank B. Gary, Judge.

Action by J. T. Medlin against the Adams Grain & Provision Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

J. K. Owens, of Bennettsville, for appellant. Townsend & Rogers, of Bennettsville, for respondent.

WATTS, J. This was an action for damages for breach of contract. The defendant appellant agreed to deliver to plaintiff respondent car loads of hay at different times and failed to do so. Plaintiff brought his suit, alleging that he had been damaged in the sum of $310.95. The cause was tried before Judge Frank B. Gary and a jury at the fall term of court, 1914, for Marlboro county, and resulted in a verdict in favor of the plaintiff for $198.95. Defendant appeals, and by four exceptions asks for a reversal.

[1] The first ground of appeal alleges error in admitting an alleged conversation over the telephone with the defendant, over de-

fendant's objection. It appears from the record that the plaintiff, Medlin, was on the stand and attempted to detail a conversation he had with the defendant over the telephone, and upon objection the following took place:

"The Court: Let him tell exactly what took place, and then I will determine.

"Q. Mr. Medlin, all that I care for you to say—did you make complaint as to the quality of the hay? A. I did. (Objected to.)

"The Court: He can tell what he did.

"Q. Tell what you did. A. Well, I put in a long-distance call for the Adams Grain & Provision Company. I had no acquaintance with them, and did not have the name of any. After the connection was given, I asked if it was them, and they said it was, and I told them that I paid the draft for the hay and unloaded it, and that it was very inferior in quality, more inferior than what I bought. They said they were surprised, that they had bought the hay from one of the most reliable shippers in the West, and they presumed the others would come to grade.

"The Court: The jury are the ones to judge whether he was talking to the Adams Grain & Provision Company or not. He gives it as his opinion that he was. Having explained what took place, I allow it to go to the jury, and they are to determine whether or not he was talking to the grain company."

This exception is overruled. His honor committed no error, and the defendant introduced testimony, but he did not deny, explain, or contradict the plaintiff on this point, and it was competent to go to the jury for what it was worth. Plaintiff put in a long-distance call for defendant, he was connected with that office, some one responded, he made complaint as to quality of hay, and said party expressed surprise, telling how hay was procured, bought by them from another party for plaintiff, and showed a familiarity with the transaction from which jury could infer that the plaintiff had procured the right party and the one he had asked to be connected with by long-distance phone, the defendant in this case, and the admission of evidence is not shown to be prejudicial to the defendant.

[2, 3] Exceptions 2, 3, and 4 are practically the same, and allege error on the part of the presiding judge in his charge to the jury as to the measure of damages. While it is true that his honor was in error in charging the jury that "the measure of damages was the difference in the contract price and the highest market price of the same article at the time the suit was brought," as the law is that the measure of damages is the difference between the contract price and the market price at the time of the breach of the contract, yet this is harmless, in view of the fact that in other portions of his charge he told them that "the measure of damages would be the difference in the value of the article furnished and the article purchased at the time and the place agreed upon for the delivery." He told them this more than once. At the close of his charge the judge asked if there was anything further, addressing himself to both counsel, and defendant's counsel asked for and obtained from the court a further instruction, but overlooked what the judge had charged in reference to damages.

It is unfortunate that attorneys engaged in a case do not pay particular attention to judge's charge, so as to aid him when he calls upon them at close of charge for further suggestions, in order that he may charge, or refuse, or correct, or explain. His honor was obliged not to ask for an expression, but inasmuch as he did, if counsel had caught what he charged in reference to damages, it would have been their duty to have called his attention to it. The jury by their verdict show that they were not misled by this error, and that it was harmless, as they did not adopt the highest price as a measure of damages. They only awarded plaintiff judgment for $198.95, whereas he had sued for $310.95, and if they had fixed the highest price under his honor's charge it would have been much more than amount found.

We are therefore of opinion that his honor's error was harmless, and not prejudicial to the defendant, and all exceptions are overruled, and judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

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(100 S. C. 329)

## McCRAW v. KILLIAN. (No. 9045.)

(Supreme Court of South Carolina. March 31, 1915.)

1. LANDLORD AND TENANT ⟸265—DISTRESS—RETAKING.

While one cannot break into a house to make distress, property may be distrained for rent when possession can be peaceably acquired, and, when so acquired, the tenant should not forceably retake the property.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1062–1074; Dec. Dig. ⟸265.]

2. REPLEVIN ⟸88—ACTIONS—JURY QUESTION.

In a suit to recover goods which plaintiff asserted he was entitled to by virtue of a distress, the question whether the distress warrant was properly served *held* for the jury.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 343–348; Dec. Dig. ⟸88.]

Appeal from Common Pleas Circuit Court of Cherokee County; S. W. G. Shipp, Judge.

Action by T. G. McCraw against H. A. Killian. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

Butler & Hall, of Gaffney, for appellant. G. W. Speer, of Gaffney, for respondent.

WATTS, J. This was an action for claim and delivery by plaintiff against the defendant for certain shop tools of the alleged value of $100. Plaintiff alleges he was in lawful possession of the same, and entitled to possession of the same, by reason of and under a distress for rent levied on the property for arrears of rent alleged to be due him as landlord by H. A. Killian and C. E. Edwards.

He alleges that without his knowledge or consent the defendant wrongfully, unlawfully, and willfully broke open the house and shop after he had lived on the property for rent and was in possession of the same under lock, and unlawfully carried away and detains the same. Defendant by answer puts in a general denial, and alleges he was in peaceful possession of the property by reason of a chattel mortgage executed to him by C. E. Edwards, and that Edwards had delivered the property to him after condition broken to sell and apply proceeds of sale to extinguishment of this mortgage, and plaintiff knew of these facts, and property was advertised for sale, but that, in a high-handed way, through his agent, he entered the premises and locked up the house, with contents.

The case came on for trial before Judge Shipp and a jury, and at the close of all the testimony defendant moved for a nonsuit, and plaintiff moved for a direction of verdict in his favor. Judge Shipp refused to direct a verdict for plaintiff, but granted defendant's motion for a nonsuit, on the ground that there had been no legal levy. From this plaintiff appeals, and alleges error on the part of his honor in granting a nonsuit, and in not directing a verdict for plaintiff as moved for. The defendant also served notice that he would ask the court to sustain the order of nonsuit on the additional grounds relied on in motion made in the circuit court.

[1, 2] We think that his honor was in error in granting the nonsuit, as there was some testimony to go to the jury as to whether or not the distress warrant had been levied, and whether or not the plaintiff was in peaceable possession of the property taken by the defendant. The testimony shows the plaintiff rented to Killian, and that Killian re-rented or sublet to Edwards. Edwards got in possession of the house or shop not by any contract that he made with the plaintiff, but through Killian, who had rented from McCraw. There was some rent due, and when McCraw's agent went to distrain he found Edwards in constructive possession, having gotten this possession through some arrangement he had made with Killian, the tenant of McCraw, and not with McCraw, the landlord. It was not a dwelling house, but a shop, and no more than a corncrib, forage house, cotton house, or seedhouse, and he gave McCraw's agent a list of the contents of the house, and an inventory was made of the same. Thereupon he put another lock on the house. If he had levied on the contents of a crib or forage house, he would probably have done the same. There is no evidence but that McCraw's agent was peaceable, courteous, and polite. He broke no locks to get in the house; was not rude or oppressive. Edwards testifies that Phillips (the agent of McCraw) told him that he was going to lock the shop, and got a list from him of what was in there, and wrote out a distress warrant and served it. He also served a copy of the distress warrant on Mrs. Killian, Killian being absent, and while, of course, it is the law that possession of property under distress must be obtained peaceably, and that one cannot break into a house to make distress, yet in this case it is a question for the jury, and they should have been allowed to determine whether possession of this property was obtained by plaintiff's agent peaceably or not. There is no doubt but that the plaintiff owned the lot and house. There was evidence that the man he rented to no longer occupied the premises. There was some evidence by which the jury might infer that both Killian and Edwards had ceased to occupy it. Mrs. Killian had the key, the inventory was obtained from Edwards, Killian's tenant, and Killian was McCraw's tenant, and had sublet to Edwards. It was for the jury to say, under all the facts and circumstances, whether the seizure was complete, peaceable, and effective, or whether it was unlawful and wrongful. If it was effective, then the defendant, Killian, was wrong in repossessing himself of the goods without doing it in a lawful manner by suit. For this reason we think the order of nonsuit should be set aside, as there was sufficient evidence for a jury to determine whether a legal distress warrant was shown, and we see no error in his holding that there was evidence of tenancy and arrears of rent sufficient to go to the jury, and in refusing to direct a verdict in favor of plaintiff.

Judgment reversed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

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(100 S. C. 308)

## WALKER v. SPARTANBURG REALTY CO.

(No. 9042.)

(Supreme Court of South Carolina. March 29, 1915.)

LANDLORD AND TENANT ⊂⊃208—RENT—SUBSTITUTION OF TENANT.

A tenant who rented rooms under a verbal agreement which had been in force for several months, and under which rent was payable monthly in advance, and who at the 1st of a month agreed to keep the premises for that month with the privilege of surrendering them on securing another tenant, is liable for the rent for the entire month, where the substituted tenant was objected to by the landlord, and where the original tenant tendered the rent only for the portion of the month preceding the substitution, and the substituted tenant made no tender of the rent for the balance of the month.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 737, 821–831; Dec. Dig. ⊂⊃208.]

Appeal from Common Pleas Circuit Court of Spartanburg County; Thos. S. Sease, Judge.

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Action by L. P. Walker against the Spartanburg Realty Company. From a judgment of the circuit court on appeal from the magistrate's court in favor of the plaintiff for only the amount tendered by defendant, the plaintiff appeals. Reversed.

Johnson & Nash and Lyles & Daniel, all of Spartanburg, for appellant. Bomar & Osborne, of Spartanburg, for respondent.

FRASER, J. This case was commenced in the magistrate's court. This appeal involves, to some extent, questions of fact, which cannot be considered by this court.

There are six exceptions, but it does not present so many questions. In order to decide this case, this court must take the undisputed facts, and also the statement of disputed facts, most strongly against the appellant.

It therefore appears that the respondent rented rooms from the appellant under a verbal contract that had been in force for some months, the rent payable monthly in advance. On February 1, 1913, the respondent agreed to keep the premises for the month of February, but should be allowed to surrender the premises at any time during the month that it saw fit to do so, on condition, however, that it secured another tenant to take its place. On the 17th day of February the respondent vacated the premises, and notified the appellant that it had secured another tenant to take its place. The appellant (the landlord) objected to the substituted tenants on the ground that they were undesirable. Why the substituted tenants were undesirable does not appear. When the respondent entered upon the month of February it became liable for the entire month of February especially as the rent was payable in advance.

The only question in the case that this court can consider is: Did the respondent relieve itself from this liability by offering a substitute on the 17th of February? It is very manifest that it did not. The rent was payable in advance (undisputed). It is undisputed that the rent was not paid on the 1st of February. There was no tender or even an offer to pay the rent from the 17th of February to the 1st of March, either by the respondent or the substitute tenant. The respondent tendered only the rent to the 17th of February. This tender did not discharge the obligation, and the respondent is liable for the full month's rent. Besides, the key to the rooms, that was the token of possession, was not surrendered.

The judgment of the circuit court that allowed rent only for the time of actual occupancy is reversed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(100 S. C. 228)

## DAGNALL v. DAGNALL. (No. 9039.)

(Supreme Court of South Carolina. March 29, 1915.)

1. HUSBAND AND WIFE ⊂⊃297—ACTION FOR ALIMONY—BURDEN OF PROOF—EXCUSE FOR DESERTION.

Where, in a wife's action for alimony, it appears that she voluntarily left her husband's home, the burden is on her to show that her husband inflicted on her such physical violence or personal indignity as rendered it intolerable to live with him as wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1090; Dec. Dig. ⊂⊃297.]

2. HUSBAND AND WIFE ⊂⊃297—ACTION FOR ALIMONY—DESERTION—SUFFICIENCY OF EVIDENCE.

Evidence, in a wife's action for alimony, *held* insufficient to sustain her contention that defendant either drove her away from home or prevented her from returning to him after she had gone to visit her sick grandchild, and was thereby guilty of desertion, though it showed that he had objected to her going to see the child.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1090; Dec. Dig. ⊂⊃297.]

3. HUSBAND AND WIFE ⊂⊃297—ACTION FOR ALIMONY—SUFFICIENCY OF EVIDENCE.

Evidence, in a wife's action for alimony, *held* insufficient to sustain plaintiff's contention that defendant required of her such servitude as tended to destroy her life or health.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1090; Dec. Dig. ⊂⊃297.]

4. HUSBAND AND WIFE ⊂⊃297—ACTION FOR ALIMONY—GROUNDS—MISCONDUCT OF HUSBAND—EVIDENCE.

Evidence that defendant came home under the influence of whisky and broke up some furniture and cursed did not authorize a judgment for his wife for alimony, where it failed to show that he offered her any personal violence or abused or cursed her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1090; Dec. Dig. ⊂⊃297.]

Appeal from Common Pleas Circuit Court of Laurens County; Frank B. Gary, Judge.

Action by Elizabeth Dagnall against John T. Dagnall. From judgment for defendant, plaintiff appeals. Affirmed.

F. P. McGowan, of Laurens, for appellant. Simpson, Cooper & Babb, of Laurens, for respondent.

FRASER, J. This is an action for alimony. The issues of law and fact were referred to a referee who found against the plaintiff. The plaintiff appealed to the court of common pleas. In that court the report was affirmed, and from that judgment this appeal is taken. There are 21 exceptions. The appellant discusses in argument four questions, one of law and three questions of fact, as follows:

"It is respectfully submitted his honor the circuit judge rested his view of the law upon the case of Hair v. Hair, 10 Rich. Eq. 163, supra, overlooking the modification as contained in Levin v. Levin, 68 S. C. 123, 46 S. E. 945. The preponderance of the testimony shows:

"(1) That either the wife was driven away by the defendant in September, 1913, or, leaving to visit a sick child, the defendant was guilty

of conduct unbecoming a husband that has prevented her return to him, and not provided a way for her return. He is guilty of desertion.

"(2) He is guilty of sevitia by requiring of her such servitude that it tends to destroy her life or health; he does not furnish her with suitable food or sufficient clothing; he heaps upon her repeatedly cursing and abusive language which she cannot endure, and charge of spoliation of his papers.

"(3) He has been guilty of indecencies in the family circle, such as drunken sprees, mad fits, as breaking up the furniture and throwing the dishes out of the kitchen window."

[1] I. It is not necessary to discuss in this case the modification of the rule laid down in Hair v. Hair. The case of Gordon v. Gordon, 91 S. C. 245, 74 S. E. 360, states the rule by which this case can be determined as follows:

"If the wife voluntarily leaves her husband's home, as a condition of obtaining even temporary alimony and suit money, she must assume the burden of showing prima facie that her husband has inflicted on her such physical violence or personal indignity as would make her living with him as a wife intolerable."

It is undisputed that Mrs. Dagnall left her husband's home contrary to his wishes and in spite of his protest. The appellant's insuperable difficulty is found in the facts of the case.

[2] II. The first complaint of the husband's conduct, as set forth above, is that he treated her cruelly in refusing to take her to the railway station, or to furnish her the money to enable her to go to see her sick or dying grandchild. That the husband objected to her going is clear. The unreasonableness of his objection is not apparent. Both husband and wife had been married before, and both had children by former marriages. Mr. and Mrs. Dagnall were well advanced in life when they married each other. They lived in comparative peace until a daughter of the plaintiff, Mrs. Agnes Barnett, came to visit them, and her husband, Dan Barnett, followed her. While Mr. and Mrs. Barnett were staying at the defendant's home, the first open breach came, and Mrs. Dagnall left her husband's home. Mr. Dagnall went to Orangeburg and Georgetown to look for his wife. Mrs. Dagnall wrote to her husband from Georgia, and said that his home was a good one, and that the trouble had been caused by her son-in-law, Mr. Barnett, and that Mr. Barnett should never enter her house again. Mr. Dagnall then went to Georgia for Mrs. Dagnall and brought her home. The telegram announcing the illness of her grandchild called her to Mr. Barnett's home. Mr. Dagnall knew that his wife in the Barnett home would be subject to the same disturbing influence that had once before broken up his home. It was not unreasonable, therefore, that he should have objected to the visit. His objection was neither physical violence nor personal indignity. Besides this, Mr. Dagnall testified that while he objected to the visit, he did make arrangements to take his wife to the station, and would have paid her fare; that his horse had run away, and he was afraid to drive it and went over to the house of his son-in-law and borrowed his horse, but when he returned his wife had left his home; that he followed her to a neighbor's house and told her he had borrowed a horse to take her to the station, and she replied that she had made her own arrangements and wanted no help from him or his son-in-law. The preponderance of the evidence is not in favor of the appellant on the first question of fact.

[3] III. The appellant complains that while she had a goiter and was sick and nervous from it, her husband required her to milk the cows, wash the clothes, and scrub the floors, did not furnish her with suitable food or clothing, and cursed and abused her, and charged her with spoliation of his papers. The record shows that the defendant is a man of very moderate means, but notwithstanding that, he did hire some one to milk a part of the time, and the milker did not come in bad weather. The failure of a servant to appear in bad weather does not appear to have been Mr. Dagnall's fault. It does not appear that he could have secured more efficient help. It does appear that he did not know how to milk a cow. It does appear by the plaintiff's testimony that Mr. Dagnall sometimes did the family washing with his own hands.

The plaintiff testified that once she applied to him for some money and he replied—

"I caused him to spend all his money on me, and he had to go back without shoes, and I felt mighty bad about it and told him I would do without 'postum' until he could buy him some shoes."

The evidence of the truth of his statement must have been easily accessible and, if untrue, her remorse was unnecessary.

[4] Some of this record (typewritten) is almost unreadable, but as best we can make it out, the record only tends to show that on one occasion Mr. Dagnall came home under the influence of whisky, and on that occasion he broke up some furniture and cursed, but does not show that he, even then, offered his wife any personal violence, or cursed and abused her.

This disposes of the third specification, and the judgment appealed from is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(100 S. C. 284)

JORDAN v. SOUTHERN RY. CO. (No. 9037.)

(Supreme Court of South Carolina. March 27, 1915.)

1. CARRIERS ⟸254—CARRIAGE OF PASSENGERS—TICKET.

Where a carrier had three routes between two points in different states, and the fare, as filed with the Interstate Commerce Commission,

over the longer route was more than that over the other two, a passenger who paid the fare for the longer route is not bound by his signing of a ticket calling for the transportation over a shorter route, since that contract would be illegal.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1020-1026; Dec. Dig. ⟸254.]

2. CARRIERS ⟸382—EJECTION OF PASSENGER —PUNITIVE DAMAGES—LAW GOVERNING.

In a suit for punitive damages for willful ejection of a passenger, where the amended complaint alleged that the carrier's agent within the state fraudulently issued to plaintiff a wrong ticket, and there was evidence to support that allegation, the court could not direct a verdict for defendant on the ground that, under the law of the state where the ejection occurred, punitive damages could not be recovered under the facts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1478, 1483-1491; Dec. Dig. ⟸382.]

3. CARRIERS ⟸384—EJECTION OF PASSENGER —REQUESTED INSTRUCTIONS—MODIFICATION.

Where a passenger paid for an interstate ticket over a longer route, but the agent gave him one over a shorter route, which he took and signed, though the fare over that route was less than that over the other, it was proper for the court, in an action by the passenger for his ejection, to modify an instruction, requested by carrier, that the passenger was bound by the contract that he signed by adding "if he got the contract called for and paid for," since he could not make a legal contract for transportation over the shorter route at the fare charged over the longer route.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1497-1500; Dec. Dig. ⟸384.]

Appeal from Common Pleas Circuit Court of Fairfield County; J. W. De Vose, Judge.

Action by W. Glover Jordan against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

B. L. Abney, of Columbia, and McDonald & McDonald, of Winnsboro, for appellant. G. W. Ragsdale, of Winnsboro, for respondent.

FRASER, J. The respondent lives in Winnsboro, S. C., and desired to go to Black Mountain, N. C., for a vacation. The appellant railroad company has three routes between Winnsboro and Black Mountain. For the purpose of convenience, we will call them the Salisbury route, the Statesville route, and the Marion route. The Salisbury route was the longest and the Marion route the shortest in miles. The fare (round trip) by the Salisbury route was $7.75. Although there was considerable difference in the distances by the Statesville and Marion routes, the fare was the same, to wit, $6.75; while the fare was $1 more by the Salisbury route, the connection was better, and it was cheaper and quicker to the passenger in the long run. The respondent claims that he went to the agent of the appellant at Winnsboro and asked for a ticket to Black Mountain by the Salisbury route and paid him the $7.75 required. The respondent was given a summer excursion round-trip ticket, upon which was marked "via short line only." This ticket the respondent signed. Respondent's baggage was checked via Salisbury. On the way to Black Mountain, the respondent went by Salisbury, and his ticket was accepted without question. On the return trip, the plaintiff was directed by the conductor to get off at Marion, before he had reached Statesville even, and take the short trip, or to pay $1.30 additional fare. This the respondent refused to do, stating that he had paid for transportation by the Salisbury route; that he had come that way and would return that way. The conductor refused to honor the ticket by that route and ejected him. The respondent then brought suit for punitive damages for the willful and malicious conduct of the appellant in ejecting him. The respondent amended his complaint to allege that the agent of the defendant willfully, fraudulently, and knowingly delivered to the plaintiff the wrong ticket. Upon the trial of the cause the jury found a verdict for the plaintiff, and from the judgment entered thereon the defendant appealed. The defendant moved for a nonsuit and for a direction of verdict upon the whole case; both motions were overruled.

There are several exceptions, but the appellant makes an independent statement of the questions. This practice the court commends. It is by far the most satisfactory way.

[1] 1. "There was error in not directing a verdict generally for the defendant, upon the ground that, under the Interstate Commerce Act, the ticket was the exclusive contract between the plaintiff and the defendant, and the plaintiff was legally and properly ejected from the train for failure to conform and comply with the conditions and limitations of such contract of carriage," i. e., the payment of the extra fare.

The ejectment occurred in North Carolina and the statutes of that state allowed the ejectment of a passenger for nonpayment of fare. The rate in this case was fixed by the Interstate Commerce Commission and fixed for the Salisbury route at $7.75. There was testimony, and it was uncontradicted, that the passenger had paid $7.75. He paid every cent that the law required. To grant this motion, his honor would have had to find, in the face of the uncontradicted testimony, that the plaintiff had not paid the full fare. It is said, however, that the plaintiff had signed a contract that required him to go by the Marion route. The plaintiff is bound by any lawful contract he may make. The parties could not make a contract that was in violation of the rates fixed by the Interstate Commerce Commission that would bind either party. It is just as unlawful to charge too little as to charge too much. The railroad company could no more have made a contract by the short route at $7.75, than it could have made a contract by long route at $6.75. Good rules work both ways.

The principle upon which appellant's agents

acted, to wit, when in doubt charge the higher rate, is not sound. If the plaintiff had paid $6.75 and had gone by Salisbury, in spite of any contract it may have signed, it not only had the right, but it was its duty, under heavy penalties, to collect the excess as, if it did not discover the mistake until after the transportation had ended, it had then the right to demand and bring suit, if necessary, to collect the deficit. If the plaintiff had paid $6.75, then he had the choice of two routes, to wit, Statesville or Marion, and he could bind himself to go by Statesville or by Marion, and when he signed the contract to take the short route, he bound himself to take the Marion route. If, however, he paid the $7.75, there was only one route for that fare, and it was unlawful, under that fare, to take any other. No other contract would have been allowed by law, and an unlawful contract binds no one. This position cannot be sustained.

[2] 2. "There was error in not directing a verdict in favor of the defendant, upon the ground that, under the law of the state of North Carolina, and the undisputed facts of the case, the plaintiff could not recover punitive damages."

This was a motion to direct a verdict on the whole case. Two acts were complained of, to wit, a willful and fraudulent sale of the ticket as well as the willful ejection. The direction of a verdict would have included both. The amendment to the complaint put the blame on the ticket agent.

There is testimony to show that the plaintiff called for a ticket by Salisbury and paid for it. There is also testimony that plaintiff's baggage was checked that way. The jury might have inferred from that that the agent thoroughly understood the route and yet gave him the wrong ticket. Was that negligence, or willfulness? Fraud was charged. The only one who could have explained the improper ticket, to wit, the ticket agent, was not put on the stand, and no explanation was given. On the contrary, the regular ticket agent (for he who sold the ticket was a substitute), testified that the cash entry made by the substitute was only $6.75. If the substitute received $7.75, and only accounted to the railroad company for $6.75, then fraudulent conduct might have been inferred. The defendant was not required to put him up, but when it did not, it cannot complain if the jury took the view that he could not deny the charge. This is not a criminal proceeding, where the defendant is shielded. This proposition cannot be sustained.

3. "His honor should have directed a verdict upon the ground that under the terms and conditions of his ticket, which was the contract between him and the carrier, he had no right to be carried by the longer route without payment of extra fare, and the defendant's agents, therefore, had the right, under the law of the state of North Carolina, to eject him."

The uncontradicted testimony is that the plaintiff had already paid his fare. This position cannot be sustained.

[3] 4. "His honor erred in modifying the defendant's third, fourth, and fourteenth requests to charge."

The defendant asked his honor to charge that the plaintiff is bound by the contract that he signed, and his honor added, "if he got the contract he called for and paid for." The route was in question. We have seen that there was but one route for $7.75. There was but one route possible for that fare. His honor had no right to tell the jury that when the Interstate Commerce Commission had fixed the fare on the short route at $6.75, the parties could make a binding contract for that route at $7.75. This proposition cannot be sustained.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

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(100 S. C. 304)

## SPEIGHTS v. COLLETON COUNTY.

(No. 9041.)

(Supreme Court of South Carolina. March 29, 1915.)

NAVIGABLE WATERS ⟸ 26 — STREAM AS "HIGHWAY"—STATUTORY PROVISIONS.

A navigable stream, within Civ. Code 1912, § 2132, providing that navigable streams shall be deemed highways, and the county board of road commissioners shall keep the same in repair at all times, is not a highway, within section 1972, authorizing an action for injury through a defect in a highway, and a county operating a ferry by means of a cable stretched across a river is not liable for damages caused by a raft striking the cable.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 133–166; Dec. Dig. ⟸ 26.

For other definitions, see Words and Phrases, First and Second Series, Highway.]

Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Colleton County; R. W. Memminger, Judge.

Action by I. A. Speights against Colleton County. From a judgment for plaintiff, defendant appeals. Reversed.

Howell & Gruber, of Walterboro, for appellant. Padgett & Moorer, of Walterboro, for respondent.

FRASER, J. This is an action against Colleton county for an injury to the respondent, caused by an obstruction in Ashepoo river. There is an agreed statement of facts, but the facts may be stated, in brief, as follows: Ashepoo river is a navigable stream, and at the place of the accident is wholly in Colleton county. One of the county public roads crosses this river, and the county operates a ferry to enable travelers to cross

the river. The county owns and operates the ferry. In the daytime the ferry is free, but a small charge is made at night. The fee paid at night goes to the employé of the ferryman and not to the county. The ferry is operated by a cable stretched across the river. When the cable is not in use, it should be lowered to the bottom of the river so as to allow the unimpeded use of the river for navigation. On the night of December 7, 1913, the cable was stretched across the river, but just under the surface of the river. The plaintiff was carrying a raft of lumber down the river. When he came to the ferry he could not see any obstruction, as the cable was out of sight. The raft struck the cable and was broken up. The lumber was damaged, and the plaintiff thrown into the water and made sick. For his injury he brought suit against the county, in the magistrate's court. The magistrate gave judgment for the plaintiff. The defendant appealed to the court of common pleas. This appeal was heard by Judge Memminger, who sustained the magistrate, and the defendant appealed to this court. The appellant states that there is but one question, and that is: Is the county liable?

It is conceded that if a navigable stream is a highway, within the meaning of the statute, then the county is liable under section 1972, Code of Laws of South Carolina 1912, vol. 1. Section 2132 reads as follows:

"The said navigable streams, water courses and cuts shall be taken and deemed as highways, and the county board of road commissioners shall take charge of and keep the same in repair at all times."

It seems to me that the county is liable, and the judgment should be affirmed.

The majority of the court differ with me, and the following is the opinion of the majority of this court:

We shall refer to land roads as dirt highways and to navigable rivers as water highways.

It is only a casualty that the raft was overturned at a point in the water highway where the stream is crossed by a dirt highway. The issue here made would be the same had the accident occurred a mile below the crossing of the two ways, and had the obstructing agency been the protruding stump of a fallen tree out of the water highway, instead of a cable in the water.

The dirt highway and the cable there, as part of that highway and an agency of the county, have no relevancy as such to the offense charged, to wit, an obstruction in Ashepoo river. The bald issue, therefore, is this: Is a county liable to be sued in damages by a person who may be hurt by obstructions while he is going up and down the water highways of the state?

The sole contention of the plaintiff is: (1) That section 2132, Code of Laws, constitute Ashepoo river a highway; and (2) the same section charged the county to "keep the same in repair." That is true; but, for such failure to keep in repair, the statute gives no right of action. The plaintiff could not maintain this action under section 2132, standing by itself, nor by any other provision in chapter 29. The plaintiff therefore points to section 1972 for his warrant to sue. But that section is part of another chapter of the statutes, every section of which, except the first, has express or implied reference to dirt highways. Section 1972 is part of a statute enacted in 1871 "for the construction and repair of public highways." The highways must first have been constructed, and then repaired.

Section 1928 was not then a part of the chapter. It was enacted in 1850, and its object was plainly to make navigable stream ways, open to public use, with no suggestion of their repair. The section was not incorporated in the codification of 1868 or 1881. The last three lines of section 1928 plainly prescribe a remedy for the obstruction of water highways, and it is other than the remedy provided for defects in the repair of dirt highways. The language of the statute is:

"And if any person shall obstruct the same, otherwise than as hereinafter provided, such person shall be deemed guilty of a nuisance, and such obstruction may be abated as other public nuisances are by the laws of this state."

When all the words of section 1972 are considered, the inference to be had is that they refer to dirt highways. The three provisos were not in the act at its passage in 1871. In the first proviso the words are road, causeway, or bridge, all parts of a dirt highway; and thereby a recovery is denied if the plaintiff's load exceeded the ordering weight. An overloaded wagon might crush a bridge or culvert; an overloaded boat might sink; but it would hardly be affected by obstructions in a water highway.

The construction of the statute contended for by the plaintiff would have a county liable in damages resulting from defect in hundreds of miles of navigable streams, never seen by county officials, and rarely or never traveled, except by a few persons. We would not reach such a conclusion, unless shut up to it by the plain mandates of the General Assembly.

The judgment appealed from is reversed.

GARY, C. J., and WATTS, HYDRICK, and GAGE, JJ., concur.

(100 S. C. 324)

## Ex parte OWENS.

## DARLINGTON et al. v. BUSH et al.

(No. 904.)

(Supreme Court of South Carolina. March 31, 1915.)

1. MORTGAGES ⇐548—FORECLOSURE SALE—RENT LIEN.

Where a lessor reserved a rent lien and before the rent was due the land was sold under mortgage foreclosure, the rent lien passed to the purchaser.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1566; Dec. Dig. ⇐548.]

2. MORTGAGES ⇐548—FORECLOSURE—SALE.

Where before rent became due, the land was sold under mortgage foreclosure, the purchaser became entitled to the entire rent reserved, and there could be no apportionment between the time the tenant held under the lessor and the purchaser.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1566; Dec. Dig. ⇐548.]

Appeal from Common Pleas Circuit Court of Barnwell County; Geo. W. Gage, Judge.

Ex parte application by L. V. Owens, in the matter of E. S. Darlington and others against W. W. Bush and others. From an order approving the report of the master, D. P. Key and another appeal. Affirmed.

The report of the master is as follows:

To the Honorable Court of Common Pleas for Barnwell County:

The above entitled proceedings, in the nature of an application for a writ of assistance, having been referred to me, as master, to ascertain, as matter of law and fact, what right, if any, Key and Salinas, or McKay, or either of them, has to the crops or the proceeds thereof, I respectfully report:

That I held a reference on the 17th inst., when I was attended by Mr. James E. Davis, attorney for the petitioner, and by Messrs. G. M. Greene and R. C. Holman and Mr. Darlington, attorneys for W. W. Bush, and D. P. Key, and heard the matter upon the agreed statement of facts and records mentioned in the minutes of reference hereto attached.

From the evidence and admissions I find as matter of fact: That an action was commenced in this court, by service of the summons and complaint on the defendants W. W. Bush and Dionicious Bush, to foreclose three mortgages given on the lands described in the petition, by their ancestress, L. A. Bush, under whom the said W. W. Bush and Dionicious Bush claim title. The defendants in this action were said W. W. Bush, Dionicious Bush, who were the holders of the legal title to the land, and W. A. Holman and J. O. Patterson and Mrs. Darlington and Miss Stoney, who held mortgage liens thereon. The lis pendens in this action was filed with the clerk of this court on May 23, 1913. Judgment and decree for foreclosure and sale of the mortgaged premises, without any reservation of the growing crops thereon, was rendered at the July, 1913, term of this court directing such sale by me, as master on sales day in October, 1913, when such sale was made, at which the petitioner, Mrs. L. V. Owens, became the purchaser, complied with the terms of sale, and received from said master a deed of conveyance of the said lands. On the 8th of February, 1913, said W. W. Bush leased or rented a portion of the said mortgaged lands, containing 35 acres, more or less, bounded on the north by the Barker estate, east by Mrs. Cuebine, south by J. O. Walker, and west by the estate of W. H. Mears, for $75, to Tom McKay, who gave the said Bush a rent lien thereon for that amount, which is in writing under seal, and was assigned to the Bank of Western Carolina, on February 11, 1913, as collateral to some indebtedness, which was paid on October 17, 1913, so that bank is making no claim under said rent lien, which was returned by it to said W. W. Bush. The said Tom McKay thereupon entered upon said 35 acres (a portion of the mortgaged premises) and planted them with the crops mentioned in the petition in these proceedings. On May 3, 1913, said Tom McKay executed a mortgage of said crops and delivered same to D. P. Key, to secure his note for $118, due October 1, 1913, with interest after maturity at the rate of 8 per cent. per annum, which crop mortgage was filed and recorded in the office of the clerk of this court on June 24, 1913. On May 9, 1913, said W. W. Bush executed and delivered a mortgage in writing, on his crops then being grown, 80 acres, portion of the mortgaged premises remaining in his possession, to A. J. Salinas, to secure certain advances, and as additional security to his note for $168.50, dated on May 9, 1913, and due October 15, 1913, which mortgage was recorded in the office of the clerk of this court on May 14, 1913, and there said mortgage was assigned by said Salinas to said D. P. Key in consideration of $5.

I conclude as matter of law that section 3633 of the Code cited by counsel for the purchaser at the foreclosure sale has no application to the facts of this case. But whatever rights the defendant Bush had to the crops growing upon the mortgaged lands during the year 1913 passed to Mrs. Owens, as purchaser at the master's sale, inasmuch as said defendants were parties to the action, and such crops were not reserved in the order for sale. Hancock v. Caskey, 8 S. C. 282, 286. The defendants Bush have no rights in said crops as against the petitioner, Mrs. Owens, who is entitled to a writ of assistance to compel them to turn over and deliver said crops in their possession to her.

I further conclude as matter of law that, Tom McKay having been in possession of the 35 acres, more or less, above mentioned, as a tenant, under a written lease dated the 8th of February, 1913, for a period not longer that 12 months (Code of Laws 1912, vol. 1, § 3542) at the time action was commenced by service of the summons and complaint upon Bush, his landlord was a proper party to said action, and, not having been made a party thereto, his interest, and the interest of D. P. Key, mortgagee claiming under McKay, although the mortgage was not recorded until June 24, 1913, after the commencement of the action, in the crops grown by him upon said 35 acres of land, was not affected by the decree and sale in foreclosure, and that said McKay and Key have a right to hold said crops, as against the petitioner, Mrs. Owens, who purchased at said sale; and is not now entitled to a writ of assistance to take said crops from McKay and his mortgagee. Ex parte Jenkins, 48 S. C. 335, 336, 26 S. E. 686; Tittle v. Kennedy, 71 S. C. 9, 50 S. E. 544, 4 Ann. Cas. 68. But the rights of McKay and Key to these crops are subject to the lien of the prior mortgages on said lands, at the time that McKay leased them, in January, 1913, and such lien, if necessary to the payment of the mortgage debt, may yet be enforced by proper proceedings against said crops in the hands of McKay or Key. But these mortgages have been paid. In the same way, the rights of McKay to the possession of said 35 acres of land under his lease for the year 1913 not having been foreclosed in said foreclosure proceedings, he is entitled to withhold possession of said 35 acres until either the expiration of his lease December 31st next, or its termination for nonpayment of rent (secured by the lien given to W. W. Bush), or the

foreclosure of the prior mortgage liens as against him.

I further conclude that when Mrs. Owen, the petitioner, purchased the interest of the defendants Bush in said lands, she acquired all their interest therein, including their interest in the rents for the land which were to become due after the date of her purchase, sales day in October, 1913.

It will be observed, as suggested by Judge Richardson, in Riley v. Snyder, 1 Speers, 273, 40 Am. Dec. 602, that the whole year's rent under the lease from Bush to McKay did not become due until October 15, 1913, after the master's sale to Mrs. Owens; and I conclude that she is entitled, as assignee of the rights of W. W. Bush in said lands, to enforce the lien which he held to secure the payment of the $75 rent by Tom McKay on and after October 15, 1913, and still has a right to do. This rent should be paid by McKay or those claiming under him to Mrs. Owens, and not to Bush.

I further conclude as matter of law: That A. J. Salinas as mortgagee of the crops raised on the 80 acres above mentioned cultivated by Bush, took his mortgage lien on said crop subject to the prior liens of the mortgages on lands foreclosed in the above-mentioned action, and was a proper party to that action; but as he was not made a party to said action, and D. P. Key, his assignee of his rights under that mortgage, was not made such party, said assignee is not affected by said decree and sale in foreclosure; and said Key as such assignee of Salinas is entitled to enforce his mortgage lien upon the crops made on said 80 acres of land; and the petitioner, Mrs. Owens, is not entitled to a writ of assistance as against him, but his interest as mortgagee in said crops may be subjected to the lien of the superior mortgages on the lands, by proper proceedings, if necessary to secure the payment of the mortgage debt. The superior mortgages on these lands have been paid. That McKay and his mortgagee, and Key, assignee, have reasonable time in which to gather the crops. That respondents pay these costs.

G. M. Greene and R. C. Holman, both of Barnwell, for appellants. James E. Davis, of Barnwell, for respondents.

WATTS, J. [1, 2] This is an appeal from an order of Hon. Geo. W. Gage, circuit judge, confirming and approving the report of H. L. O'Bannon, master. The report of master fully sets out the facts of the case, and will be reported. From the order of his honor, Judge Gage, D. P. Key and Thomas McKay appeal, and allege error in holding that Thomas McKay should have paid the year's rent to the petitioner, and in holding that the rent lien of Thomas McKay which he was to pay W. W. Bush for part of the land for the year 1913 went to the purchaser at the sale under foreclosure, and in not finding and holding that the bank had first lien on crop of Thomas McKay and had the right to collect the same, and that Thomas McKay, in paying the same as he did to the true lawful owner and holder of rent lien, was discharged from paying the rent to any other person, and in holding that the purchaser got the whole rent for the year 1913, whereas it should have been prorated and the purchaser should only have been decreed the proportion of the $75 equal to that which would be earned for the use of land from date of purchase in October until the end of the year, and allege it was error to require the respondents to pay the costs as recommended by the master.

We have a finding by the master concurred in by the circuit judge, and we fail to find any errors or abuse of discretion on the part of his honor as complained of by the appellants, and all exceptions are overruled, and judgment affirmed.

GARY, C. J., and HYDRICK and FRASER, JJ., concur. GAGE, J. disqualified.

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(100 S. C. 331)

STATE v. GRIFFIN et al. (No. 9047.)

(Supreme Court of South Carolina. March 31, 1915.)

1. CRIMINAL LAW ⟸1156—APPEAL AND ERROR—REVIEW—MOTION FOR NEW TRIAL.

The granting or the denial of a motion for new trial rests within the sound discretion of the trial court, and should be disturbed only for errors of law or for an abuse of such discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067–3071; Dec. Dig. ⟸ 1156.]

2. CRIMINAL LAW ⟸706—TRIAL—CONDUCT OF PROSECUTING ATTORNEY — SUPPRESSION OF EVIDENCE—"BAD FAITH."

In a prosecution for murder, where the state proved at the trial that a certain distance was 200 yards, and it was contended in argument on appeal from denial of motion for new trial that the state solicitor knew from another witness, who had measured the space, that the distance was 500 yards, conceding the truth of the statement, it would not warrant reversal on the ground that the solicitor purposely and with bad faith suppressed the evidence, within the definition of "bad faith" as the opposite of good faith, implying constructive or actual fraud, a design to deceive or mislead another, or a neglect or refusal to fulfill some duty or some contractual obligation not prompted by an honest mistake as to one's rights, but by some interested or sinister motive, more particularly where the argument of defendant's counsel showed that he had knowledge of the alleged suppressed evidence at the close of testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. ⟸706.

For other definitions, see Words and Phrases, First and Second Series, Bad Faith.]

3. WITNESSES ⟸78—COMPETENCY—CRIMINAL CHARGE.

On appeal from denial of motion for new trial in a prosecution for murder, evidence by affidavit to the effect that the state's chief witness had, some eight years before the trial, stolen chickens from the affiant was not such proof of the commission of crime as to render such witness incompetent, since any other rule than that only conviction can disqualify a witness would involve the trial of the collateral issue of the guilt of the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 195–200; Dec. Dig. ⟸78.]

4. CRIMINAL LAW ⟸945—MOTION FOR NEW TRIAL — CHARACTER OF SUPPORTING AFFIDAVIT.

On appeal from denial of new trial after conviction of murder, affidavits in support of the motion, executed by two negro women while in the city guardhouse, with the chief witness for the prosecution, as to declarations made by

him, was evidence of a character too unreliable to upset the verdict of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. ⊂⇒945.]

5. CRIMINAL LAW ⊂⇒1156—APPEAL AND ERROR—MOTION FOR NEW TRIAL—"ABUSE OF DISCRETION."

The "abuse of discretion" that authorizes an appellate court to reverse denial of a new trial implies not merely error of judgment, but error of judgment that is plain.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. ⊂⇒1156.

For other definitions, see Words and Phrases, First and Second Series, Abuse of Discretion.]

Appeal from General Sessions Circuit Court of Chester County; Ernest Moore, Judge.

Meeks Griffin and others were convicted of murder, and they appeal. Affirmed.

W. H. Newbold, of Chester, for appellants.
J. K. Henry, of Chester, for the State.

GAGE, J. This cause has been here once before. 98 S. C. 105. After that judgment was pronounced the defendants moved at the July, 1914, term of the sessions for a new trial on after discovered evidence. The court refused the motion, and this appeal is from that order.

The following is a statement of a present possible procedure in the sessions court of the state, as exemplified by this cause: Homicide 24th April, 1913; trial and conviction of murder July, 1913; appeal to this court fall term, 1913; judgment affirmed spring 1914; motion on circuit for a new trial on after discovered evidence July, 1914, and motion refused; appeal here argued January 1915. The law of the land does demand that "the accused shall enjoy the right of a *speedy* trial," but that does not imply the right to *obstruct* the course of justice. The motion in the sessions court was refused in a pro forma order.

There are four exceptions, but they charge one error only, and that is the court ought to have granted a new trial. To these exceptions we shall shortly revert, in connection with the proof.

The proof below, for the motion, consisted of four affidavits other than those by the defendants and their counsel. Of the four, two were made by white men, Howze and Weir, and two by negro women, Gill and English. There was one witness for the state in rebuttal, but his testimony is not included in the "case."

[1] It is settled by numerous cases that we may not too nicely weigh the testimony upon which such a motion is based; that power rests in the circuit court, for it has at hand the instrumentalities with which to exercise the power, and that court's settled judgment ought not to be impeached except for errors of law, or for an abuse of its discretion. The latest leading case thereabout is well known. State v. Jones, 89 S. C. 41, 71 S. E. 291, Ann. Cas. 1912D, 1298.

[2] The first exception charges "bad faith" on the part of the solicitor of the Sixth circuit in withholding from the jury a fact about measurement, sworn to now by the witness Howze. Bad faith is defined as:

"The opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to fufill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." Black's Law Dictionary, 112.

A charge like that against a public servant of no mean reputation, and of long and approved service, ought not to be lightly made, and, when made, it ought to be clearly proven. There is no such proof.

The exact matter in issue is this: One Monk Stevenson, a witness for the state and confessedly guilty, had testified that he stood on the fatal night at a particular spot, at some distance from the house where the homicide was committed. The appellant contends in argument here, that the state proved at the trial by one Lewis that the distance betwixt these points was 200 or 225 yards, but that the state knew at the close of the testimony, from Howze, who made the measurement pending the trial, that the distance was 500 yards. That bare statement, conceded to be true, would not nearly warrant a court to conclude therefrom that an officer of the state purposely and with sinister motive suppressed Howze's testimony. The argument of appellant's counsel itself shows that his contention is not sound; for it recites:

"At the close of the testimony defendant's attorney called on the state to prove the distance from the house to the peach tree. '*As he understood* it had been measured.' This request was ignored."

If defendant's counsel understood the measurement had been made, and so said in open court, then there was concealment which did not conceal. So at all events there was no concealment by the solicitor from defendant's counsel.

[3] The second exception is that Weir's testimony now proves that the state's chief witness Monk had before the trial, some eight years, stolen some chickens from Weir. The legal conclusion now contended for is that Monk was disqualified to testify at the trial. There is no pretention that Monk was ever convicted of larceny; the contention is that guilty as now proved by Weir would disqualify Monk now to testify. Such is not the law, though there may be authority of some sort therefor. Greenleaf states the law to be otherwise; that guilt must be evidenced by a judgment. 1 Greenleaf, § 372. Any other rule would involve the trial of a collateral issue, to wit, the guilt or innocence of a proffered witness.

[4] The third exception refers to the testimony of two negro women. They swear

now to declarations by Monk when he and they, pending the trial, were inmates of the city guardhouse. It would be utterly unsafe to upset the verdict of a jury upon evidence of that character, if we were disposed to consider it.

[5] There is no room whatever to conclude the circuit court abused the discretion invested in it to hear and determine the motion. Abuse of discretion implies, not merely error of judgment, but error that is plain.

There is no ground upon which to conclude that the judgment of that court, in the matter now under review, was wrong; and its judgment is affirmed. It is therefore ordered that the cause be remanded to the circuit court, for the pronouncement of final judgment of the law.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

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(100 S. C. 341)

## DICKS v. CASSELS et al. (No. 9050.)

(Supreme Court of South Carolina. April 2, 1915.)

1. WILLS ⟹61—AGREEMENTS TO MAKE MUTUAL WILLS—SUFFICIENCY OF EVIDENCE.
To establish an agreement for the execution of mutual, irrevocable wills, the proof must be definite, clear, certain, and convincing, and it should be scrutinized and received with the greatest care.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 168; Dec. Dig. ⟹61.]

2. WILLS ⟹73, 167—RIGHT TO DISPOSE OF PROPERTY BY WILL.
A person ordinarily has a right to leave his property by will to whom he pleases and to revoke his will at any time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 190–192, 438, 450; Dec. Dig. ⟹73, 167.]

3. WITNESSES ⟹159—COMPETENCY—TRANSACTION WITH DECEASED PERSON.
Under Code Civ. Proc. 1912, § 438, providing that no party to an action shall be examined in regard to any transaction or communication between him and a person then deceased as a witness against the executor, heir at law, legatee, devisee, etc., of such deceased person, in an action by one of the parties to an alleged agreement to execute mutual, irrevocable wills against the executor, legatees, and devisees of the other party to enforce such agreement, plaintiff's testimony as to transactions and communications with the deceased should have been excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 629, 664, 666–669, 671–682; Dec. Dig. ⟹159.]

4. WILLS ⟹61—AGREEMENTS TO MAKE MUTUAL WILLS—SUFFICIENCY OF EVIDENCE.
In an action by a person against the executor, devisees, and legatees of his deceased brother for specific performance of an alleged contract between him and the brother to make mutual wills, evidence *held* insufficient to show such an agreement.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 168; Dec. Dig. ⟹61.]

Appeal from Common Pleas Circuit Court of Aiken County; T. S. Sease, Judge.

Action by James J. Dicks against Homer C. Cassels, as executor of L. E. Dicks, deceased, and others. From a judgment for plaintiff, defendants appeal. Reversed.

Hendersons, of Aiken, for appellants. Claude E. Sawyer and Gunter & Gyles, all of Aiken, and Bates & Simms, of Barnwell, for respondent.

WATTS, J. This was an action whereby plaintiff asks specific performance of an alleged contract for execution of mutual wills. The evidence shows that two brothers, James J. Dicks and L. F. Dicks, on September 11, 1890, executed wills in favor of each other. Before this they planted and rented their lands and also did a mercantile business in Augusta, Ga., that L. F. Dicks had charge of the lands and farming operations, and that James J. Dicks had charge of the mercantile business. In 1905 they failed in their mercantile business, went into bankruptcy, and their mercantile effects were sold. On August 22, 1911, L. F. Dicks executed a later will, giving legacies to two of his servants, Polly Scott and James Larry, and the remainder of his estate to two of his half-sisters, Sarah A. Cassels and Hattie M. Dicks, and naming Homer C. Cassels executor of the will. L. F. Dicks died December 3, 1911, and later this will was admitted to probate in Aiken county in common form; later, upon application made to him, the judge of probate for Aiken county issued notice to the executor of this will to appear and prove the will in due and solemn form. In this proceeding James J. Dicks, the only full brother of the deceased, and the half-brothers and sisters of the deceased and the others concerned in this will were brought in as parties, and this will was proven in due and solemn form and established and admitted to probate in due form of law. Shortly after the filing of the decree of probate court admitting will to probate in due form of law this action was instituted. James J. Dicks is the plaintiff in this action, and under the will of L. F. Dicks made September 11, 1890, he is the sole beneficiary, and he claims that on that date, under an agreement then existing, he and his brother executed mutual, irrevocable wills for survivorship of property. The defendants are the executor and beneficiaries of the will of L. F. Dicks of August 22, 1911, and they (except Hattie M. Dicks, who made default) deny that such agreement for survivorship or for the execution of mutual wills ever existed. Both L. F. Dicks and James J. Dicks were bachelors. The cause was referred to the master for Aiken county to take testimony and report the same, which he did, and upon the testimony so reported the case came on for trial before his honor, Judge Sease, who made a decree sustaining the claim of the plaintiff and directing that after the debts of L. F. Dicks are paid by the executor of his later will, all of the remaining property be deliv-

ered over to James J. Dicks as his property. From this decree all of the defendants under the later will of L. F. Dicks who had answered appeal.

[1, 2] Exceptions 1, 2, 3, 9, and 10 raise the question which is the vital and pivotal one in the case, and that is whether or not there was a contract entered into between the dead brother, L. F. Dicks, and the living brother, J. J. Dicks, for the execution of mutual, irrevocable wills. To establish an agreement such as is claimed by the plaintiff here, the proof must be definite, certain, clear, and convincing. A person has a right ordinarily to leave his property to whom he pleases. He has a right any time to make a will disposing of his property, and later on he can revoke this will in toto or change or modify the same by new will or codicil. It is a fixed principle of law that a will is revocable whenever the maker desires to change. A person has the right to dispose of his property as he pleases. He can show gratitude, affection, or charity, or he can be capricious with his own. The law gives to every one the right to enjoy his property while alive, and to make disposition of it after death. The maker of the will is dead, and the degree of proof establishing a contract whereby a will is made that cannot be revoked by the maker ought to be clear and convincing, certain and definite, and scrutinized and received with the greatest of care; for it practically deprives the owner of property of any interest in the property except to enjoy it for life. It is a most serious thing for the court to decide that a person cannot dispose of what is his by deed or devise, and because at one time he intended a certain person to be the beneficiary under his will and after his death to have his property, that later he cannot change his mind and substitute another or others. As persons advance in life they change their views as to a number of things, and it frequently happens that a wealth of affection and favors have been wasted on persons, and the recipient he favors proves weak, unresponsive, unworthy, or ungrateful. A young person it has been said regards every one as his friend, but as he grows older he is wiser, more cynical, and his judgment more clarified, and he frequently finds that his judgment as to men and things has been inaccurate and erroneous. Some he has judged as being worthy he finds unworthy, or unsympathetic, or uncongenial; others that he has judged as unworthy he finds worthy and congenial. There is no doubt that at the time the wills were executed by the brothers in September, 1890, L. F. Dicks intended J. J. Dicks to have his property. But it is a long time between 1890 and 1911, and during that time they had farmed together, merchandised together, and failed in the mercantile together. In McKeegan v. O'Neill, 22 S. C. 468, this court says:

"Such a contract, especially when it is attempted to be established by parol, is regarded with suspicion, and not sustained except upon the strongest evidence that it was founded upon a valuable consideration and deliberately entered into by the decedent."

In Wilson v. Gordan, 73 S. C. 160, 53 S. E. 81, this court says:

"Where a contract to make or not to revoke a will is set up, there are strong reasons for requiring an agreement definite and certain established by evidence clear and convincing. The evidence comes from the living against the dead, who cannot speak in his own behalf in disproof of a charge of the violation of a solemn obligation. For this reason it is obvious little, if any, consideration should be given to the testimony of those who claim the benefit of such a contract. On account of the secrecy observed by most persons as to the will they expect to make, there is little general discussion of the subject, and it is therefore difficult to disprove any intention or agreement attributed to a testator. Again, the discussion by two persons bound to each other by the closest ties of affection as to disposition of their property, resulting in separate wills by which the property of each was left to the other, affords no ground for the inference that either undertook or exacted a legal obligation. Such action may be far more reasonably attributed to the promptings of affection, and courts should not introduce the mercenary element, except upon clear affirmative proof that it was present within the understanding of both parties. With this statement of the character and strength of the evidence which ought to be required in cases of this kind, we consider that which is here offered."

On page 164 of 73 S. C., on page 82, the court says:

"All the facts relied on as implying a contract to make * * * wills are entirely consistent with the absence of contract and the presence of the union of life and mutual affection as the impelling motive. * * *"

And lower on same page:

"The fact that there was an absolute devise from each sister to the other without limitation was strong evidence that there was no intention to limit the power of alienation. When an intention is reduced to writing either in form of a will or contract, there is always a strong implication of fact that the whole intention has been expressed, and an implication still stronger that there is no agreement or intention contrary to that expressed."

This principle is approved of in other states. Allen v. Bromberg, 163 Ala. 620, 50 South. 884; Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265. Our court also says, in Church v. Farrow, 7 Rich. Eq. 383 (28 S. C. Eq.):

"It is, however, equally settled that the terms of the agreement shall be unambiguous and definitely ascertained. If a court be at liberty to conjecture the intention of the parties, it might fall into the error of decreeing what the parties never contemplated." "Specific performance of agreements is not an absolute right in the party, but a question of sound discretion in the court." Holley v. Anness, 41 S. C. 354, 19 S. E. 646; Marthinson v. McCutchen, 84 S. C. 256, 66 S. E. 120.

[3] In establishing the alleged agreement Jas. J. Dicks was examined, objection was made, his evidence as to transaction and communications he had with the deceased must be excluded under section 438 of the Code of Procedure. McAulay v. McAulay, 96 S. C. 86, 79 S. E. 785.

[4] There was no attempt to prove an ear-

lier agreement or contract for mutual wills or survivorship prior to September 11, 1890, the time the wills were drafted and executed, and there is no proof at all of any written agreement. All the proof relied on to establish the agreement is parol, and that is confined to the testimony of the plaintiff and T. R. Erwin on the part of the plaintiff and Messrs. D. S. and E. P. Henderson, attorneys, who advised and drafted the wills; D. S. Henderson being the one who advised and E. P. Henderson being the draftsman of the wills. A careful examination of all the evidence on this point convinces us that there was no agreement between James J. Dicks and L. F. Dicks that the wills were written and executed by them because of an agreement between them to make mutual, irrevocable wills. But on the contrary both the plaintiff and his witness, Erwin, give as a reason that the wills were executed was because their stepmother was threatening to sue L. F. Dicks as administrator.

Taking the evidence as a whole we fail to find that the plaintiff has made out his case by the preponderance of the testimony. The evidence was the plaintiff shows that they were mistaken and inaccurate in their statement due to defective memory, lapse of time, or some other excusable cause, while the evidence on the part of the defense, especially that of D. S. and E. P. Henderson, is clear, definite, positive, and convincing, and establishes beyond question that there was no such agreement that the wills were to be mutual wills and intended to be irrevocable, and that the purpose and object in making the wills were not intended as claimed by the plaintiff. D. S. Henderson is positive of this, and testifies most emphatically that this was not the object and purpose. E. P. Henderson is equally as positive. The evidence of the Hendersons, backed up as it is by their books in reference to the payments for the wills, and all of the circumstances of the case convince us that they were correct in their recollections as to the transactions. Mr. Erwin is in bad physical condition, the transaction was years ago, and by length of time, or impaired memory, we are satisfied he is mistaken. The overwhelming preponderance of the testimony on this crucial question is against the plaintiff, he has failed upon this vital point to establish his contention, but the defendants, by a clear preponderance of the testimony, have shown that there was no such contract or agreement, and his honor was in error in so finding, and these exceptions must be sustained.

We do not think that it is necessary to consider all of the exceptions, other than to say that the eleventh exception should also be sustained, as there is no testimony to sustain his honor's finding that L. F. Dicks was incapacitated and unduly influenced. Mrs. Cassels and Miss Dicks were closely related to him, and it was natural that they should be kind to him, and also to their credit that they were, and there is no proof that justifies the finding by his honor that he was incapacitated and unduly influenced.

The whole testimony shows us that the will of 1911 was the will of L. F. Dicks, made upon due consideration and intent to dispose of his property as therein provided for.

Judgment reversed.

GARY, C. J., and HYDRICK, J., concur.

FRASER, J. I concur on the ground that no contract for mutual wills is shown. I do not think the question of undue influence can arise in this case.

GAGE, J., concurs.

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(100 S. C. 339)

## SANDERS v. D. LANDRETH SEED CO.

(No. 9043.)

(Supreme Court of South Carolina. April 3, 1915.)

1. SALES ⟸270 — IMPLIED WARRANTY OF QUALITY—INVOICE AND BILL OF LADING.

Where the plaintiff ordered seeds at a sound price, which were shipped to him under an invoice and bill of lading making various statements negativing any warranty of quality, such statements could not render the transaction a sale on inspection; since a sound price warrants a sound article.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 766–768; Dec. Dig. ⟸270.]

2. SALES ⟸287—IMPLIED WARRANTY—BILL OF LADING AND INVOICE—STATEMENTS.

In an action by a buyer of potatoes for damages resulting from failure of the crop, where, by the invoice and bill of lading, the seller stated that it would allow no claim for damages after delivery to the carrier in good condition, such seller could not escape the consequences of its own statements when the buyer took it at its word and planted the shipment without asking the seller to take back the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 811–816; Dec. Dig. ⟸287.]

3. SALES ⟸270 — DENIAL OF RIGHT OF INSPECTION—EFFECT.

In an action against the seller of seed potatoes for damages resulting from failure of the crop, where the buyer had no right of inspection until after he had purchased, denial of the plaintiff's right of action on an implied warranty of soundness, raised by a sound price, could be predicated as upon his having accepted the goods after examination.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 766–768; Dec. Dig. ⟸270.]

4. SALES ⟸417 — ACTION ON WARRANTY — SUFFICIENCY OF EVIDENCE.

In action against a seller of seed potatoes for failure of the crop, evidence *held* sufficient to sustain verdict for plaintiff on the implied warranty of soundness raised by a sound price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1173; Dec. Dig. ⟸417.]

5. SALES ⟸202 — SHIPMENT — RESERVATION OF TITLE.

Where seeds were sold and shipped to the buyer, the bill of lading, with draft attached,

being sent to a bank at the point of delivery, such draft being paid by the buyer, the seller retained title and possession in itself until the goods arrived at the point of delivery and the draft was paid and the bill of lading turned over to the plaintiff by the bank.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 542-551; Dec. Dig. ⟸202.]

6. SALES ⟸266 — IMPLIED WARRANTY OF QUALITY—INVOICE AND BILL OF LADING.

The implied warranty of the soundness of goods sold raised by a sound price cannot be abrogated by the mere insertion by the seller in the invoice and bill of lading of statements negativing any warranty or any responsibility for the quality of the goods in general.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 743, 746, 747, 754-759; Dec. Dig. ⟸266.]

Appeal from Common Pleas Circuit Court of Beaufort County; I. W. Bowman, Judge.

Action by Gustave Sanders against the D. Landreth Seed Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mordecai & Gadsden & Rutledge, of Charleston, for appellant. W. J. Thomas, of Beaufort, for respondent.

FRASER, J. The respondent gave to the appellant the following order:

"G Sanders, Treasurer Beaufort County.

"Order with D. Landreth Seed Co., Bristol, Pa.

"Beaufort, S. C., Jan. 15, 1910.

| | | |
|---|---|---|
| 200 Sax Cobblers | @ | 2.90 |
| 20 " Spaulding Rose | @ | 3.45 |
| 20 bus. Peas, Ameer, | @ | 4.50 |
| 50 No cuc Extraordinary Spunc | | 65 |
| 20 bu. Beans, Red Valentine | | 3.25 |
| 1 No. Nelon, Kleckley Sweet N/C | | |

"Shipment Dec. 20, '09

"Subject to revision or cancellation till Nov. 1st, 1909. [Signed] V. V. Vansant.

"July 22, 1909."

The order was written on the official stationery of Mr. Sanders, but it was for his private use. The goods were shipped to appellant's agents in Savannah, Ga., in car load lots, and the potatoes intended for Mr. Sanders were there separated and reshipped to respondent at Beaufort, S. C. The bill of lading, with draft attached, was sent to a bank in Beaufort, to order notify Gustave Sanders. Mr. Sanders paid the draft, and took the bill of lading to the transportation company, and took possession of the potatoes and sent them to his farm. Comparatively few came up, and this action is brought to recover damages for the defective seed potatoes.

There is testimony tending to show that the potatoes were in bad condition when Mr. Sanders took charge of them, and that he knew it. The defendant in its answer admitted that the price was sound, but alleged that it had delivered a sound article; that the plaintiff had every opportunity to inspect the potatoes and, after inspection, accepted them; that the same was without any warranty; and that the defendant is not liable for the failure of the potatoes to germinate.

The invoice, and it is said the bill of lading contains the following:

Invoice offered in evidence marked "Exhibit B."

Exhibit B—HDE.

The D. Landreth Seed Co. give no warrant, express or implied, as to description, quality, productiveness, or any other matter of any seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned. In preparing onion sets and potatoes for shipment every possible care is taken to insure safe carriage and delivery, but the precarious nature of such articles makes it necessary that we should call the attention of our customers to the fact that after delivery in good order to transportation company (which thereupon becomes the agent of consignee), our responsibility ceases, and the risk of safe carriage, delays of carriers, and damage from any cause whatever, must be assumed by the purchaser. No claim for damage will be allowed by us. Onion sets should be taken out of the barrels or crates as soon as received and spread out on a dry floor.

We do not guarantee safe carriage or delivery of goods. After shipment in good order, our responsibility ceases. Your recourse is upon the carrier.

Shipped at Risk of Purchaser.

No goods taken back. All claims must be made within five days.

All Orders are Received Subject to Results of Crops. Net cash, due on date of shipment, subject to draft at sight.

Burnet Landreth, President.
Burnet Landreth, Jr., Treas.
S. Phillips Landreth, Sec'y.
Bloomsdale Seed Farms,
Bristol, Pa., Jan. 5, 1910.
Mr. Gustav Sanders,
Beaufort, S. C.
Bought of D. Landreth Seed Co.,
Founded 1784, Incorporated 1904.
—— packages —— 220 bags
Boxes 36,300.
—— crates —— bbls.
Garden Seed Farmers and Merchants.

Potatoes:

| | | | |
|---|---|---|---|
| 130 sacks Irish Cobblers | @ 2.90.. | 377.00 | |
| 20 " Spaulding Rose | @ 3.45.. | 69.00 | |
| 70 " Sunlight | @ 2.90.. | 203.00 | 649.00 |
| Freight 36,300 lbs. Bristol to Beaufort @ 29c. | | | 75.87 |
| Less freight Savannah @ 10c. sack | | | 22.00 |
| | | | 702.87 |

These goods are shipped to order.

The testimony was conflicting. The jury found for the plaintiff, and from the judgment entered upon their verdict, the defendant appealed.

The following are the exceptions:

[1,2] 1. "There was no testimony tending to show that the defendant was responsible for the quality of the seed furnished the plaintiff or for its productiveness or for the crop, and the evidence showed that the defendant had expressly disclaimed any such responsibility."

The weak place in appellant's case is that very disclaimer of responsibility for the quality of goods furnished. The attack was on the quality. The general rule is, undoubtedly, that a sound price warrants a sound article. The effort to combine the order with the statement on the invoice and bill of lading, as a matter of law, must fail under Grocery Co. v. Brooke, 70 S. C. 496, 50 S. E. 186.

In that case inspection was allowed before the payment of the draft, and the permission was written on the bill of lading, and yet this court held that the purchaser was not bound to exercise the permission. Here there was no such indorsement and the agent of the transportation company said, while he did not feel bound to allow goods to be opened by every one, he would probably have allowed the plaintiff to open and inspect, as he was a responsible man.

When the plaintiff first saw the potatoes (and we have seen that he was not bound to inspect) he had already paid the draft, taken the bill of lading, and was then the owner of the goods. It is claimed by appellant that it was the duty of the respondent to notify the appellant of the defect at once. Whether the buyer is held to the disclaimer or not, the seller cannot escape the consequences of its own statement. That statement notified the appellant that the seller did not hold itself liable for defect in quality, and no goods would be taken back. The appellant claims that it notified the respondent time and again that it denied liability for "quality," and it is in court now strenuously maintaining the same thing.

The demand for reparation was refused in advance as a matter of right, and a party is not bound to ask a favor. The appellant claims he should have been given the opportunity to do that which he declared he would not do. "No goods taken back." If the appellant had shipped the potatoes to the respondent, and he had received and paid for them, after he knew of the alleged defects, and nothing more appeared, a very different sort of a question would have been presented.

This exception cannot be sustained.

[3] 2. "Because the testimony offered on behalf of the plaintiff showed that the plaintiff had voluntarily accepted the seed potatoes, after examination, and had himself taken the risks of producing a crop therefrom."

We have seen that there was evidence to show that the respondent did not inspect, nor was the right to inspect accorded to him, until after he had purchased them.

This exception cannot be sustained.

[4] 3. "There was no testimony before the jury to sustain the plaintiff's cause of action."

We have seen that there was such testimony, and this exception is overruled.

[5] 4. "Because the presiding judge erred in refusing to charge the defendant's first request to charge, which was as follows: 'The jury are instructed that, if they find from the evidence that the potatoes were in good condition, fit for the use for which purchased, when the same were shipped at the point of shipment, and that the same were purchased f. o. b. with draft against them, then, as a matter of law, the title to the shipment passed to the purchaser, the plaintiff, when put on board, for carriage to the point of destination, and the defendant would not be liable for any damages to the potatoes occurring during such shipment or after arrival at destination'—the error assigned being there was no admission in the answer which made it improper to charge this proposition, and the evidence showed that the shipment of these goods, which was accepted and agreed to by him, before or at the time of receiving these goods, was f. o. b. point of shipment."

His honor could not have charged that request, because the undisputed evidence is that, according to the law of this state, the defendant retained title and possession in itself until the goods arrived in Beaufort, S. C., and the draft was paid and the bill of lading turned over to the respondent.

This exception is overruled.

[6] 5. "Because the presiding judge erred in leaving it to the jury to say in charging the defendant's fourth and fifth requests to charge and in his general charge that there was any contract between the parties that there should be no warranty of the seed furnished by the plaintiff to defendant; the error assigned being, that such contract was shown by undisputed evidence in the case, and the defendant was therefore entitled to have its request to charge, without the modification made by the presiding judge."

Under the case of Grocery Co. v. Brooke, 70 S. C. 496, 50 S. E. 186, Judge Bowman could not have made the charge.

This exception is overruled.

In its argument in reply, the appellant raises the question of measure of damages. The measure of damages was not in issue on circuit, nor by exception to this court.

The judgment appealed from is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

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(100 S. C. 335)

## BENNETT v. COLLETON CYPRESS CO. et al. (No. 9048.)

(Supreme Court of South Carolina. April 1, 1915.)

1. TRESPASS ⟸46 — DAMAGES — EXEMPLARY DAMAGES.

Where defendants contended at the trial that the boundaries of a tract, the timber on which had been sold to them, included the lands from which the timber in controversy was cut, but there was evidence that they had previously offered to buy that timber, which plaintiff had refused to sell, and that they cut it in such a way as to conceal their operations until all desirable timber had been cut, the jury, if they believed such evidence, might find a willful invasion of plaintiff's right and award punitive damages.

[Ed. Note.—For other case, see Trespass, Cent. Dig. §§ 123–127; Dec. Dig. ⟸46.]

2. TRIAL ⟸267 — REQUESTS — SUBSTITUTION BY COURT.

In trespass for cutting timber, where defendants requested a charge that their deed to the timber fixed the beginning point at a boat landing, which was at the high land of plaintiff,

and that the burden of plaintiff to prove the location of such boat landing was not met by proving the location of a boat landing in a swamp, and the court refused the charge in those words, but stated the language of the deed that the boundary began at the high land of plaintiff at a point where there was a boat landing, and that high lands and swamp lands were not the same, and a boat landing in a swamp would not be a boat landing at the high lands, the requested charge was substantially given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668–672, 674; Dec. Dig. ⟸267.]

Appeal from Common Pleas Circuit Court of Colleton County; Hayne F. Rice, Judge.

Action by A. Bennett against the Colleton Cypress Company and others. Judgment for the plaintiff, and defendants appeal. Affirmed.

Howell & Gruber, of Walterboro, for appellants. Padgett, Lemacks & Moorer, of Walterboro, for respondent.

FRASER, J. This is an action for actual and punitive damages. The appellant states the case as follows:

"The above-entitled cause was tried before the Honorable Hayne F. Rice, presiding judge, and a jury, at the March term, 1914, of the court of common pleas for Colleton county, and resulted in a verdict in favor of the plaintiff and against the defendants Colleton Cypress Company and Angus McKenzie for the sum of $2,500 damages.

"The complaint of the plaintiff was that the defendants, in the year 1910, entered upon certain lands belonging to the plaintiff, described in the complaint, and destroyed the timber growing thereon. For this alleged wrongful act the plaintiff sought damages, both actual and punitive. The answer of the defendants was that they cut no timber from the said lands of the plaintiff, except such timber as the plaintiff himself had sold and conveyed to one C. B. Weekly, who in turn sold and conveyed the same timber to the defendant Colleton Cypress Company.

"At the close of the testimony, plaintiff's counsel announced in open court that they did not ask for any damages against the defendant Wigfall. All of the testimony shows that A. McKenzie was the general superintendent of the Colleton Cypress Company, and that all of his acts in relation to the cutting of this timber were done through and for the Colleton Cypress Company. The verdict of the jury, however, was against the Colleton Cypress Company and against A. McKenzie in his own right. At the close of the testimony defendant's counsel requested the court to instruct the jury that they could find no verdict against the defendants for punitive damages; there being no testimony tending to show any intentional willful or wanton invasion of the plaintiff's rights and no testimony upon which a verdict for punitive damages could be based. The court refused to instruct the jury as requested, and charged that, on the contrary, they could find for the plaintiff punitive as well as actual damages against the defendants.

"The jury rendered a general verdict against the defendants for $2,500 damages. From the judgment entered upon this verdict, the defendants appealed to the Supreme Court upon the exceptions set out in the case.

"Argument.

"In order to discuss the exceptions intelligently, it is necessary to state, first, the essential facts of the controversy.

"On December 1, 1909, the plaintiff Abraham Bennett, for the consideration of $4,000, duly conveyed unto C. B. Weekly (who later conveyed to Colleton Cypress Company) all of the trees and timber of every kind situated on the following described tract of land:

"Tract No. 1. Beginning where the line between A. Bennett and J. C. and Susan Padgett crosses the Owens Ford causeway, running west to the corner of Mrs. M. J. Carter's land, thence south with the said M. J. Carter line, thence to the main run of Buckhead Swamp, thence northeast following the main run to Owens Ford causeway, thence with the Owens Ford causeway to the beginning, containing 75 acres, more or less.

"Tract No. 2. Beginning at the northwest corner of M. J. Carter's land, and the northeast corner of A. Bennett's land, running west to the Barrony line, thence south on A. Bennett's land to the main run of Buckhead swamp, thence with the run of Buckhead swamp to M. J. Carter's land, thence with the line of M. J. Carter's land to the beginning, containing 60 acres, more or less.

"Tract No. 3. Beginning at the high land of A. Bennett at a point about 300 yards south of Bell's causeway, known as the boat landing, running west to the main run of Little Salkahatchie, parallel with the causeway, thence down the swamp in the southerly direction to the line of Dr. J. P. Herndon, thence east and south and southeasterly to the high lands of A. Bennett, following the line of Dr. J. P. Herndon's land, thence on the mud line of Old Field creek and Salkahatchie swamp to the beginning, containing 200 acres, more or less.

"The plaintiff admitted the execution of this conveyance, but contended that the defendants cut timber over and beyond the boundary lines mentioned in the said deed. The sole question of fact in the case was the location of certain boundary lines mentioned in the deed.

"Tract No. 1 is not involved in the controversy; it being admitted that the defendants did not cut any timber beyond the boundaries of that tract as mentioned in the said deed.

"The only disputed boundary line of tract No. 2 is 'the main run of Buckhead swamp.' The plaintiff owned land lying on both sides of the main run of Buckhead swamp, but sold to the defendant only the timber on the west side of the said run; the said run being the eastern boundary of tract No. 2. The contention of the plaintiff was that the defendants, in cutting the timber, crossed to the east side of the said main run. The defendants denied this. The undisputed testimony shows that Buckhead swamp has many runs. The sole issue of fact, in so far as tract No. 2 is concerned, is the true location of the main run—which one of the many runs is the main run.

"The only disputed boundary line of tract No. 3 is the correct location of the point known as the 'boat landing,' mentioned in the deed. The plaintiff contended that the boat landing referred to in the deed is located on the main run of Little Salkahatchie river. The defendants contended that the boat landing referred to in the deed is located, not on the main run of Little Salkahatchie river, but 'at the high land of A. Bennett.'

"The testimony shows that there were in fact two boat landings on tract No. 3, one located on the main run of the Salkahatchie river, and the other located at the high land of A. Bennett. Which of the two is the boat landing referred to in the deed?"

There are seven exceptions, but the appellant argues only four—Nos. 1, 2, 6, and 7—and consolidates 6 and 7.

[1] 1. The first question argued by appellant is the consolidation of 6 and 7, and raises the

question: Is there any evidence to sustain a verdict for punitive damages? The question as to which of two bodies of water in a swamp is the main run is a question of fact for the jury. There was much conflict of testimony, but it was the province of the jury to locate the main run. If the jury concluded that the western body was the main run, and the defendants cut the timber beyond that run, then the defendants trespassed on the plaintiff's land and were liable for actual damages. There was testimony that the defendants offered to buy the timber across the western run, and the plaintiff refused to sell it; that the timber was cut so as to conceal operations until all the desirable timber was cut.

If the jury believed that the defendants tried to buy the timber on the disputed area, and the plaintiff refused to sell, and that it was not included in its deed, and defendants knew it, but the defendants took it any way, they could have given damages for a willful invasion of plaintiff's rights. The exceptions that raise this question cannot be sustained.

[2] 2. The first exception is as follows: "That the presiding judge erred in refusing to charge the jury the defendant's third request to charge; such request being as follows: 'That in the said deed the boat landing mentioned as the starting point of the said boundary is described as being located at the high land of the plaintiff; the boundary line running therefrom west to the main run of Little Salkahatchie. That, in order to recover for an alleged trespass in crossing this boundary line, it was incumbent upon the plaintiff to prove, to the satisfaction of the jury, the location of this boat landing at the high lands of the plaintiff, and the burden is not met by proving the location of a boat landing in Salkahatchie swamp at or near the stream or channel and entirely away from the highlands of the plaintiff; such proof being inconsistent with the terms of the deed referred to and the allegations of the complaint.' It is respectfully submitted that such request contained a sound principle of law, was directly applicable to the issues involved, and the presiding judge was in error in refusing to charge the same."

In response to that request to charge, Judge Rice said: "Mr. Foreman, and gentlemen of the jury, I cannot charge you that in exactly those words, because it seems to me that that contains some reference to the facts, and I am not allowed to even intimate what I think about the facts in this case. I will say this: That the reference of this deed is as to the boat landing on the high lands of Mr. Bennett; the deed says tract No. 3, 'beginning at the high lands of A. Bennett at a point,' etc. Now, of course, you know as well as I do that high lands and swamp lands are not one and the same, and a boat landing on the high lands would not be a boat landing in the swamp, and it is hardly necessary for me to say that proof of a boat landing in the swamp is not proof of a boat landing on the high lands."

That was a substantial charge of the request. This exception cannot be sustained.

3. "That the presiding judge was in error in refusing to charge defendant's fourth request, as follows: 'That in considering the question as to whether or not the plaintiff has shown any right to recover of the defendant, or either of them, the jury will disregard all claims for damages for the alleged trespass on the lands of the plaintiff lying to the south of what is known as Bell's causeway'; there being a total failure on the part of the plaintiff to introduce any competent testimony showing damages to his property on the south side of the said causeway."

There was testimony to the contrary, and his honor could not have so charged. This exception cannot be sustained.

Judgment affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

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(100 S. C. 423)

## TOWN OF DENMARK v. CORLEY.

(No. 9059.)

(Supreme Court of South Carolina. April 9, 1915.)

CRIMINAL LAW ⊂⊃1158—APPEAL—REVIEW—NEW TRIAL—QUESTIONS OF FACTS.

Facts being involved in the order of the circuit court granting defendant a new trial, on the ground that he did not have a fair trial, it cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061–3066, 3070, 3071, 3074; Dec. Dig. ⊂⊃1158.]

Appeal from General Sessions Circuit Court of Bamberg County; T. S. Sease, Judge.

M. D. Corley, convicted on prosecution before the Town Council of the Town of Denmark, was, on appeal to the circuit court, granted a new trial, and the Town appeals. Appeal dismissed.

The order of the circuit court is as follows:

This cause came on to be heard before me at the present term of court, alleging error in the town of Denmark in trying the defendant for that the said officers of said town had not qualified or taken the constitutional oath, as provided for in article 3, § 26, of the Constitution of 1895; alleging error further in allowing the testimony as to a search warrant when there was no sufficient warrant to search defendant's premises; alleging error further in allowing the marshal to testify as to a search warrant when he had not been sworn in as required by law (in other words, that he had not taken the constitutional oath as above stated); alleging error because the warrant under which the defendant was first arrested was not sworn to, and on motion the same was quashed, and the said court erred in writing out a similar warrant and affidavit and having same sign-

ed by marshal or other person and arresting the defendant and trying him summarily.

The further exceptions were not passed upon.

The court is of the opinion that the record having disclosed the fact that the officers of the town not having taken the constitutional oath, as required by the Constitution, as aforesaid, and not holding over, having been just elected, they are not officers de facto, and this exception is sustained.

The court is of the further opinion that the defendants are entitled to a new trial because, the warrant having been quashed, the defendant was entitled to be discharged from said arrest, and the record having disclosed the fact that counsel objected to the trial of the cause at that time. And, under the circumstances disclosed by the record, I hold that the defendant has not had a fair trial.

The court is of the opinion that the objection as to the testimony by the marshal or other persons disclosing the fact that contraband liquors were found upon the premises of the defendant is not tenable. I am of the opinion that the town had the right to prove, by any person or persons who may have seen or found contraband liquors upon the premises of the defendant, they had a right to prove it, and this exception is overruled. Let the defendant have a new trial; and it is so ordered.

J. Wesley Crum, Jr., of Denmark, for appellant. Jas. E. Davis, of Barnwell, for respondent.

GARY, C. J. The defendant was tried by a jury before the town council of the town of Denmark, for storing liquor unlawfully, and appealed to the circuit court, which granted him a new trial, whereupon the town council appealed from the order of the circuit court, which will be reported.

Two of the grounds upon which the new trial was granted involve questions of law which are untenable, and, if nothing further appeared, this court would render judgment absolute. There is, however, a third ground, upon which the new trial was granted, to wit, that the defendant did not have a fair trial. The record shows that the facts were involved in this ruling, and prevents this court from rendering judgment absolute. Daughty v. Railway Co., 92 S. C. 361, 75 S. E. 553.

Appeal dismissed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

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(100 S. C. 432)

## TOWN OF DENMARK v. ROBINSON.

(No. 9058.)

(Supreme Court of South Carolina. April 9, 1915.)

Appeal from General Sessions Circuit Court of Bamberg County; T. S. Sease, Judge.

"To be officially reported."

J. H. Robinson was prosecuted before the Town Council of the Town of Denmark. From a judgment on a verdict of guilty, he appealed to the circuit court, which granted a new trial, and the Town appeals. Appeal dismissed.

J. Wesley Crum, Jr., of Denmark, for appellant. Jas. E. Davis, of Barnwell, for respondent.

GARY, C. J. The principles announced in the case of Town Council of the Town of Denmark v. Corley, 84 S. E. 884, in which the opinion has just been filed, are conclusive of the questions raised by the appeal in this case.

Appeal dismissed.

HYDRICK, WATTS, and FRASER, JJ., concur.

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(75 W. Va. 793)

## MANCHESTER et al. v. PARSONS.

(Supreme Court of Appeals of West Virginia. March 16, 1915.)

*(Syllabus by the Court.)*

1. BILLS AND NOTES ⟸427 — PAYMENT TO PRIOR HOLDER—EFFECT.

Payment to a prior holder does not discharge a negotiable instrument in the hands of a subsequent holder in due course. Subsection 4 of section 119, Negotiable Instruments Act (Code 1913, c. 98a, § 4290), does not apply in such case.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1233–1244; Dec. Dig. ⟸427.]

2. BILLS AND NOTES ⟸489 — ACTION BY HOLDER IN DUE COURSE—SIGNATURE OF INDORSER.

In a suit by the holder in due course against the maker of a negotiable note, the genuineness of the indorser's signature is not material if he has either authorized, or subsequently ratified, such indorsement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1587–1642; Dec. Dig. ⟸489.]

3. TRIAL ⟸168 — DIRECTION OF VERDICT — EVIDENCE.

When the evidence is such as to warrant a finding by the jury in favor of one of the parties only, the court may properly direct a verdict for that party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 311, 376–380; Dec. Dig. ⟸168.]

Error to Circuit Court, Tucker County.

Action by Jason Manchester and others against L. W. Parsons. Judgment for plaintiffs, and defendant brings error. Affirmed.

L. Hansford and A. R. Stallings, both of Parsons, for plaintiff in error. A. Jay Valentine, of Parsons, for defendants in error.

WILLIAMS, J. By this writ of error defendant seeks to reverse a judgment recovered against him by Jason Manchester and L. M. Elliott, upon notice and motion, under the statute. The recovery was upon a negotiable note made by defendant, payable to Burton & Co., a partnership composed of L. A. Burton and D. J. Grindell, and indorsed to plaintiffs. Defendant filed three pleas on which issues were joined. The substance of the pleas are: (1) That defendant had discharged the note by payment to the legal owner and holder, before the suit was brought; (2) denial that plaintiffs are bona fide holders for value in due course; and (3) that the name of Burton & Co., indorsed on the note, is not the firm's genuine signature, and was not placed there by any one having authority from them to do so. This last plea is verified by affidavit.

After the evidence had all been introduc-

ed, the court, on motion of plaintiffs, excluded defendant's evidence, and directed the jury to return a verdict for plaintiffs. A motion to set aside the verdict was overruled, exceptions taken, and judgment entered.

Burton & Co. was a Kenton, Ohio, firm, engaged in importing and selling horses for breeding purposes. Defendant lived at Parsons, W. Va., and was engaged in breeding horses. The note is for $800, payable 18 months after date, to the order of Burton & Co., at the First National Bank of Parsons, with 6 per cent. interest, and bears date September 22, 1910. It is proven that the note was negotiated to plaintiffs by one Lee Whorton, about the 1st of November, 1910. Whorton was then employed in selling horses for Burton & Co.

[1] Defendant's pleas set up affirmative matters entailing on him the burden of proof. Any one of them, if sustained, would defeat recovery. But there is no evidence to support any of them. To sustain his first plea, defendant proved that on the 3d of June, 1911, he sold and delivered to Burton & Co. some Percheron colts for $1,675, with the understanding and agreement that it was to pay his note, and that they were to execute to him their note for the balance. He produced a letter from D. J. Grindell, then a member of the firm, but now deceased, dated June 15, 1911, acknowledging receipt of the colts in good condition, and promising defendant to send him his note and the firm's note for the balance, soon. Counsel contends that defendant's note was thus discharged. But the uncontradicted testimony of L. A. Burton, the surviving partner, and of Lee Whorton, is that it had been indorsed to plaintiffs, for value, about the 1st of November, 1910, and therefore payment to the original holders did not discharge it. Counsel invokes subsection 4 of section 119 of the Negotiable Instruments Act as authority for his contention. Section 119 describes how a note may be discharged, and subsection 4 reads: "By any other act which will discharge a simple contract for the payment of money." This subsection must be interpreted with reference to the general purpose of the negotiable instrument act. It must be read in connection with its other provisions, and made to harmonize with the general scheme and plan of the act. Thus viewing subsection 4, it is apparent that it was never the legislative intent to make so radical a change in the general law respecting negotiable instruments, as would be wrought by the literal interpretation contended for. It is clear, from other provisions of the act, as well as from the preamble thereto, that the Legislature did not contemplate making so vital and radical a change in the law, as to permit equities between the original parties to a negotiable instrument to defeat the title of an innocent holder for value in due course. That would counteract the purpose of the statute, which was not to revolutionize the law, but to amend, enlarge, and re-enact certain sections of the statute law respecting negotiable instruments, and consolidate and arrange in one act the general laws on that subject, so as to make them uniform with the laws of other states. The acts which will discharge a simple contract for payment of money, in order to effect a discharge of negotiable paper, within the contemplation of subsection 4, must therefore necessarily be limited to such acts as relate to and affect the holder of the paper demanding payment of it. It does not include a holder for value in due course. Negotiable paper, in the hands of such holder, is not discharged by payment made to his transferror, either before or after the transfer. Such was the rule of the common law respecting negotiable paper, and it was clearly not the legislative purpose to change the rule. It would injuriously affect the value of commercial paper, by putting it on a plane with simple contracts for the payment of money. We cannot conceive that the Legislature intended any such thing, although a literal interpretation of the subsection in question might indicate otherwise. Other provisions of the statute expressly preserve the rights of holders in due course. Section 52 (sec. 4223) defines a holder in due course to be one who takes the paper in good faith for value, without notice of any infirmities in it or defect in the title of the person negotiating it. And section 57 (sec. 4228) says that such an one holds it "free from any defect of title of prior parties, and free from defenses available to prior parties among themselves and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." To construe subsection 4 of section 119, as contended for by counsel, would defeat section 57 and other provisions contained in the act. Trust Co. v. Crawford & Ashby, 69 W. Va. 109, 70 S. E. 1089, 33 L. R. A. (N. S.) 587, holds that "the rights of a bona fide assignee of such a note, in due course, are not affected by the equities of the maker." Although that was a suit on a negotiable note, given and payable, before the passage of the negotiable instruments statute, still it does not change the general commercial law in that respect. Hence payment by defendant to Burton & Co., before the note became due, whether before or after they had negotiated it, could not defeat collection by an innocent holder for value who acquired it in due course.

There is likewise no evidence to support defendant's second plea. Every holder is deemed prima facie to be a holder in due course. Section 59 (sec. 4230). And if it be assumed that proof of payment to Burton & Co., before the note was due, shows such defect in their title as casts upon plaintiffs, the holders, the burden of proving that they acquired title in due course, still they have fully discharged the burden. They prove that they purchased the note about Novem-

ber 1, 1910, and paid value therefor. There is no conflict in the testimony on that point.

[2] There is, however, some conflict in the testimony respecting the genuineness of Burton & Co.'s signature indorsed on the note, an issue presented by the third plea. Still, in view of the testimony of L. A. Burton, a member of the firm, admitting that the note was negotiated for them, and that they received the benefit of it, the genuineness of their signature becomes immaterial. By receiving the money for the note, they ratified the indorsement, no matter by whom made, and no one else has any right to controvert it. Bank v. Bryan, 72 W. Va. 29, 78 S. E. 400.

[3] There is no evidence upon which the jury could have returned a verdict for defendant, and, according to the well-established rule of practice, the court properly directed them to find for plaintiffs. Diddle v. Casualty Co., 65 W. Va. 170, 63 S. E. 962, 22 L. R. A. (N. S.) 779; Butcher v. Sommerville, 67 W. Va. 261, 67 S. E. 726; Vance v. Virginia Pocahontas Coal Co., 82 S. E. 1081.

The judgment is affirmed.

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(75 W. Va. 574)

## W. BATESON & CO. v. BALDWIN FORGING & TOOL CO. et al. (No. 2524.)

(Supreme Court of Appeals of West Virginia. Feb. 2, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. MECHANICS' LIENS ⟸148—SUBCONTRACTOR'S LIEN—VALIDITY.

The lien of a subcontractor, filed pursuant to section 3, chapter 75, serial section 3844, Code 1913, containing an itemized account of bricks furnished from time to time, is not void on its face or in fact, because it contains a lump credit for 187,000 bricks, furnished, but not used in the construction of the building.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 254; Dec. Dig. ⟸148.]

2. MECHANICS' LIENS ⟸281 — SUBCONTRACTOR'S LIEN—ENFORCEMENT—SUFFICIENCY OF EVIDENCE.

The decree below adjudging to such lienor the balance claimed by him for said material, and as a valid lien upon the property of the owner, and that such itemized account was served upon the owner and filed in the clerk's office, within the time required by the statute, facts put in issue by the pleadings, is amply supported by a reasonable view of the evidence.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565–572; Dec. Dig. ⟸281.]

3. MECHANICS' LIENS ⟸33 — SUBCONTRACTOR'S LIEN—VALIDITY—USE OF MATERIAL.

The fact that a portion of the bricks so furnished was used in constructing a well on adjoining land with right appurtenant to the property of the owner and attached to and connected with the same by means of pipes, etc., and necessary in the operation of his plant, does not render the lien therefor on said plant invalid.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 32, 33, 38; Dec. Dig. ⟸33.]

4. MECHANICS' LIENS ⟸48—MATERIALMAN'S LIEN—VALIDITY—USE OF MATERIAL.

That such subcontractor or materialman at the time of contracting with the principal contractor for such material, or while furnishing the same, may have been advised that a portion thereof was to be used by the principal contractor in other buildings than the one covered by his contract with the owner on whose property the lien is asserted, will not defeat the lien for the bricks actually furnished and used in the structure on the property of such owner.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 51; Dec. Dig. ⟸48.]

5. MECHANICS' LIENS ⟸108 — SUBCONTRACTOR'S LIEN—MATERIAL FURNISHED.

Though material furnished by a subcontractor be charged in a general account with the principal contractor, the subcontractor will nevertheless be entitled to the lien given by statute therefor, to the extent of the material so furnished and actually entering into the construction of the building on the owner's land, if such material was in fact furnished with reference to and in execution of such contract of the principal contractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 140, 141; Dec. Dig. ⟸108.]

6. MECHANICS' LIENS ⟸239 — PAYMENTS — APPLICATION.

Payments made by a principal contractor on his account with such subcontractor, if not otherwise applied by him, may be applied by the creditor or by a court of equity to the oldest items in the account, so as not to defeat the lien for the material furnished by such subcontractor, and actually entering into the construction of the building contracted for.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 420, 421; Dec. Dig. ⟸239.]

7. MECHANICS' LIENS ⟸149 — SUBCONTRACTOR—RIGHT TO LIEN—VALIDITY.

A subcontractor contracting to furnish the material and labor and perform a portion of the contract of the principal contractor, for a stipulated price, has a lien therefor, and such lien is not invalidated because his account is the lump sum stipulated, and is not otherwise itemized, nor because the labor was not performed by him personally. In such case the account filed with the lien setting forth the contract price is all that is required.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 256–259; Dec. Dig. ⟸149.]

8. CONTRACTS ⟸320 — DAMAGES ⟸120 — BUILDING CONTRACT—BREACH—MEASURE OF DAMAGES—LIABILITY OF OWNER.

In a suit by owner against contractor in a building contract for breach thereof by the latter, the measure of damages is the amount of the loss sustained by the former by reason of the breach. And where workmanship or materials prove defective and inferior the owner will be required to pay only what the building is really worth.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1459, 1469, 1493–1527; Dec. Dig. ⟸320; Damages, Cent. Dig. §§ 291–305; Dec. Dig. ⟸120.]

Appeal from Circuit Court, Wood County.

Suit by W. Bateson & Co. against the Baldwin Forging & Tool Company and others. From a decree for plaintiffs, defendants appeal. Affirmed.

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H. P. Camden, of Parkersburg, and William P. Herod, of Indianapolis, Ind., for appellants. Kreps, Russell & Hiteshew, McCluer & McCluer, and Smith D. Turner, all of Parkersburg, for appellees.

MILLER, J. Plaintiff, as principal contractor, sued defendant, to enforce against its property their alleged lien for labor performed and material furnished in the execution of a contract to construct a factory building in accordance with the plans and specifications covered by the contract, impleading also numerous subcontractors who are alleged to have performed labor and furnished material in the execution of said contract.

Answers and cross-answers were filed by the Baldwin Forging & Tool Company, and by several of the subcontractors, and answers to said cross-answers of the subcontractors were also filed by the Baldwin Forging & Tool Company.

After issues were joined on these pleadings the cause was referred to a master, to report the property of defendant company, and the several liens thereon, and the priorities thereof, and from the decree on that report and the several exceptions thereto, the Baldwin Forging & Tool Company has appealed, and Bateson & Company, without itself applying for or obtaining an appeal from the decree against them in favor of appellant on its cross-answer, for $22,893.15, and as found by the commissioner, have attempted to cross assign error, on appellant's appeal from the decree against it in favor of other appellees, and adjudicating large sums against its property in their favor, and enforcing the liens therefor.

We will first consider and dispose of the errors assigned and relied on in the decree respecting the

Lien of C. H. Shattuck, Special Receiver.

The first point of error raised by demurrer to the cross-answer, and by exceptions to the commissioner's report, overruled, is that the account served on appellant and recorded, and exhibited with the bill, is not such an itemized account as is required by the statute to constitute a good and valid lien on appellant's property. In support of this proposition it is said, and the fact is, that the account begins with an item on September 1, 1910, and then continues with numerous intervening items down to and including two items of November 26, 1910, the first for 11,900 bricks, by L. S. & M. S. Car No. 31797, the second, 4,500 bricks, hauled by wagon, all totaling 526,100 bricks, at $7.50 per thousand, or $3,945.75. And that following these items and footings is an item under August ——, 1910, 295,716 bricks, $2,217.87, and after them the credit item, October 4, 1910, $2,217.87; and then the following credit under date 1910, month and day not indicated:

"Brick used by W. Bateson & Co., elsewhere than in Baldwin Forging & Tool Company plant and building 187 (meaning 187,000) brick at 7.50 per M. $1402.50. To balance $2543.25."

[1] The contention is that as the credit item, 187,000 bricks, is not itemized, and the account on its face does not show what items on the debit side are covered by this credit item, so as to identify and enable the owner to definitely trace the same, it is not an itemized account within the meaning of section 3, chapter 75, serial section 3844, Code 1913, and is therefore void on its face, and that the demurrer to the cross bill answer, and appellant's exceptions to the commissioner's report, allowing the same, should have been sustained, and relief denied.

If on its face the lien is void, as contended, the demurrer and exceptions to the commissioner's report properly presented the question. Hill Clutch Co. v. Independent Steel Co. of America, 82 S. E. 223. The statute, section 3, chapter 75, serial section 3844, requires an itemized account, and section 4, serial section 3845, of the same chapter, requires that within sixty days after ceasing to labor on, or furnish material, the person desiring to avail himself of the lien provided by the statute, must file with the clerk of the county court, "*a just and true account* of the amount due him, after allowing all credits, together with a description of the property," etc. Lumping items, or lumping estimates, at least on the debit side, will not do. Niswander & Co. v. Black, 50 W. Va. 188, 40 S. E. 431. In the case last cited, while the lien was held bad as to the lumping estimate therein, it was held good as to all items properly itemized. So, an account containing items furnished beyond the period of nine months from the date of the notice to the owner, contrary to said section 3, of chapter 75, was held good as to the items furnished within that period. Huntington Plumbing & Supply Co. v. McGuffin, 83 S. E. 194. The lump credit of 187,000 bricks in the account now under consideration, however, shows that of the whole number of bricks, itemized on the other side of the account, that number, whether furnished for the purpose of constructing the defendant's plant, or not, did not in fact go into that construction, for they are credited back, and a lien is not claimed for them. The question recurs, is the account void on its face for this reason?

True, as argued, the demurrer, if they be well pleaded, admits the facts alleged, but if the exhibit vouched therefor contradicts or conflicts with the allegations we take the exhibit as showing the facts and not the allegations of the pleading. Richardson v. Ebert, 61 W. Va. 523, 56 S. E. 887; Board of Education v. Berry, 62 W. Va. 433, 436, 59 S. E. 169, 125 Am. St. Rep. 975; Lunsford v. Wren, 64 W. Va. 458, 466, 63 S. E. 308; Lumber Co. v. Railway Co., 69 W. Va. 682, 688, 72 S. E. 786; Plaster v. Harmon, 70 W. Va. 634, 636, 74 S. E. 905. And in a suit to enforce a mechanic's lien, if the bill and exhibits read together, show all the facts necessary to be

alleged, the bill is sufficient in law, and the demurrer should be overruled. Grant v. Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36. By these authorities either party may look to the exhibit on demurrer, and neither is bound by any of the allegations in conflict or inconsistent therewith. Is this lien void then on its face, regardless of what is said about it in the other part of the pleading?

It will be observed that the statute requires an itemized account of the labor done and material furnished by a subcontractor "for the construction, alteration, * * * of any house or other structure." The account in this case complies literally with this requirement, and is verified by the oath of the claimant, as being a just and true account. But the statute does not, in terms at least, require that the credits be itemized. What is required is an itemized account of the labor done or material furnished, and the affidavit prescribed by section 3 requires that affiant shall swear that a certain sum is owing on the account after allowing all just and true credits made thereon; and section 4 requires the account to state the "amount due him, after allowing all credits." Neither section requires the credits to be itemized. In Grant v. Cumberland Valley Cement Co., supra, we decided, point 2 of the syllabus, with respect to both debits and credits that itemization in form was unnecessary, if it appear in substance and effect. In that case the account in question contained a credit, "By aggregate of all payments made to said James Grant on account of salary up to this date, $4,000.00," and it was held good, the reasons for so holding being set out in the opinion, with citation of authorities.

So we are disposed to hold this account valid on its face. While our decisions say that such lien of a subcontractor cannot be enforced against the property of the owner, for material furnished which did not enter into the structure in some way, with perhaps some few exceptions, the statute at least gives an incipient lien from the time material is furnished, to be lost if in fact it does not go into the structure. The affidavit prescribed by said section 3 requires affiant to swear that the materials, etc., furnished were actually used in the construction or alteration of the building, making plain the meaning of our statute. Without such affidavit the lien would not be good, and unless the legislature meant that the statute should have that effect no such affidavit would have been required. Atlantic Terra Cotta Co. v. Moore Constr. Co., 80 S. E. 924; McConnell & Drummond v. Hewes, 50 W. Va. 41, 40 S. E. 436; Thorn v. Barringer, 81 S. E. 846.

[2] But on the merits, the first point of error is, that the allegation of the bill that an itemized account of material furnished was filed with the owner within thirty-five days after claimant ceased to furnish the same, is denied by the answer, and that there is no proof supporting it, and that there is no evidence sufficient and competent to support the allegation that the last items in the account, of November 26, 1910, were furnished on that date, or that the bricks covered by these items ever went into appellant's building.

As these issues are sharply drawn by the pleadings they must be determined in favor of or against the claimant, upon the evidence, and according to the rules and principles applicable in such cases. The commissioner in his report says, that the proof is not as definite as might be desired, but that the evidence satisfied him that of the 526,100 bricks furnished, all but 187,000 were incorporated in the building, with the exception of 8,000 or 10,000 used in the building of a well on adjacent property, which, though not located on appellant's property, was so far attached thereto as to become a part of the plant, and his conclusion was that the lienor was entitled to a lien on the property and plant of the defendant company therefor.

But the pivotal question on which the case must turn is not alone whether the bricks were used in the building or on the plant of the owner, but whether within thirty-five days after ceasing to furnish this material notice was given the owner by the lienor as required by statute. This fact being denied the burden of course is upon the claimant to establish it clearly by proof. Central City Brick Co. v. Norfolk & W. R. Co., 44 W. Va. 286, 28 S. E. 926; Wees v. Elbon, 61 W. Va. 380, 56 S. E. 611. A witness, Upson, manager in charge for Shattuck, receiver, swears that delivery of the 526,100 bricks furnished was completed about November 26, and with respect to the two items of November 26, one of 4,500 bricks, hauled by wagon, and the other of 11,900, shipped by rail, that he saw the first item loaded and started on its way to the plant, and as to all of the bricks hauled by wagon and rail that he saw them started from the brick works.

And in regard to the movements of the car, in which the last lot of bricks was shipped, the evidence of the railroad agents shows that it was delivered on the George Street siding for loading the bricks on November 21st; that on November 23d, as shown by the railroad records, this car had been moved by the B. & O. Railroad Company, and that on November 24th, it was delivered to the Little Kanawha Railroad, loaded with brick for defendant company's siding at the plant; but there is no evidence showing just when the car was actually delivered on that siding. The Little Kanawha agent says that the car was received by his company on November 24th; that it was then subject to the orders of the Bateson Company, and would be held on the side track of the company until he had orders from Bateson & Company to deliver it on the

defendant's switch at the plant. The next record of the railroad company after November 24th is, that the car was delivered to the B. & O. Railroad Company on November 30th, 1910, empty. A witness, Barrett, an employé of plaintiff company having charge of checking up deliveries of bricks and other material, does not appear to have been examined as to the date of the delivery at the plant of the two items of November 26th. The only part of his evidence tending to throw light on the question of the date of the delivery of these two items, or tending to show that these bricks or any portion thereof went into the construction of the plant, is, that the 187,000 bricks diverted by Bateson & Company, were bricks delivered between October 10th, 1910, and November 25th, 1910, leaving those bricks covered by the last items of the account as among those actually used in the construction of the defendant's plant, and in the construction of the well on the adjoining lot. The testimony of Bateson and others shows, or tends to show, that the bricks that were used in the plant, in filling in and patching the walls after the roof was on, and in the construction of brick piers in the forge shop, machine shop and grinding room, were of the brick lastly delivered. The evidence shows clearly that the bricks lastly delivered were those covered by the items of November 26th, and Bateson swears that approximately 16,000 or 17,000 brick were used in constructing these piers, and that all these were bricks purchased of the Parkersburg Brick Company, Shattuck, receiver.

We cannot detail all the evidence, but from that recited, and other evidence in the case, we think the commissioner was justified in finding that the bricks charged as of November 26th, were delivered to Bateson & Company, and that they all went into the plant of the defendant company. True it cannot be said that there is much, if any, conflict in the evidence on this point. The question is what does the evidence prove in regard to the date of the delivery of these last bricks, and the use made of them, whether in defendant's plant, or diverted to other uses. The fact that 4,500 bricks were delivered by wagon on November 26th, is supported by the testimony of Upson, without doubt. The doubt, if any, relates to the use of the bricks after they were delivered. Contrary to what seems to be the general rule in many jurisdictions, our statute requires that in order to perfect the incipient lien begun by the delivery of the material the lienor must show that the material actually went into the construction of the building contracted for. Such being the rule of the statute, and one, as in this case, sometimes difficult to comply with, we think it should not be enforced with such rigidity as to work injustice, and render it next to impossible for the lienor to comply therewith, and to deprive him of his lien for material furnished in good faith, and when he has, as we think the evidence of the special receiver shows in this case, established with reasonable certainty that the material furnished by him was actually consumed in the execution of his contract by the principal contractor. The owner has it in his power by due care to save himself from any imposition. The commissioner having found in favor of the lienor and the court having confirmed his report, and as we cannot see that the decree was unwarranted by a reasonable view of the evidence, we are not disposed to disturb the findings of the commissioner or the decree of the court thereon, at least in so far as the bricks used went into defendant's plant.

[3] It is contended, however, that as to the bricks used in building the water well, some 10,000 or 11,000 in number, there should be no lien on defendant's land for them. But if the fact be that this well was located on land leased by the defendant company or over which it had an easement and appurtenant to its plant, and connected therewith by pipes, as the evidence shows the fact to be, we think the authorities justify us in holding that there would be a lien on the plant and property of defendant for the materials used in the construction of such well on adjacent land, with right appurtenant to the property of the owner and constituting a part of his land. Bodley v. Denmead, 1 W. Va. 249; O'Niel v. Taylor, 59 W. Va. 370, 379, 53 S. E. 471.

As to the additional point made against this lien, that the bricks were of an inferior quality, we have examined the evidence thereon, and we find little, if any, merit in it. The statute gives a lien for the value of the material furnished. There is no evidence tending to show that the value of the bricks, as decreed, was less than the amount claimed. The evidence shows and tends to show that the price of the bricks delivered at the plant of this company was $8.50, instead of $7.50 charged therefor. So we must overrule this point.

[4] Another point made against this lien as a whole is, that the bricks were sold on the sole credit of the contractor, and without any reference to their use in the execution of his contract with the defendant company. If the evidence established this fact the authorities cited would probably deny the claimant any lien for the brick. But we do not so understand the evidence. The evidence of Upson, representing the receiver, is, that he sold Bateson the brick for the purpose of building the building for which they had a contract with the Baldwin Forging & Tool Company. True, he says that some of these bricks were delivered at houses which Bateson & Company were building near the tool company's plant. But this would not defeat the lien for brick actually used in the construction of the defendant company's building; but the evidence clearly shows that the bricks for which a lien is

claimed were furnished with special reference to the defendant's factory and plant, and that those for which a lien is claimed were so used. We think these facts establish the right to the lien. 2 Jones on Liens (3d Ed.) section 1326, citing Choteau v. Thompson, 2 Ohio St. 114, 124, opinion by Judge Thurman.

Lien of Chancellor Hardware Company.

[5] The first point of error made against the decree adjudicating this lien is, that it includes the price of the rubberoid roofing which it is claimed was furnished originally without any knowledge or understanding that it was to go into the Baldwin plant, a point just disposed of in connection with the lien of Shattuck, receiver, and the same authorities are relied upon. As in the former case, so in this, the evidence does not support the contention.

Main reliance is placed upon the fact that the material for which this lien was decreed was charged in a general account of the hardware company against Bateson & Company, and along with articles sold generally and without any reference to their being used in defendant's plant. But Bateson & Company were not general dealers in merchandise; they were general contractors, and the chief item of the account was for the material and labor employed in applying it to the roof of defendant's factory building; and the evidence shows that when the contract for this roofing was made it was made with special reference to the contract of Bateson & Company with the Baldwin Company, and with reference to its application to defendant's factory, and that the material and labor actually went into defendant's plant. The price of the roofing applied to the building as agreed upon was $3.95 per square. We think this showing under our statute sufficient to establish the lien. McConnell & Drummond v. Hewes, supra; Hommel v. Lewis, 104 Pa. 465; Power v. McCord, 36 Ill. 214; Presbyterian Church v. Allison, 10 Pa. 413.

[6] The second point of error is that the commissioner and the court below applied the credits to the discharge of those items in the account of Bateson & Company which are non-lienable, and which were innocently and by mistake included in the lien as filed. We find but two credits in the account, one of September 19th, 1910, $50.96, and one of December 19th, 1910, $400.00. The contract for the rubberoid roofing included the labor of applying it to the roof, and the amount thereof is included under one item charged in the account on February 7, 1911, $3,041.50, the very last item in the account. There being no evidence that Bateson & Company gave any direction as to the application of these payments, equity would apply them to the oldest items of the account. According to the evidence the work of putting on this roofing was begun the latter part of November, 1910, but it was not completed until January 31st, 1911, and properly it could not have been debited either to Bateson & Company, or made a lien on defendant company's plant until after the work was completed, and no payment on account thereof under the contract could have been demanded of Bateson & Company, or of the tool company until that time.

Under these facts and circumstances the hardware company had the right to make the application. Hempfield R. Co. v. Thornburg, 1 W. Va. 261; Poling v. Flanagan, 41 W. Va. 191, 23 S. E. 685. And a court of equity had the right to make the application of these payments it did make by the decree appealed from, no application thereof having been made by the debtor. See Rowan v. Chenoweth, 55 W. Va. 325, 47 S. E. 80; Grafton v. Reed, 34 W. Va. 172, 12 S. E. 767; Genin v. Ingersoll, 11 W. Va. 549.

Nor does the inclusion of non-lienable items in an account, unless fraudulently done, vitiate the lien. Huntington Plumbing & Supply Co. v. McGuffin, supra.

[7] The third point of error is, that it was improper to decree the lump charge of $3,041.50, which it is said included the price of the labor for applying the roofing by Cecil-Jones Company, characterized as second subcontractors. There is no merit in this point. The hardware company contracted to furnish and apply this roofing at so much per square, and of course could not perform the contract, being a corporation, without employing labor to make the application. It is settled by our own and the decisions of other states with statutes like ours, that a subcontractor executing a contract of this kind, and who does not himself personally furnish the material and perform the labor, is nevertheless the one furnishing the material and performing the labor under the statutes, and is entitled to the lien provided thereby. Collins v. Board of Trustees, 72 W. Va. 583, 79 S. E. 10. And under such a contract for an entire consideration, the account filed with the lien setting forth the contract price is all that is required and is sufficient. Taylor v. Netherwood, 91 Va. 88, 20 S. E. 888; Boisot on Mechanics' Liens, section 411; Gunther v. Bennett, 72 Md. 384, 19 Atl. 1048; Pue v. Hetzell, 16 Md. 539; Woolf v. Schaefer, 103 App. Div. 567, 93 N. Y. Supp. 184; Ogden v. Alexander, 140 N. Y. 356, 35 N. E. 638; Clark v. Heylman, 80 App. Div. 572, 80 N. Y. Supp. 794.

This substantially disposes of all points of error made against the allowance of this lien. We, therefore, overrule the points.

Lien of the Radeker Lumber Company.

Two points only are made against the decree respecting this lien. First, that no material was furnished after December 21st, 1910, and notice of the lien therefore was not filed in time; and second, that the first item in the account, amounting to $76.20, was for lumber not of the grade provided for by the

[2] The main issues fought out before the jury were, whether the fall of the horse was due to the alleged negligence of defendant, or to stumbling of the horse by striking his foot on the paved street or the steel rail of defendant's track, unaffected by any supposed negligence of defendant, and whether in fact the rail was charged with electricity in a way to have caused the fall of the horse. That the horse did fall upon the track, injuring plaintiff, as charged, is conceded; and the testimony of the plaintiff, and several other witnesses, disinterested, who were present and observed the fall of the horse and the character thereof, and the electrical manifestation on the track at the instant of the fall, if not contrary to the physical facts, and known and proven characteristics of electric currents over the wires, motors and tracks employed by defendant in the operation of its railway at the time of the injuries, certainly justified the verdict of the jury on the fact of negligence. The evidence of the witnesses was, that the horse fell as his foot struck the track, not as if stumbling in the ordinary way, but as if shot, that his feet fell right from under him, and that he fell straight down. These witnesses were all familiar with horses, and skilled in observing and handling them, most of them were horse men, traders in horses, and some of them say they knew the fall was not a stumble, that it was peculiar and not like a stumble, and for this reason their attention was particularly attracted by it. And several witnesses concur in saying that as the horse struck the rail with his foot sparks flew out, one says it looked more like a string of fire than sparks. Plaintiff also swears that as he fell on the pavement he struck his finger against the rail, and that it knocked him over, gave him a twist, and that was when the broken bone of his leg ran through the flesh, causing him great pain. A buggy was passing over the track at the same time, and some of the witnesses, including the man riding in the buggy, witnessing the occurrence, swear positively, that when the iron tire of one of the wheels, the other wheels having rubber tires, struck the same rail, it jumped up a foot or more. All the expert witnesses concur in saying that when bonds on the rails are broken or defective the rails at the bonds may become very hot, and thereby become welded together, producing a new bond.

As to whether it was possible for the electricity in the rails, employed by defendant for motive power as it was, to escape from the rail and cause the injury as alleged, two expert witnesses, one for plaintiff and one for defendant, the defendant's witness being its track foreman, concur in saying that if the bond between the rails was broken or defective, a horse or man coming in contact with the rail, as claimed by plaintiff, would receive a shock, and would be liable to get burned, particularly if the contact was between the point where the bond was broken and the power house. And defendant's track foreman says he has seen horses fall on the track from such shocks when there were bad bonds. Another expert witness for defendant, an electrical engineer, having a college degree as such, and manifesting a great deal of technical learning, and with considerable experience, particularly in the practical construction of electrical machinery, and installing electrical plants of various kinds, said that "theoretically and practically there is no possible way that a horse could get a shock sufficient to knock him down off of the street car rail only." This witness goes into considerable detail in explaining the operations of electric currents over the wires, and rails, to justify his opinion that the accident and injury to plaintiff could not have resulted in the manner described by plaintiff's witnesses.

Strange it is that no tests were made at the time of the injury or afterwards to ascertain whether the bonds on the rails were broken or defective; or whether the rail which was supposed to have done the injury was in fact charged with electricity as claimed. Plaintiff's counsel excuse him by saying that the rails were mostly under ground, or flush with the street pavement, and buried in brick and cement, and entirely under the control of defendant company, and, that it was the duty of defendant, denying defective bonding of the rails, to have made all proper tests, and to overcome by positive evidence the presumption of negligence, arising from the fact of the accident and attendant facts and circumstances tending to show negligence. We think there is much force in this position of counsel, and that the general rule that where evidence is in the possession of one party and he has the means of producing it, and fails to do so, the conclusion may be drawn that if produced the evidence would be against him.

[3] True we have no positive evidence that bonds on the rails at the point of the injury were broken or defective; and whether the dangerous condition of the rail causing the injury was due to defective bonding or to defects in other appliances employed by defendant does not clearly appear by any affirmative evidence of the witnesses. The question then is, do the facts proven and above briefly detailed, by a fair preponderance, establish the fact of negligence, justifying the verdict? We have concluded that they do. We think the jury could reasonably conclude that the rail struck by plaintiff and his horse was overloaded with electricity, and that it was escaping as described by the witnesses. Besides the injury to plaintiff personally, the evidence tends to show the horse's hoof was also burned or injured by the escaping electricity. We can not refuse to give weight to the evidence of the physical facts occurring at the instant of the horse's fall, nor deny to the jury the

right to all reasonable inference therefrom. If these physical manifestations were present, as the witnesses say, and the jury had the right to believe, a case was presented for the application of the rule *res ipsa loquitur*. Briefly stated that rule is that where the agency causing the injury is under the management and control of the defendant, and the injury is such as in the ordinary course of things does not occur if those having such management and control use proper care, it affords reasonable evidence, in absence of explanation by defendant, that the injury resulted from negligence. Bice v. Wheeling Electrical Co., 62 W. Va. 685, 59 S. E. 626; Snyder v. Wheeling Electrical Co., 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922, and other cases cited.

[4] Further research has rewarded us in finding three decisions of other courts, not cited by counsel, where this rule was applied on concrete cases almost, if not quite, on all fours with the case at bar, and where want of evidence showing negligence was relied on. We refer to Trenton Passenger Railway Co. v. Cooper, 60 N. J. Law, 219, 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592, Clarke v. Nassau Electric Ry. Co., 9 App. Div. 51, 41 N. Y. Supp. 78, and Wood v. Wilmington City Railway Co. (1905) 5 Pennewill (Del.) 369, 64 Atl. 246. All these cases are cited with approval as the basis for his text, in 2 Joyce on Electric Law (2d Ed.) § 602. The language of that text is:

"Where a horse being driven upon the public street is injured by contact with the rails of an electric street railway, such fact is presumptive proof of negligence by the company in the operation of its road."

The one point of the syllabus in Clarke v. Nassau Electric Ry. Co., supra, is:

"The facts that a horse stepped on the rail of a trolley road and immediately fell to the ground in a dying condition, also that its driver, touching the hames, received a severe shock, held, to be prima facie proof of defective insulation and so of negligence on the part of the railway company."

And pertinent to the evidence of defendant's expert witness in this case, the court said of like evidence in that case:

"It is true, the expert testimony indicated that such an accident could not occur unless, through the defective insulation of the overhead wires, some portion of the positive current was withdrawn therefrom and found its way into the ground or other surface upon which the animal was stepping at the time he also came into contact with the negative rail; but the very accident itself tended to show that such defective insulation existed or some other condition which would produce the same effect."

And as to the application of the rule res ipsa loquitur the same court says:

"The fact that the defendant brought electricity into the street for use as a motive power and the fact that electricity so employed was capable of escaping in such a way as to produce the casualty which actually took place were sufficient, taken together, to justify the inference that the accident was due to the agency of the defendant, in the absence of proof that it was otherwise caused. The maxim *res ipsa loquitur* is directly applicable. Scott v. London & St. Katherine Docks Co., 3 Hurlst. & Colt. 596; Kearney v. London, Brighton, etc., Ry. Co., L. R. 5 Q. B. 411; s. c., L. R. 6 Q. B. 759. The learned counsel for the respondent in his brief apparently assumes that this doctrine cannot be invoked unless the facts are such as to exclude every hypothesis but that of the defendant's negligence, and argues that the railroad in Thirty-Ninth street might have been in perfect order and that the accident might have been occasioned by the carelessness of third persons engaged in stringing telegraph or telephone or electric light wires. But the rule is one which relates merely to negligence prima facie, and it is available without excluding all other possibilities."

[5] But it is suggested that a proper case is presented here for the application of the rule that where the injury sustained may have resulted from one of two causes, equally plausible, and for one of which defendant is liable and for the other not, the burden is on the plaintiff to show that the injuries resulted from the negligence of the defendant, and were not the result of the other agency for which defendant was not responsible. If any force be given to the positive evidence of the witnesses as to the manner of the horse's fall and the electrical phenomena occurring on the rail at that instant, we cannot say that the theory of the defendant that the horse stumbled naturally and not from anything due to defendant's negligence, causing the injury, is equally plausible with the theory of plaintiff that the injuries were due to the negligence of defendant. Wherefore, a case is not presented for the application of the rule invoked.

Another point suggested is that if the track was defective as charged, and as the evidence of plaintiff tends to prove, resulting in the injuries complained of, there was no evidence showing knowledge thereof on the part of defendant and imputing negligence. The evidence shows or tends to show that the track in question had been laid for several years, and that there had been no real tests made of the condition of the rails at the point of the injuries since they were laid; that instruments are made, and methods are well known for making such tests, but had not been used or employed by defendant company in testing the rails assumed to have done the injury in this case.

For the foregoing reasons we are of opinion to affirm the judgment.

LYNCH, J., absent.

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(75 W. Va. 894)

ARNOLD v. KNAPP et al. (No. 2502.)

(Supreme Court of Appeals of West Virginia. March 16, 1915.)

*(Syllabus by the Court.)*

1. BANKRUPTCY ⇐287—TRUSTEE—RIGHT OF ACTION—PREFERENCES.

Equity has jurisdiction at the suit of a trustee in bankruptcy of an insolvent corpora-

tion, by virtue of section 40, chapter 53, serial section 2873, Code 1913, to recover from a stockholder dividends unlawfully declared and paid him, and to recover from officers and directors of such corporation money paid them as creditor within four months of the adjudication in bankruptcy, in violation of the federal bankruptcy act, and to follow the funds so improperly paid into any property or rights into which the same have been invested and to charge the same therewith.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 444–447; Dec. Dig. ⊂⊃287.]

2. EQUITY ⊂⊃150—BILL—MULTIFARIOUSNESS —TRUSTEE IN BANKRUPTCY.

The bill in this case is not multifarious and bad on demurrer for that reason. The objects sought and the rights and interests of the defendants impleaded are so interwoven and related as to make them all cognizable in one suit.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 371–379; Dec. Dig. ⊂⊃150.]

3. BANKRUPTCY ⊂⊃287—TRUSTEE—RECOVERY OF PREFERENCES—RIGHT OF ACTION.

Independently of any question of substitution or subrogation, equity has jurisdiction in such suit by a trustee in bankruptcy, to follow the money so unlawfully paid officers and directors, and to charge them therewith and the property into which they may have invested the same, for the benefit of all the creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 444–447; Dec. Dig. ⊂⊃287.]

4. BANKRUPTCY ⊂⊃161—CORPORATIONS ⊂⊃ 545—PREFERENCES BY CORPORATE OFFICERS.

When a corporation becomes insolvent, or in failing condition, its officers and directors no longer represent the stockholders, but become trustees of the corporate property and assets for the benefit of all the creditors, and cannot then prefer themselves or other creditors out of the money, funds or property of the corporation. And all payments or preferences so made within four months of adjudication in bankruptcy are voidable and recoverable by the trustee in bankruptcy after adjudication on like principles of trusteeship.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261–263; Dec. Dig. ⊂⊃161; Corporations, Cent. Dig. §§ 2170–2175; Dec. Dig. ⊂⊃545.]

5. BANKRUPTCY ⊂⊃166—PREFERENCE RECEIVED BY CORPORATE OFFICER—ACTION TO RECOVER—ESTOPPEL.

A managing officer and director of an insolvent corporation receiving such priority of payment and preference will not be heard to plead ignorance of the insolvency of his corporation existing at the time of such preference, so as to avoid recovery thereof by the trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ⊂⊃166.]

6. BANKRUPTCY ⊂⊃165—VOIDABLE PREFERENCES—PAYMENTS ON NOTES EXECUTED TO CORPORATE OFFICERS.

Payments on notes executed to himself by such managing officer and charged to him in his account of money loaned or other obligation of his company, and endorsed by him to a third person, and subsequently paid by him or by his procurement out of the funds of his insolvent company, and within four months of the adjudication, will be treated as payments to him and voidable at the suit of the trustees in bankruptcy against him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. ⊂⊃165.]

7. BANKRUPTCY ⊂⊃348—VOIDABLE PREFERENCE — SALARY OF CORPORATE OFFICER—"DEBT OF WAGE EARNER."

The salary of such officer and director is not the debt or claim of a wage earner protected by the bankruptcy act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ⊂⊃348.]

*(Additional Syllabus by Editorial Staff.)*

8. EQUITY ⊂⊃148—PLEADING—"MULTIFARIOUSNESS."

A bill is "multifarious" when the different grounds of the suit are wholly distinct from each other, and each ground stated in the bill is sufficient in itself as a subject of equity jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341–367; Dec. Dig. ⊂⊃148.

For other definitions, see Words and Phrases, First and Second Series, Multifariousness.]

9. BANKRUPTCY ⊂⊃54—WHO DEEMED INSOLVENT—"FAIR VALUATION."

The term "fair valuation," as used in Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, providing that a person is deemed insolvent whenever the aggregate of his property shall not at a fair valuation be sufficient to pay his debts, means the present market value and the value that the debtor might realize thereon if permitted to continue in business.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 54, 84, 85; Dec. Dig. ⊂⊃54.

For other definitions, see Words and Phrases, First and Second Series, Fair Value.]

Appeal from Circuit Court, Randolph County.

Suit by D. H. Hill Arnold, trustee, etc., against G. A. Knapp and others. From decrees for plaintiff, defendants appeal. Affirmed.

W. B. & E. L. Maxwell, of Elkins, for appellants. Arnold & Arnold and Talbott & Hoover, all of Elkins, for appellee.

MILLER, J. Plaintiff, as trustee in bankruptcy of the Knapp-Sanderson Company, a corporation, adjudged a bankrupt in January, 1911, of which defendant H. C. Sanderson was president, and defendant O. A. Knapp was secretary-treasurer, filed the present bill, at April rules, 1911, the object of which was, first, to recover from said Knapp the sum of $287.50, dividend on the stock held by him in said company, declared by the board of directors on January 20, 1910, but not paid to Knapp or credited to him on the books of his company until November 16, 1910, such dividend, as alleged, having been made when said company was in fact insolvent and had no surplus out of which to declare a dividend, and made in impairment of its capital stock; second, to recover from said Knapp the sum of $1,065.00, paid by him out of the funds of his said company, by check, November 9, 1910, to the order of one Harding, attorney for William Flint, owner by assignment from R. B. Stalnaker, of the first of three purchase money notes of said Knapp and Sanderson individually, executed to said Stalnaker, and secured by a vendor's lien reserved on a tract

of 6$^{45}/_{100}$ acres of land in Randolph County, conveyed to them by him, and in payment of said note, and charged to said Knapp on account of the indebtedness of his company to him, as an unlawful preference; and also seeking to be subrogated to the rights of said Stalnaker to the purchase money lien reserved in his deed aforesaid, and to have the land thereby conveyed sold to satisfy said recovery; third, to also recover from said Knapp, for a like unlawful payment or preference to said Knapp, the amount of three several payments to the Davis Trust Company, as follows: November 17, 1910, $200.00, December 27, 1910, $250.00, and December 29, 1910, $300.00, on account of four several notes which on behalf of his company he had executed to himself and endorsed to said trust company, as follows: One of August 19, 1910, at ninety days, for $200.00; two of August 27, 1910, at four months, one for $100.00, and the other for $150.00; and one of August 29, 1910, at four months, for the sum of $300.00, all alleged to be void for want of authority of said Knapp to execute the same, and all paid to said trust company as aforesaid; fourth, to also recover from said Knapp as unlawful payments or preferences, the sum of $200.00, paid November 15, 1910, and the sum of $375.00, paid December 6, 1910, on account of the alleged indebtedness of said company to him; and the bill also seeks to have all such alleged illegal and preferential payments charged as a lien on said land, but subject to all prior liens and encumbrances thereon, as alleged, and the land sold to satisfy the same.

The bill also alleges, as a basis for the relief sought, that the said Knapp, at the time he caused said payments and preferences to be made knew or had reason to believe that said company was insolvent, and that the payments were so made with intent to prefer and give him an unlawful preference over all other creditors of said company.

Defendant Knapp alone demurred to the bill, assigning as grounds, (1) want of equity therein, (2) full and complete remedy at law, (3) multifariousness, and, (4) that the Davis Trust Company is a necessary party to the bill. And with the exception of defendant J. H. Fout, holder of one of said Stalnaker notes, Knapp alone answered the bill. Of the material issues of fact tendered thereby he controverts the following only: First, that said company had been insolvent for a long time previous to the time it was adjudged a bankrupt. He says that up until the establishment of the branch store at Richwood in September, 1910, managed by him, said company was in fair financial condition; second, that the four notes executed and delivered to him in August, 1910, aggregating $750.00, were then received and accepted by him as cash, and as payments on respondent's loan to his company in January, 1910, of $2,100.00, and that said notes were at the same time charged to him in his account as cash, leaving a balance due him of $1,151.22, and were not payments to him at the date of their maturity and payments thereof to the Davis Trust Company; that of said balance, $706.22, thereof, was arrear of salary and $445.00 thereof was due him on account of the loan he had made said corporation in January, 1910, of $2,100.00, and on which said loan prior to the execution of said notes in August, 1910, he had received by way of credits, March 5, 1910, $605.00, May 27, 1910, $500.00; that though said notes were paid at maturity, as alleged, in November and December, 1910, it is not true as alleged that respondent then received the money; that having been endorsed by him to the Davis Trust Company, that company, the creditor, received payment, and not himself, and he denies that said notes were void for the reason alleged, or for any reason; third, he denies that at the time of said payments to him said company was insolvent, because he says, it had sufficient property which if sold for cash would have paid its debts, and says that at the time of the payments to him he had no idea said company was insolvent, and had no reason to believe the same were intended as preferences over other creditors of said corporation; fourth, respondent denies that the declaration of the dividends in January, 1910, and payment thereof, amounted to an impairment of the capital stock, and, fifth, he says that in so far as said payments were made to him and credited for salary, amounting to $907.50, they did not constitute unlawful payments or preferences, made within four months of the adjudication in bankruptcy.

The first point of error is that appellant Knapp's demurrer to the bill should have been sustained, on the grounds assigned, namely, (1) complete and adequate remedy at law, (2) multifariousness. Want of parties does not seem to be relied on here.

[1] Was there complete and adequate remedy at law, and was equity without jurisdiction to grant the relief prayed for? We think jurisdiction in equity well grounded. The statute, section 40, chapter 53, serial section 2873, Code 1913, gives equity jurisdiction at the suit of creditors, to recover the amount the capital may have been diminished by the distribution and payment of dividends. If creditors may so sue, the trustee in bankruptcy representing them, we think, should also be entitled to go into equity for the same purpose.

Besides, substitution and subrogation sought by the bill are the peculiar subjects of equity cognizance. Neff v. Baker, 82 Va. 401, 4 S. E. 620; Haffey's Heirs v. Birchetts, 11 Leigh (Va.) 83; McNeil v. Miller, 29 W. Va. 480, 2 S. E. 335; Blair v. Mounts, 41 W. Va. 706, 24 S. E. 620; Simmons v. Lyles, 82

Grat. (Va.) 752. These features of the bill distinguish it from Maxwell v. Davis Trust Co., 69 W. Va. 276, 71 S. E. 270, relied on. That case simply holds there is no jurisdiction in equity at the suit of a trustee in bankruptcy against a creditor to recover preferential payments made in violation of the national act of bankruptcy, with no ground of equitable jurisdiction alleged. If right of substitution or subrogation or other grounds exist in allegation and proof of course equity would have jurisdiction to convene the several lienors and enforce the lien to which plaintiff is entitled to be subrogated.

[2, 3] But is the bill bad for multifariousness? We do not think it is. The statement of its objects and purposes shows that while the claim of plaintiff against Knapp is made up of several demands, some for subrogation, others not, all are recoverable for the creditors of the bankrupt estate, and chargeable against his interest in the land in which the money paid him was invested, and that the interests of all defendants are so involved in the relief sought against him, as to render it improper to proceed in their absence. To render a bill multifarious the different grounds of the suit must be wholly distinct from each other, and each ground stated in the bill must be sufficient in itself as a subject of equity jurisdiction. Hogg's Eq. Proc. sections 136a and 136b. And as said by Mr. Hogg in this connection:

"The objection of multifariousness in a bill may be disregarded except in plain cases, whereby the administration of justice will be furthered and multiplicity of suits avoided." Id. section 136; Johnson v. Sanger, 49 W. Va. 405, 38 S. E. 645.

A good illustration of bills properly regarded multifarious is found in Turk v. Hevener, 49 W. Va. 204, 38 S. E. 476. In the case here there is no such uniting of several and distinct matters distinct in their nature, against several defendants, unconnected in interest and liability, as to properly stamp the bill multifarious, as in Crickard v. Crouch, 41 W. Va. 503, 23 S. E. 727; Moore v. McNutt, 41 W. Va. 695, 24 S. E. 682; Day v. Building & Loan Association, 53 W. Va. 550, 44 S. E. 779, and other cases cited and relied on by appellants. We think those cases inapplicable, and overrule the point.

[3] The next point, and one involving the merits of the case, is that the court erred in subrogating plaintiff to the rights of William Flint, or his assignor Stalnaker, to the first note paid, and the vendor's lien securing the same. It is contended that the case as presented is wanting in allegation and proof of the essential elements entitling plaintiff to the relief of subrogation. It is argued (1) that to be entitled to subrogation one must have paid the debt due a third party, (2) that in making such payment he must not have done so as a mere volunteer, but on compulsion, and to save himself from loss by reason of a superior lien or claim of the one to whom payment is made. Such is undoubtedly the general law of subrogation. Ætna Life Ins. Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; Prairie State Bank v. United States, 164 U. S. 227, 231, 17 Sup. Ct. 142, 41 L. Ed. 412; McClaskey & Crim v. O'Brien, 16 W. Va. 791; McNeil v. Miller, supra. It is urged that the plaintiff trustee did not in fact pay the note, voluntarily or involuntarily, that it was paid for account of Knapp and charged to him by the Knapp-Sanderson Company, prior to adjudication in bankruptcy, and while it was still doing business, and that neither before nor since had that company acquired any lien on said real estate entitling it as a subsequent creditor to pay off the prior debt and lien and be subrogated thereto as a means of its own protection.

But this argument based on the general rule of subrogation is not decisive of the case at bar. As was said by the Virginia court in Simmons v. Lyles, supra, 32 Grat. (Va.) page 762:

"Subrogation is the creature of the chancery courts. It is not founded upon any idea of contract, but upon principles of equity and good conscience. It is a mode which equity adopts to compel the ultimate discharge of a debt by him who in good conscience ought to pay it. Brandt on Suretyship, § 260."

And upon principles applicable to trustees, it is well settled law that if a trustee diverts trust property or money from its true and proper course, and as required by the law of the trust, the trust fund may be pursued by the beneficiaries, so long as it can be identified, into any land or other form of investment made by the trustee, the law implying and imposing a trust therein in favor of such beneficiaries. Marshall's Ex'r v. Hall, 42 W. Va. 641, 26 S. E. 300. And such trust money or fund may be followed into purchase money notes and the lien reserved therefor. Pomeroy, Eq. Jurisprudence (3d Ed.) sections 1048, 1049. And this rule applies to directors of corporations. Id. section 1049, p. 2023. And to a trust fund in the hands of a vendee of land, which he has used to discharge a lien thereon, under such circumstances as to render it a fraud on the beneficiaries unless the lien is retained for their benefit. Oury v. Saunders, 77 Tex. 278, 13 S. W. 1030; Aiken v. Taylor (Tenn. Ch. App.) 62 S. W. 200; Bell v. Bell, 174 Ala. 446, 56 South. 926, 37 L. R. A. (N. S.) 1208, and note.

[4] In this case the evidence tends strongly to show that Knapp had no authority to execute the notes to himself, or to issue checks in payment thereof, or to pay and charge himself on account of his alleged indebtedness. The by-laws of the company in express terms seem to have denied him any such authority. But whether the course of conduct and dealings by him at Richwood, while he had charge of the store there, and transacted the business complained of in this suit, was such as might work an estoppel

upon the corporation to deny his authority generally in the premises, we need not say for the purposes of this suit. The law by the great weight of authority seems to be settled that when a corporation becomes insolvent, or in a failing condition, the officers and directors no longer represent the stockholders, but by the fact of insolvency, become trustees for the creditors, and that they then can not by transfer of its property or payment of cash, prefer themselves or other creditors, and that this is so, independently of any of the provisions of the national bankruptcy law. Besides, the policy of our law, by statute, section 2, chapter 74, serial section 3830, Code 1913, for many years, has been to void all preferences of creditors by insolvent individuals or corporations. That the officers and directors of an insolvent corporation are trustees for the creditors is established law by a long line of decisions in this state. Pyles v. Riverside Furniture Co., 30 W. Va. 123, 2 S. E. 909; Hope v. Salt Co., 25 W. Va. 789; Ruffner Bros. v. Welton C. & S. Co., 36 W. Va. 244, 15 S. E. 48; Kahle v. Oil Co., 51 W. Va. 313, 41 S. E. 233; Sweeny v. Sugar Refining Co., 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88; Ravenswood S. & G. Ry. Co. v. Woodyard, 46 W. Va. 558, 33 S. E. 285; Lamb v. Laughlin, 25 W. Va. 300, 322; Lamb v. Pannell, 28 W. Va. 663, 666.

As the law in this state once was, corporations like individuals might prefer creditors, even director creditors. Pyles v. Riverside Furniture Co., supra, 30 W. Va. 140 to 142, 2 S. E. 909. But such is not the present status of the law, certainly not in so far as insolvent corporations are concerned. And by section 52, chapter 53, serial section 2884, Code 1913, no officer or director of a corporation can prefer himself or be present at a meeting of the directors where business is transacted in which he is personally interested, not as a stockholder, without rendering the transaction in his favor prima facie void. Ravenswood S. & G. Ry. Co. v. Woodyard, supra, 46 W. Va. 563, 33 S. E. 285; Sweeny v. Sugar Refining Co., supra, 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88. Whatever may be the law respecting solvent corporations dealing with its officers and directors, it is now well settled by the great weight of authority, that an insolvent corporation cannot pay or secure a pre-existing debt due a director in preference to debts due others, either by transferring property or cash to him, or by giving him a mortgage on corporate assets. 2 Cook on Corporations (6th Ed.) section 692, and numerous cases cited in note. Our statute, section 2, chapter 74, serial section 3830, Code 1913, would render any such transfer or assignment of property intended as a preference a general assignment for the benefit of all creditors. Payments in cash to creditors, other than officers and directors of corporations, would not be void as a preference under the statute. Hulings v. Hulings Lumber Co., 38 W. Va. 351, 369, 18 S. E. 620. But subsections 60a and 60b, of the federal bankruptcy act (U. S. Comp. St. 1913, § 9644) as construed by the Supreme Court of the United States, include payments of money within four months of adjudication in bankruptcy among preferences voidable under that act, and recoverable by the trustee in bankruptcy. Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 442, 21 Sup. Ct. 906, 45 L. Ed. 1171. This federal statute must be reckoned with, therefore, in determining what assets of a bankrupt are to be treated as trust funds or property which may be followed and recovered, and the lien therefor, by subrogation, enforced against the persons and property into whose hands the funds and property have come and been invested. Independently of the federal statute, it is laid down by high authority, that the time when officers and directors lose power to prefer themselves, where that may be lawfully done, or to deal with the corporate assets, except as trustees for the creditors, is not limited to the time when they have declared the corporation insolvent by a vote to that effect, but whenever the fact of its insolvency comes to their knowledge, and as a result, that a discontinuance of the business operations will likely occur. Jones on Insolvent and Failing Corporations, sections 131 and 132. In the case at bar it is not pretended that there was any action of the board of directors authorizing the execution of the notes, or the payment of the money to Knapp. In Jessup v. Thomason, 68 N. J. Eq. 443, 59 Atl. 226, it is held, that an officer who pays a debt from the corporation to himself within ten days of a receivership must refund. And it is well settled that neither the president nor the treasurer of a corporation has inherent authority by virtue of his office to execute a negotiable note which will bind the corporation. Bank v. Laboringman's Mercantile & Manufacturing Co., 56 W. Va. 446, 49 S. E. 544. So far then as payments were made to appellant Knapp in cash, or for his account, and charged to him, out of the money belonging to the bankrupt, they must be regarded as preferences to him, if his company was insolvent, and voidable preferences under the federal statute, if he knew or had reasonable cause to believe a preference was intended, for all were made within four months of the adjudication in bankruptcy.

[9] But appellant insists that at the time of said payments he did not know, and had no reasonable ground to believe, that his company was insolvent; and he contends that there is in fact no proof of actual insolvency at that time. That said company was then insolvent, within the meaning of the bankruptcy act, we think is clearly shown by the evidence of the inventory after bankruptcy, made a short time after these payments, showing that the assets were many

thousand dollars less than the creditor liabilities, to say nothing of stock liability; and that when subsequently sold and purchased by Knapp and Sanderson from the trustee in bankruptcy, they brought $15,000.00, a sum sufficient to pay only about fifty per cent. on the total indebtedness. And we find in the record, evidence of the fact that before the adjudication of bankruptcy, and before some of the payments were made to Knapp, that a proposition was made by the corporation through them to settle with the creditors on the basis of fifty per cent. of the indebtedness. Insolvency does not depend, as appellants assume, on whether the assets if sold at cost price would pay the debts. A person or corporation is insolvent within the meaning of the bankruptcy act, "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Collier on Bankruptcy (10th Ed. 1914) page 2. The statute says "fair valuation." This has been interpreted to mean present market value, and the value which the debtor might realize thereon if permitted to continue in business. But in considering the actual value of commercial paper, accounts, etc., the actual value, not the face of the accounts, must be taken as the true value. The evidence tends to show that in January, 1910, taking the property and stock and fixtures at cost, and the book accounts at face value, and not at their actual value, and after payment of the dividend declared, a small balance to the credit of profit and loss remained. But the evidence clearly shows that these assets, particularly the fixtures and book accounts, against which nothing had ever been charged for depreciation, were many thousand dollars less in value than represented on the books, and the business was evidently a losing business during the following year, as evidenced by the inventory taken, and the result of the sale thereof; and the fact that insolvency, denied in this proceeding, was not interposed as a defense to the adjudication in bankruptcy, we think, taken together, fairly establishes insolvency at the time of the alleged preferences. Collier on Bankruptcy, supra, page 10.

[5] But did Knapp know or have reason to believe a preference was intended? He was secretary-treasurer of the company. He and his associate, Sanderson, were the main stockholders, and controlled the company, and if anyone should have had knowledge of the condition of the company, and was inexcusable for not having such knowledge, it was the secretary-treasurer of the corporation. In Whitehead v. Whitehead, 85 Va. 870, 876, 9 S. E. 10, it was held that such an officer cannot be heard to plead ignorance of the financial condition of his corporation. And our cases of Lamb v. Cecil, 28 W. Va. 653, and Lamb v. Pannell, Id. 663, in effect, lay down the same rule.

[6] Another point made by appellants against the decree is, that as to the notes executed by Knapp and charged to his account in August, 1910, and held by the Davis Trust Company, he was simply endorser, and not creditor of the bankrupt, and that the payment of those notes at maturity in November and December, 1910, within four months of the adjudication of bankruptcy, did not amount to a payment and preference to him, voidable by the trustee in bankruptcy. But we find no authority for this proposition. In re George M. Hill Co., 130 Fed. 315, 318, 64 C. C. A. 561, 66 L. R. A. 68, and Pirie v. Chicago Title and Trust Co., cited, we do not think in point. The Hill Case would make the trust company creditor, and liable to account to the trustee, if with knowledge or reason to believe payment was made to it as a voidable preference. There is no evidence imputing knowledge to the trust company.

But there is another rule applicable to appellant as endorser of the notes, and the active agent in making payments to the trust company. By the weight of authority, when such is the fact, and a director is endorser, payment of the note by his procurement and to his relief, constitutes an unlawful preference to him, recoverable from him by the trustee in bankruptcy. 2 Cook on Corporations, section 693, and notes; Savage v. Miller, 56 N. J. Eq. 432, 36 Atl. 578, 39 Atl. 665; Miller v. Audenried, 67 N. J. Eq. 252, 57 Atl. 1076; Collier on Bankruptcy (10th Ed.) 813. It might be, upon the principles of Kenyon Realty Co. v. National Deposit Bank, 140 Ky. 133, 130 S. W. 965, 31 L. R. A. (N. S.) 169, that the trust company, taking the note of the bankrupt in payment of the individual indebtedness of a director, or discounting the paper for him individually, would not be protected as an innocent holder for value. But that question is not presented, but if presented, that would not excuse the offending director, endorser of the paper. It is said in Collier on Bankruptcy, just cited, that:

"If an endorser permits or induces payment of a note, with knowledge or reasonable cause to believe that such payment will result in a preference, he receives the benefit of the payment and he is a creditor."

Another rule is that:

"The payment by the maker of a note to the holder in exoneration of an accommodation indorser, within four months of bankruptcy, is a preference to the indorser which may be recovered by the trustee under § 60, subdivision a and b, of the bankruptcy act." Platt v. Ives, 86 Conn. 690, 86 Atl. 579, 45 L. R. A. (N. S.) 1068.

For the same doctrine see Kobusch v. Hand, 156 Fed. 660, 84 C. C. A. 372, 18 L. R. A. (N. S.) 660, and note. In the latter case the Supreme Court of the United States in April, 1908, refused a writ of certiorari. 209 U. S. 547, 28 Sup. Ct. 758, 52 L. Ed. 920.

And in reply to the contention of appellant Knapp that he took the notes as cash, and in payment, and charged himself therewith in August, it may be said that the giving of a note generally is not payment of a debt. Hornbrooks v. Lucas, 24 W. Va. 493, 49 Am. Rep. 277; Bank v. Good, 21 W. Va. 455, 464; Lewis v. Davisson's Ex'r, 29 Grat. (Va.) 216, 225; 2 Daniel on Neg. Inst. (6th Ed.) section 1260. And it is urged by appellee, that in this case none of the notes were authorized or executed in accordance with the by-laws governing such transactions.

[7] Another point of contention by appellant Knapp is that as to the salary part of his account, paid, the payments thereon were not preferences voidable in bankruptcy. The answer to this proposition, according to the authorities, is that the salary of an officer or manager of a corporation is not the debt or claim of a wage earner, protected by the statute. Collier on Bankruptcy, 906. A debt due from a corporation to an officer on account of salary stands on the same basis as any other debt to such director. 2 Cook on Corporations (6th Ed.) section 692, page 2126, and note.

The necessary conclusion from the foregoing is, that the two decrees appealed from of March 5th, and May 29th, 1913, respectively, must be affirmed, and we will so order.

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(76 W. Va. 17)

## ATKINS v. EVANS et al.

(Supreme Court of Appeals of West Virginia. March 16, 1915.)

*(Syllabus by the Court.)*

1. GARNISHMENT ⟸95, 104—JURISDICTION—SERVICE OF GARNISHEE.

In garnishment, it is primarily essential to the court's jurisdiction in relation to the debt or property sought to be affected, that the garnishee be actually served with the writ of attachment whereon he is designated as such. Acceptance of service or voluntary appearance by the garnishee will not suffice.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 181–188, 209–213; Dec. Dig. ⟸95, 104.]

*(Additional Syllabus by Editorial Staff.)*

2. GARNISHMENT ⟸1—NATURE OF PROCEEDING.

A "garnishment" proceeding is in the nature of a proceeding in rem. Its aim is to invest the plaintiff with the right and power to appropriate, to the satisfaction of his claim against the defendant, property of the defendant in the hands of the garnishee, or a debt due from the garnishee to the defendant.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 1; Dec. Dig. ⟸1.

For other definitions, see Words and Phrases, First and Second Series, Garnishment.]

Error to Circuit Court, Mingo County.

Action by L. H. Atkins against William Evans and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Quesinberry & York, of Williamson, for plaintiff in error. S. D. Stokes and Wade H. Bronson, both of Williamson, for defendants in error.

ROBINSON, P. An action for the recovery of money, brought by Atkins against Evans and others, partners, regularly proceeded to issue, trial, and judgment for the plaintiff. A writ of attachment accompanied the action. On this writ James O. Cole and Clinton Crane, partners, were designated as garnishees, pursuant to Code 1913, ch. 106, sec. 5 (sec. 4459). An invalid service of the writ having been made as to the garnishees, they accepted service, appeared, and filed their answer. In the answer they admitted that when the writ came to them, they were liable in a particular sum to the defendants in the action. But they set forth that subsequently they had received notice from one Deskins that he was the owner of the debt upon an assignment made to him by the defendants in the action. The garnishees prayed that by proper order Deskins be required to appear, state the nature of his claim, and maintain or relinquish the same, so that the matter as between him and Atkins, the attaching plaintiff, might be properly determined and the garnishees thereby be enabled to pay the debt to the proper party. In response to an order made in pursuance of this prayer, Deskins appeared and filed his petition. In it he alleged that he was the owner of the debt by valid assignment, and prayed that his right thereunder be properly protected. To this petition, Atkins, the plaintiff, demurred generally. At this stage the court cut the garnishment proceedings short by entering the following order:

"The court being of opinion that it has no jurisdiction to make any order herein with respect to the funds in the hands of the garnishees, Cole and Crane, it is therefore considered by the court that the attachment heretofore sued out herein be and the same is hereby dismissed."

From this order or judgment of the court, Atkins has appealed.

In the foregoing statement we have eliminated all matters shown by the record which are immaterial to be noticed in a consideration of the question with which we are to deal. The one point for decision is whether the court erred in summarily dismissing the garnishment proceedings. In other words, was the court without jurisdiction in the premises because the garnishees had not been actually served with the writ of attachment suggesting them as garnishees, but had accepted service of the same and voluntarily appeared? That the judgment complained of was made on the theory that the court was without jurisdiction because of the want of actual service on the garnishees, is conceded by the briefs.

[1, 2] There is much diversity of opinion in the authorities on the subject which we have

at hand. By some it seems to be considered that the acceptance of service or voluntary appearance by the garnishee will lend jurisdiction in garnishment when the defendant is a party to the cause by personal service or appearance. But this seems inconsistent with the very nature of garnishment, making it in such case merely a proceeding in personam. It is not ordinarily so considered. It is in the nature of a proceeding in rem. Its aim is to invest the plaintiff with the right and power to appropriate, to the satisfaction of the claim against the defendant, property of the defendant in the hands of the garnishee, or a debt due from the garnishee to the defendant. Drake on Attachment (6th Ed.) sec. 452. It is not a direct action between the persons, but a species of seizure of the property or debt of the one by the other. It involves a res. Though the court may have jurisdiction of the parties in the main action, it must also acquire a jurisdiction over the property or debt sought to be affected by the ancillary garnishment, in order to render a judgment against that property or debt. Such a jurisdiction can only be acquired by direct compliance with the statute which prescribes the manner of taking of it. The law must thus be caused to attach to the thing sought to be affected. It can be transferred from the defendant to the plaintiff in no other way. The right of the defendant to the property or debt is not taken away unless the property or debt has been attached by the law in the manner prescribed, and is thus transferred from him. A mere order in personam is not prescribed as sufficient and will not take away his right. The intervention of the prescribed law can alone initiate such a compulsory novation.

Though the garnishee appears, his mere appearance does not bring in the thing sought to be affected in his hands. It can only be brought under the power of the court by being attached by the law just as is prescribed in the statute. With us, what is it that attaches the property or debt in the hands of the garnishee and brings the same under the power of the court? It is the swearing out of a valid writ of attachment, the designation thereon of a person as being indebted to the defendant, or as having in his hands effects of the defendant, and the serving of the writ of attachment, endorsed with such designation, on the party so designated. Code 1913, ch. 106, sec. 5. Only in this way is the debt or property in the hands of the garnishee reached so that the court may make any order affecting it. Actual service of such writ on the garnishee is primarily essential to the court's jurisdiction to act in relation to the debt or property sought to be affected.

In this case we have no such service. We have an acceptance of service by the garnishees and their appearance by answer. All this is abortive to reach the debt which the garnishees admit they owe. That debt has not been attached—has not been brought under the law—for the law has not been complied with in relation to it. It was essential to serve the writ of attachment designating the garnishees, on the garnishees themselves. In that way the debt involved would be affected by the act of the law—would be attached. Acceptance of service and appearance by the garnishees is the voluntary act of the garnishees, not the act of the law. Such voluntary act does not bind the debt. The garnishees can not bring the debt before the court, the law only can bring it there. "Garnishment rests wholly upon judicial process and depends upon the due pursuit of the steps prescribed by law for its prosecution. It can borrow no aid from volunteered acts of the garnishee." Drake on Attachment (6th Ed.) sec. 451b.

Consistent with what we have herein said is the holding of this court in Railroad Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178:

"A garnishee cannot give jurisdiction of a debt due from him by his voluntary appearance, when not previously served with the order of attachment, nor when an attempted service is invalid."

The trial court saw that it had no jurisdiction over the fund. It could properly do nothing but dismiss the garnishment. The judgment will be affirmed.

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(76 W. Va. 19)

## STATE v. KING et al. (No. 2511.)

(Supreme Court of Appeals of West Virginia. March 16, 1915.)

*(Syllabus by the Court.)*

1. PUBLIC LANDS ⟸186—FORFEITED SCHOOL LANDS—MONEY FOR REDEMPTION—RESTITUTION.

Money paid into court for redemption of forfeited land under a decree which is subsequently reversed, should be refunded to the person by whom it was paid, by way of restitution.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 599; Dec. Dig. ⟸186.]

2. STATES ⟸191—"SUIT AGAINST STATE"—SUIT FOR REDEMPTION MONEY.

A petition filed in the suit, praying the return of such money by way of credit on the amount due for redemption of part of the tract of land on account of which it was paid, under a subsequent decree, is not a suit against the state; the money never having been disposed of in any manner by order of the court.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179–184; Dec. Dig. ⟸191.]

For other definitions, see Words and Phrases, First and Second Series, Suit Against the State.]

3. PUBLIC LANDS ⟸186—FORFEITED LAND—RECOVERY OF REDEMPTION MONEY—INTEREST.

But it is to be allowed or returned without interest, unless it has been loaned, pending the proceedings, and produced interest.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 599; Dec. Dig. ⟸186.]

Appeal from Circuit Court, Marion County.

Suit by the State against Henry C. King and others. From a decree for plaintiff, the defendant named appeals. Reversed and remanded.

M. F. Stiles, of Charleston, for appellant. A. A. Lilly, Atty. Gen., and John B. Morrison and J. E. Brown, Asst. Attys. Gen., for the State.

POFFENBARGER, J. Having been denied credit on the money due from him to the state, as the purchase price of certain portions of the Robert Morris grant, for the sum of $2,198.65, paid into the court, under the decree made and entered in the cause of State v. King, on the 30th day of September, 1897, which was partially reversed by this court on appeal, King has appealed from the decree refusing to allow him such credit.

Under the decree of September 30, 1897, King paid $3,090.08. On appeal to this court the decree was reversed, except in so far as it recognized his right to redeem the land by proper proceedings in accordance with the statute. This affirmed King's right, as against the state, to redeem the land, but not as against the superior rights of others. Long after the cause was remanded and the greater part of the immense tract of land had been dismissed out of the suit, as being held under superior rights, King was permitted to redeem certain portions thereof. Having such right as to six tracts, he elected to let them be sold and purchased them at the price of $6,400, paying $1,600 in cash and filing a petition asking credit on the balance for the amount he had paid in, under the decree of 1897, as for taxes and interest thereon. Of this $3,090.08 so paid, $891.43 had been disbursed by the court as cost, leaving a balance of $2,198.65, the amount paid in on account of taxes and interest. It does not appear that any disposition has ever been made of said sum. The report of a commissioner to whom an inquiry was referred, after the filing of King's petition for credit, says:

"The residue was held for the benefit of the school fund, or to be applied as money paid in redemption of land is subject to be applied."

Neither this court, on reversal of the decree, nor the lower court, after the cause was remanded, ever ordered the money to be returned to King, nor did he request return thereof. All of the parties, as well as the court, must have assumed his right to credit therefor on the redemption money of any land he should ultimately prove himself entitled to redeem. His right to such credit is resisted upon two grounds: (1) That his claim therefor is virtually a suit against the state; and (2) that presumptively the money has been distributed in part to the counties and districts in which portions of the lands lie.

[1] As the state herself is plaintiff in the cause and has virtually sued King, it is very difficult to see how his counterclaim can be regarded as a suit against the state. The money was paid into court, not to the commissioner of the school lands, agreeably to the provisions of section 17, c. 105, Code, serial section 4449, and could only be disbursed upon the order of the court. According to the commissioner's report, it has never been disbursed. It remains in the custody of the court to be disposed of according to the rights of the parties. On the reversal of King's decree of redemption under which it was paid, the principle of restitution applicable under such circumstances required an order returning it to him, and, as that order has never been made, it ought to be made now. The fund therefore is not in the hands of the state, and King's claim thereto is not a claim against the state. It is a claim to a fund in the hands of the court, which the court has the right and power to award to the person to whom it belongs. What has been said respecting the first ground of resistance fully disposes of the second. Any presumption of distribution that might arise from lapse of time is negatived by the facts shown. The money is still in the hands of the court and subject to its power to make restitution.

[2] On the refusal of the relief asked for in his petition, and after having excepted to the decree or order refusing him such relief, King paid the $4,800 into court under protest, and obtained this appeal. Having preserved his right by his protest and exception, he is clearly entitled to a decree directing payment to him of the sum of $2,198.65, but no ground is perceived upon which he may claim interest on said sum from the date of the payment thereof, or the date of the reversal of the decree under which it was paid. He has voluntarily permitted it to remain in the hands of the court, and it does not appear in any way to have earned any interest. If it has not been loaned out and caused to earn interest, the fault is as much his as that of the court. Whether it has been loaned or earned any interest does not appear. If it has, he is entitled to such interest as it has made, but no more.

[3] In so far as the decree complained of denies King's right to the sum of $2,198.65, it will be reversed and the cause remanded, with direction to enter a decree awarding to him said sum, together with the interest it has produced, if any. He is also entitled to his costs in and about this appeal, out of any money in the hands of the court, derived from his redemption or purchase of lands within the Robert Morris patent proceeded against in this cause.

(75 W. Va. 346)

YEATER v. JENNINGS OIL CO. (No. 2366.)

(Supreme Court of Appeals of West Virginia. Dec. 15, 1914. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. PLEADING ⊂=30—SUFFICIENCY OF COMPLAINT—MISTAKES IN SPELLING.

A declaration charging negligence in providing a defective steam *guage*, instead of steam *gauge*, is not bad on demurrer for the bad spelling of the word "gauge."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 51; Dec. Dig. ⊂=30.]

2. TRIAL ⊂=191—DEATH OF SERVANT—INSTRUCTIONS — ASSUMING CONTROVERTED FACT.

The instructions in this case given at the instance of plaintiff and the substance of which are noted in the opinion propound correct legal propositions, applicable to the case made by the evidence, and were properly given to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420–431, 435; Dec. Dig. ⊂=191.]

3. TRIAL ⊂=252—DEATH OF SERVANT—DEFECTIVE APPLIANCES—REFUSAL OF INSTRUCTION—ASSUMPTION OF CONTROVERTED FACT.

Defendant's instruction No. 15, was properly rejected for assuming the fact, not supported by the evidence, that deceased voluntarily went to the boiler, which exploded, causing his death. Other instructions given fully covered the question of fellow servantcy, and proximate cause of the injury introduced into this instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. ⊂=252.]

4. MASTER AND SERVANT ⊂=276—DEATH OF SERVANT—DEFECTIVE APPLIANCES — SUFFICIENCY OF EVIDENCE.

The verdict was fully supported by the evidence, and there was no error in denying defendant's motion to set aside the verdict and award it a new trial.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950–952, 954, 959, 970, 976; Dec. Dig. ⊂=276.]

5. DEATH ⊂=99—DAMAGES—EXCESSIVE RECOVERY.

The verdict, $8,000.00, damages awarded for the death of deceased, an unmarried son of the beneficiary, was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125–130; Dec. Dig. ⊂=99.]

Error to Circuit Court, Wetzel County.

Action on the case by J. W. Yeater, administrator, etc., against the Jennings Oil Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Thos. P. Jacobs and M. R. Morris, both of New Martinsville, and Patterson, Crawford, Miller & Arensberg, of Pittsburgh, Pa., for plaintiff in error. F. V. Iams, J. H. Robinson, and E. L. Robinson, all of New Martinsville, for defendant in error.

MILLER, P. Action on the case by his administrator for the death of William Collier Lewis, by the negligence and wrongful act of defendant.

The judgment on the verdict complained of was for eight thousand dollars.

[1] The declaration, in three counts, was demurred to, and the demurrer overruled, and we think properly. The only point of error urged here is that the pleader employed the word "guage" for the word "gauge," in charging the negligence of defendant in providing a defective steam gauge, resulting in the explosion of its steam boiler, and in the death of decedent. Though seriously argued in the brief of counsel we see no real merit in the point and must overrule it. The first two counts charge negligence in furnishing a defective steam gauge, the third in providing a defective, insecure, unsafe, unsound, rotten and unsuitable boiler, in consequence of which the boiler exploded and killed decedent. It does not appear to us that the declaration is bad in any substantial way.

[2] The alleged insufficiency of the evidence to support the verdict, and denial of defendant's motion for a new trial, are the main points relied on, but we will first dispose of the points made against the giving and refusing of the instructions. First, with respect to plaintiff's instructions numbered 1, 3a, 4, 5, 6, 7, and 10. Number 1 defines negligence and told the jury that if they find defendant guilty of negligence, of doing or leaving undone that which an ordinarily prudent man would have done, resulting in the death of decedent, the defendant was guilty of negligence. Number 3a is to the effect that if defendant knowingly supplied a defective steam gauge, which failed to register the steam pressure on the boiler, and that such negligence proximately caused the death of decedent, the defendant was guilty and the jury should so find and assess damage fair and just, not exceeding the amount sued for. Number 4 is substantially the same as number 3. Number 5 relates to the right of the jury, in judging of the credibility of the witnesses, to take into consideration their interest, if any, in the matter in controversy. Number 6, to the non-assignable duty of the master to furnish reasonably safe machinery, and a reasonably safe place to work, and its consequential liability to its servant for neglect of that duty, in the usual terms. Number 7 relates to the use of the defective steam gauge, and told the jury that if they found the same defective and not to register correctly the steam pressure in the boiler at the time of the explosion, thereby misleading and deceiving its servant, and that the defective condition of said gauge was the proximate cause of the explosion, and that its defective condition was, at or before the time of the explosion, known to defendant, defendant was liable to plaintiff in damages, unless they should find that the deceased was not at the place of his injury pursuant to any employment by the defendant. Number 10 relates to the method of ascertaining the damages, and told the jury that if they should find plaintiff entitled to recover damages, they should first have reference to the pecuniary loss sustained by the father, fixing such sum as would be equal to the probable earnings of

the deceased, considering his age, earning capacity, experience and habits, during his probable lifetime and the lifetime of his father if he had not been killed, etc.

We see nothing wrong in these instructions as to form or substance, but we will further consider number 10 hereafter. They are not generally binding instructions, but cover correct legal propositions, certainly in the abstract. The criticisms of counsel are, not that they propound bad law, but first, that they are irrelevant, immaterial and misleading, in that they assume that the place assigned deceased to work was at the boiler house, and in effect call the mind of the jury away from the oil well, where the "roustabout" gang, of which deceased was a member, was working, to the boiler house, and assume that the boiler was defective, and that decedent was properly at the boiler house under his employment.

We do not see that these instructions assume any really controverted fact. None of them, unless it be number 3a, assume that deceased was rightly at the boiler house when killed. Number 7, does submit that question to the jury, but the fact is not really controverted, and we do not think there was any error in the assumption that deceased was at the place where he had the right to be as an employee. Besides, instructions given for defendant submit all these theories to the jury. The evidence shows that he was a member of a so-called "roustabout gang," in charge of and under the direction of the man employed to clean out the well, and it is fully proven that deceased was sent to the boiler house in company with others of the gang to assist in doing some work on the boiler; that deceased himself had been specially sent to obtain some bolts or taps to use at the boiler house, and some tallow cups to use on the engine at the well, and that after this work had been done he had gone a short distance above the boiler where he lived to get something to eat, and that at the time he was killed he was on his way back, having stopped at the boiler house waiting for the man in charge there to get up sufficient pressure of steam to do the work of cleaning out the well, located a short distance below the boiler house, before going to the well. It is proven that the man in charge of the boiler knew nothing about the defective steam gauge, and there is no evidence that deceased knew anything about it, but it is fully proven that defendant and its representatives knew that it would not properly register the steam pressure months before the accident occurred, and were fully warned of its condition. So that we do not see that any controverted fact is assumed by the instructions complained of. There is nothing in the record on which to base the theory of the defendant that deceased assumed the risk incident either to a defective steam gauge or a defective boiler, and there is no room for the application of the principles enunciated in Stewart v. Ohio River R. Co., 40 W. Va. 188, 20 S. E. 922, and Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999. Of course deceased assumed any risks necessarily incident to the character of his employment, but he did not assume the risk of a defective steam gauge or a defective boiler, unknown to him.

Instruction number 10 is more especially complained of, because of its supposed responsibility for the large verdict. It is unnecessary to enter into any extended discussion of this instruction, or the principles underlying it. Our statute, section 6, chapter 103, serial section 4410, Code 1913, the same as the statute of Virginia, authorizes the jury in such cases to "give such damages as they shall deem fair and just, not exceeding ten thousand dollars." As interpreted by the Virginia court and this court this statute justifies the instruction complained of. Indeed, it is substantially plaintiff's instruction number 5, in Norfolk & W. R. Co. v. Cheatwood, 103 Va. 356, 364, 49 S. E. 489, which followed B. & O. R. R. Co. v. Wightman's Admr., 29 Grat. (Va.) 431, 26 Am. Rep. 384, B. & O. R. R. Co. v. Noell, 32 Grat. (Va.) 494, and Portsmouth R. R. Co. v. Peed, 102 Va. 662, 47 S. E. 850, and which cases are cited approvingly and followed in our case of Kelley v. Railroad Co., 58 W. Va. 216, 52 S. E. 520, 2 L. R. A. (N. S.) 898, and again in Wigal v. City of Parkersburg, 81 S. E. 554.

[3] Next it is complained that the court improperly rejected defendant's instruction number 15. This instruction, after defining fellow servantcy, would have told the jury, that if they found that the cleaning out man suggested that something be done with the boiler so that the tubing could be pulled on that day, and that the deceased and one Norris volunteered to go with Bungard, the fireman, to repair the boiler, then Justin, Lewis, Norris and Bungard were fellow servants, and if they further found that Bungard negligently and carelessly weighted down the safety valve, causing the boiler to explode and resulting in the death of decedent, defendant was not liable and they should find for it. We think the court properly rejected this instruction, if for no other reason, because there is no evidence showing or tending to show that deceased volunteered with others to go to the boiler house as stated. They were ordered to go there by the cleaning out man who had charge of the gang. Moreover, there is little evidence, hardly a scintilla of evidence, going to show that the proximate cause of the injury was the weighting down of the safety valve. We will dispose of that subject later in disposing of the point of error on the motion for a new trial. All theories of the defendant were fully covered by other instructions given at its instance. Its theory of fellow servantcy was fully covered, we think, by instructions numbered 7 and 14, given.

[4] Lastly, did the court err in denying de-

fendant's motion to set aside the verdict and grant it a new trial, on either of the grounds relied upon, namely, want of evidence to support the verdict, or that the verdict is excessive? We have already indicated the opinion that the evidence fully shows deceased had a right to be at the boiler house, where he was killed. That he was sent there to do work, assist in doing work, put the boiler in use, by the cleaning out man in charge of the roustabout gang, is not a controverted fact. The boiler house was a place where he could have been reasonably expected to work, and that he was sent there for that purpose by the man in authority, is fully proven. The boiler house constituted a part of the plant employed in operating the well and in cleaning out the same; and under his employment deceased was required to be wherever he was ordered. While the evidence tends to show that his services would have been required at the well when there was sufficient steam in the boiler, it also shows that he was tarrying at the boiler house until sufficient steam had been procured for the operations at the well. We do not think, therefore, that there is anything in the point that the deceased was at a place other than where he was required to be under the terms of his employment.

That the boiler was an old defective one, and had on it a defective steam gauge, all known to the defendant, are not really controverted facts. But the point is urged strongly in briefs and supplemental briefs filed on behalf of the defendant, that the evidence leaves it so uncertain as to whether the weighting down of the safety valve by Bungard, a fellow servant, or the defective steam gauge, was the proximate cause of the explosion, and in such cases recovery is precluded. The proposition stated in the language of counsel is:

"That where the effect of the evidence is merely to establish that there were two causes, either one of which may have been the proximate cause of the injury, the burden is on the plaintiff to show that the cause for which the defendant is responsible was the one which produced the injury sought to be recovered for."

For this they cite 4 Labatt on Master and Servant (2d Ed.) pages 4898, 4899, and cases cited in notes. Labatt says:

"From this rule it follows that the action cannot be maintained, if, after all the testimony has been put in, it remains doubtful whether the injury resulted from the cause suggested by the master, or from the cause suggested by the servant. As long as there is nothing more tangible to proceed upon than two or more conjectural theories, it is immaterial that the theory which is suggested in the interest of the servant is more probable than that which is suggested in the interest of the master."

We have examined the authorities for the proposition cited and relied upon by counsel, and while we have no fault to find with them, we do not think the evidence leaves it doubtful, conjectural or uncertain as to whose negligence was the proximate cause of the injury. That the boiler was old and defective and had a defective steam gauge installed on it by defendant, is, as we have said, not a controverted fact. While the evidence does show a slight weighting down of the safety valve by Bungard, it also shows that the boiler was leaking at the safety valve and had leaked there before, and that he was deceived thereby in believing that it was because of this defect that he could not get up steam to the required pressure, 110 pounds. If the gauge had properly registered the pressure he would not have weighted the safety valve; there would have been no necessity for his doing so.

[5] But is the verdict, $8,000.00, so excessive as under the rules governing us it should be set aside? We cannot say so. Our statute, referred to, gives the jury right to give such verdict as they shall deem fair and just, within the limitation of ten thousand dollars. The value of a man's life was involved, negligently and wrongfully cut off by the fault of defendant. The elements properly to be considered by a jury in such cases, as we have shown, were properly submitted to the jury. We cannot say the verdict is wrong.

The judgment will, therefore, be Affirmed.

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(76 W. Va. 27)

## ATKINS v. GREY EAGLE COAL CO.

(No. 2532.)

(Supreme Court of Appeals of West Virginia. March 16, 1915.)

*(Syllabus by the Court.)*

CONSTITUTIONAL LAW ⊂⊃275—MASTER AND SERVANT ⊂⊃69—POLICE POWER—RIGHT OF CONTRACT—PAYMENT OF WAGES.

Section 80, c. 15H, Code 1913 (sec. 539), forbidding under penalty "any corporation, company, firm or person, engaged in any trade or business, either directly or indirectly, to issue, sell, give or deliver, to any person employed by" such corporation, company, firm, or person, "in payment of wages due such laborer, or as advances for labor not due, any scrip, token, draft, check or other evidence of indebtedness payable or redeemable otherwise than in lawful money," and providing that such "scrip, token, draft, check or other evidence of indebtedness, shall be * * * construed, taken and held in all courts and places, to be a promise to pay the sum specified therein in lawful money by the corporation, company, firm or person, issuing, selling, giving or delivering the same to the person named therein, or to the holder thereof," does not violate any constitutional provision, or unduly curtail the right of contract, and is therefore not an illegitimate exercise of the state's police power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 830, 835, 839, 843-846; Dec. Dig. ⊂⊃275; Master and Servant, Cent. Dig. §§ 78-81; Dec. Dig. ⊂⊃69.]

Error to Circuit Court, Mingo County.

Action by J. Dennis Atkins, sole trader, etc., against the Grey Eagle Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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Wiles & Bias, of Williamson, for plaintiff in error. A. A. Lilly, of Charleston, for defendant in error.

LYNCH, J. As owner, by purchase in due course, of scrip, or disks, of denominations ranging from 5 cents to $1, payable in merchandise, signed, issued, and delivered by the Grey Eagle Coal Company, a coal mining corporation organized and doing business under the laws of this state, to its employés, J. Dennis Atkins, trading as the Atkins Company, brought suit before a justice of the peace of Mingo county to recover from the coal company the total face value of such scrip, amounting to the sum of $72. From a judgment for that amount, defendant appealed to the circuit court, wherein, upon an agreed statement of facts, judgment for a like sum was again rendered against defendant, and it obtained a writ of error thereto; the sole question involved and determinable here being the validity of the act forbidding, under penalty of fine and imprisonment, "any corporation, company, firm or person, engaged in any trade or business, either directly or indirectly, to issue, sell, give or deliver to any person employed by" such corporation, company, firm, or person, "in payment of wages due such laborer, or as advances for labor not due, any scrip, token, draft, check or other evidence of indebtedness payable or redeemable otherwise than in lawful money," and providing that such "scrip, token, draft, check or other evidence of indebtedness, * * * shall be construed, taken and held in all courts and places, to be a promise to pay the sum specified therein in lawful money by the corporation, company, firm or person, issuing, selling, giving or delivering the same to the person named therein, or to the holder thereof." Section 80, c. 15H, Code 1913 (sec. 539). The only other question urged for reversal cannot be considered on this review, even if meritorious, though we do not so consider it, because, except as to the validity of the act, this court is without jurisdiction, the amount involved being less than $100.

The objection urged to the act in question is that ordinarily interposed as to legislative enactments of a similar character; the charge being that the act is in violation of the federal Constitution, imposes undue restrictions upon the liberty of contract, and is not a legitimate exercise of the police power of the state.

While the present statute differs in material respects from the act construed and held invalid in State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863, it is the same act construed and held valid in State v. Peel Splint Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385, though by an equally divided court. The former act (chapter 63, Acts 1887; Code 1913, c. 15H, §§ 75–79 [secs. 534–538]) embraced within its inhibition only persons engaged in certain specifically designated business activities; while the latter in express terms embraces all persons, firms, companies, and corporations engaged in any trade, calling, or business. The discrimination manifestly appearing from the act of 1887, though not generally recognized in criticisms directed against the decision in the Goodwill Case, was the real basis of such decision, as readily appears from the first point of the syllabus. The act imposed no restrictions upon employers of labor engaged in other trades or callings where the propriety or necessity therefor was equally apparent. That feature, however, was eliminated by the subsequent act, the one upheld in the Peel Splint Case, and the one involved here (chapter 76, Acts 1891).

In the opinion in the last case Judge Lucas cites many instances of similar regulations by Parliament, generally known as "truck acts," and by acts of the several states, and reaches the conclusion epitomized in the syllabus prepared and adopted by the court. The argument so well sustained by him need not now be restated or amplified. The trend of it is that the freedom of individual contract must yield to due legislative restraint whenever necessary to conserve the public health, safety, and morals and to promote the general welfare and peace of the community; and ordinarily such is the basis of the decisions in other jurisdictions upon similar statutes. The court, in Hancock v. Yaden, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. Rep. 396, said:

"It is a fundamental principle that every member of society surrenders something of his absolute and natural rights in all organized states."

Reluctant, as apparently it seems to be, to hold valid any legislation tending towards infringement of the right of an individual citizen to enter into such contracts as he may deem advisable, the Supreme Court of New York upheld a recent statute requiring every factory and mercantile establishment to give to each of its employés an opportunity for 24 consecutive hours rest in every 7 days. People v. Klinck Packing Co., 108 N. E. 278. So state legislation limiting hours of service in dangerous employments, requiring semimonthly payment of wages to employés, requiring payment of wages in money, instead of merchandise, securing a just standard for determining wages, has been upheld by the Supreme Court of the United States as not violative of the federal Constitution or as imposing unwarranted restrictions upon the liberty of contract. Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957; Railroad Co. v. Williams, 233 U. S. 685, 34 Sup. Ct. 761, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097, affirming 199 N. Y. 108, 92 N. E. 404, 35 L. R. A. (N. S.) 549, 139 Am. St. Rep. 850; Iron Co. v. Harbison, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55, af-

firming 103 Tenn. 421, 53 S. W. 955, 56 L. R. A. 316, 76 Am. St. Rep. 682; McLean v. Arkansas, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315. See, also, "Liberty of Contract," by Prof. Roscoe Pound, 18 Yale Law Journal, 454; note on "Freedom of Contract Under Constitution," 28 Harvard Law Review, 496.

Many comparatively recent cases decided by the state courts have held, on various grounds, legislative enactments similar to the one now under review not subject to challenge as contravening the supreme or fundamental law of the state or general government. Some have taken the position that payment of wages by persons or corporations to their employés is a matter of vital concern to the general public, and that it is therefore within the power of the Legislature to prescribe the mode of payment. Hancock v. Yaden, supra; Iron Co. v. Harbison, supra. Such doubtless was the view, and, in our judgment, not an erroneous one, that prompted the enactment of the statute now being considered. Its purpose evidently was the elimination of one of the prime motives or causes alleged for the unfortunately prevalent and frequently recurring labor disputes and disturbances that have recently grievously afflicted this and other states, resulting in incalculable loss alike to employer and employé. The opinion in the Peel Splint Coal Company Case was in part also predicated upon the right of the state to impose subsequent conditions upon companies chartered and doing business in and under the laws of this state.

Coal Co. v. Commonwealth, 96 Ky. 218, 28 S. W. 502, 28 L. R. A. 273, denying infringement of any constitutional provision or curtailment of freedom of contract, upheld a penal statute forbidding payment of wages to employés otherwise than in money, but justified the act as one intended to protect against imposition and oppression. Such seems to be the purpose of the English "truck acts." 2 Labatt, M. & S. §§ 824–826. Acting in the capacity of an advisor to the Legislature, the Supreme Court of Colorado, in Re House Bill No. 147, 23 Colo. 504, 48 Pac. 512, held:

"Legislation having for its object the protection of laborers from oppression and fraud, by prohibiting the issuance by employers, in payment of wages, of scrip or orders redeemable in goods at exorbitant prices, may properly be enacted under the police powers of the state."

Without detailing the provisions of the various state statutes held valid, or the reasons assigned therefor, except to state that, though expressed in terms somewhat different, they are substantially of the same purport and effect, and have in view the same general purpose as our own, we cite the cases infra as authority for the proposition that the provisions challenged by defendant do not conflict with the Constitution of the United States or of this state. Shaffer v. Mining Co., 55 Md. 74; Johnson v. Mills, 68 S. C. 339, 47 S. E. 695, 1 Ann. Cas. 409; Shortall v. Puget Sound Co., 45 Wash. 290, 88 Pac. 212, 122 Am. St. Rep. 899; Lawrence v. Railroad Co., 80 Vt. 370, 67 Atl. 1091, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475; Sawmill Co. v. Felsenthal, 85 Ark. 346, 108 S. W. 217; Regan v. Lumber Co., 134 La. 199, 63 South. 874. See, also, Labatt, M. & S. § 2820. Though declaring a statute providing an eight-hour day for workingmen in mines, smelters, and mills for the reduction of ores not unconstitutional, the reasoning of the court in Ex parte Boyce, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47, 1 Ann. Cas. 66, and Ex parte Kair, 28 Nev. 127, 80 Pac. 463, 6 Ann. Cas. 893, and 28 Nev. 425, 82 Pac. 453, 6 Ann. Cas. 893, is equally forceful in support of the statute now under consideration.

We do not think the statute challenged by defendant violates any constitutional provision, or unduly curtails the right of contract, or is an illegitimate exercise of the state's police power.

So thinking, we affirm the judgment of which complaint is made.

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(76 W. Va. 21)

## WILLIAMSPORT, N. & M. RY. CO. v. STANDARD LIME & STONE CO.

(No. 2652.)

(Supreme Court of Appeals of West Virginia. March 16, 1915.)

*(Syllabus by the Court.)*

1. EMINENT DOMAIN ⇐196—CONDEMNATION FOR RAILROAD RIGHT OF WAY—PUBLIC USE—BURDEN OF PROOF.

Lands sought to be condemned for rights of way, by a duly organized railroad corporation, will be deemed and treated as intended for public use; and the burden of showing the contrary rests on him who asserts it.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529–534; Dec. Dig. ⇐196.]

2. CORPORATIONS ⇐32 — EMINENT DOMAIN ⇐196—CONDEMNATION OF RAILROAD RIGHT OF WAY—SUFFICIENCY OF EVIDENCE.

Evidence introduced to prove applicant's legal organization as a railroad corporation *held* to be sufficient, and that introduced to show intent to serve a purely private purpose *held* insufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 106–118, 2086, 2087; Dec. Dig. ⇐32; Eminent Domain, Cent. Dig. §§ 529–534; Dec. Dig. ⇐196.]

Error to Circuit Court, Berkeley County.

Proceedings by the Williamsport, Nessle & Martinsburg Railway Company against the Standard Lime & Stone Company. Judgment for plaintiff, and defendant brings error. Affirmed and remanded.

Brown & Brown, of Charlestown, Faulkner & Walker, of Martinsburg, and E. G. Baetjer, of Baltimore, Md., for plaintiff in error. Martin & Seibert, of Martinsburg, B. A. Richmond, of Cumberland, and N. C. Hubbard, of Wheeling, for defendant in error.

LYNCH, J. Upon application to the circuit court of Berkeley county, made in the manner prescribed by statute, for an adjudication of its right to appropriate to public use part of a tract of land owned by the Standard Lime & Stone Company and by it operated as a limestone quarry, the court held the applicant, the Williamsport, Nessle & Martinsburg Railway Company, to be a corporation duly chartered, organized, and empowered to invoke the aid of the statutory provisions in that behalf enacted, and, upon compliance with the due prosecution of the regulations requisite for such procedure, permitted it to pay into court the compensation fixed by commissioners appointed for that purpose. Defendant, on writ of error, challenges (1) the sufficiency of the corporate organization of the applicant; (2) its right to condemn; (3) the lawfulness or bona fides of its purposes; (4) denies any attempt to agree upon the compensation for the land to be taken; (5) that such land is necessary for railroad purposes; (6) that the road is or will be devoted to public use in whole or in part, asserting that as to one parcel the sole purpose is to serve the Pittsburgh Limestone Company by a branch or spur connecting it with the Western Maryland Railway at Williamsport, such connection being the moving cause for the abortive attempt of the Western Maryland Railway Company to construct a spur track from Charlton, a station on its main line on the Maryland side of the Potomac to the boundary line between the two states, the failure of which was due to want of authority to condemn a way through the lands now sought to be appropriated to serve none other than the competitor and rival of defendant; and hence (7) that the organization of the applicant was to effectuate what the Western Maryland Railway Company was unable to accomplish, under pretense of constructing a branch line from Williamsport opposite Piedmont by way of Nessle to Martinsburg.

[1, 2] Is the applicant a duly organized railway corporation? To it was issued a charter by the proper officer of the state, upon the application in due form of five persons, who each subscribed one share to the capital stock and paid in the requisite percentage of the several subscriptions. Thereafter the same persons increased their shares to a total of 500, 122 by each of four and 12 by one of them. On such increased subscription was also paid into the treasury $5,000, or 10 per cent. of the total amount. After notice published as required by statute, the stockholders met March 22, 1913, adopted by-laws for the government of the corporation, and elected directors for it. The directors met on the same day, organized, elected the officers authorized by the by-laws, advised the Secretary of State of the names and post office addresses of these officials, appointed an attorney to accept service of process, directed the charter to be filed in the proper office, selected the executive committee required, employed an engineer to make a survey of the proposed line, and adopted the route apparently previously surveyed, mapped, and platted, together with a profile, and ordered the same to be filed as required by law, employed a right of way agent to negotiate for and accept voluntary grants of way to the company and in its name to purchase at once other rights of way where purchases could be had by agreement, and to condemn where such agreements could not be had, and designated the various tracts of land through which such ways were necessary between the terminals designated in the charter, the courses and distances through each tract, and the quantity deemed necessary for railway purposes. On the same day, the executive committee so appointed also entered upon the performance of the duties likewise prescribed by the by-laws.

This, it seems to us, prima facie establishes the sufficiency of the corporate organization, and, in that respect, authorizes the company to proceed to exercise the right of eminent domain. Caretta Ry. Co. v. Coal Co., 62 W. Va. 185, 57 S. E. 401. Indeed, the applicant has done more than is reasonably deemed necessary; for it is not a condition precedent to the right to condemn that the certificate of incorporation shall be certified for recordation and recorded in the county wherein is the principal office or place of business of the company. Railway Co. v. Oil Co., 35 W. Va. 205, 13 S. E. 369.

Plaintiff in error seems to place most stress upon the fact, conceded to be true, that J. M. Fitzgerald, then president of the Western Maryland Railway Company, but at the time he testified not officially or otherwise connected with it, furnished and paid the funds required on the stock subscriptions. Without citing any authority therefor, Bluefield v. Bailey, 62 W. Va. 304, 57 S. E. 805, held a plea immaterial which averred that the money paid in condemnation proceedings was furnished by a person other than the applicant. And to us it now seems that payment is the material fact prerequisite, and not the source from which funds for that purpose came. If paid in good faith for corporate purposes, the requirements of the law are satisfied. While the statute makes necessary 10 per cent. of the stock actually subscribed, there was in this case twice that amount paid in. In Caretta Railway Co. v. Coal Co., supra, one subscriber held 246 of the 250 shares of stock subscribed; the other 4 shares appearing on the books of the company in the names of his attorney and three of his clerks. Discussing the question here presented, this court in that case said:

"Yet giving to this contention with others the full weight to which they are entitled, when we add the fact that the public has a right to use this road for its purposes, everything said

against the right to condemn this property is insufficient to defeat that right."

Because in argument nothing is said in support of the assignment denying attempt by the applicant to agree upon a compensation for the lands to be taken, we assume defendant has abandoned it. And upon the fifth assignment we need not delay, as, within certain limitations, a railroad corporation may, preliminary to the exercise of the power of eminent domain, determine what and how much land of the citizen it will condemn for its purposes. And, so long as it acts within such limitations, its discretion is practically absolute. Courts will supervise the exercise of the power, but will not control the right to take any particular property except where the power is clearly abused. Gas Co. v. Lowe, 52 W. Va. 662, 44 S. E. 410; Railroad Co. v. Railroad Co., 75 Va. 780, 40 Am. Rep. 743. In response to the objection that the appropriation of the land is not for a public use in whole or in part, we cite Caretta Railway Co. v. Coal Co., supra, saying:

"A company organized under and pursuant to the laws governing the organization of railroad companies in this state has the power to exercise the right of eminent domain, and the taking of property necessary for its corporate purposes is for a public use."

The other assignments may readily be simplified and reduced to the one inquiry, whether the applicant is endeavoring to appropriate property to a purely private purpose under the guise of a public service corporation. The argument urged in support of a negative answer to that inquiry is in the main predicated upon two propositions. The first is that the applicant was chartered and organized to accomplish that which the Western Maryland Railway Company had failed to accomplish in its effort to construct a branch line from Charlton to the property of the Pittsburgh Limestone Company, solely to provide shipping facilities for the product of the quarries of that company; and that, because the railroad company could not legally condemn the land of defendant for such private use, as held in Railroad Co. v. Iron Works, 31 W. Va. 710, 8 S. E. 453, it procured the organization of the Williamsport, Nessle & Martinsburg Railway Company. The second proposition, confirmatory of the first, is that through Fitzgerald, its president, the Western Maryland company provided directly or indirectly the funds necessary to finance the railroad corporation subsequently organized. As already observed, Fitzgerald did secure and provide the money used by the new corporation. But his testimony clearly shows no part of the funds so used was furnished by the Western Maryland Railway Company, the Pittsburgh Limestone Company, the United States Steel Corporation, the Carnegie Steel Company, or any one or more of them, or by any other company, and that none of them or any other company has agreed to provide the capital necessary to finance the construction, equipment, and operation of the railroad contemplated by the applicant. He says, and no witness contradicts or denies the statement, that the money furnished and paid was his own personal private contribution; and he expresses his readiness and ability likewise to provide, or, by negotiations with others than the corporations mentioned, to secure, the capital necessary to build, equip, and operate a railroad between the two terminals designated in the charter granted by the state. We think the argument sought to be deduced from these facts is by no means conclusive. Nor are they persuasive to the extent authorizing us to deny to the applicant the exercise of the right to condemn, granted to it by the issuance of the charter.

This case readily may be distinguished from Railroad Co. v. Vencill, 80 S. E. 1103. The evidence in that case manifestly showed a purely private purpose, and not a public one, as did also Railroad Co. v. Iron Works, supra.

Plaintiff in error does not undertake to controvert the fact, clearly apparent, that along the line of the proposed railroad valuable properties await the shipping facilities to be provided. Many ledges of limestone, lying in close proximity or readily accessible to it, await such construction and operation. When crushed or pulverized, limestone becomes an indispensable accessory in the manufacture of steel and iron. Defendant fully appreciates the value of these quarries, one of them being profitably operated by it. The railroad will serve other manufactories, and afford facilities for the transportation of farm products, enlarge facilities for public travel by furnishing connection with the Western Maryland and other railroads, and enhance the value of all properties and serve many communities located along the projected route, all of which will and must be served alike by the applicant's road when constructed and operated.

The lower court did not, nor do we, find from the evidence any substantial ground or reason for denying to the applicant the right it has invoked, a right by statute conferred upon all railroads chartered, organized, and doing business in this state. A mere suspicion of the want of good faith will not suffice.

We are therefore of opinion to affirm the judgment sought to be reversed, and to remand the case for further proceedings according to law; and an order will be so entered.

(76 W. Va. 1)

## WINDSOR HOTEL CO. v. SCHENK.
(No. 2759.)

(Supreme Court of Appeals of West Virginia. March 16, 1915.)

*(Syllabus by the Court.)*

1. CORPORATIONS ⟸81—SUBSCRIPTION—VALIDITY AND EFFECT.

A subscription to the capital stock of a corporation subsequently to be formed, not revoked before the organization thereof, is valid but conditional.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 266–284; Dec. Dig. ⟸81.]

2. RIGHT TO REVOKE SUBSCRIPTION.

Quære, whether such a subscription is revocable?

3. CORPORATIONS ⟸197 — ORGANIZATION — MEETING OF STOCKHOLDERS—RIGHT OF SUBSCRIBER TO PARTICIPATE.

An informal, antecedent subscriber to the stock of a corporation subsequently to be formed is entitled to an opportunity to pay the initial statutory installment of his subscription before organization and to participate in the first meeting of the stockholders held for the purpose of organization.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 747, 749–763, 764; Dec. Dig. ⟸197.]

4. CORPORATIONS ⟸84 — ANTECEDENT SUBSCRIPTION—RELEASE OF SUBSCRIBER—FAILURE TO TENDER PRIVILEGE.

Tender of such privileges is a condition of the subscription and nonperformance thereof by the incorporators releases the subscriber.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 296–327; Dec. Dig. ⟸84.]

5. CORPORATIONS ⟸81 — ANTECEDENT SUBSCRIPTION—STATUTES.

Though such an antecedent subscription does not make the subscriber a technical or statutory stockholder, it is made in contemplation of the constating laws of corporations, and to be executed and carried into effect under them, wherefore they form parts of the contract of subscription.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 266–284; Dec. Dig. ⟸81.]

Error to Circuit Court, Ohio County.

Action by the Windsor Hotel Company against Otto Schenk. Judgment for defendant, and plaintiff brings error. Affirmed.

T. S. Riley, of Wheeling, for plaintiff in error. Charles J. Schuck and Caldwell & Caldwell, all of Wheeling, for defendant in error.

POFFENBARGER, J. The defendant, Schenk, having refused to pay assessments on an informal subscription by him to preferred stock of the Windsor Hotel Company, a corporation, made before the articles of incorporation had been issued, was proceeded against by a statutory motion for judgment for the amount of the unpaid assessments, aggregating $4,500. Denying the validity of the subscription, because not made in the statutory form, the defendant interposed numerous pleas, some of which were rejected, and, trial by jury having been waived, the court tried the case, found for the defendant, and rendered judgment accordingly.

On the 12th day of August, 1912, the promoters of an enterprise having for its purpose the erection of a large modern hotel gave a banquet to certain citizens of Wheeling, at which the purpose and plans of a prospective corporation, to be known as the Windsor Hotel Company, were discussed and subscriptions to the capital stock thereof solicited. Among those in attendance was the defendant, who expressed his willingness to subscribe. On the following day a paper was presented to him, bearing the subscription of E. B. Carney for 500 shares. Mr. Schenk added his for 50 shares, and thereafter many additional subscriptions were secured, making an aggregate of 1,750 shares or more. The paper signed by the defendant reads as follows:

"We, the undersigned, hereby subscribe for the number of shares set opposite our names of the cumulative seven per cent. preferred stock in the Windsor Hotel Company, at par value of $100.00 per share to be paid for at the call of the board of directors."

Though the subscriptions were numerous, only five persons became incorporators. The articles of incorporation were issued on the 25th day of October, 1912, in the names of E. B. Carney, Charles T. Alexander, P. B. Shook, W. B. Irvine and J. D. Merriman, each of whom subscribed in that paper for one share of the preferred stock. Having waived the statutory notice to stockholders, these gentlemen met on the 1st day of November, 1912, and organized the company, by the election of themselves as directors and the adoption of by-laws. At the same meeting they adopted a resolution directing the purchase of certain real estate, at the price of $115,000, to be paid for by $50,000 of preferred stock, $50,000 of first mortgage bonds of the company, and $15,000 in cash. Other resolutions were adopted, authorizing issuance of $200,000 of preferred stock and sale of $150,000 thereof at par, the proceeds to be used in the construction of the new hotel and payment for services in the sale of the stock and bonds, and the issuance of $200,000 of common stock and $200,000 of bonds, the latter to be secured by a mortgage on the property of the company. The board of directors were authorized to contract for the construction of the hotel building upon the property purchased. Another resolution authorized said board to lease the hotel property to another prospective corporation, the Hotel Windsor Operating Company, and to deliver to E. B. Carney, Charles T. Alexander, the Valley Investment Company of Youngstown, Ohio, and the Fidelity Investment & Loan Association of Wheeling, W. Va., the $200,000 of common stock, in equal shares, for their services in the promotion of said operating company. Upon the adjournment of the stockholders' meeting, the board of directors met and ordered an assessment of 100 per cent. upon all the subscriptions to

the preferred stock of the company, payable in installments of 10 per cent. as used in the construction of the hotel building, and the treasurer was authorized to fix the times of payment and give notice thereof to the stockholders. Nine assessments of which the defendant had notice were made, but he refused to pay any of those made against him.

[1] While the constating articles of a corporation are prescribed, and the rights of stockholders defined, by law, the courts in most jurisdictions hold preliminary contracts of subscription to the capital stock of corporations may be made in advance of the organization thereof. Such a contract, however, does not constitute the subscriber a stockholder in the technical and full sense of the term. According to some authorities, the subscription is held to be a continuing offer to take stock, which becomes binding on the organization of the company. Some courts say the offer is revocable until the organization has been effected. Others say it is irrevocable. In a few instances, such contracts have been held invalid, upon the theory of an implied repeal of all common law applicable to stock subscriptions, by the enactment of a comprehensive statutory system of organization, which is deemed to have taken the place of the common law and to be exclusive. But in those instances in which it has been so held, language was found in the statute indicating intent to make the statutory method exclusive. Helliwell, Stock and Stockholders, § 43. Among the decisions regarded as so holding is Greenbrier Industrial Exposition v. Rodes, 37 W. Va. 738, 17 S. E. 305. In the opinion in that case, there are general expressions which may be regarded as importing invalidity of all subscriptions made in any manner different from that prescribed by the statute. This view, however, is not consistent with the decision in the Greenbrier Industrial Exposition v. Squires, 40 W. Va. 307, 21 S. E. 1015, 52 Am. St. Rep. 884, which obviously treats the informal subscription as being merely voidable, not absolutely void. Rodes did not ratify and confirm his subscription, after the organization of the company, by conduct, but Squires did. The former was released and the latter held upon his subscription. The peculiar state of facts in both, differing very materially from those presented here, fully justified the decisions. Each of the subscriptions was made in a special manner. It was a technical one in the articles of incorporation, and the act of subscription was incomplete, the law requiring an acknowledgment by each subscriber, which, in those instances, was omitted. The subscription involved here was informal, nontechnical and complete, if a valid subscription can be made in the manner in which it was made. According to the great weight of authority throughout the country, such a subscription is conditional and revocable, but nevertheless binding, if the conditions are complied with, and it is not revoked. Stuart v. Valley Railroad Co., 32 Grat. (Va.) 147; Helliwell on Stocks and Stockholders, § 41; Clark and Marshall on Corporations, § 439c; Cook on Corporations, 75; Johnson on Corporations, § 1170.

Though our statutes prescribe the manner of creating and organizing corporations, with a considerable degree of minuteness, they are wholly silent on the subject of antecedent informal subscriptions or agreements to organize corporations. The right of individuals to bind themselves to form a corporation, or take stock in a corporation to be formed by others, if any, is not nullified by any terms of the statute. Being one for the execution of a lawful purpose, an agreement to organize a corporation, or to take stock in one, seems to fall within the broad liberty of contract allowed by general law, unless expressly or impliedly prohibited by statute. Even in those states in which it has been held that a subscription can be made only in the statutory mode, the ground of the decisions is that the statute either expressly or impliedly prohibits a subscription in any other form. This view necessarily implies the validity of the subscription and the right to make such a contract, unless the statute denies it. In all those jurisdictions in which subscriptions made in advance of organization of the corporation are held valid and binding, the right is directly affirmed.

Not less apparent than the legal right to take preliminary subscriptions is the utility of the procedure. The procurement of articles of incorporation and the organization effected under them involve labor and expense. Hence it is both advantageous and desirable to have a guaranty of the success of a proposed organization before entering upon it. This is no more than an ordinary business precaution, the right to which ought not to be denied in the absence of a legal prohibition thereof.

[2-4] As the subscription involved here was not revoked in any manner prior to the organization of the corporation, it is unnecessary to enter upon any inquiry as to whether or not it was revocable. The subscriber expressed no dissatisfaction with his proposal, if such it was, and did not signify any intention to withdraw it, until after the corporation had been organized and the first assessment made against him. Even then, he made no express revocation. He did nothing more than express his dissatisfaction with the manner in which the organization had been effected and what had been subsequently done. Without deciding the question, it is deemed not inappropriate, however, to suggest what seems to be a lack of any legal impediment to a conclusion that the subscription was irrevocable. Read in the light of the purpose expressed or indicated by them, the circumstances and situation of the parties, the subscriptions can be

fairly interpreted as constituting an agreement among the subscribers to form a corporation, and a consideration for each subscription may be found in the benefit conferred upon the subscriber by the others, or the detriment to which each subscriber subjects himself for the benefit of the others. Kimmins v. Wilson, 8 W. Va. 584. Considering the subscription as an offer to take stock in the corporation, the consideration just indicated would render it irrevocable, under well-settled legal principles. Though, in a sense, unilateral, an option or offer founded upon a valuable consideration is not revocable. Rease v. Kittle, 56 W. Va. 269, 49 S. E. 150. If this principle is applicable, and no reason is perceived why it should not be, the subscription is irrevocable, because founded upon a valuable consideration. If it is an irrevocable offer, acceptance by organization of the corporation converts it into contract between the subscriber and the corporation upon which either of the parties may sue. If it is a contract among the subscribers, each subscription being founded upon the others as consideration therefor, a contract is thus made for the sole benefit of the corporation. The subscribers do not promise to pay one another. On the contrary, each promises to pay the corporation the amount of his subscription, and no other person. The promise is clearly one for the sole benefit of the corporation to be formed and brings it within the scope and operation of section 2, c. 71, Code, serial sec. 3740. That the corporation had, at the date of the contract, only a potential existence seems to be immaterial. Upon these principles, the Minnesota court and others hold an antecedent subscription irrevocable.

[5] On the contract of subscription so completed, whether regarded as a contract among the subscribers for the benefit of the corporation or as a continuous offer to subscribe, accepted by the corporation, the statute gives a right of action for the amount thereof. Section 33 of chapter 53 of the Code, serial sec. 2866. This makes it a contract for the payment of money, founded upon a sufficient consideration, admission into the corporation as a stockholder. Failure to pay the amount subscribed is not therefore a mere breach of a contract to take stock, giving right of action for damages only. While the provisions of the statute for enforcement of payment of subscriptions apply in terms to subscriptions made in the statutory mode, it is to be remembered that informal subscriptions are made in view of these provisions and with expectation, on the part of the subscriber, of exactly the same status in the corporation as if his subscription were made in strict conformity with statutory regulations. Such regulations are clearly within the contemplation of the parties, and necessarily become a part of the contract in its completion and operation.

From the conclusion just stated, it manifestly results that the subscription is a conditional one. It is not a contract merely for the payment of money to the corporation, but one also for admission of the subscriber into the corporation as a stockholder. To avail itself of the promise to pay the money, the corporation or the incorporators must comply with this condition. The law contemplates and guarantees participation by the stockholders in the organization of the corporation. After the certificate of incorporation has been issued and before organization or election of the board of directors, additional shares of stock may be disposed of under the superintendence of such persons as those holding the majority of the shares may appoint. Section 16, c. 54, Code, serial sec. 2909; sec. 23, c. 53, Code, serial sec. 2856. No reason is perceived why those holding a majority of the shares subscribed for in the certificate may not accept, on behalf of the corporation, the subscriptions made before issuance thereof. Having the power to take subscriptions for new and additional stock, they certainly have the lesser power to accept subscriptions already made in an informal manner, and, if they desire to hold such informal subscriptions, it is their duty to accept them and thus admit the new subscribers into the corporation and afford them an opportunity to take part in the organization. They are not technically stockholders until the first installments of 10 per cent. of their subscriptions have been paid. Section 26, c. 53, Code, serial sec. 2859. Fairly construed, these subscriptions are agreements to pay on admission of the subscribers into the corporation before organization, not subscriptions to the stock of the corporation after organization. "It appears from the complaint that, at the time of this subscription, the company was fully organized, so that it does not stand upon precisely the same footing as a subscription made prior to, and for the purpose of perfecting, the organization. Such a subscription gives to the subscriber an interest in the corporation, and the right to take part in organizing it." Railroad Co. v. Robbins, 23 Minn. 439. "There is a substantial difference between an increase of capital and the filling up of one both authorized and required. * * * When the subscription to formative stock precedes the creation of the body corporate which will untimely issue the certificate, there is, of necessity, at the time such subscriptions are entered into, no corporation in existence with which a contract could be made. The subscribers, as a consequence, and for the very purpose of effecting an organization, become stockholders by the mere act of subscribing, if there are no conditions precedent prescribed, and they are thereby invested with the privileges and subjected to the liabilities incident to that relation. The subscribers, in the absence of any statutory restrictions, acquire by such a subscription an interest in the body corpo-

rate and a right to participate in its organization." Railroad Co. v. Hambleton, 77 Md. 341, 26 Atl. 279. The genuine equity of this proposition appears from the mere statement thereof, and its consistency with the legal rules of interpretation of contracts cannot be doubted. Though not technically made under or within the statute, as has been stated, the contract of subscription is made with the statute in plain view and with full expectation that the execution or operation thereof will be within and under it. Hence the statute becomes as much a part of the contract as if it had been made technically under the statute.

Having misapprehended the law applicable to the subject and, in consequence thereof, misconstrued the contract of subscription, the incorporators of the Windsor Hotel Company failed to comply with the conditions of the subscription. They did not afford the subscriber an opportunity to pay the statutory installment of 10 per cent. thereof, so as to make him technically a stockholder and entitle him to notice of the organization and an opportunity to participate therein. Five of the subscribers took out the certificate of incorporation, without any notice to the other subscribers, paid their own initial installments, waived the statutory notice of the first meeting of stockholders, met as stockholders, elected a board of directors, and fully determined the policy of the corporation. This may not have been materially prejudicial to the subscriber. Whether it was or not, it is unnecessary to inquire. Under a proper construction of the contract, he was legally entitled to participate in the organization. Tender of an opportunity to do so was a condition precedent to the right of action on his subscription and also to the right of the corporation to recover the amount subscribed. The construction placed upon the contract by the corporation, if accepted and upheld, would open the door wide for the perpetration of all sorts of fraud upon antecedent subscribers to stock of prospective corporations.

None of the pleas interposed specifically set up noncompliance with this condition, as matter of defense, but the procedure adopted for recovery of the subscription is an informal one, and plea No. 1 denies, in general terms, that there is anything due from the defendant on account of the matters set forth in the notice. This is tantamount to a plea of nonassumpsit or nil debet and raised the general issue. The notice does not reveal the antecedent character of the subscription, but it appears by the evidence adduced in support of the motion. Had the notice fully stated the nature of the subscription, it would have been necessary to have averred compliance with the condition and then to have proved performance thereof. An absolute and unconditional subscription having been averred, as the ground or basis of the motion, and the proof having disclosed a conditional one, as well as nonperformance of the condition, no right of recovery has been shown. The notice could probably be amended (Kunst v. Findley et al., 80 S. E. 136), but, in view of the evidence, an amendment would avail nothing. Assuming, without deciding it, that the doctrine of repleader would apply in a proceeding of this sort, the plaintiff could not invoke it, for a repleader is not grantable in favor of the party who makes the first fault of pleading which occasions the immaterial issue. 18 Ency. Pl. Pr., 492.

For the reasons stated, the judgment complained of will be affirmed.

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(75 W. Va. 309)

## PEOPLE'S BANK OF WILKESBARRE v. COLUMBIA COLLIERIES CO. et al.

(Supreme Court of Appeals of West Virginia. Dec. 15, 1914. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. LIS PENDENS ⊂⊃24—PURCHASE PENDING SUIT—NOTICE OF PRIOR SALE—RIGHTS OF BUYER.

A purchaser of stock and bonds, with actual notice that his vendor has contracted to transfer them to another and that suit is pending for the specific enforcement of such contract, takes title subject to the contract and the judgment in the suit.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 38–40, 42–46; Dec. Dig. ⊂⊃24.]

2. LIS PENDENS ⊂⊃3—APPLICATION OF RULE — SUIT FOR SPECIFIC PERFORMANCE — CONTRACT TO SELL CORPORATE STOCK.

In a suit maintainable for the specific performance of a contract for the sale of corporate stock, the rule lis pendens applies.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 3–8; Dec. Dig. ⊂⊃3.]

3. SPECIFIC PERFORMANCE ⊂⊃36 — CORPORATIONS—CONTRACT BY SOLE STOCKHOLDER.

Where one owns all the stock in a corporation and has contracted with another to cause real estate of the corporation to be conveyed to the latter, it is within the power of the party owning all the stock and so contracting to carry out corporate action consummating such conveyance, and in a suit for specific performance, no rights of creditors of the corporation being involved, equity will compel him to fulfill the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 107; Dec. Dig. ⊂⊃36.]

Appeal from Circuit Court, McDowell County.

Suit by the People's Bank of Wilkesbarre against the Columbia Collieries Company and others. From decree for complainant, defendants appeal. Modified and affirmed.

Anderson, Strother & Hughes, of Welch, and Vinson & Thompson, of Huntington, for appellants. G. W. St. Clair, of Tazewell, Va., and Sanders & Crockett, of Bluefield, for appellee.

ROBINSON, J. This suit was once before here on appeal, under the style of La-

throp v. Columbia Collieries Co. et al., 70 W. Va. 58, 73 S. E. 299. The change in name is accounted for by the death of Lathrop and revival of the cause in the name of his testamentary trustee. The opinion written on the former appeal must be read as part hereof. It discloses the character of the controversy, and our determination of certain principles having to do with the present appeal.

When the case was here before it merely turned on a demurrer to the bill. The decree of the court below, sustaining the demurrer and dismissing the bill, was reversed. We distinctly held that the bill on its face made a case for specific performance of the contract involved, not only as to the land but also as to the stock and bonds embraced by the contract. When the case went back, an amended and a supplemental bill were filed, but these did not change the substantial phase of the case and are immaterial for present notice other than that they were in place. The various separate demurrers by the defendants may also be passed over with the remark that we find no error in the overruling of the same. Nor shall we particularly differentiate as to the many separate answers of the defendants. It suffices to say that issue was made on the bill. The cause proceeded to proof and to final hearing. The court was of opinion that the cause was for plaintiff and entered a decree accordingly.

Mainly and substantially we have the case as we had it before, except that issue has been made on the bill and the parties have submitted proof pro and con. The principal question we now have is whether plaintiff has maintained the issue.

In many parts of the extended brief filed for defendants, it is argued that our former decision is wrong. Defendants still insist on a different construction of the contract than we gave it, and in other particulars challenge our holdings. That decision was made after much careful consideration, and was then reviewed on application for rehearing, which was refused. Now, for a third time, again we have freely given the same questions consideration. The result is the same. We are still satisfied with the decision. It must stand as the law of this case and similar ones.

There is a new feature of the case, which we must set forth. While the former appeal was pending in this court the Southwest Virginia Trust Company, which had executed the contract to Lathrop that is sought to be specifically enforced herein, sold all of the stock and bonds of the Columbia Collieries Company to the Central Pocahontas Coal Company. That the last named company at the time it so purchased had actual notice of the pendency of the suit, and of the contract with Lathrop in relation to the same stock and bonds, is unquestionably established. The trust company delivered all the stock and bonds to the Central Pocahontas Coal Company, for the sum of $95,000, and the purchaser agreed to take the risk of this suit. So for $10,000 more than Lathrop had contracted to pay, the trust company turned over to another the very stock and bonds it had obligated itself to turn over to Lathrop by the contract sought to be enforced in this suit. It was certainly a good bargain for the trust company as far as the financial phase was concerned. What a court of equity may think of it in conscience is another thing. From a purely financial point of view the trust company could well afford to disregard its contract with Lathrop. It could well afford to take a handsomely increased price when the purchaser assumed the burden for its disregard of the prior obligation that was violated. The seductiveness of the proposition is a factor in a solution of the equitable rights that we are to consider.

After the trust company had delivered all the stock and bonds to the Central Pocahontas Coal Company the latter company carried out what it meant to be a new organization of the corporate entity of the Columbia Collieries Company. This was done by transfers from the total 300 shares of the capital stock of the Columbia Collieries Company which the Central Pocahontas Coal Company had taken over from the hands of the trust company. One share was made to stand in the name of each of seven individuals, all in some way connected with the Central Pocahontas Coal Company. The remaining 293 shares were left to stand in the name of that company. By a corporate organization growing out of such a standing of the stock, all of the bonds which had been delivered over with the stock were cancelled, and a lease of the lands for mining purposes was made to the Central Pocahontas Coal Company. Possession was taken under the lease by the last named company, and it proceeded to mine coal from the premises until inhibited therefrom by an injunction obtained in this suit on the supplemental bill.

The 293 shares of the capital stock continued to stand in the name of the Central Pocahontas Coal Company from the date of the reorganization referred to, October 1, 1909, that being the day following the purchase made from the trust company, until February 6, 1912. Under the last named date the books of the company show a distribution of the 293 shares by transfers to a number of persons. These transfers were made soon after the service of the summons to bring in by an amended bill the Central Pocahontas Coal Company as a party to the suit, indeed on the day before the amended bill was filed. Evidently method prompted these transfers, for it appears that the various parties to whom the transfers of stock were made were all in a way related to the Central Pocahontas Coal Company. We are

led to believe that these transfers, and any sales of the stock they may represent, were made so that the amended bill seeking to follow the stock in the hands of the Central Pocahontas Coal Company, which company took it over with actual notice of Lathrop's rights, would not find it there, but in the hands of subsequent purchasers who might better shield themselves against attack as to the ownership of the stock. Such is a fair inference from the record.

The decree complained of declares that the Central Pocahontas Coal Company did not under the circumstances become the owner of the 300 shares of the capital stock of the Columbia Collieries Company, nor did anyone claiming under it, and adjudges that the lease made to the Central Pocahontas Coal Company was not authorized by the rightful stockholders of the Columbia Collieries Company, and is therefore void. The decree further adjudges that the Central Pocahontas Coal Company did not become the rightful owner of the bonds which that company took over from the trust company and cancelled, and proceeds to restore these bonds to their original status. It orders that the land mentioned in the contract be conveyed by the Southwest Virginia Trust Company and the Columbia Collieries Company to plaintiff, and that the stock and bonds be transferred and set over to plaintiff.

[1] By the contract entered into by the trust company with Lathrop the stock and bonds of the Columbia Collieries Company were rightly his. He had by notice converted the option contract into one binding the trust company to perform its provisions and had done all he was required to do until the trust company further complied. It failed to act, and this suit demanded compliance on its part. Notwithstanding the pendency of the suit seeking compliance, the trust company sold the stock and bonds to another company quite as fully advised of Lathrop's rights as was the trust company. As between the vendor and the purchaser equity will promptly cancel such a transaction and not allow it to stand in the way of the enforcement of the contract in favor of Lathrop. We held on the former appeal that under the circumstances of the case the contract wherein it relates to the transfer of the stock and bonds was subject to specific enforcement in equity.

Under the circumstances of this case plainly it would not be equity to protect the Central Pocahontas Coal Company in its purchase of the stock and bonds from the trust company, made with full knowledge of Lathrop's rights. As to the Central Pocahontas Coal Company the doctrine of lis pendens adverted to in the argument does not apply. It is a question of actual notice. That the Central Pocahontas Coal Company had actual notice can not be gainsaid. Its contract with the trust company expressly embraced the chances of this suit then already pending for the enforcement of the prior contract between the trust company and Lathrop. The doctrine of actual notice is more certain and effective than the doctrine of lis pendens. Where a purchase of property, real or personal, is made by one with actual notice of the pendency of a suit relating thereto, the purchaser unquestionably takes subject to whatever decree may be made in the suit. 25 Cyc. 1452. With the full knowledge that the Central Pocahontas Coal Company had when it dealt with the trust company, the former could take no better title than the latter had. A purchaser with notice of Lathrop's rights could only take subject to those rights. Certainly we need not employ much language on this subject. Lynch v. Andrews, 25 W. Va. 751.

[2] But those to whom the Central Pocahontas Coal Company transferred shares of the stock are not parties to this suit. We can not, therefore, adjudge as to them on the question of actual notice, even if the record shows that as purchasers or as transferees they also had notice of Lathrop's rights. Are they subject to the rule lis pendens?

It has long been a mooted question whether lis pendens applies to personal property. In England it is now settled that lis pendens is only applicable to real estate. Wigram v. Buckley, L. R. 3 Chy. Div. (1894) 483. In this country there is a great diversity of authority on the subject. The tendency has been toward extending the rule to personal property except negotiable instruments. Bennett on Lis Pendens, sec. 83; Freeman on Judgments, sec. 194; 56 Am. St. Rep. 862. In the Virginias lis pendens has generally been considered applicable to personal property. 2 Tucker's Commentaries, 448; 2 Barton's Ch. Pr. 1039; Bowlby v. De Witt, 47 W. Va. 323, 34 S. E. 919; Osborn v. Glasscock, 39 W. Va. 749, 20 S. E. 702; opinion of Judge Green in Bruff v. Thompson, 31 W. Va. 16, 6 S. E. 352. By this court the rule has been recognized as applicable to non-negotiable choses in action where the plaintiff in the case has acquired a lien or hold on the property involved, by the institution of his suit to set aside a fraudulent transfer, or in some other way. Dent v. Pickens, 59 W. Va. 274, 53 S. E. 154.

Though the property involved in this case is corporate stock, it is not negotiable in the sense that a transferee may take complete title regardless of any equity of another in it. The suit is one for specific performance of a contract, maintainable extraordinarily in this instance as to personal property. We have seen that plaintiff's equitable right to an enforcement of the contract must prevail over a sale of stock made by the trust company under such circumstances as to be in effect fraudulent upon Lathrop's rights. The suit is not only one directly affecting specific property, as must be the case for the rule

lis pendens to apply, but it is also one asserting a right as against a transfer of the property which is virtually fraudulent, to which latter character of suit the rule is declared applicable in Dent v. Pickens, supra. Though the suit is not one to charge the property with debt, as in the case cited, it is to get in the very property by a superior right of Lathrop to the same, and we can see no reason why the rule out of the broad policy underlying the same does not apply in the one case as well as in the other. In the case before us plaintiff asserts a hold on the property, of such character and under such circumstances that equity will consider it virtually equivalent to a lien.

Moreover, lis pendens is ordinarily applicable to specific performance suits. True, those suits usually affect land. But where stock or other personal property is of the character or value that it may be the subject of a suit ordinarily affecting land wherein lis pendens is applicable, it would seem that the rule should be likewise applicable to the personal property which equity by taking cognizance of in a specific performance suit has deemed of equal dignity to land as far as the specific enforcement of a contract in relation to the property is concerned. It is only infrequent that corporate stock may be made the subject of a suit for specific performance, but when such property may be, all the rules and remedies ordinarily applicable to such a suit should follow.

Since lis pendens applies as to the parties to whom the Central Pocahontas Coal Company transferred shares of the stock, it was of course unnecessary to make them parties to the suit. Wick v. Dawson, 48 W. Va. 469, 37 S. E. 639.

Neither the Central Pocahontas Coal Company nor the parties to whom it transferred shares took such title to the stock as to interfere with the enforcement of Lathrop's contract. Actual notice bound the company; lis pendens the other parties. Equity must consider the stock as still in the hands of the Southwest Virginia Trust Company, capable of being used by it for the fulfillment of the contract.

[3] The decree appealed from recites a finding from the evidence that all the capital stock and the outstanding bonds of the Columbia Collieries Company "were delivered to Central Pocahontas Coal Company by the Southwest Virginia Trust Company at a time when the Southwest Virginia Trust Company was under contract obligations to deliver all of said certificates of stock and all of the said bonds to the plaintiff." The finding is clearly sanctioned by the evidence. It therefore appears that it was within the power of the trust company to comply fully with all that was demanded by the suit. The trust company had the stock of the Columbia Collieries Company and thereby controlled the property of that company so that it could have executed the covenant even to causing the conveyance of the property called for by the contract. The trust company so had the stock that it could transfer the same to the Central Pocahontas Coal Company and thereby enable the latter company to obtain a lease of the property. Surely, if it was within the power of the trust company to do this, it was quite as much in the power of that company by the use of the stock to enable Lathrop to take title to the property of the Columbia Collieries Company. It is said that defects of title to the land excused compliance with the Lathrop contract. We held on the former appeal that the trust company was obligated to clear the title of defects. It seemed possible to do so. Besides, Lathrop by the bill chose to take the portion of the land that was clear of defects of title, with an abatement of the purchase money. But about all this we need not now concern ourselves. During the progress of the suit the question of the soundness of the title has disappeared and is no more involved.

Not only does it appear that the trust company could have complied with the Lathrop contract at the time that company transferred the stock to the Central Pocahontas Coal Company, but it convincingly appears from the evidence that there never was a time theretofore, from the date of the Lathrop contract, that the trust company did not have the power to cause a conveyance of the property of the Columbia Collieries Company to be made to Lathrop and then to turn over the stock and bonds to him as evidence of the regularity and strength of the title so conveyed. It is insisted that the trust company was not the sole stockholder of the Columbia Collieries Company. We think it was. Equity looks more liberally on things than does the law. True, a small minority of the shares stood on the books in the names of others. But those others were officers of the trust company, and viewing the evidence as a whole, we are firmly of the opinion that they held the stock only for the trust company, in the formality of keeping up a corporate organization of the Columbia Collieries Company. Convincing facts and circumstances lead us to hold that at the date of the Lathrop contract and thereafter to the time of the transfer made to the Central Pocahontas Coal Company, the trust company was in truth the sole stockholder of the Columbia Collieries Company. It virtually so represented in the contract made with Lathrop, wherein it is recited that the trust company "owns and controls the property" of the Columbia Collieries Company. Fishburn and Godwin, as officers of the trust company negotiated and signed the contract. They are two in whose names stock appeared on the books of the Columbia Collieries Company. Immediately upon Lathrop's giving notice of his acceptance of the contract executed to him, a meeting of the directors of the trust

company was held at which a resolution ratifying the contract was adopted and spread on the records. Fishburn, Godwin, Stone, and Woods were present as directors of the trust company. They were the only parties in whose names the minority shares appeared on the books of the Columbia Collieries Company. The resolution which they took part in adopting without dissent on their part recited that the trust company "is owner of the entire capital stock and bonded indebtedness of the Columbia Collieries Company." Their taking part in the adoption of such a recital is totally inconsistent with personal ownership by them of the very stock to which the resolution referred. This circumstance, as well as others to which we need not refer, sufficiently overcomes the weak and qualified claim which they make in their testimony to personal ownership of the stock appearing in their names. We do not invoke their action in this particular as an estoppel. We invoke it as evidence. It tells what in truth appears from the whole case, that the trust company owned all the stock, and that there was absolutely nothing to interfere with its use of the same in complying with the Lathrop contract. The trust company readily owned all the stock and delivered it over when the additional ten thousand dollars came along from the Central Pocahontas Coal Company.

Perhaps the most insistent argument made on behalf of defendants is that the Columbia Collieries Company did not execute the contract that was made to Lathrop and that its property can not be taken thereby. Much is said about the statute of frauds and constitutional inhibitions as to deprivation of property without due process of law. These considerations do not have place in the case. This suit is to compel the trust company to cause a conveyance of the property owned by the Columbia Collieries Company to be made to Lathrop or his assigns and to turn over with the conveyance the stock and bonds of that company. The trust company is bound. It was the owner of all the stock of the Columbia Collieries Company. It could certainly contract as it did in relation thereto. Therefore the stock is bound. If by the binding of the stock the property of the Columbia Collieries Company is thereby set over to another even without its having signed a contract for the sale of the property, we are quite sure the statute of frauds is not violated and that the corporation is not deprived of its property without due process of law. All the stock surely represents and stands for all the corporate property. If one owns all the stock in a corporation, he equitably owns all the property of the corporation, subject of course to superior equities by creditors. But no rights of the creditors arise in this case. It simply comes to this: The Southwest Virginia Trust Company owned all the stock of the Columbia Collieries Company and contracted with Lathrop to cause the property of the Columbia Collieries Company to be conveyed to him. The trust company by voting all the stock which it holds can readily take the necessary corporate action within the Columbia Collieries Company and direct the conveyance to be made. The trust company has the legal title in its power through its equitable title. It can readily cause the deed to be made. Will not equity compel it to do so? Certainly it will, quite as readily as it will compel one who has contracted to convey title to land which he holds only by contract or title bond to use the instrumentality that he holds to set over the title in compliance with the contract.

The decree is erroneous in one particular. It orders the Southwest Virginia Trust Company and the Columbia Collieries Company to execute a deed to plaintiff conveying the lands owned by the latter company. This is neither consistent with the contract to be enforced nor with a proper view of the procedure obtainable in this suit for its enforcement. The trust company does not own the land, nor did it contract to make a deed for it. Its contract to be enforced is that it will cause the land to be conveyed to Lathrop or his assigns. As we have seen, it has, as sole stockholder of the Columbia Collieries Company, not as owner of the land of that company, power to carry out this contract and that equity will compel it to do so herein. But it is beyond the case for the court to decree that the trust company shall do something it did not contract to do, and something it is unable to do effectually because it has no title to the land. Nor is it proper to decree that the Columbia Collieries Company shall make a deed for the land. It is not a party to the contract. It occupies in this case simply a relation like this: The single owner of all its stock has covenanted that he will cause its land to be conveyed to another. All this the sole owner of the stock may do by voting the stock for a sale and conveyance of the property and carrying out full corporate action of the Columbia Collieries Company consummating the conveyance. Thus a deed is made by the Columbia Collieries Company, but that is because its sole stockholder is bound to use the stock in causing the same to be done, not because the Columbia Collieries Company as a corporate entity is bound, for it is not.

The decree must therefore be modified. That will be now here done by striking therefrom all within the order in relation to the execution of a deed by the Southwest Virginia Trust Company and the Columbia Collieries Company and by substituting therefor an order and decree that the Southwest Virginia Trust Company, as sole owner of the stock of the Columbia Collieries Company do, by assembling itself in stockholders meeting of the latter company, vote the stock for a sale and conveyance of the land of that company to plaintiff, as assignee of Lathrop,

pursuant to the contract on which this cause is based, and further as such stockholder cause its vote to be carried into effect by the execution of a deed from the Columbia Collieries Company to plaintiff, after which the Southwest Virginia Trust Company shall turn over to plaintiff all the stock and bonds of the Columbia Collieries Company as the decree further directs.

Plaintiff cross-assigns error, complaining that the chancellor did not adopt a proper measure of damages for the coal mined from the land by the Central Pocahontas Coal Company, and did not therefore allow plaintiff a sufficient sum in this particular by way of abatement of the purchase money. It suffices, we think, to say that upon mature consideration of all the facts and circumstances in evidence we are of opinion that the chancellor adopted a safe and fair standard, and that we are not disposed to disturb the finding. Equity seems to have been done in this regard.

An order will be entered modifying the decree in the particular mentioned as hereinbefore set forth, and as so modified the decree will be affirmed.

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(75 W. Va. 482)

## JACKSON et al. v. STOCKERT et al.

(Supreme Court of Appeals of West Virginia. Jan. 14, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. CORPORATIONS ⟸138 — SALE OF STOCK — SETTING ASIDE—FRAUD.

Equity has jurisdiction to cancel a sale of shares of stock in a corporation fraudulently procured.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⟸138.]

2. CORPORATIONS ⟸117—SALE OF STOCK—RESCISSION — GROUNDS — REPRESENTATIONS OF FACT.

False statements to the purchaser, by the seller of such stock, that he had paid in full therefor, and that the corporation had earned $15,000 net in the year preceding, which statements the purchaser believed to be true, and was thereby induced to buy the stock, is good ground for rescinding the sale. Such statements are representations of facts, and not of mere opinions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. ⟸117.]

Robinson and Lynch, JJ., dissenting.

Appeal from Circuit Court, Upshur County.

Suit by Charles F. Jackson and others against G. F. Stockert and others. From decree for defendants, plaintiffs appeal. Reversed and rendered.

G. M. Fleming and C. C. Higginbotham, both of Buckhannon, for appellants. U. G. Young, of Buckhannon, for appellees.

WILLIAMS, J. Plaintiff purchased from defendant 50 shares of capital stock of the Buckhannon Water & Light Company, of the par value of $100 per share, paying therefor $5,000, its par value. This suit is brought to rescind the sale and recover back the purchase money, on the ground that plaintiff was fraudulently induced to buy the stock by certain alleged false statements and representations made to him by defendant. Plaintiff avers that defendant represented to him that he had paid in full for his stock, and that he was the only stockholder who had paid in full; that the year before the plant had earned a clear profit of $15,000, and he thought it would make $20,000 that year. He avers that he believed those statements to be true and was thereby induced to buy the stock, but that they were in fact false and untrue, and were known so to be by defendant at the time they were made. He also avers that there was a mortgage indebtedness of about $85,000 upon the plant, of which he had no knowledge until after he had bought the stock, and offers to return the certificate of stocks on return of the purchase money, with interest. Defendant answered, specifically denying each allegation of the bill, plaintiff replied generally, and depositions were taken by both parties, but before the cause was heard plaintiff departed this life. The suit was then revived in the name of Charles F. Jackson and Edward W. Jackson, plaintiff's executors, and on the 30th December, 1912, was finally heard on pleadings and proof, and a final decree pronounced, denying relief on the merits and dismissing the bill, and plaintiffs have appealed.

[1] Jurisdiction in equity was challenged in the court below by demurrer, which the court properly overruled. That equity jurisdiction exists in all cases where fraud is properly charged as the grounds for relief, is too well established to require argument, or citation of authorities. But it is proper to state that counsel for appellee has abandoned his contention of want of equity jurisdiction, and in his brief admits it, provided the fraud is properly charged. But he insists that the charges in the bill relate to matters of opinion merely, and do not constitute fraud even if they afterwards turned out not to be true. But we do not think the matters charged as false and fraudulent relate to mere opinion. Some of them relate to facts that either had, or had not, an existence at the time. We, therefore, think the bill states a good cause for relief in equity.

[2] The question we have to consider then relates to the proof, the weight of evidence, depending chiefly, but not wholly, upon conflicting testimony of the two interested parties. They flatly contradict each other on the most material facts. Defendant was the owner of 140 shares of stock, was one of the organizers and a director of the corporation. He was also, at the time of the sale, and had been for some time before, its general manager. The corporation was a close one, com-

posed of 9 or 10 stockholders, each having subscribed to $10,000 of the capital stock, which was to be $100,000. Only a small part of the capital subscribed seems to have been paid into the treasury. At the time of the stock sale in question, there appears to have been an unpaid bond issue amounting to $80,500 or about that sum, secured by deed of trust on the company's plant. Plaintiff wished to make a permanent investment of $5,000 for the benefit of an infant daughter, and spoke a number of times to defendant about buying some stock in the Buckhannon Water & Light Company. Defendant told him the stock was not for sale, and offered to sell him some bonds, but plaintiff said he did not want the bonds because they were liable to be paid off in a few years, and he wanted to make a longer investment. Defendant says the stockholders had agreed among themselves not to sell any of their stock to a stranger to the corporation. Frequent conversations were had between them, extending back over several months before the sale. Defendant says he never went to plaintiff to sell, but that plaintiff always came to him to buy. Plaintiff admits that he went to defendant, about a year before the sale when the company's books were first opened, and offered to buy stock, and says defendant told him it was all sold, and proposed to sell him 20-year bonds, but that he told him he did not want bonds. He further says:

"That was the last conversation we had, until he came to my house and told me he had bought some stock, and I could buy some stock; that he would let me have as a favor, as I had always been a special friend of his; that he had named it to the company, and they asked him if I was a good man, and he told them I was, and a special friend of his."

Plaintiff says he did not know of the existence of the mortgage, but defendant denies this, and says he explained the mortgage to him. But whether he did or not, plaintiff's own admission that defendant had previously offered to sell him bonds would seem to be enough to put him upon inquiry concerning the lien on the property. A corporation would hardly be offering its bonds for sale without first having secured them by a lien of some kind upon its visible property. Plaintiff was familiar with methods of business by corporations, he was a stockholder and director in a bank, and was interested as stockholder in a number of other corporations, and he would not likely be misled concerning a mortgage on the company's plant, when he knew its bonds were on the market. Whether the trust deed exhibited with the bill is the one then in existence we are not able to determine. Plaintiff purchased the stock on 25th January, 1907, and the deed of trust, spoken of as a mortgage, bears date December 1, 1906, and was not recorded until 20th February, 1907, nearly a month after the stock transaction was had. It is not likely the company would be selling its bonds before the security was recorded. Furthermore, defendant himself says he does not think that deed of trust, or the proposed bond issue under it, was ever carried into effect. It may be, therefore, that the bonds that defendant proposed to sell were bonds of another and previous issue, or they may have been bonds of the issue then contemplated, but never consummated. The record leaves that question in doubt.

Plaintiff swears that, at the time he bought the stock, defendant told him the plant had made a net profit of $15,000 in that year (1906), after paying interest and all expenses; that in a year or two it would pay a big thing; that the reason no dividends had been declared was because the earnings had all been used to extend the water mains and increase the capacity of the plant; that he invited him to the office to inspect the company's books. He says he went to examine the books, but they could not be found; that plaintiff told him he had paid for all his stock, and did not think any of the other stockholders had paid for theirs; that he believed those statements to be true; and that, if he had not believed them as true and relied on them, he would not have bought the stock. Defendant denies making some of those statements, and others he admits he made, and insists that they are true. The two which we think are material, as being statements of facts, and not mere matter of opinion, are: (1) The statement that the plant had earned $15,000 net in 1906; and (2) that he had paid in full for his stock. Defendant denies having made the first statement, but admits making the second, and insists that he had paid in full for all his shares of stock. The falsity of the first statement, if it was made, is virtually admitted. Defendant does not claim, in his testimony, that the net earnings of the plant, for the year 1906, amounted to much, and from other parts of the record it appears to have been only $39.61. But he denies that he made that statement. He swears he did not tell plaintiff what the net earnings were, but says he told him the gross earnings for that year were $19,700. Here is direct conflict between them, but we think a decided preponderance in the scale exists in favor of plaintiff. In the first place he is corroborated by his son Charles F. Jackson, who swears he was present when the deal was made and heard defendant tell his father the plant had earned $15,000 net. Defendant does not deny that plaintiff's son was present, but says, if he was, he has no recollection of it. Plaintiff and his son both swear that the son was present. Plaintiff says he asked his son to go along with him to examine the company's books, and that the books could not be found when they got to defendant's office. The testimony is also flatly contradictory concerning the place where the sale occurred. Defendant says it took place at plaintiff's house, whereas plaintiff and his son both say

it was at defendant's office. However, the place is not material, but we mention it as showing the many points of conflict between them. Defendant does not deny that he invited plaintiff to inspect the books, and that when he came to his office, the books could not be found. His testimony on that point is as follows:

"Q. Mr. Jackson also says, among other things, you referred him to the books, and that he was to come downtown that day or the next day, that you told him to come down to your office, and that you found the books were not there, and that you called in his son Charlie Jackson and made a statement to him of the contract and the facts and why you could not get the books. I will ask you to state whether or not such conversation occurred between you? A. I don't remember of anything of that kind ever occurring, and if Charlie Jackson was ever in my office in his lifetime I don't remember it. Ed has been in my office several times, but I don't remember of Charlie Jackson ever being in my office. Q. Did you close the deal in your office? A. No, sir; up at Mr. Jackson's house."

Moreover, plaintiff and defendant both appear to have been experienced business men, and it is more consonant with reason that the conversation should have related to the net, rather than to the gross earnings, for the profit to the stockholders would be determined by the former and not by the latter. The gross earnings, however large they may have been, would not indicate actual earnings, unless the operating expenses had also been given, and defendant does not pretend that he told plaintiff what the operating expenses were.

Concerning defendant's claim that he had in fact paid for his stock in full, we do not think it is borne out by the record. He was general manager of the company, and superintended the erection of the buildings and the installation of its plant, and claims that, for those and other services rendered, he was paid in capital stock amounting to $14,000. But it appears from a statement of the company's accounts filed with his deposition, the correctness of which he admits, that his services in full to 1st December, 1906, were paid for with $4,000 worth of stock and two $500 bonds. He owned 140 shares, and he does not claim to have paid more than $1,070 in money, the balance he claims to have paid in 2½ years' services for which, he says, he was to be paid $100 per month, but for which the company allowed him only $70 per month. Some of his salary, he says, was paid in money and some in stock. When asked how much of his salary went into the $10,000 of stock for which he had subscribed, he replied that he did not then know exactly, and, continuing his answer, said:

"When we first commenced building the plant we put in so much money, and then they give me $100 a month salary that I paid on the stock, and then give me so much stock extra as a gift; that all made up $10,000."

His salary at $70 per month, for 2½ years, amounts to $2,100, to which, if we add the cash he paid in, $1,070, we have $3,170. That is all he has proven he paid for 140 shares, of the par value of $14,000. But he does not claim to have been paid all his salary in stock, some of it, he says, was paid in cash. Without detailing the evidence further, we think it is proven that defendant held 100 shares of stock in consideration of $1,070 cash paid in, and 40 additional shares for services rendered to the company. Only a small per cent. of the par value of the stock appears to have been paid into the treasury of the company by any stockholder. Therefore the statement he made to plaintiff that he had paid for his stock in full, and that he was the only stockholder who had, was not true, and was misleading. It may be true that he paid a greater per cent. on his stock than other stockholders, in that he seems to have paid in full, in services performed, for 40 of his 140 shares. The other stockholders appear to have paid in only about $1,070 on their several holdings of 100 shares of stock.

It is shown that some of the stock was sold at auction and brought a small price, which would indicate that it is not of much value, but that fact is not material. Plaintiff's right to relief does not depend upon the value of the stock, but upon the fact that he was fraudulently misled by defendant into buying it. The case is one which, in equity and good conscience, calls for relief. We reverse the decree complained of, and will enter such decree here as the lower court should have entered, decreeing plaintiff a recovery of the money paid, with interest thereon from the time of payment, on his surrendering to defendant the certificate of stock.

ROBINSON and LYNCH, JJ., dissenting.

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(75 W. Va. 517)

LACY et al. v. GREENLEE et al. (No. 2648.)

(Supreme Court of Appeals of West Virginia. Jan. 26, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. PARTNERSHIP ⟸208—APPLICATION OF ASSETS TO LIABILITIES—RIGHTS OF INDIVIDUAL CREDITORS.

A debt due from a third person to a partnership cannot be subjected to garnishment, in an action at law, by an individual creditor of a partner, while the firm accounts and liabilities remain unsettled and unpaid.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 383–400; Dec. Dig. ⟸208.]

2. GARNISHMENT ⟸144 — ANSWER — SUFFICIENCY.

If, when made, a garnishee's answer correctly states the liability sought to be imposed, it is sufficient, although subsequent changes in the liability may afford good grounds to require him to answer over.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 270; Dec. Dig. ⟸144.]

Error to Circuit Court, Tyler County.

Action by James B. Lacy and others against C. D. Greenlee and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

M. H. Willis, of New Martinsville, and Arlen G. Swiger and J. H. McCoy, both of Sistersville, for plaintiffs in error. Underwood & Moore and Boreman & Cater, all of Middlebourne, for defendants in error.

LYNCH, J. This proceeding arose out of an action at law brought in the circuit court of Tyler county on the 17th day of August, 1907, by James B. Lacy, upon a note executed to him by C. D. Greenlee. The plaintiff at the same time sued out an attachment against the property of the defendant; the affidavit therefor stating that he was then a nonresident of the state. The attachment was levied, not upon property owned alone by Greenlee, or upon his interest in the social assets of the partnership composed of Greenlee and Samuel Hissam, but on Greenlee's undivided one-half interest in certain specific property, consisting of oil rigs, casing, tools, etc., situated on the Hissam farm, and on a certain leasehold estate which the return states was conveyed by Lacy to Greenlee, but which the proof shows was the property of the partnership.

To a summons upon a suggestion, requiring him to disclose in what amount he was indebted to Greenlee, J. T. Inghram answered under oath that on the date of service of the notice, August 22, 1907, "he was not and is not liable to C. D. Greenlee for any sum of money, and has not in his possession any effects of C. D. Greenlee; but he says that at the time of the service of said attachment on him he was indebted to the mining partnership of Hissam & Greenlee, composed of Samuel Hissam and C. D. Greenlee, and that he is indebted to Hissam & Greenlee in the sum of $243." Though tendered and lodged with and as a part of the file in the main cause early in November, 1907, no objection was made to the sufficiency of the answer until June 18, 1913, and no order was entered actually filing it until March 5, 1914, when it was ordered to be filed as of the date of its lodgment into the papers of the cause. In the order of June 18th, for the first time it was suggested that Inghram had not fully disclosed his indebtedness to Greenlee at the date "of the service of the process of garnishment upon him and at the time of his appearance to make answer herein." The same order directed that at "a future term" a jury should be required to "say how much, if anything, the said J. T. Inghram was indebted to C. D. Greenlee on the 22d day of August, 1907, the date of the service of the process of garnishment upon" him, "together with any indebtedness of the said garnishee to C. D. Greenlee accruing since the date of the service of said process until the date of the said answer, to wit, the 6th day of November, 1907."

On Inghram's motion, the evidence introduced by the plaintiffs upon the trial so ordered was excluded, and the jury directed to return a verdict in his favor; and to the judgment entered thereon the plaintiffs, as the personal representatives of Lacy, in whose names the action was revived, assign error.

Although an order entered in the action directed the sheriff to sell the property levied on under the attachment (defendant having previously appeared and confessed judgment on the note sued on), the sale of it was made to Inghram by Hissam and Greenlee as partners; Inghram paying one half the proceeds to Hissam as and for his share therein, retaining in his hands the other half thereof as a protection against the garnishment proceedings. To this one half, or such part of it as now remains in Inghram's hands or under his control, this controversy relates.

Whether the sale of the property by the partners was before or after the levy under the attachment, the proof is not clear. But it does show that at that time the partnership owned other property; that the partnership accounts then remained unsettled; that liabilities existed against it; and that these liabilities were not finally discharged until some time in 1908, or, as stated by Hissam, about a year after the date of the sale to Inghram.

[1] Viewed in the light most favorable to plaintiffs, was the proof excluded sufficient to authorize the jury to find failure on Inghram's part fully to disclose any indebtedness due from him to the judgment debtor? The date to which the inquiry must relate, of course, is the date of the answer by the garnishee, November 6, 1907. Ringold v. Suiter, 35 W. Va. 186, 13 S. E. 46. The observations made that the firm of Hissam & Greenlee owned other property at that time, that it then had outstanding unpaid liabilities, and that its accounts remained unsettled until about a year thereafter, are facts clearly proved by Hissam, the only witness testifying as to them. Indeed, none of them are denied. There was no testimony to the contrary. And, although Hissam did virtually say he claimed no interest in the funds retained by Inghram, yet they, in law, remained chargeable with the payment of the firm liabilities until the latter were finally discharged. While the firm creditors had no legal lien on the funds, members of the copartnership did have an equitable lien thereon for the payment of any outstanding liability incurred for their mutual benefit. Through this lien, firm creditors may force application of the social property to the payment of their claims. Such equitable lien, however, does not inure to the benefit of creditors of the individual members of the firm, nor is it enforceable in their behalf. Their rights are confined solely to the interest of the debtor

in the surplus remaining after payment of the firm debts and after an adjustment of the equities between him and his associates in the joint dealings. 30 Cyc. 539, 541; Darby v. Gilligan, 33 W. Va. 247, 10 S. E. 400, 6 L. R. A. 740; Frank v. Pringle, 96 Va. 456, 31 S. E. 605. See, also, Conaway v. Stealey, 44 W. Va. 163, 28 S. E. 793.

Besides, treating the part retained by Inghram, as plainly it is and as in his answer he virtually states it to be, a liability due from him to the partnership until a final adjustment of all the firm accounts and the payment of the firm liabilities, it is well settled that such indebtedness is not subject to an attachment by a creditor of an individual partner. Of course, as held in Martin v. Reiniger, 82 S. E. 221, if no other interests were involved and all the accounts and liabilities of the partnership had been settled prior to the date of Inghram's answer, plaintiff's right to the fund could hardly be questioned. But, as we have seen, the balance is an asset of the partnership. In it two classes of creditors were then interested—the creditors of the partnership, and upon proper limitations the creditors of the individual members of the firm. 2 Wade on Attachment, § 490, states such double liability, and announces the general rule, well established, that:

"The former have a preferred right to satisfaction out of the partnership assets, and, as a consequence, may be regarded as having an interest at stake when it is sought to reach the interest of an individual member of the firm by attachment in the suit of the individual's creditors. * * * The garnishee cannot answer that he is indebted to the individual. When he answers that he is indebted to the defendant and his copartner, there is nothing upon which to base a judgment against the garnishee. Before it could possibly be decided that the defendant had any interest whatever in the credit, the partnership liabilities must be ascertained and a balance struck with his copartner." Drake on Attachment (6th Ed.) § 567.

[2] While Grogan v. Egbert, 44 W. Va. 75, 28 S. E. 714, 67 Am. St. Rep. 763, involved the right of a foreign receiver of an insolvent partnership to remove the funds of the latter to another jurisdiction, it correctly states, as the true rule, that copartners cannot by garnishment be divested of their right and title in and to the funds while the accounts of the firm remain unsettled or its debts unpaid. That proceeding being purely legal, the equitable rights existing between the garnishee and the defendant cannot be adjusted therein. Only after all the affairs of the firm have been settled can the undivided share of a partner be taken by that process and applied to an individual debt. But by it the plaintiffs here sought to appropriate to payment of their debt one due the firm, without awaiting the adjustment of the partnership affairs and the ascertainment of the real interest of their debtor. What they may do now, or heretofore ought to have done, under the facts proved, are questions not before us. We are concerned only with the facts as they existed at the date of the garnishee's answer. As to these only did he respond, and not to those thereafter arising.

Being of opinion that his answer clearly was right, we affirm the judgment of which plaintiffs complain.

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(75 W. Va. 613)

## HAINS v. PARKERSBURG, MARIETTA & INTERURBAN RY. CO.

(Supreme Court of Appeals of West Virginia. Feb. 16, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. WITNESSES ⟸154—COMPETENCY — STATEMENTS BY PERSON SINCE DECEASED.

In an action against a street railway company for personal injury, caused by the negligence of the conductor, plaintiff is a competent witness to prove oral admissions by the deceased officer and manager of the railway company, tending to prove that he knew of the conductor's careless habits and his incompetency.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 661; Dec. Dig. ⟸154.]

2. WITNESSES ⟸37—COMPETENCY—CONVERSATIONS.

One who hears a conversation is as competent to testify concerning it as the person with whom it was had. The testimony of such witness is primary evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80–87; Dec. Dig. ⟸37.]

3. PRINCIPAL AND AGENT ⟸177 — KNOWLEDGE OF AGENT — NOTICE TO PRINCIPAL — MASTER AND SERVANT.

Knowledge by an agent respecting the incompetency of employés over whom he has charge for the employer is knowledge of the employer.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 670–679; Dec. Dig. ⟸177.]

4. MASTER AND SERVANT ⟸303—INJURY TO THIRD PERSON — INCOMPETENT FELLOW SERVANT—LIABILITY OF MASTER.

If a master knowingly employs or retains a careless and incompetent servant, he thereby impliedly authorizes or ratifies his negligent acts, committed in the course of his employment, and, if the servant's negligence is wanton and willful or malicious, the master is liable for exemplary or punitive damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1209, 1226; Dec. Dig. ⟸303.]

5. MASTER AND SERVANT ⟸331—INJURY TO THIRD PERSON — INCOMPETENT FELLOW SERVANT—LIABILITY OF MASTER.

A pedestrian in the street, who, without fault on his part, is injured by the conductor's negligently throwing a heavy tool off the car onto the pavement and striking him, is entitled to recover of the street railway company compensatory damages, and if the conductor's negligence was wanton and willful or malicious, and was authorized or ratified by the company, either expressly or impliedly, he is entitled also to exemplary damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1273; Dec. Dig. ⟸331.]

6. HUSBAND AND WIFE ⟸209 -- PERSONAL INJURIES—RECOVERY BY MARRIED WOMAN—RIGHT—AMOUNT.

The earnings of a married woman are her separate estate, and, although she is living with

her husband, she may sue alone for a personal injury, and is entitled to recover for loss of time and money expended in effecting a cure, if she avers and proves that her time, or a material part of it, was spent in earning money for herself.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 766–772, 968, 973; Dec. Dig. ⟸209.]

7. Master and Servant ⟸302—Injuries to Third Person—Negligence of Servant—Scope of Employment.

A street car conductor in charge of a passenger car, in assisting to unload heavy tools, such as shovels, picks, and pipe tongs, which he had permitted to be carried on his car by passengers thereon, is acting for the railway company, and within the scope of his employment; it not being shown that the rules of the company forbade the carrying of such tools on passenger cars.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217–1221, 1225, 1229; Dec. Dig. ⟸302.]

8. Trial ⟸250—Refusal of Instructions—Pleading and Proof.

Where there is nothing in the pleadings or proof to indicate that plaintiff claimed rights as a passenger, it is not prejudicial error to refuse an instruction telling the jury that he had ceased to be a passenger before the injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584–586; Dec. Dig. ⟸250.]

9. Torts ⟸22—Joint Tort-Feasors—Liability.

Joint tort-feasors are jointly and severally liable, and if sued jointly the jury may find any one, or all of them, guilty, according to the proof.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 29, 31; Dec. Dig. ⟸22.]

10. Trial ⟸260—Refusal of Instructions—Scope of Instructions Given.

It is not prejudicial error to refuse an instruction telling the jury to find for the defendant, if they believe the injury was accidental, when it appears they have been properly instructed respecting the only ground of plaintiff's right to recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⟸260.]

Error to Circuit Court, Wood County.

Action by Margaret Hains against the Parkersburg, Marietta & Interurban Railway Company and another. Judgment for plaintiff, and the defendant named brings error. Affirmed.

See, also, 71 W. Va. 453, 76 S. E. 843.

V. B. Archer, of Parkersburg, for plaintiff in error. Wm. Beard, of Parkersburg, and A. B. Fleming, Chas. Powell, and Kemble White, all of Fairmont, for defendant in error.

WILLIAMS, J. In an action for personal injuries caused by the alleged negligence of the servants of the Parkersburg, Marietta & Interurban Railway Company, and the Mountain State Gas Company, plaintiff recovered a judgment against the railway company only, and it brings error.

According to plaintiff's evidence, she had been a passenger on one of the railway company's cars, and when the car stopped at one of the public street crossings in the city of Parkersburg, to let off and take on passengers, she alighted on the side of the car farthest from the post office, and went around the hind end of the car to go to the post office, and, in going around the car, she observed a delivery wagon coming toward her, but, seeing that the driver had checked his horse, she continued her course, and just as she was passing the end of the car she was struck on the ankle by a pick thrown off the car by the conductor. The pick was one of a number of tools which had been carried on the rear platform, by some employés of the gas company who had ridden on the same car. They were unloading the tools when plaintiff was passing around the car. They had gotten off on the opposite side from plaintiff. Two witnesses identified the conductor as the man who threw the pick that struck plaintiff.

This is the second writ of error in the case. It was here once before on writ of error to a final judgment sustaining a demurrer to the declaration and dismissing plaintiff's suit. That judgment was reversed by this court, the demurrer overruled, and the cause remanded for further proceedings. 71 W. Va. 453, 76 S. E. 843. Issue was then joined on a plea of not guilty and a trial had, resulting in a verdict and judgment in favor of plaintiff against the railway company, and verdict and judgment for the gas company.

[1, 2] It is assigned as error that the court improperly permitted plaintiff and another witness, Mrs. Rutter, to testify concerning conversations had with Mr. Shattuck, president of the railway company. The objection to plaintiff's testimony is made on two grounds: (1) That, as Mr. Shattuck was dead, the witness was rendered incompetent; and (2) that statements made by him would not bind the railway company, which latter ground of objection applies to the testimony of both witnesses. Mrs. Rutter's testimony was objected to on the further ground that it was not the best evidence, that it purported to relate a conversation had, not between herself and Mr. Shattuck, but between him and Mrs. Agnes Downey, witness' daughter. The death of Mr. Shattuck did not render the plaintiff incompetent as a witness to prove the conversation. Section 23, c. 130 (sec. 4879) Code 1913, does not preclude a party to a suit, or one interested in the result thereof, from testifying in relation to personal transactions and communications had with a deceased agent of the opposite party to the suit. The defendant railway company is not included in any one of the class of persons as to whom such personal transactions are forbidden to be given in evidence by a party to the suit or an interested person. The statute forbids such testimony, only against "the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor" of the deceased person, and the railway company does not occupy

any of those relations to Mr. Shattuck; and therefore plaintiff was a competent witness. The enabling portion of the statute permitting all parties to suits to testify qualified her as a witness, and the exception limiting its application does not apply. This question was decided in Board of Education v. Harvey, 70 W. Va. 480, 74 S. E. 507, wherein we held that Mrs. Harvey, a party to the suit, could testify in her own behalf and against the board of education concerning personal transactions had with a deceased member of the board acting as its agent. Mrs. Rutter was present when the conversation between Mr. Shattuck and her daughter took place, and it does not appear that she did not have equally as good an opportunity to hear it as her daughter, and, having heard it, she is competent to testify concerning it. Her testimony was primary evidence. We know of no rule of law that would exclude her because she was not a party to the conversation. The testimony of plaintiff and Mrs. Rutter was evidence of admissions by Mr. Shattuck that he knew of the careless habits and incompetency of the conductor. Mr. Shattuck was president of the railway company, and it is proven he had power to discharge employés. Therefore his retention of an incompetent servant, with knowledge thereof, would be an act affecting his principal, which, being a corporation, can acquire knowledge and perform acts only through its agents and servants. The employment, or retention, by the master of a servant, known to him to be careless and incompetent, is an implied authorization, or ratification, of the servant's negligent acts, and, if the act is wanton, willful, and malicious, renders the master liable for exemplary damages. Downey v. Railway Co., 28 W. Va. 732; 7 Labatt on Master & Servant, § 2560; 6 Thompson on Negligence, § 7174. Plaintiff says she went to Mr. Shattuck's office and told him she was the woman the conductor had injured, and he became angry and said his conductor did not do it, and if she would hear the conductor's story she would be fully convinced that he did not do it; that she informed him that two disinterested persons saw the conductor throw the pick off the car and strike her, but he insisted that she hear the conductor's statement, and agreed, if she would return on a day named, he would have the conductor present; that she returned on the day appointed and the conductor was not there, and he made another appointment with her for 3 o'clock of the same day, and she again went to his office and took her brother with her; that the conductor was not then there. Continuing, she says:

"I told him it wasn't worth while for me to wait, that possibly the conductor wouldn't come. And he insisted on it, and said he could believe his conductor's story, and he knew I would if I would hear it, and I said, 'Mr. Shattuck, possibly you do not know you had a careless man in that conductor?' Q. What did he say? A. He says: 'Oh, I know he is no account. He stole from me, and I discharged him.'"

[3-5] Mrs. Rutter testified that she went to Mr. Shattuck's office in company with her daughter Mrs. Downey, and heard a conversation between Mr. Shattuck and Mrs. Downey concerning the injury to plaintiff; that Mrs. Downey told him she saw the conductor throw a pick off the car and strike plaintiff with it; that he suggested that it might have been one of the gas company's employés; that when Mrs. Downey insisted she knew it was the conductor, because she saw him, Mr. Shattuck grew angry and told her he was surprised, and remarked that "some of the conductors are awfully careless and there has been complaint about this conductor about being careless;" that he told Mrs. Downey he was employing her husband and two of her brothers-in-law, and threatened to discharge her husband. The foregoing testimony tended to prove that the railway company retained in its employ a conductor whose incompetency its president, having power to discharge employés, admitted he knew of. But counsel insists that it shows the conductor had been discharged. It does not show when he was discharged, nor that he was discharged for incompetency, but it does show that he was discharged because he stole from Mr. Shattuck. Mrs. Rutter says Mr. Shattuck threatened to discharge Mrs. Downey's husband, who was also an employé, because she insisted that she saw the conductor commit the negligent act. The jury had a right to weigh the whole of the testimony of these two witnesses, and from it find that Mr. Shattuck impliedly approved what the conductor had done by his trying to screen him, and professing not to believe him guilty in the face of his own admissions that he had heard a good deal of complaint about him. The testimony was admissible for the purpose of laying the foundation for recovery of exemplary or punitive damages, provided the jury believed the wrong was wanton and willful. Of course, a master is liable for compensatory damages, in any event, for the negligent performance of an act by his servant, done within the scope of his employment and in furtherance of his master's business, and he is also liable for exemplary damages, if the negligence is such that the servant himself would be liable therefor, and the master has either authorized it before it was done or ratified it afterwards. His authorization or approval need not be expressly made, but may be by implication. If he knowingly employs, or retains, a careless and incompetent servant, it is evidence of authorization or ratification. 7 Labatt, § 2560. The rule of implied ratification applies strongly to corporations as they act only through their servants and agents. 1 Sedgwick on Damages (9th Ed.) § 380. But in applying the doctrine of exemplary damages to corporations, the decisions are not uniform, some holding that authoriza-

tion or ratification in some manner is necessary, and others that it is not. 1 Sedgwick, § 380; 7 Labatt, § 2554; and 6 Thompson, § 7175. The rule of general liability for exemplary damages is more often, and perhaps more justly, applied in actions against carriers for the misconduct of their servants in whose care they have intrusted passengers. The carrier is under a grave contractual duty and must exercise a degree of care commensurate therewith, and, because of the extreme difficulty, in most cases, of proving even implied authorization or ratification, the protection of the traveling public requires that they should be held liable for the acts of their servants, to whom they have intrusted the performance of their contracts of carriage, if done within the scope of their employment, to the same extent that the servant himself is liable. This court has so held in the following cases: Davis v. C. & O. Ry. Co., 61 W. Va. 246, 56 S. E. 400, 9 L. R. A. (N. S.) 993; McDade v. N. & W. Ry. Co., 67 W. Va. 582, 68 S. E. 378; and Wilhelm v. Parkersburg, etc., Ry. Co., 82 S. E. 1089. But, being of the opinion that it is the better rule, and more consistent with justice, not to extend the doctrine of liability for exemplary damages to corporations other than public carriers, unless the servant's negligence is authorized or ratified, it was essential to show authorization or ratification of the conductor's wrongful act in order to fix liability on the railway company for exemplary damages, because plaintiff is not suing as a passenger. It does not appear that she claimed the rights of a passenger. Therefore, assuming that plaintiff had ceased to be a passenger, the railway company was still bound to use reasonable care to avoid doing injury to her. She had a right to the use of the street, as a pedestrian, which defendant could not violate without incurring liability. There was evidence tending to show that the car was behind time, and the conductor may have been in haste to get his car started and may have thrown the pick off carelessly, without looking to see if any one was in the street and liable to be struck with it. If he did so, and the jury had a right to believe from the evidence that he did, he was guilty of such reckless disregard of the rights of others as amounted to legal malice. Vinal v. Core, 18 W. Va. 1, and Spengler v. Davy, 15 Grat. (Va.) 381. Whether his negligence was wanton or malicious, was a question for the jury; there being sufficient evidence from which it could properly be inferred. Authorities above cited, and Moats v. Rymer, 18 W. Va. 642, 41 Am. Rep. 703.

[6] Plaintiff was a married woman living with her husband, and there is evidence that, on account of her injury, she was in a hospital for some time, and expended money for surgical and medical treatment. The jury were instructed that she had a right to recover for money expended in effecting a cure and for loss of time, and this is assigned as error. We do not think the assignment is well taken. She had a right, under the statute, section 15, c. 66 (sec. 3683), Code 1913, either to sue alone or join her husband as coplaintiff. She chose to sue alone. Warth v. County Court, 71 W. Va. 184, 76 S. E. 420. The statute makes the earnings of a married woman as clearly her separate estate as it does her real estate and visible personal property. Section 12, c. 66 (sec. 3680), Code 1913. Plaintiff's declaration does not disclose that she was a married woman, and it was not necessary that it should do so. But it does aver that she was a school teacher and was rendered unable to pursue her occupation as such, because of the injury, and also that she expended large sums of money to effect her cure. These averments were sufficient to entitle her to prove loss of time and money expended. The declaration in the Warth Case, supra, cited by counsel for plaintiff in error, did not contain any such averments, and there was no proof that Mrs. Warth employed her time, otherwise than as keeping house for her husband; and, for that reason, we held she was not entitled to recover for loss of time.

[7] Taking what appears to us a reasonable view of the scope of employment and duties of a street car conductor, we hold that the conductor's negligence in throwing the pick off the car was an act within his employment, and was performed for his employer. A conductor would be expected to assist persons with baggage, or children, in boarding and in alighting from his car. So far as we have observed, it is the universal custom of polite and obliging conductors to do so, and such are the kind of persons that public carriers generally seek to employ. The conductor was assisting some passengers in unloading their tools. There was no effort to show that it was a violation of the railway company's rules to carry such tools on the platform of its passenger cars. Hence the refusal of the court to permit a witness to answer the question, whether the street car company also ran freight cars, was proper. The answer, whatever it might have been, could have had no bearing on the case. Moreover, even if the answer were material, the exception does not disclose what the witness' answer would have been, and therefore fails to show prejudicial error.

We have carefully considered the assignments of error in relation to the court's giving certain instructions for plaintiff and refusing to give certain others for the railway company, and are of opinion that no error was committed in respect thereto. The most strenuous objection is urged to the giving of plaintiff's instruction No. 3, which authorized the jury to find exemplary damages, if they believed plaintiff's "injuries were inflicted in a malicious, unlawful, wanton, and unnecessary manner, and that the said defendant, with the knowledge of the manner of com-

mitting said injuries, thereafter ratified and approved the acts of its servants." In view of the law respecting implied ratification, which we have already discussed, and the testimony of plaintiff and Mrs. Rutter tending to prove ratification by Mr. Shattuck, this instruction was properly given. It would have been proper, even in the absence of evidence tending to prove ratification, if the relation of carrier and passenger had existed at the time of the injury, according to the comparatively recent decisions of this court in the three cases above cited. Those cases practically overrule point 7 in Downey v. Railway Co., 28 W. Va. 732, and point 4 in Ricketts v. Railway Co., 33 W. Va. 443, 10 S. E. 801, 7 L. R. A. 354, 25 Am. St. Rep. 901, in so far as they relate to common carriers.

[8] There was no prejudicial error in refusing to give defendant's instruction No. 1, which would have told the jury that the railway company was not responsible to plaintiff for her injury, as a common carrier of passengers. Her declaration is not framed on the theory that she was injured while a passenger, and there is nothing in the record to indicate that her counsel contended, or the court intimated, that the strict rule of liability of carriers applied to the case. The instruction might, with propriety, have been given, as it appears that plaintiff had been a passenger only a minute or two previous; but the refusal to give it certainly did no harm. Her right to recover purely compensatory damages does not depend upon the existence, or nonexistence, of the relation of carrier and passenger, and her right to exemplary damages depends upon the wantonness and maliciousness of the negligent act, and whether the railway company had authorized or ratified it, as to which the jury were properly instructed.

No. 1A, which would have told the jury that plaintiff, being a married woman and living with her husband, was not entitled to recover for loss of time, was properly refused, for the reason that she had averred and proved she earned money as a school teacher. The money so earned was her separate estate, and the time she lost was her loss, not the loss of her husband.

[9] No. 2 is clearly erroneous and was properly refused. It would have told the jury that plaintiff was not entitled to a verdict, unless they found from the evidence that the injury was caused by the joint negligence of the servants of the railway company and of the gas company. Notwithstanding defendants were jointly sued for the tort, they were jointly and severally liable; and if the jury found the negligence was not joint, but was committed by a servant of one defendant only, they were bound to render their verdict against the guilty defendant, and in favor of the other one. This is a familiar rule in cases of tort. Pence v. Bryant, 80 S. E. 137; Johnson v. Chapman, 43 W. Va. 639, 28 S. E. 744; and 1 Cooley on Torts, side page 153. Counsel for plaintiff in error does not insist upon this assignment of error in his brief.

Nos. 3 and 4 are on the subject of contributory negligence, in regard to which the jury had been instructed by defendants' No. A, and were therefore properly refused.

[10] No. 5 would have told the jury that plaintiff could not recover, if they believed from the evidence that the injury was purely accidental. It could very properly have been given. But it is apparent that defendant was not prejudiced by its refusal, because the jury were plainly instructed that they had to believe, from the evidence, the negligence of defendant's servant was the proximate cause of plaintiff's injury, and that she was not herself at fault, before they could find a verdict for her. That, of course, excluded all right of recovery upon the mere theory of accident.

No. 6 would have submitted to the jury the question, whether or not the conductor, in throwing the pick off the car, was acting in the course of his employment. That is a question of law which the court had a right to determine from the contractual relation between the conductor and the railway company, as to which there is no dispute. We have already intimated, in another part of this opinion, that it was an act performed by the conductor in the course of his employment. Whether it was ever contemplated by the railway company that such tools as the one with which plaintiff was injured would be carried on a passenger car or not, they were in fact carried on such car on the occasion in question, and presumably the conductor had a right to allow them to be carried. There is no evidence that he was forbidden to do so; and, in carrying them, the conductor was performing services for the railway company. It is not proper to submit purely legal questions to the jury.

The court very properly instructed the jury to render a verdict of not guilty as to the defendant the Mountain State Gas Company; there is no evidence whatever in the record to warrant the finding of a verdict against it.

The evidence is very conflicting as to the manner in which plaintiff received her injury. Some of defendant's witnesses say she ran against one of the employés of the gas company, who was handling a pair of heavy pipe tongs, and knocked them out of his hands and they fell upon her foot, near the ankle, causing the injury. Two eyewitnesses for plaintiff testify that they saw the conductor throw the pick, saw it strike plaintiff on the ankle, and saw her fall, and that they immediately went to her assistance. The jury were the judges of the weight of this conflicting testimony, and, there being ample evidence to sustain their finding in

favor of plaintiff, the court did not err in refusing to set it aside. We affirm the judgment.

(75 W. Va. 767)

## STATE v. HICKS et al.

(Supreme Court of Appeals of West Virginia. March 9, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. PUBLIC LANDS ⟸186—SALE OF FORFEITED LANDS—PROCEEDINGS—CLAIMANT'S PETITION—PARTIES—PROCESS.

A claimant, not made a party to the state's bill in a school commissioner's proceeding to sell forfeited land, who files his petition therein, as provided by section 6, c. 105, Code 1913 (sec. 4438), is not required to make other claimants parties to his petition. Such petition may be filed in court, at rules, or before the commissioner to whom the cause is referred, and no process need issue thereon.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 599; Dec. Dig. ⟸186.]

2. PUBLIC LANDS ⟸186 — PROCEEDING TO SELL FORFEITED LAND—DECREE—BINDING EFFECT.

A defendant, named in the bill in such proceeding, who is duly served with process and fails to appear, is bound by the final decree therein, and cannot have it set aside at a subsequent term, except for such errors, apparent upon the record, as would justify reversal upon appeal.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 599; Dec. Dig. ⟸186.]

3. PUBLIC LANDS ⟸186 — PROCEEDING TO SELL FORFEITED LAND—SCOPE OF JURISDICTION—CROSS-PLEADINGS.

Forfeiture of some claimant's title to land, whether a good or a bad title when the forfeiture occurred, confers jurisdiction to entertain a suit by the commissioner of school lands, and authorizes the court to decide all questions between conflicting claimants, relative to the forfeited land, without cross-pleadings between them.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 599; Dec. Dig. ⟸186.]

Appeal from Circuit Court, McDowell County.

Bill by the State against J. W. Hicks and others. From the decree, Louisa Day appeals. Affirmed.

M. O. Litz, of Welch, for appellant. A. W. Reynolds, of Princeton, Joseph S. Clark, of Philadelphia, Pa., and Anderson, Strother & Hughes, of Welch, for the State.

WILLIAMS, J. Appellant, Louisa Day, was made a party defendant to the state's bill in this school commissioner's proceeding to sell forfeited lands, and was served with process, but made no appearance either in court or before the commissioner to whom the cause had been referred in due course of procedure. The commissioner filed his report on the 8th of July, 1910, finding that a certain tract of 100 acres, alleged in the bill to be forfeited in the name of Mary Johnson and Barney Johnson, for nonentry on the land books of McDowell county, from 1888 to 1905, inclusive, was in fact forfeited, but that, as to certain parts thereof included within the bounds of two larger tracts, known as the Landsburg 50,000-acre tract and the Crozer tract of 4,115 acres, owned by the Pocahontas Coal & Coke Company, the forfeiture inured to its benefit, and that the balance of the tract should be sold for the benefit of the school fund. The Pocahontas Coal & Coke Company was not made a party to the bill, but came into the case by petition, setting up its claim to the land, and praying to be made a party defendant, as it had a right to do under section 6, c. 105, Code 1913 (sec. 4438). The court heard the cause on the commissioner's report, on the 8th of July, 1910, and decreed that the Pocahontas Coal & Coke Company was in position, by virtue of section 3, art. 13 of the Constitution, to claim the benefit of the forfeiture as to so much of the 100-acre tract as lay within the boundaries of its two tracts above named, and set forth, in the decree, by metes and bounds, the portions of the tract that were so included, and held "that neither the state nor those claiming title to the said 100 acres under the said patent therefor have any interest in those portions," and dismissed the suit as to those parts of the forfeited tract. It not appearing that all the tract was thus included, the court dismissed the suit as to the remainder of it, if any, without prejudice to the parties. Having given due notice, appellant appeared on the 28th of September, 1910, at a subsequent term, and moved the court to set aside and annul the aforesaid decree, in so far as it undertook to adjudicate title in the Pocahontas Coal & Coke Company to any part of the 100-acre tract, and so far as it purported to adjudge that appellant's title had been forfeited to the state and transferred, by virtue of article 13, § 3, of the Constitution, to the Pocahontas Coal & Coke Company. The court took time to consider the motion, and on the 11th of March, 1912, overruled it. From that decree and the decree of July 8, 1910, Louisa Day has appealed.

[1] Her counsel insists that it was error to decree against her upon the petition and answer of the Pocahontas Coal & Coke Company, because she was not made a party defendant thereto and served with process thereon. But that was not necessary. Chapter 105 of the Code, prescribing the method of procedure for the sale of the state's land, does not contemplate cross-pleadings between conflicting claimants, and makes no provision for the joinder of issues between codefendants to the state's bill. Section 7 says such suit shall be proceeded in as other suits in chancery, "except as herein otherwise provided." One exception, clearly shown by the general plan of the statute, is that the issues are made between the state and each claimant upon the bill and the several answers, and not upon cross-pleadings between

the claimants. No such pleadings are provided for or even contemplated. Section 6 provides that a claimant of the land, or of any interest therein, who has not been made a defendant, may file his petition, either in court, at rules, or before the commissioner to whom the cause is referred, and thereafter constitutes him a defendant and clothes him with the right to protect and defend his interest, if any he has, to the same extent as if he had been originally made a defendant. There may be, and generally are, several claimants of the land under conflicting titles, but in the very nature of the case there can be but one valid title, and the court must decide the question, as to who is the owner of it, upon the issues made on the several answers to the state's bill. All questions relative to the forfeited title and the right of redemption are thus presented.

[2] By ascertaining that the Pocahontas Coal & Coke Company took the benefit of the forfeited title, the court decided the issue of title, not only against the state as to that part of the forfeited tract within the boundaries of said company's land, but it also necessarily decided it against every other claimant thereof who was a party to the cause. Such decree is final and binding upon the state and all other parties, unless and until reversed. The court was bound to ascertain who, if any one, was in a position to claim the benefit of the forfeited title, and if none such, then to ascertain who, if any one, had right to redeem, in order to determine what disposition to make of the state's suit. Having ascertained that the Pocahontas Coal & Coke Company was entitled to the benefit of the forfeiture, there was nothing for the court to do but to dismiss the state's bill as to so much of the tract as said company had title to. That proceeding was in strict accord with section 6, c. 105, Code (sec. 4438).

[3] It is urged that the dismissal of the state's bill carried with it the petition of the Pocahontas Coal & Coke Company, and is equivalent to a dismissal of the whole proceeding for want of jurisdiction. This does not follow. The bill was not dismissed for want of jurisdiction, but because the dismissal was a proper decree upon the merits. The court had ascertained that, although the title was forfeited, the state did not have it, because it had been transferred from the state, by virtue of the constitutional provision, to the Pocahontas Coal & Coke Company. The state simply failed to make out a case entitling it to sell the land for the benefit of the school fund. There is no pretense that appellant's title to the 100-acre tract was not actually forfeited; and the forfeiture, whether of a good or a bad title when forfeited, confers jurisdiction and power in the court to determine the rights of the respective claimants. It is not essential that the title should be in the state, to warrant a proceeding by the commissioner of school lands. It is only necessary that there be a forfeiture, and when such is the case, the court is authorized to determine all questions relative to the forfeited title.

There is no error in the record for which this court could reverse the decree of July 8, 1910. Hence the circuit court properly overruled appellant's motion to vacate it and reopen the cause.

The decree is affirmed.

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(75 W. Va. 700)

## E. L. GARRETTSON & CO. v. RINEHART & DENNIS CO. (No. 2640.)

(Supreme Court of Appeals of West Virginia. Feb. 23, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. CONTRACTS ⟸306 — CONSTRUCTION CONTRACT—ALTERNATIVE RIGHTS OF CONTRACTOR—ELECTION.

A contractor having the alternative right, under his subcontract, in case of default in the prosecution of the work thereunder, to take full and complete possession of the work and the subcontractor's tools and machinery and use the latter in the completion of the work, at the expense of the subcontractor, after having given notice in writing of his intention so to do, or to put on additional men, leaving the work in the hands of his subcontractor, does not exercise the former right by the mere putting on of additional men, slight alteration of the method of work, without objection from the subcontractor, and payment of their wages directly to the men after having previously found it necessary to guarantee their wages by reason of delay in payment by the subcontractor, at the same time requesting co-operation on the part of the subcontractor. His procedure is the exercise of the latter right, notwithstanding a reference to the other in a telegram giving notice thereof.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1528–1533; Dec. Dig. ⟸306.]

2. CONTRACTS ⟸306 — CONSTRUCTION CONTRACT—ABANDONMENT BY SUBCONTRACTOR—COMPLETION BY CONTRACTOR.

Abandonment of the work by the subcontractor, after such procedure, authorizes the principal contractor to take full possession of the work, machinery, tools, and appliances, and use the latter in the completion of the work, for and on account of the subcontractor, crediting him with the contract prices of the work, as it is performed, and charging him with the cost thereof. Such use of his machinery and appliances is not a conversion thereof.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1528–1533; Dec. Dig. ⟸306.]

3. BAILMENT ⟸9—CONSTRUCTION CONTRACT—RENTAL OF APPLIANCES—WARRANTY—REPAIR.

In an agreement between a contractor and his subcontractor for the rental by the former to the latter of machinery and appliances already on the ground at the date of the contract, for use in execution of the work sublet, there is no implied warranty of the fitness of the machinery for such work, nor any implied undertaking on the part of the principal contractor to repair defects therein.

[Ed. Note.—For other cases, see Bailment, Dec. Dig. ⟸9.]

Error to Circuit Court, McDowell County.

Action by E. L. Garrettson & Co. against the Rinehart & Dennis Company. Judgment for defendant, and plaintiffs bring error. Affirmed and remanded.

Walton O. Bowers, and Anderson, Strother & Hughes, of Welch, for plaintiffs in error. Stokes & Sale, of Welch, for defendant in error.

POFFENBARGER, J. The loss of a verdict for $15,000 found and returned as damages for an alleged breach of a contract for railroad construction work and the award of a new trial constitute the complaint on this writ of error.

Having obtained a contract from the Norfolk & Western Railway Company for the grading, masonry, and tunnel and trestlework required for its roadbed between certain mileposts at Vivian, W. Va., covering a distance of 2.70 miles, the Rinehart & Dennis Company, a corporation, sublet the work to E. L. Garrettson & Company, after having performed a portion of it. It consisted principally of bridge and tunnel work. The tunnel was something like 600 or 700 feet long, and the principal contractor reserved to itself the work of driving it through the hill. The subcontract included all of the concrete work to be done, the completion of the bridge work, the tunnel portals and tunnel lining, consisting, for the most part, of excavation and concrete work. The subcontractors obligated themselves to complete the work by September 1, 1911, and commence it within ten days after the date of the contract, February 18, 1911. In so far as they were applicable to the work sublet, the subcontractors assumed or undertook all of the contractor's responsibility and obligations to the company, as set forth in the principal contract, and the contractor expressly reserved all of the powers and rights against the subcontractors which the company held against it. In other words, the contract between the company and the principal contractor was adopted as the contract between the contractor and the subcontractors, in so far as it was applicable and not inconsistent with the terms of the subcontract. The subcontractors were to have specified prices for the work, somewhat less than those agreed to be paid by the company to the principal contractor, and 85 per cent. of the amount agreed upon was to be paid to the subcontractors on or about the 20th of the month following that in which the work was done; the residue being deducted and held until completion of the work. The subcontract further provided for the use by the subcontractors of the masonry plant of the contractor, then on the work, for which they were to pay $400 per month as rental, one-half to be deducted as a charge against the corresponding monthly estimate, and the balance charged against the final estimate.

Clause C of the contract with the railway company provided that, in case of violations of the contract, the chief engineer might, after 10 days' notice in writing, setting forth the particular breaches thereof and served on the contractor, either in person or mailed to its address last given by it to the company, or by posting the same at the door of its office on or near the work, proceed as follows:

"Require the contractor to at once supply such increase of force, appliances, or tools, and to cause to be made such improvement in the character of the work and materials as may be required, in the opinion of the chief engineer, to make the same conform to the stipulations of this agreement and the specifications; and if, on the expiration of ten days after such service of writing, the contractor shall have failed to furnish to the company evidence satisfactory to the chief engineer of the intention and ability of the contractor to furnish the desired improvements and remedy the specified deficiencies, the said company may thereupon enter on and take possession of said work, or any part thereof, with the tools, materials, plant, appliances, houses, machinery, or other appurtenances thereon, and hold the same as security for any or all damages or liabilities that may arise by reason of the nonfulfillment of this agreement within the time herein stipulated; and, furthermore, may employ the said tools, materials, etc., as aforesaid, and such other means as the company may deem proper to complete the work, at the expense of the said contractor, and may deduct the cost of completing the entire work from any payments then due or thereafter falling due to the said contractor, and recover from him any and all deficiency."

Having commenced the work at the time specified for commencement thereof, or soon afterwards, Garrettson & Co. continued in the performance thereof until some time in October, 1911, but their progress was unsatisfactory. The Rinehart & Dennis Company did not complete the driving of the tunnel until some time in July, 1911, in consequence whereof the tunnel work to be done by Garrettson & Co. may have been delayed. From February until August they were engaged in what is known as outside work, bridge work, and other similar construction. After the work in the tunnel was started in July or August, the inspecting engineers of the railway company ascertained that the progress thereof was too slow, and complained to Rinehart & Dennis Company that the force on the work was insufficient. Having been notified in April, 1911, that the tunnel had not been started, the chief engineer of the railway company notified Rinehart & Dennis Company, by letter dated April 28th, that he desired the tunnel entirely finished in October, and he observed, in the summer, that the concreting was not progressing as it should. He was on the ground in August and made a vigorous complaint. As early as June 1, 1911, Rinehart registered a complaint about the progress of the work with the plaintiffs. On July 29, 1911, they were advised of the paucity of the work done in the tunnel and the necessity of completing it on time. They were told it might be possible

to get an extension of 30 days, but also that the work must not drag along, and that inability to get help was no legal excuse for delay. By a letter dated August 5th they were reminded of the nonfulfillment of their promise to put on more men, and admonished that the work must be completed before freezing weather, and that they must show such progress within the next few weeks as would insure its completion. On August 14, 1911, this telegram was sent:

"Chief engineer complaining about your progress. Something must be done at once. Wire answer so we can make reply to him."

On the same day they answered thus:

"We have placed a night force on our work and expect to finish side walls this month also erecting centers in position to concrete every day until work is finished."

In a telegram dated October 2d, Rinehart & Dennis Company requested permission of the chief engineer to do the concrete work in day time only. To this he replied as follows:

"Necessary that you carry out the schedule laid down and put on night force on tunnel work. This work must be finished before freezing weather."

About September 20th plaintiffs had trouble with their men by reason of their failure to pay them at that time, and the defendant had to guarantee their wages. As to the cause of said failure there is some controversy in the evidence. Early in October the Rinehart & Dennis Company put on a night force. Whether the men were employed by them or by Garrettson & Co. is not material. The work was still unsatisfactory. Garrettson seems to have given it but little direct personal attention. He left it largely to his bookkeeeper and foreman. The Rinehart & Dennis Company did not remit the amount of money necessary to meet the October pay roll. Instead of sending it to Garrettson & Co., it sent it to one Perkins, its own superintendent, and wired Garrettson & Co. as follows:

"On account of condition of your work and our liability for pay roll, etc., we are exercising our rights under clause C of contract and your pay roll money will be sent to-day to Perkins. Will be glad to have you co-operate with him. See letter."

The effort of Perkins, representing the defendant, to put on the night force met with some resistance. Plaintiffs sent their attorney on the ground, in resistance thereof, but he seems to have been convinced of the right of the contractor to put it on and yielded. At or about the time this force was put on, Perkins found fault with the appliances used by Garrettson & Co. in the lining of the arch of the tunnel, and expressed intention to adopt a different method. Owing to the friction thus engendered, Garrettson & Co.'s bookkeeper sent in his resignation, on the 14th of October, to take effect on the 25th. Some time between the 15th and the 20th of October Perkins made the alterations. When the money necessary for the pay roll, mentioned in the telegram quoted from, was received by Perkins, he had Patterson, plaintiffs' bookkeeper, pay their employés, but not from their office. They were paid at the office of the defendant. All of these transactions were reported to Garrettson at Cincinnati, Ohio, by Patterson.

In the opinion of all who have testified on the subject, including Garrettson & Co.'s foreman, the altered appliances effected economy in the work and facilitated its progress. Under the Garrettson plan the concrete was put in buckets on a narrow-gauge car, pushed into the tunnel by a small engine, from which they were lifted by a derrick to a movable platform about 18 inches above what is called the springing line of the arch, but 8 or 9 feet below the top of the arch, where they were emptied. From this platform, the concrete was shoveled to another higher up, and then into the forms. Perkins took this arrangement out, and substituted railroad cars with high platforms on them, on which the concrete was loaded outside of the tunnel. From these platforms the concrete was immediately placed in the forms. The advantage of the new arrangement was the saving of a good deal of time and labor in the handling of the concrete. The cost of tearing out the old platform was a small matter of $25 or $50, and that of the platforms on the railroad cars about $100.

Garrettson & Co.'s bookkeeper left the work on the 26th day of October, and Malarky, their foreman, on November 24th. Garrettson himself seems never to have gone about the work after these controversies arose. The machinery, tools, and appliances of the plaintiffs were used by the defendant, and the cost of repairs thereof charged to them; and, on the completion of the work, such of them as had not been worn out or sold to satisfy claims of creditors were left there. A hoisting engine belonging to Garrettson & Co. which had cost originally $1,800 was sold under an attachment proceeding at the instance of creditors, and purchased by Perkins for his company at the price of $240. The work was completed, and the Rinehart & Dennis Company left the premises January 1, 1912.

Upon the theory of wrongful seizure of the machinery, tools, and appliances by the defendant, and conversion thereof to its own use, based upon its alleged assumption of charge of the work, without having given the notice required by clause C of the contract, the plaintiff sued for the value of said property, placing it at more than $10,000. The remaining items of the bill of particulars are: $1,185, the cost of repairs to the rented machinery; $4,790, a 15 per cent. deduction from an estimate; and $8,000, loss of estimated profits on the work.

[1, 2] The first claim is predicated upon the telegram of October 23, 1911, the withholding of the pay roll for October, distribution thereof to the men from the office of the

defendant, the alteration made in the appliances, and the alleged exclusion of the plaintiff from the work. The right of the defendant company to take charge of the work and exclude the plaintiff, after having given the notice prescribed in the contract and referred to in clause C, is conceded, but no such formal notice was given. Therefore it is urged seizure of the property of the plaintiff used in the work was wrongful, and amounted to a conversion thereof to the use of the defendant.

Another clause of the contract provides that, in the event of failure or refusal of the contractor to prosecute the work with a force sufficient, in the judgment of the chief engineer, for its completion within the time prescribed, the company may proceed to employ such a number of workmen, laborers, and overseers as, in the opinion of the chief engineer, is necessary to insure such completion at such wages as the company may find necessary or expedient, and pay all persons so employed, and charge the amounts so paid as so much money paid to the contractor under the contract. An important question is whether this provision is a part of clause C or an independent one. That clause contemplates a complete and absolute ouster of the contractor from the work and premises. It is immediately followed by a paragraph which says all rights of occupancy in or upon any lands or property of the company and all rights of the contractor, or any person claiming under or through it, to any further prosecution of or interest in the work, shall cease and determine, and the company may take possession of such land and property, and complete the work thereon in such manner as it may think best. This paragraph is followed by the clause authorizing the employment of additional men and overseers. It does not contemplate a complete ouster, but only the furnishing of additional men whom the contractor must accept. In view of this great difference, we are clearly of the opinion that the provision for additional men is not a part of clause C.

Although the telegram of October 23d, repeated in the letter of confirmation bearing the same date, purported to be notice of the exercise of the right of the contractor under clause C of the contract, it did not give any notice of intent to exclude the subcontractors from the work. On the contrary, it expressed a desire for their assistance and gave an invitation to them to co-operate with Perkins, as did also the letter of confirmation; nor, in point of fact, were the subcontractors excluded or ousted. Perkins recognized the bookkeeper and foreman as being still in control. Such of their men as would stay seem to have been retained, and none of them were discharged. None of them except Carpenter and Malarky seem to have left. In view of the magnitude of the work, a $70,000 undertaking, the alterations in the appliances were relatively slight and unimportant, as well as highly beneficial to the subcontractors in point of economy and facilitation of the work. Inquiry as to the effect and purpose of direct payment of the October pay roll to the men involves consideration of the contract in the light of the lien given by law to laborers on railroads for their wages. In all cases of nonpayment by the contractor of money due the laborers or other workmen for work performed, the company was expressly authorized to pay them, and the subcontract makes this provision operative between the contractor and the subcontractors. As to the October pay roll the subcontractors were not in fault. They could not pay it until they received the amount due on their estimate for the month of September. Failure to meet the September pay roll on time had necessitated a guaranty of the wages of the men by the contractor. This circumstance, no doubt, was a cause of the action taken respecting the October pay roll. That action did not signify assumption of complete control of the work and exclusion of the subcontractors therefrom, within the meaning of clause C. The inference that might arise from the circumstance is clearly negatived by the telegram and letter of confirmation, as well as by the contractor's recognition of the bookkeeper and the foreman of the subcontractor. Each of them was retained until he voluntarily left. Moreover, Garrettson did not know what was meant by the reference to clause C in the telegram at the time he received it. After these transactions the foreman went to Cincinnati and consulted Garrettson, and was told by him to stay on the work. Neither the telegram nor the contemporaneous and subsequent conduct of the contractor discloses intent to take over the work and exclude the subcontractor therefrom, within the meaning of clause C of the contract. Our conclusion, therefore, as a matter of law, is that the procedure of the contractor was under the independent clause, conferring right to put on additional men and overseers, and that the subcontractors, after the action taken in October, wholly abandoned their contract, and so impliedly surrendered possession of the work, machinery, tools, and appliances to the contractor, and authorized it to take possession and continue the use of the property for completion of the work. Technically stated, our opinion is that the evidence is insufficient to sustain a finding of conversion of the property to the use of the defendant. From this conclusion it follows that the contractor is liable, if at all, only for such injuries as were wrongfully inflicted upon the property in the use thereof, in completing the work, or resulted from failure to take precaution for its preservation and safety on the premises, after the completion thereof.

Whether a technical violation of the contract on the part of the defendant such as

is claimed would make it liable as for a conversion of the property is not decided; decision of the question being unnecessary.

[3] Liability for the second item of the bill of particulars is precluded by the terms of the contract, which neither guarantee the fitness or suitableness of the rented machinery, nor obligate the contractor to put the same in repair. It reads as follows:

"The contractor agrees to turn over to the subcontractor all of the contractor's masonry plant now on the work, and permit the use of the said plant by the subcontractor for his operations under the agreement for a rental at the rate of $400.00 per calender month, one-half of said rental to be deducted as a charge against the corresponding monthly estimate, and the balance of said rental to be deducted as a charge against the final estimate."

This clause must be read in connection with all the other provisions of the contract, and, so read, its interpretation is clear. The rental of the machinery shows the defendant was not to furnish it at its own expense. Plaintiffs undertook the work and were to furnish the machinery. It appears from the oral testimony that Garrettson had spent a day on the work and inspected the machinery, some of which was then running so he could see whether it was sufficient or not. Having done so, he knew exactly what he was getting. Under such circumstances, there is no implied warrant, and an express one cannot be ingrafted upon the written agreement by resort to parol evidence. Erie Iron Works v. Miller Supply Co., 68 W. Va. 519, 70 S. E. 125; Griffin v. Runnion, 82 S. E. 686.

For the third item of the bill of particulars there is no foundation whatever in the evidence. The final estimate of the work includes all of it and amounts to $71,738.65. From that there is no 15 per cent. deduction. Nothing is taken from it except the credits previously given, represented by the net estimate for the month of December, 1911, $60,758.04, leaving a difference of $10,980.31, which was placed to the credit of the plaintiffs in the statement showing a balance of over $5,000 due from them. Though it does not admit nonpayment of any retained percentage, justifying a verdict therefor, the statement is incomplete and somewhat contradictory. The defendant may not have paid and credited all that is due, but it is impossible to say, from the evidence adduced, whether anything is due the plaintiffs for work done under the contract or not. The final estimate shows $71,738.65, but the summary of the statement credits only $50,194.20. Deductions made from the gross amount, in striking balances, may account for this apparent discrepancy, and it may be cleared up on the new trial.

These conclusions settle substantially all of the legal questions fairly raised on the writ of error, and fully sustain the action of the court in setting aside the verdict and awarding a new trial. Wherefore the judgment complained of will be affirmed, and the case remanded.

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(75 W. Va. 752)

## JARRELL et al. v. LAUREL COAL & LAND CO. et al.

(Supreme Court of Appeals of West Virginia. March 2, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. JUDGMENT ⟸503 — CONCLUSIVENESS — PLEADING.

Where, in a court having general jurisdiction of the subject matter, parties are duly summoned in a cause to which they are named as defendants in the caption of the bill, and the allegations of the bill, though not direct and affirmative as to them, are sufficient to disclose wherein rights belonging to them are sought to be affected by the proceedings, a decree based on such allegations is good as against collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 943; Dec. Dig. ⟸503.]

2. JUDGMENT ⟸503—CONCLUSIVENESS—COLLATERAL ATTACK.

Judgments and decrees are not collaterally assailable as void for want of jurisdiction in the court to enter them, merely because the pleadings on which they rest lack material averments.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 943; Dec. Dig. ⟸503.]

3. JUDGMENT ⟸503—CONCLUSIVENESS—COLLATERAL ATTACK.

The power to decide upon the sufficiency of a cause of action as presented by the complainant's pleading, like the power to decide any other legal proposition, is binding except as to direct proceedings of review or appeal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 943; Dec. Dig. ⟸503.]

4. JUDGMENT ⟸503—CONCLUSIVENESS—COLLATERAL ATTACK.

If it can be gathered from the allegations of the bill, either directly or inferentially, that the complainant was seeking the relief granted, or that he was entitled thereto, the decree resting on the bill will be shielded from collateral assault.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 943; Dec. Dig. ⟸503.]

5. JUDGMENT ⟸503—CONCLUSIVENESS—COLLATERAL ATTACK.

Where all persons who owned the lands prayed to be sold in a cause were named by the bill as parties thereto, were summoned, and actually appeared and defended, the decree can not be held void on collateral attack, for mere incompleteness or defectiveness in the bill.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 943; Dec. Dig. ⟸503.]

6. JUDGMENT ⟸501—CONCLUSIVENESS—COLLATERAL ATTACK.

A judgment, however erroneous, entered in a case wherein the court had jurisdiction over the parties and the subject matter, is not open to impeachment by parties or privies in any collateral proceeding whatever.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 941; Dec. Dig. ⟸501.]

Appeal from Circuit Court, Boone County.

Suit by Paris Jarrell and others against the Laurel Coal & Land Company and others.

From decree for defendants, complainants appeal. Affirmed.

John E. Blake, of Madison, and Belcher, Stiles & Goettman, of Charleston, for appellants. Chilton, MacCorkle & Chilton, of Charleston, E. T. England, of Logan, and Frank P. Murphy, of Madison, for appellees.

ROBINSON, P. In 1861, Simeon Jarrell died intestate, seized and possessed of several tracts of land in Boone County, aggregating more than 2000 acres. He left surviving him a widow, three sons, and four daughters. The widow and one of the sons became the personal representatives of the decedent. A suit instituted in 1871, by one who had obtained a judgment against these personal representatives, plainly had for its object the subjection of the lands of the decedent to the payment of his debts. By decrees in that cause the lands were sold, and were conveyed to the purchasers, by a special commissioner. The title so passed is now held by the defendant herein.

After many years, bringing great increase in the value of the lands, the heirs of Simeon Jarrell who are still living and the descendants of those deceased, have brought the present suit. By it they seek to have the decrees in the suit through which the title to the lands came down to defendant, set aside and held for naught. They collaterally attack the proceedings in the old suit and maintain that they did not lose title by the sale of the lands therein. They base their right to come into the equity forum on an allegation that they are in possession of the lands. In other words, they assert that they hold the true title to the lands, and being in possession under the same, that they may seek equity to cancel defendant's claim of title as a cloud on their title. Upon a hearing on the bill and amended bill, the exhibits therewith, answers of defendant, and depositions taken and filed by both plaintiffs and defendant, the chancellor has decreed that the cause is for defendant and has dismissed plaintiffs' suit. From that decree we have this appeal.

Assuming that plaintiffs have proved such present possession of the lands as will enable them to maintain this suit, all of which seems exceedingly doubtful, we are of opinion that the decree is warranted on the ground that defendant has the true title to the lands. In one of the briefs on behalf of plaintiffs it is submitted that the case turns on the question whether the decrees in the old suit were void for want of jurisdiction in the court to enter the same. Taking up the case from that view point, we find that the decrees attacked were not void, but that they operated to vest the purchasers at the judicial sale with good title.

The collateral attack made by this suit on the validity of the proceedings in the old suit is based on plaintiffs' theory that the court in the latter suit did not acquire jurisdiction of the heirs of Simeon Jarrell, deceased, so as to deprive them of title to the lands by the proceedings therein. That all the heirs were named as parties to the old suit in the caption of the bill and were served with process to answer the bill, is conceded. But it is maintained that the substance of the bill was not such as would make the heirs parties to the suit, and that all proceedings and decrees based on such a pleading were therefore entirely void. The caption of the bill reads as follows:

"The Bill of Complaint of Nelson Hill, Admr. of George Hill, Decd. v. Floyd C. Jarrell, Administrator, and Virgin Jarrell, Administratrix of Simeon Jarrell, dec'd, and in their own right, H. H. Hopkins, Paris Jarrell, Simeon R. Jarrell, Charles N. Mullins, and Acintha Mullins, his wife, Henry C. Mullins, and Caroline Mullins, his wife, Floyd White and Emily White, his wife, David Mullins and Harriett Mullins."

Following this caption it was alleged by the plaintiff to the suit that a judgment for his use had been recovered against the administrator and administratrix of Simeon Jarrell, deceased; that execution had been issued on such judgment and returned not satisfied, an abstract of the judgment and a copy of the execution being exhibited with the bill in this connection; that Simeon Jarrell died intestate, seized and possessed of certain tracts of land, which were listed and described; that the lands appeared to be vested in his heirs; and that the personal estate of the decedent was insufficient to pay the plaintiff's judgment. The bill then prayed that the real estate of which Simeon Jarrell died seized and possessed be sold to pay the plaintiff's judgment and the costs of the suit; that leave be granted the creditors of the decedent to come in and participate in the advantages of the suit; that a commissioner be appointed to ascertain the claims of the several creditors and to perform such other orders as may be required; and that the plaintiff have general relief.

[1] The charge against this bill is that it was invalid to give the court jurisdiction over the heirs of the decedent. The argument is made that, though the heirs were all named in the bill and summoned to answer it, they are not therein alleged to be heirs of Simeon Jarrell; that the court did not acquire jurisdiction as to the heirs, because the bill does not implead them. The court had jurisdiction of the subject matter of the suit, the real estate, for that was within the county. The heirs were sufficiently named in the caption as defendants, no prayer being necessary to make them such, as the law then was and now is. Code, ch. 125, sec. 37 (sec. 4791). Then, did the court fail to acquire jurisdiction of the persons which were so named and summoned, because the bill did not directly allege the connection which they had with the suit, or affirmatively state the rights belonging to them which the suit would affect? Clearly, in our opinion, this is not a case in which the basic

pleading is so lacking in averment as to give no jurisdiction to the court to proceed to hear and determine. A bill naming as defendants thereto the persons who were heirs, was filed. These persons were duly summoned to answer the same. Appearing in response to the summons, they could readily observe from the bill what rights belonging to them were sought to be affected by the proceedings. They would see that it was proposed to sell their lands for debts of their ancestor to which the lands were subject in their hands. Thus the bill contained allegations impleading their rights. While it did not tell them they were heirs, or by the use of the term bring them in as heirs, it disclosed to them that the heirs were to be affected by the object of the suit. It did in a way implead them as heirs, for it brought in each person that was an heir and disclosed what was proposed to be done toward a subject matter in which he had a right. The heirs of the decedent were made parties to the suit by being named in the bill and summoned to answer allegations therein which plainly, even if inferentially, disclosed to them wherein their rights were to be touched or dealt with by course of law. It may be that the bill was not sufficient and was subject to demurrer. But it was a pleading to which the heirs were named as persons defendant and in which allegations were made affecting their rights. It notified them, at least insufficiently, what judgment was proposed to be taken against them. They had opportunity to object to the insufficiency of the bill, or to resist in other ways the proposed judgment of which the bill gave them notice. The bill was not, therefore, so void as to deny the heirs opportunity to care for their rights involved.

There is a wide difference between irregularity and invalidity—between error and want of jurisdiction. We have no decision holding that a decree in a case to which one has been made a party defendant without sufficient allegation against him, is void on collateral attack. We have several holding that decrees are erroneous and must be reversed for the error of irregularly or insufficiently bringing in a defendant. In some of these it is said that the decree is a nullity, but it was so considered on error, not on collateral attack. In Underwood v. Underwood, 22 W. Va. 303, a bill was held bad on demurrer for the same insufficiency that is alleged against the bill involved herein. But it is not there declared that the decree which was reversed for the error in overruling the demurrer would have been held void on collateral attack. It is not there held that the bad bill did not give jurisdiction. Also in Preston v. West, 55 W. Va. 391, 47 S. E. 152, the bill wherein one's name as a defendant had been merely inserted in the caption without allegations touching the party's interest, was held to be insufficient. The court was dealing with such procedure on appeal merely. Indeed Judge Dent in the opinion expressly negatives the idea that a judgment based upon it is open to collateral attack. O'Neal v. Stimson, 61 W. Va. 551, 56 S. E. 889, was a case of collateral attack. In it the infant parties had not been made defendants in any way. Only one as guardian for them had been made a party. They being entirely absent from the proceedings, not being at all before the court, it was rightly held that no jurisdiction had been acquired as to them.

[2] Plaintiffs further submit that there was want of jurisdiction, because it did not appear by the bill that the debt sought to be recovered by the plaintiff therein was one for which the estate of Simeon Jarrell, deceased, was liable. Such a matter does not go to the question of jurisdiction, though it may pertain to the sufficiency of the bill. Besides, it appeared from the copy of the execution exhibited with the bill that the debt was one to be paid out of the goods and chattels of the decedent. The judgment against the personal representatives may not have been binding on the heirs, but the debt on which the judgment was taken was one for which the real estate was liable if there was an insufficiency of personal assets to pay it.

Another alleged ground of insufficiency in the bill to give jurisdiction is that it does not aver that the personal assets were insufficient to pay the debts of the estate. That this is an essential allegation for a sufficient bill, must be conceded. But is a decree based on a bill that lacks such an averment void in the sense that it may be collaterally attacked? We think not. Vanfleet on Collateral Attack, sec. 282; Adams v. Thomas, 44 Ark. 267. Hereinafter we shall show that judgments and decrees are not necessarily void for want of jurisdiction because the pleadings on which they rest merely lack some material averment. The bill before us does, however, virtually allege that the personal estate was insufficient. It plainly undertakes to set up the plaintiff's judgment as a debt against the estate and says that the personal assets are insufficient to pay it. If insufficient to pay this one alleged debt, it was certainly insufficient to satisfy the other creditors which the plaintiff asked to be brought in to participate in the suit.

[3] That the court had power to decide upon the sufficiency of the cause of action presented by the bill in question, in relation to those named as defendants therein, can not be gainsaid. Then, that very power enabled the court to enter a decree based on the bill, binding until reversed by direct proceedings of review or appeal.

"The power to decide upon the sufficiency of a cause of action as presented by the complainant's pleading, like the power to decide any other legal proposition, though erroneously applied, is binding until corrected by some superior authority." 1 Freeman on Judgments (4th Ed.) sec. 118.

It was within the power of the court to say that the bill was good as against all defendants thereto. The decrees entered on the bill involved such a finding. In making that finding as a basis of the decrees the court was within its jurisdiction. It had the power to decide the question, even erroneously. Therefore, the decrees can not be collaterally assailed, though the court may have erred in adjudging the bill to be sufficient as against the heirs.

[4] We have observed that plaintiffs' collateral attack is based on that which is a mere insufficiency of pleading in the bill on which the decrees rest. Even where a cause of action is not stated by the complaint, a judgment or decree rendered thereon will not be considered open to collateral impeachment on that ground. Black on Judgments, sec. 269; 23 Cyc. 1093.

"The rule is this: Can it be gathered from the allegations, either directly or inferentially, that the party was seeking the relief granted, or that he was entitled thereto? If it can, the allegations will shield the judgment from collateral assault." Vanfleet on Collateral Attack, sec. 61.

With this rule as a test, we must assuredly say that those named as defendants to the bill under consideration could readily gather from its allegations that the plaintiff therein was seeking the very relief against them which was afterwards granted by the decrees that are now collaterally assailed.

The author from whom we have quoted above also says:

"There is no connection between jurisdiction and sufficient allegations. In other words, in order to 'set the judicial mind in motion,' or to 'challenge the attention of the court,' it is not necessary that any material allegation should be sufficient in law, or that it should even tend to show facts that are sufficient. If that were the rule, the absence of any material allegation would always make the judgment void, because it cannot be said that such a complaint has any tendency to show a cause of action. * * * When the allegations are sufficient to inform the defendant what relief the plaintiff demands—the court having power to grant it in a proper case—jurisdiction exists, and the defendant must defend himself. * * * Allegations immaterial and wholly insufficient in law may be sufficient 'to set the judicial mind in motion,' and to give a wrongful but actual jurisdiction which will shield the proceedings from collateral attack." Vanfleet on Collateral Attack, sec. 61.

"If the object of the petitioner can be ascertained from the allegations, no matter how defective they are or how many necessary ones are omitted—the court having power to grant the relief sought, and having the parties before it—the judgment is not void. A judgment is never void for defects in a petition which is amendable." Vanfleet on Collateral Attack, sec. 256.

And upon a full review of the authorities, Judge Vanfleet further says that he considers the true and only logical rule to be that if there is any petition at all invoking the action of the court, a judgment based thereon cannot be assailed collaterally because of insufficiency in the pleading.

[5] The persons named in the caption of the bill who were heirs of the decedent were aware of the proceedings against them and took advantage of an opportunity to protect their interests in the cause. They appeared by one Laidley, attorney, who signed "for widow and heirs," and filed exceptions to reports of the commissioner to whom the cause was first referred. While this appearance does not specify whose widow or what heirs Laidley represented, the only rational inference, the proper legal presumption, is that he appeared for those persons named in the bill and brought in by summons who were the widow and heirs of Simeon Jarrell, deceased. The bill seems to have been entirely sufficient to call upon the heirs to make defense in the cause, for it is plain that they did so.

Let it be noted that all the persons who owned the lands sought to be sold in the suit were made parties defendant, were summoned, and actually appeared by attorney and defended in the cause. Certainly the court thus had jurisdiction of the subject matter of the cause and of the parties thus appearing and defending in relation to it. We may readily concede that the bill was incomplete or even defective, but its incompleteness or defectiveness does not establish want of jurisdiction.

[6] Plaintiffs also submit that the decree of sale is irregular and void. It may be irregular. It might have been reversed on appeal. But it is not void. It was based on the report of a commissioner, in which the debts against the decedent's estate were ascertained. It orders a sale of the lands for the payment of those same debts. It is in line with the ultimate object of the suit. Distinctly does it appoint and constitute a special commissioner to dispose of the lands by public sale. That it is a decree of sale—a judgment of the court—its terms fully prove. The court had jurisdiction to enter it. Whatever errors were in it, were proper to be considered on appeal, but are not assailable collaterally. It is a judgment entered in a case wherein the court had power over the parties and the subject matter. It is, therefore, not open to impeachment by parties or privies in any collateral proceeding whatever, though ever so erroneous. Black on Judgments, sec. 245.

In another suit, one by these same plaintiffs against owners of the timber on the lands, the very questions herein decided have been determined against plaintiffs by the United States Circuit Court of Appeals for the Fourth Circuit. We may, therefore, cite as authority directly in point the opinion in that case. Jarrell et al. v. Cole and Crane, 215 Fed. 315, 131 C. C. A. 589.

We find the decree complained of to be a proper one. An order affirming it will be entered.

(75 W. Va. 783)

## MULLINS et al. v. LAUREL COAL & LAND CO.

(Supreme Court of Appeals of West Virginia. March 9, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

COLLATERAL ATTACK ON JUDGMENT.

A case identical with, and controlled by the decision in, Jarrell v. Laurel Coal & Land Co., 84 S. E. 933.

Appeal from Circuit Court, Boone County.

Suit by David Mullins and another against the Laurel Coal & Land Company. From decree for defendant, plaintiffs appeal. Affirmed.

John E. Blake, of Madison, for appellants. Chilton, MacCorkle & Chilton, of Charleston, Frank P. Murphy, of Madison, and E. T. England, of Logan, for appellee.

ROBINSON, P. Decision in this case is completely controlled by our decision in Jarrell v. Laurel Coal & Land Company, 84 S. E. 933, decided at this term. The cases are indeed identical, except that the plantiffs are different. This suit is by one of the heirs of Simeon Jarrell, deceased, and her husband. They were plaintiffs in the other suit, but upon their own motion were dismissed therefrom without prejudice. Then they brought this independent suit, making the same collateral attack with which we dealt in the other. Exactly the same facts are involved. All that we said in the opinion in the other case applies here.

It is suggested in the brief filed for plaintiffs that their bill may be considered as a bill to review the old suit for the sale of the lands of Simeon Jarrell, deceased. It is said that disability of coverture has saved to plaintiffs the right to file a bill of review thereto. However that may be, the bill in this case in no way purports to be a bill of review. It is a bill collaterally attacking the decrees in the old suit as void for want of jurisdiction in the court to enter them, not a bill to review them for errors. It has neither the parties, substance, prayer, or anything else from which the court below could primarily judge it to be a bill of review. That court took it to be what it is on its face, a bill of collateral attack, sustaining it as such against a demurrer, as plaintiffs sought, and upon it heard the presentation of the case of collateral attack made by plaintiffs. We can not now upon appeal shift it to the theory of a bill of review. To allow such an amendment would be to change the cause to a totally new one. Not only does the bill lack substance and prayer giving it semblance of a bill of review, but it does not even purport to bring in the parties most necessary to such a bill, all of those who were parties to the old suit, particularly the plaintiffs therein.

An order will be entered affirming the decree.

(75 W. Va. 784)

## LOWANCE v. JOHNSON.

(Supreme Court of Appeals of West Virginia. March 16, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. PRINCIPAL AND AGENT ⟸123—INFERENCE OF AGENCY—RATIFICATION OF SIMILAR ACTS.

Agency to do a particular act may be inferred from the adoption and ratification, by the principal, of acts of like kind performed for him by the agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 420–429; Dec. Dig. ⟸123.]

2. PRINCIPAL AND AGENT ⟸171—TORTS OF AGENT—LIABILITY OF PRINCIPAL.

If a person, assuming to be agent of another, performs for him an act, which he afterwards ratifies by receiving the benefits derived from it, the principal thereby becomes liable for the torts committed by the agent, within the scope of his assumed authority, in performing the act. The principal cannot accept the benefits, without also bearing the burdens, of the agent's acts.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644–655; Dec. Dig. ⟸171.]

3. FRAUD ⟸54—ACTION BY BUYER—EVIDENCE OF SIMILAR MISREPRESENTATIONS.

In an action for fraudulent representations respecting the value of bank stock, made by the owner thereof to plaintiff or his agent, to induce him to buy, evidence of similar representations, made to others near the same time, is admissible as tending to establish a general purpose to deceive.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 50, 51; Dec. Dig. ⟸54.]

4. PRINCIPAL AND AGENT ⟸158—LIABILITY OF PRINCIPAL — DECEIT ACCOMPLISHED THROUGH AGENT.

Liability for a deceit exists, whether accomplished by the deceiver in person or by agent, and whether communicated to the injured party directly or through his agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 589–598; Dec. Dig. ⟸158.]

5. FRAUD ⟸8—FALSE REPRESENTATIONS—LIABILITY.

If a person makes false representations with intent that they be communicated to another, and they are so communicated, believed, and acted on to the injury of such other, the person making them is liable.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 1; Dec. Dig. ⟸3.]

Error to Circuit Court, Monroe County.

Action by W. F. Lowance against A. E. Johnson. Verdict for plaintiff set aside, new trial awarded, and plaintiff brings error. Reversed, and judgment entered for plaintiff.

R. Kemp Morton, of Charleston, for plaintiff in error. R. F. Dunlap, of Hinton, J. W. Arbuckle, of Lewisburg, and Jno. L. Rowan, of Union, for defendant in error.

It was within the power of the court to say that the bill was good as against all defendants thereto. The decrees entered on the bill involved such a finding. In making that finding as a basis of the decrees the court was within its jurisdiction. It had the power to decide the question, even erroneously. Therefore, the decrees can not be collaterally assailed, though the court may have erred in adjudging the bill to be sufficient as against the heirs.

[4] We have observed that plaintiffs' collateral attack is based on that which is a mere insufficiency of pleading in the bill on which the decrees rest. Even where a cause of action is not stated by the complaint, a judgment or decree rendered thereon will not be considered open to collateral impeachment on that ground. Black on Judgments, sec. 269; 23 Cyc. 1093.

"The rule is this: Can it be gathered from the allegations, either directly or inferentially, that the party was seeking the relief granted, or that he was entitled thereto? If it can, the allegations will shield the judgment from collateral assault." Vanfleet on Collateral Attack, sec. 61.

With this rule as a test, we must assuredly say that those named as defendants to the bill under consideration could readily gather from its allegations that the plaintiff therein was seeking the very relief against them which was afterwards granted by the decrees that are now collaterally assailed.

The author from whom we have quoted above also says:

"There is no connection between jurisdiction and sufficient allegations. In other words, in order to 'set the judicial mind in motion,' or to 'challenge the attention of the court,' it is not necessary that any material allegation should be sufficient in law, or that it should even tend to show facts that are sufficient. If that were the rule, the absence of any material allegation would always make the judgment void, because it cannot be said that such a complaint has any tendency to show a cause of action. * * * When the allegations are sufficient to inform the defendant what relief the plaintiff demands—the court having power to grant it in a proper case—jurisdiction exists, and the defendant must defend himself. * * * Allegations immaterial and wholly insufficient in law may be sufficient 'to set the judicial mind in motion,' and to give a wrongful but actual jurisdiction which will shield the proceedings from collateral attack." Vanfleet on Collateral Attack, sec. 61.

"If the object of the petitioner can be ascertained from the allegations, no matter how defective they are or how many necessary ones are omitted—the court having power to grant the relief sought, and having the parties before it—the judgment is not void. A judgment is never void for defects in a petition which is amendable." Vanfleet on Collateral Attack, sec. 256.

And upon a full review of the authorities, Judge Vanfleet further says that he considers the true and only logical rule to be that if there is any petition at all invoking the action of the court, a judgment based thereon cannot be assailed collaterally because of insufficiency in the pleading.

[5] The persons named in the caption of the bill who were heirs of the decedent were aware of the proceedings against them and took advantage of an opportunity to protect their interests in the cause. They appeared by one Laidley, attorney, who signed "for widow and heirs," and filed exceptions to reports of the commissioner to whom the cause was first referred. While this appearance does not specify whose widow or what heirs Laidley represented, the only rational inference, the proper legal presumption, is that he appeared for those persons named in the bill and brought in by summons who were the widow and heirs of Simeon Jarrell, deceased. The bill seems to have been entirely sufficient to call upon the heirs to make defense in the cause, for it is plain that they did so.

Let it be noted that all the persons who owned the lands sought to be sold in the suit were made parties defendant, were summoned, and actually appeared by attorney and defended in the cause. Certainly the court thus had jurisdiction of the subject matter of the cause and of the parties thus appearing and defending in relation to it. We may readily concede that the bill was incomplete or even defective, but its incompleteness or defectiveness does not establish want of jurisdiction.

[6] Plaintiffs also submit that the decree of sale is irregular and void. It may be irregular. It might have been reversed on appeal. But it is not void. It was based on the report of a commissioner, in which the debts against the decedent's estate were ascertained. It orders a sale of the lands for the payment of those same debts. It is in line with the ultimate object of the suit. Distinctly does it appoint and constitute a special commissioner to dispose of the lands by public sale. That it is a decree of sale—a judgment of the court—its terms fully prove. The court had jurisdiction to enter it. Whatever errors were in it, were proper to be considered on appeal, but are not assailable collaterally. It is a judgment entered in a case wherein the court had power over the parties and the subject matter. It is, therefore, not open to impeachment by parties or privies in any collateral proceeding whatever, though ever so erroneous. Black on Judgments, sec. 245.

In another suit, one by these same plaintiffs against owners of the timber on the lands, the very questions herein decided have been determined against plaintiffs by the United States Circuit Court of Appeals for the Fourth Circuit. We may, therefore, cite as authority directly in point the opinion in that case. Jarrell et al. v. Cole and Crane, 215 Fed. 315, 131 C. C. A. 589.

We find the decree complained of to be a proper one. An order affirming it will be entered.

(75 W. Va. 783)

## MULLINS et al. v. LAUREL COAL & LAND CO.

(Supreme Court of Appeals of West Virginia. March 9, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

COLLATERAL ATTACK ON JUDGMENT.

A case identical with, and controlled by the decision in, Jarrell v. Laurel Coal & Land Co., 84 S. E. 933.

Appeal from Circuit Court, Boone County.

Suit by David Mullins and another against the Laurel Coal & Land Company. From decree for defendant, plaintiffs appeal. Affirmed.

John E. Blake, of Madison, for appellants. Chilton, MacCorkle & Chilton, of Charleston, Frank P. Murphy, of Madison, and E. T. England, of Logan, for appellee.

ROBINSON, P. Decision in this case is completely controlled by our decision in Jarrell v. Laurel Coal & Land Company, 84 S. E. 933, decided at this term. The cases are indeed identical, except that the plantiffs are different. This suit is by one of the heirs of Simeon Jarrell, deceased, and her husband. They were plaintiffs in the other suit, but upon their own motion were dismissed therefrom without prejudice. Then they brought this independent suit, making the same collateral attack with which we dealt in the other. Exactly the same facts are involved. All that we said in the opinion in the other case applies here.

It is suggested in the brief filed for plaintiffs that their bill may be considered as a bill to review the old suit for the sale of the lands of Simeon Jarrell, deceased. It is said that disability of coverture has saved to plaintiffs the right to file a bill of review thereto. However that may be, the bill in this case in no way purports to be a bill of review. It is a bill collaterally attacking the decrees in the old suit as void for want of jurisdiction in the court to enter them, not a bill to review them for errors. It has neither the parties, substance, prayer, or anything else from which the court below could primarily judge it to be a bill of review. That court took it to be what it is on its face, a bill of collateral attack, sustaining it as such against a demurrer, as plaintiffs sought, and upon it heard the presentation of the case of collateral attack made by plaintiffs. We can not now upon appeal shift it to the theory of a bill of review. To allow such an amendment would be to change the cause to a totally new one. Not only does the bill lack substance and prayer giving it semblance of a bill of review, but it does not even purport to bring in the parties most necessary to such a bill, all of those who were parties to the old suit, particularly the plaintiffs therein.

An order will be entered affirming the decree.

(75 W. Va. 784)

## LOWANCE v. JOHNSON.

(Supreme Court of Appeals of West Virginia. March 16, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. PRINCIPAL AND AGENT ⟸123—INFERENCE OF AGENCY—RATIFICATION OF SIMILAR ACTS.

Agency to do a particular act may be inferred from the adoption and ratification, by the principal, of acts of like kind performed for him by the agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 420–429; Dec. Dig. ⟸123.]

2. PRINCIPAL AND AGENT ⟸171—TORTS OF AGENT—LIABILITY OF PRINCIPAL.

If a person, assuming to be agent of another, performs for him an act, which he afterwards ratifies by receiving the benefits derived from it, the principal thereby becomes liable for the torts committed by the agent, within the scope of his assumed authority, in performing the act. The principal cannot accept the benefits, without also bearing the burdens, of the agent's acts.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644–655; Dec. Dig. ⟸171.]

3. FRAUD ⟸54—ACTION BY BUYER—EVIDENCE OF SIMILAR MISREPRESENTATIONS.

In an action for fraudulent representations respecting the value of bank stock, made by the owner thereof to plaintiff or his agent, to induce him to buy, evidence of similar representations, made to others near the same time, is admissible as tending to establish a general purpose to deceive.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 50, 51; Dec. Dig. ⟸54.]

4. PRINCIPAL AND AGENT ⟸158—LIABILITY OF PRINCIPAL—DECEIT ACCOMPLISHED THROUGH AGENT.

Liability for a deceit exists, whether accomplished by the deceiver in person or by agent, and whether communicated to the injured party directly or through his agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 589–598; Dec. Dig. ⟸158.]

5. FRAUD ⟸8—FALSE REPRESENTATIONS—LIABILITY.

If a person makes false representations with intent that they be communicated to another, and they are so communicated, believed, and acted on to the injury of such other, the person making them is liable.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 1; Dec. Dig. ⟸8.]

Error to Circuit Court, Monroe County.

Action by W. F. Lowance against A. E. Johnson. Verdict for plaintiff set aside, new trial awarded, and plaintiff brings error. Reversed, and judgment entered for plaintiff.

R. Kemp Morton, of Charleston, for plaintiff in error. R. F. Dunlap, of Hinton, J. W. Arbuckle, of Lewisburg, and Jno. L. Rowan, of Union, for defendant in error.

WILLIAMS, J. By this writ of error plaintiff seeks reversal of an order of the circuit court of Monroe county, made on the 13th of November, 1912, setting aside a verdict found for him and awarding a new trial, in an action of trespass on the case, for alleged false and fraudulent representations made by defendant to him, respecting the financial condition of the Bank of Union, and the value of its capital stock, whereby he was deceived and induced to purchase from said defendant three shares of said stock, of the par value of $100, but then worthless, at the price of $90 per share.

Plaintiff's counsel insist that there is sufficient evidence to support the verdict, and that no error was committed during the trial, respecting the admission or exclusion of evidence, or in giving or refusing instructions, which would justify setting aside the verdict. It is, therefore, necessary to review both the evidence and the rulings of the court.

The bank was insolvent at the time plaintiff purchased, and had been so for some time previous thereto, but its real condition was concealed by its directors. Some of them may have been, and doubtless were, ignorant of its true condition. A former cashier had taken his own life, and it was generally supposed he did so because of the bad condition of the bank's affairs. This occurred on April 10, 1905. In May following, W. G. Caperton, a stockholder and director, offered to sell 149 shares of his stock to defendant at $25 per share. Defendant did not then buy, but, about two weeks later, purchased the same shares, at $10 a share. Before purchasing the stock, defendant examined the books and assets of the bank, assisted by J. D. Logan, its president. Defendant says his investigation was not thorough, because he was not familiar with the financial ability of some of the makers and indorsers of notes held by the bank. Defendant says he purchased the stock about the last of May, 1905. He became a director on the 31st of May, and was again elected on June 16, 1905. The bank was then reorganized. The bank was carrying on its books bills and notes, as live assets, that were many years overdue, and large overdrafts likewise of long standing. These claims were mostly against its officers. Although the bank was then insolvent, sworn financial statements were published on the 7th of June, and the 8th of September, 1905, showing it to have a surplus fund of $12,000. In order to meet the bank's obligations, the old directors had borrowed from other banks about $18,000, for which they had given their joint individual note, and, in addition to paying $10 a share, defendant assumed W. G. Caperton's personal liability for that loan, which was about the one-sixth thereof, the other directors who were jointly liable with him being solvent. These loans were later paid in full by the bank itself. Almost immediately after he had purchased the 149 shares of stock, defendant began selling it to various persons, in order to interest them, as he says, and thus restore the confidence of the public in the solvency and stability of the bank.

Plaintiff did not purchase the three shares of stock from defendant directly, and admits there was no direct communication between them respecting the transaction. His attention was called to the fact that defendant was offering stock for sale by S. S. Steele, who had previously bought some from him at $75 per share. Steele told plaintiff what he had paid for his stock, and that defendant had raised his price to $90 a share, saying it was worth more than when he (Steele) had bought. This conversation between Steele and plaintiff was about a month after Steele's purchase, and occurred, casually, at plaintiff's house at Peterstown, several miles from Union, where Steele had gone on a social visit, and not for the purpose of selling bank stock. Steele does not claim that he was at that time defendant's agent, but says plaintiff simply asked him if he knew where he could safely invest some money, and, knowing defendant had bank stock for sale, he mentioned it to plaintiff, and he replied that he had heard the bank was not in good condition and did not want the stock. A few days after that Steele was again at plaintiff's house, having gone, this time, to meet his daughters who were returning home from teaching school and had stopped in Peterstown to visit plaintiff's wife, their old schoolmate and friend, and the question of the bank stock, as an investment, again came up, casually, and plaintiff authorized Steele to purchase three shares for him. The exact date of this conversation is not shown, but it was about a month after Steele had purchased some stock of defendant. After returning to Union, Steele wrote plaintiff that he had secured the stock for him, and plaintiff sent his check for $270, drawn on another bank, payable to Steele's order, and dated July 13, 1905. The check is indorsed first by S. S. Steele and then by John Osborne. The name of A. E. Johnson, the defendant, does not appear on it. Defendant denies that he was the owner of the stock sold, and denies that either Steele or Osborne was his authorized agent to sell his stock. Plaintiff admits that he got all the information he had respecting the value of the stock through Steele, and says Steele told him it was claimed by those who had charge of the bank that the stock would pay 6 per cent. or more, and he relied upon the truth of that representation and was thereby induced to buy. Defendant and Osborne both swear the latter was the owner of the stock sold to plaintiff. But counsel contend in brief that Osborne's claim of ownership was only a pretense and subterfuge to conceal defendant's real interest in the transaction; and there is evidence in the record

which would justify the jury in reaching such a conclusion. They could well believe that Osborne was defendant's attorney and general agent to sell his stock, and that defendant was anxious to dispose of all the stock he had. He was defendant's legal adviser, and spent the night with him just previous to defendant's purchase of the 149 shares from W. G. Caperton, and rode with defendant in his buggy, on the next day, to the home of Cary Nickell, one of the directors, where they met J. D. Logan, president of the bank, and closed the deal with him as Caperton's agent, at $10 a share for the 149 shares of stock. Osborne admits he prepared the contract whereby defendant assumed Caperton's liability on the directors' notes securing certain loans made to the bank, and says defendant signed it and then delivered to him his check, payable to Caperton, for the stock, and he carried the check to Caperton. He further says he thought the stock was a good bargain at $10 per share, and he applied to Logan to let him have 20 of the 149 shares, and that he replied he had no objection if defendant would consent, and that defendant did consent and advanced the money for him. But he admits defendant retained the stock to secure himself. Defendant says Osborne had no right to sell any of it unless and until authorized by him. There is no evidence that Osborne paid for any of the stock, otherwise than by turning the proceeds of sales of it, when made by him, over to defendant. Plaintiff's check, being payable to Steele, was indorsed by him and left with the bank, and Osborne then indorsed it, had the funds placed to his own credit, and immediately checked it out to defendant. Shortly before this sale to plaintiff, Osborne had sold some of defendant's stock, at $90 per share, to James Campbell, under a written guaranty by defendant that it would pay a dividend of 6 per cent., giving Campbell a year in which to rescind the sale, if it did not pay such dividend. But he says he did this without previous authority, and the defendant ratified the sale and signed the guaranty contract. He further says he interested several parties in the bank, for the "purpose of enhancing the value of the stock," but that he got no compensation for doing it. Quoting his language, he says:

"I stated that he [defendant] advanced the money. He knew my circumstances. And I felt under obligation to help him all I could."

Help him in what way? we ask, unless in the manner shown by the record, by boosting this worthless bank stock and disposing of it for his client and principal, to unsuspecting purchasers, ignorant of its value, at an enormous profit. Osborne made other sales and trades of stock for defendant that were afterwards ratified by him. He says:

"I never acted as his agent to sell the stock, although I knew he would ratify any contract I made, because I wouldn't make any that I didn't know would be acceptable. I made two tracts [trades]. I traded some bank stock to Mr. Liveless for some cold storage stock, which was practically trading the devil for a witch."

It does not appear that defendant ever failed or refused to ratify a single sale or trade made by him.

[1] Although there is no direct evidence of Osborne's express authority to sell the particular stock in question, may not a general agency to sell all the stock defendant owned be inferred from these facts and circumstances showing their course of dealings? We think so. It was so held in Downer & Co. v. Morrison, 2 Grat. (42 Va.) 237. Their course of dealing between them was consistent only with the theory of agency. On what other theory could Osborne be justified in saying he knew defendant would ratify any sale or trade of stock he might make? The law is thus stated in 31 Cyc. 1221:

"The subsequent adoption and ratification by the principal of similar acts done by the agent may justify the inference that the agent has authority to do acts of that kind."

Numerous decisions are cited in support of the text. The same principle is also stated in 1 A. & E. E. L. 96.

[2] Again, if it be assumed that Osborne sold the stock without authority, but representing himself to be defendant's agent, and defendant afterwards ratified the sale, he is likewise liable for any fraudulent representations Osborne may have made to induce plaintiff to buy. A principal cannot ratify the act of an unauthorized agent, and accept the resulting benefits, without also becoming responsible for the burdens. He adopts the unauthorized act, cum onere. By ratifying the act he waives the agent's want of authority, assumes the transaction as it was done by the agent, and "becomes bound by all the instrumentalities used by the agent, within the scope of the assumed authority, including his frauds, misrepresentations, and other torts." 31 Cyc. 1289; 1 Clark & Skyles on Agency, 272; Lane v. Black, 21 W. Va. 617; Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467; Morehouse v. Northrop, 33 Conn. 380, 89 Am. Dec. 211; Gulf, etc., Ry. Co. v. Reed, 80 Tex. 362, 15 S. W. 1105, 26 Am. St. Rep. 749; Clark v. Ralls (Iowa) 24 N. W. 567; and Wilder v. Beede, 119 Cal. 646, 51 Pac. 1083.

[3] Defendant's ratification is shown by receiving the fruits of the sale with knowledge thereof. Osborne immediately turned the money over to him. There being evidence to support the claim of agency, either by inference from the course of dealings, or by subsequent ratification, it therefore follows that any statements made by Osborne, for the purpose of inducing plaintiff to purchase the stock is admissible in evidence against defendant. Steele says he bought his stock, through Osborne, from defendant, about a month before the sale to plaintiff, and that all information he had concerning the bank's condition he got from them, that defendant

told him at the time he bought that the stock was worth from 90 to 93 cents on the dollar, and if a certain debt, known as the Englishman's debt, could be collected, it would pay more, but that, regardless of that debt, it was worth $90 a share, and would pay a dividend at that price; that he communicated these representations to plaintiff because he believed them to be true, and thought the stock, at that price, was a good investment; that Osborne first told him to sell three shares to plaintiff, at the same price and on the same terms of the previous sale defendant had made to Campbell, which was at $90 a share, with a guaranty that it would pay 6 per cent. dividend, and that a little later, and before he notified plaintiff he could get the stock, defendant, Osborne, and he met at the bank, and defendant, in his presence, approved and ratified what Osborne had authorized him to do. Steele, although a director of the bank and a member of the executive committee, says he did not know the bank's real condition, never having listed and examined its assets, his duties as member of the executive committee not necessitating his doing that, but only requiring him to pass upon loans and renewals of notes. He may have been negligent not to know the bank was insolvent, but his negligence is no excuse for defendant's misrepresentations as to the value of the stock. He says he relied on what Osborne and defendant had told him as being true, and he had a right to do so. Their statements were certainly made to be accepted as true. Witness O. L. Miller testified that he bought some stock from defendant in April, 1906, and that defendant told him that he and Mr. Dwyer had examined the books of the bank and ascertained that the stock was worth 75 cents on the dollar, and that, if certain debts the bank held were collected, it was worth more, but that, without the collection of those debts, it was worth at least 75 cents on the dollar. C. B. Hunter, another witness for plaintiff, testified that, on June 15, or 16, 1905, he bought five shares of stock from defendant and paid him $100 a share for it, and that defendant represented to him that it was worth dollar for dollar.

This testimony was admissible to show intent to deceive. Evidence of similar acts and statements done and said, near the same time, concerning the value of the bank stock, for the purpose of inducing others to buy, is admissible to prove a general scheme or plan by which defendant would be enabled to deceive the public into buying it. First Nat. Bank of Pennsboro v. Barker et al., 83 S. E. 898; Wilson v. Carpenter's Adm'r, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824; 1 Wigmore on Evidence, § 304. "Where fraud in the sale and purchase of property is in issue, evidence of other frauds of like character, committed by the same party, at or about the same time, is admissible. Large latitude is always given to the admission of evidence where the charge is fraud." Piedmont Bank et al. v. Hatcher et al., 94 Va. 229, 26 S. E. 505.

[4] It is contended that Steele acted as agent of plaintiff in buying, and not as agent of defendant in selling, the stock. Whether he acted as the agent of the one or the other makes no difference as to the liability of defendant; the rule of law being that, where false representations are made to an agent, for the purpose of inducing him to act upon them in behalf of his principal, the latter has a right of action for the fraud. 20 Cyc. 81; Culliford v. Gadd, 60 N. Y. Super. Ct. 343, 17 N. Y. Supp. 457, affirmed in 139 N. Y. 618, 35 N. E. 205; Raymond v. Howland, 12 Wend. (N. Y.) 176. "Where plaintiffs are induced to take stock in the corporation in reliance on the false representations of the president, made to another, with intent that they shall be communicated to plaintiffs to induce them to take stock, or where their agent, in reliance on such representations, purchases stock for them, the president is liable to them directly." Hubbard v. Weare, 79 Iowa, 678, 44 N. W. 915. This case is very similar to the one at bar, and is directly in point.

[5] The jury had a right to believe, from all the circumstances relating to defendant's purchase, the price he paid for the stock, the numerous declarations respecting its value, and how much dividend it would earn, proven to have been made by him, after his purchase, examination of the bank's assets, and, from his effort to induce Campell to retain and pay for the stock which he had conditionally bought, by sending him his own check to make good his guaranty that the stock would earn 6 per cent. dividend, at $90 a share, a circumstance defendant does not deny, that he was endeavoring to create public confidence in the solvency of the bank, in order that he might be able to sell his stock at a great profit. The rule of law in such case is that, although the representations, intended to deceive the public, were not made directly to the party deceived or his agent, but to another, who communicated them to him and thereby misled him to his injury, the person making such false representations is liable. 20 Cyc. 81. This is a familiar principle, and many decisions are cited in support of the text in a footnote thereto. The question has frequently arisen in suits against corporations and their promoters for false representations published as to the value of stock or of the amount of the corporation's assets. The testimony of defendant and Mr. Osborne conflicts directly with that of Mr. Steele, but the jury were the triers of fact and the only tribunal to pass upon the value of conflicting testimony of witnesses. The verdict could not properly have been set aside for want of sufficient evidence to sustain it.

It is urged that plaintiff's instruction No. 3 was improperly given, and that defendant's No. 6 was erroneously refused. Objection to

plaintiff's instruction is that it assumes that Steele was the agent of plaintiff. That was an assumption warranted by evidence proving the fact, which is not denied. Plaintiff and Steele both testify that plaintiff authorized Steele to buy three shares of stock for plaintiff, and no other witness denies it. Defendant's instruction, refused, does not state the law correctly, as applied to the facts of the case. The jury might believe all the facts submitted to them by the instruction, and still defendant would be liable for other reasons, yet the instruction binds them to find for defendant if they believe those particular facts.

We find no error for which the court should have set aside the verdict, and will therefore reverse the order of the court, reinstate the verdict, and enter judgment thereon.

Reversed, and judgment entered here.

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(75 W. Va. 370)

## JAGGIE v. DAVIS COLLIERY CO.

(Supreme Court of Appeals of West Virginia. Dec. 22, 1914. Rehearing Denied April 20, 1915.)

1. MASTER AND SERVANT ⟸118—DUTY OF MINE OPERATOR—SAFE APPLIANCES.

It is the duty of a mine operator to maintain his motor and motor tracks in a reasonably safe and suitable condition for the safety of his servants employed to operate the same. Code 1913, c. 15H, § 24 (sec. 483), does not impose upon the mine foreman the duty to see that either the motor or tracks in the mine are properly maintained, and consequently the master is not relieved from his common-law duty in respect thereto.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. ⟸118.]

2. MASTER AND SERVANT ⟸118—SAFE "APPLIANCES"—MOTOR TRACKS.

Motor tracks, although constituting a permanent part of the mine, are nevertheless "appliances" for the removal of coal therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. ⟸118.

For other definitions, see Words and Phrases, First and Second Series, Appliance.]

3. MASTER AND SERVANT ⟸141—INJURY TO MINE EMPLOYÉ—FAILURE TO PRINT AND POST RULE—LIABILITY OF OPERATOR.

Code 1913, c. 15H, § 34 (sec. 493), requires a mine operator to adopt, print, and post rules for the government and operation of his mine, which shall embrace "all the work pertaining thereto in and outside of the same," and for the failure to print and post a rule regulating the number of cars that may be hauled by a motor, proximately resulting in injury to one of his servants, he is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 283; Dec. Dig. ⟸141.]

4. WITNESSES ⟸379—CONTRADICTORY STATEMENTS—ADMISSIBILITY.

Contradictory statements by a witness, as to material facts, are admissible in rebuttal for the purpose of weakening or destroying the value of his testimony, provided the foundation therefor has been laid by proper cross-examination, but are not admissible as primary evidence of the controverted fact.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220–1222, 1247–1256; Dec. Dig. ⟸379.]

5. MASTER AND SERVANT ⟸270—DEATH OF MINE EMPLOYÉ—EVIDENCE—REPORT OF INSPECTOR.

The report of a district mine inspector, respecting the condition of the interior of a coal mine, is not evidence in the trial of an action for the wrongful death of an employé in the mine, caused by the alleged negligence of the mine operator.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913–927, 932; Dec. Dig. ⟸270.]

6. NEGLIGENCE ⟸136—EVIDENCE—CONFLICTING EVIDENCE—QUESTION FOR JURY.

Negligence is a question for the jury when it depends upon the existence of certain facts respecting which the testimony is conflicting.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. ⟸136.]

7. TRIAL ⟸143 — WEIGHT OF EVIDENCE — QUESTION FOR JURY.

The jury are the sole judges of the weight and value of conflicting testimony of witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. ⟸143.]

Error to Circuit Court, Randolph County.

Action by Benjamin J. Jaggie, administrator, etc., against the Davis Colliery Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. A. Bowers, of Elkins, for plaintiff in error. H. G. Kump, of Elkins, for defendant in error.

WILLIAMS, J. Plaintiff's intestate, who was his son, was employed as motorman in defendant's coal mine, and, as he was bringing a train of loaded cars out of the mine, the motor was derailed and ran against the props at the side of the haulway supporting the roof, knocking some of them down and causing loose rock and slate overhead to fall on him and kill him. Plaintiff recovered a judgment for $6,000 for his alleged wrongful death, and defendant was awarded this writ of error. The declaration contains 11 counts. A demurrer was interposed to it and to each separate count. The court sustained the demurrer to the third, fourth, seventh, eighth, and ninth counts, and overruled it as to all the others. A number of errors are assigned. We will first consider the one relating to the overruling of the demurrer to the six remaining counts.

[1, 2] The first count, briefly stated, avers that it was defendant's duty to maintain a reasonably safe and suitable motor track in its mine; that it failed to perform its duty in this respect; that the track was defective, uneven, and unsafe, and by reason thereof plaintiff's intestate was killed while engaged in the regular performance of services for defendant. The overruling of the demurrer to this count presents the legal question whether it was defendant's duty to maintain a rea-

sonably safe and suitable track in its mine. Such was unquestionably the master's duty at the common law; it was one of the primary duties a master owed to his servant to furnish him a place and appliances, reasonably safe, in and with which to work. Motor tracks in the main haulway of a coal mine partake of the nature of both a place and an appliance. They are permanently laid in the mine, and therefore a part of the place; and they are essential to the operation of the motor, and hence an appliance for the removal of coal. "'Appliance' is anything brought into use as a means to effect some end." Honaker v. Board of Education, 42 W. Va. 174, 24 S. E. 545, 32 L. R. A. 413, 57 Am. St. Rep. 847. Machinery, apparatus, and premises (Collins v. Harrison, 25 R. I. 489, 56 Atl. 678, 64 L. R. A. 156), a gate on the side of the platform of a street car (Stappers v. Interurban St. Ry. Co., 56 Misc. Rep. 337, 106 N. Y. Supp. 854), scaffolding for workmen (Phœnix Bridge Co. v. Castleberry, 131 Fed. 175), skids laid over a trench on which iron pipes are placed to rest there until lowered into a trench (Tamaseric v. Beckwith, 145 App. Div. 78, 129 N. Y. Supp. 361, have all been held to be appliances. "Appliances of transportation" include the road bed, tracks, cars, and engines. Burns v. Penna. R. R. Co., 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811.

But the principal question with which we are confronted in this case is: Does the statute requiring a mine operator to employ a mine foreman, and prescribing the mine foreman's duties, relieve the operator from his common-law duty to maintain a reasonably safe and suitable track, after he has employed a mine foreman? It is settled by previous decisions that section 24, c. 15H, serial section 483, Code 1913, defining the mine foreman's duties, discharges the master from liability to his servant for injury resulting from failure to do any of those things which are enjoined upon the mine foreman, provided the mineowner or operator has used reasonable diligence to procure a suitable mine foreman. If he has done his duty in this respect, the mine foreman is then held to occupy the relation of fellow servant, and not of vice principal or agent of the master, to every other employé in the mine, in respect to those things expressly given in his charge by the statute. Williams v. Thacker Coal & Coke Co., 44 W. Va. 599, 30 S. E. 107, 40 L. R. A. 812; McMillan v. Coal Co., 61 W. Va. 531, 57 S. E. 129, 11 L. R. A. (N. S.) 840; Squilache v. Coal & Coke Co., 64 W. Va. 337, 62 S. E. 446; Bralley v. Coal & Coke Co., 66 W. Va. 278, 66 S. E. 684, 40 L. R. A. (N. S.) 945, 19 Ann. Cas. 510; Peterson v. Paint Creek Collieries Co., 71 W. Va. 334, 76 S. E. 664; and Helliel v. Piney Coal & Coke Co., 70 W. Va. 45, 73 S. E. 289. The statute says the mine foreman shall "keep a careful watch over the ventilating apparatus and the airways, traveling ways, pumps and drainage." This direction is general. In other parts of the section his duties with respect to these things are specifically set forth. Respecting the traveling ways and ventilation, he is required to see that proper break-throughs are made or that brattice is used; that no loose coal, slate, or rock is hanging overhead or along the haulways; that sufficient props, caps, and timbers are furnished to the miners in their respective places of work; that the water is drained out of the working places and they are kept dry, as near as practicable, while the miners are at work; that recesses are made not less than 100 feet apart along the haulways, between the wagon and the ribs, for a refuge place for the men; and, on all haulways, where hauling is done by machinery of any kind, he is required to provide a proper system of signals and a conspicuous light, and to see that such conspicuous light is carried on the front and rear of every trip of cars when in motion in a mine. A number of other duties of the mine foreman are specifically named in the statute. But nowhere in it is he expressly given supervision of the motor tracks and required to see that they are maintained in a safe and suitable condition; nor do we think it can be fairly implied from the language of the statute that the Legislature meant to impose that particular duty upon the mine foreman. To lay a track properly requires engineering skill; skill that a mine foreman, possessing all the requisites prescribed by the statute for his qualification as a mine boss, is not presumed to have. By defining the mine foreman's duties with such great particularity, and expressly naming the things committed to his charge, and omitting to mention the supervision of the motor tracks as one of them, although it is evident the Legislature had in mind the removal of coal by electric motors, for it required the foreman to provide a system of lights and signals on haulways where hauling was done by machinery, evinces a clear legislative purpose not to include the care of the tracks as a part of his duties. Supervision of the tracks is not a duty to be implied; it is not essential to the complete performance of any of the acts expressly required of the mine foreman. By the common law the servant was given a right of action for neglect of duty proximately causing him injury, and by statute his personal representative is given such right of action in case of his death by such neglect of duty, and such rights can be taken away only when the intention of the Legislature to do so clearly appears by the express language of the statute or by necessary implication. The statute, being in derogation of a common-law right, is subject to the rules of strict interpretation. In Mitchell v. United States Coal & Coke Co., 67 W. Va. 480, 68 S. E. 366, we held it was the master's duty to see that the insulator on the motor, protecting the wire that connected with the trolley, was kept in proper condition. In

Humphreys v. Raleigh Coal & Coke Co., 80 S. E. 803, we held that the mine foreman statute did not relieve the mine operator from "his common-law duty to exercise reasonable care to provide reasonably safe machinery, tools, and appliances for use in the mine, and make the mine a reasonably safe place for work, except in so far as the duty is devolved upon the mine foreman." In Cheeks v. Virginia-Pocahontas Coal Co., 82 S. E. 756, we held the statute did not exonerate the mineowner or operator from his duty to exercise reasonable care "to provide safe and suitable appliances, like a motor, for use in the mine." And in Crockett, Adm'r, v. Black Wolf Coal & Coke Co., 83 S. E. 987, decided at the present term, we held that the mineowner or operator is not relieved from his common-law duty to see that the trolley wire in a coal mine is maintained in a reasonably safe condition. The tracks are just as essential to the successful operation of an electric motor as the trolley wire, both are appliances used in the mines for the removal of the coal, and it is the imperative duty of the master to see that all those things, the tracks, trolley wire, and motor, are maintained in a reasonably safe condition. The demurrer to the first count was therefore properly overruled.

For the reason already given, it was likewise proper to overrule the demurrer to the second count, which avers that defendant furnished a motor with defective, imperfect, and broken wheels which proximately caused the death of plaintiff's intestate. But we may properly say here and now that there is no evidence to support this count.

The fifth, sixth, tenth, and eleventh counts will be considered together. The fifth count avers that the defendant negligently and carelessly overloaded the motor, that its capacity was limited to 19 loaded cars, and that defendant negligently caused 25 loaded cars to be attached to it, thereby causing its derailment resulting in the death of plaintiff's intestate. The sixth count charges negligence in two particulars, (1) overloading the motor, and (2) in overcharging the trolley wire with electricity, which negligent acts combined caused the derailment and the death of plaintiff's intestate. There is no evidence to support the averment of an overcharge of electric current. But the demurrer to the two counts last mentioned was properly overruled, as they averred negligent overloading by defendant. It cannot be inferred from the allegations that it was done by a fellow servant of deceased. Whether or not it was by a fellow servant depended on the evidence.

[3] The tenth count charges negligence in failing to adopt and print rules prescribing the number of car loads to be hauled on a trip, and that on account of its neglect of duty in this respect the motor was overloaded, causing its derailment. The eleventh count avers that the defendant did prescribe special rules pertaining to the work carried on inside and outside of the mine, and in one of said rules prescribed that not more than 19 loaded cars should be hauled by a motor on one trip, but that it disregarded its said rule and negligently and carelessly overloaded the motor causing its derailment and the death of intestate. The validity of counts 10 and 11 depends upon the duty of a mineowner or operator respecting the making and publishing of rules for the safety and security of the miners. Section 34, c. 15H, serial section 493, Code 1913, requires every mine operator to adopt "special rules for the government and operation of his mine or mines, covering all the work pertaining thereto in and outside of the same, which however, shall not be in conflict with the provisions of the mining laws of this state." Such rules are required to be published in all the languages spoken by at least 10 of his employés, and posted in certain designated places about the mine; and the operator is also required to furnish each employé a copy of the printed rules when requested. Does the statute contemplate the making of a rule regulating the operation of motors and limiting the maximum number of loaded cars that they may haul? We think it does. Its terms are very broad and comprehensive. The rules are expressly intended for the government and operation of the mine, and the statute says they shall embrace "all the work pertaining thereto, in and outside of the same." Hence a rule prescribing the maximum number of cars to be hauled by a motor would seem to be included, as it pertains to the operation of the mine. There is more danger in operating a long train than a short one, and a rule on the subject would seem to be a reasonable requirement. The tenth and eleventh counts were therefore good, and the demurrer thereto properly overruled.

[4] We will next consider the assignment relating to the action of the court in permitting William Scott, witness for plaintiff, to testify respecting an alleged declaration, made some time after the accident concerning the cause thereof, by mine foreman Condry, one of defendant's witnesses. Scott's testimony was rebuttal evidence and was for the purpose of contradicting Condry. The foundation therefor had been laid in the cross-examination of Condry. In his examination in chief Condry had testified as to the cause of the derailment, and on cross-examination he was asked if he had not told witness Scott, shortly after the accident, that it was caused by a bad joint, and denied making the statement. The fact was material to the issue, and Scott was permitted to testify that he did tell him it was caused by a bad joint in the rail. The evidence was clearly admissible for the purpose of contradiction. It was not offered as evidence in chief, and of course would not be admissible as such.

[5] The court refused to permit the de-

fendant to introduce, as evidence, the report of the district mine inspector, for the purpose of proving the condition of the mine. There was clearly no error in that. The district mine inspector's report was not proper evidence on the trial of the cause. Moreover, if admitted, it would only have been self-serving to the witness, for he was there in person and testified as to what he knew about the condition of the mine when he examined it, which was some days after the accident.

[6, 7] The fourth and fifth assignments relate to the giving of certain instructions for plaintiff and the refusal to give certain others asked for by defendant. But before taking them up we will consider the question of the sufficiency of plaintiff's evidence, falling under the sixth, and last, assignment of error relating to the overruling of defendant's motion to set aside the verdict. The evidence is very conflicting as to what caused the derailment of the motor. There was a joint in one of the rails at, or near, the place where it left the track, made by the union of a 56-pound rail with a 35-pound rail; and the conflict is on the question whether it left the track immediately at the joint, and because the joint was not in proper condition, or at a point about the middle of the 56-pound rail, where it is proven the track was in proper alignment and in good condition. The motor was going out of the mine with a train of 25 loaded cars, over a straight track and on a downgrade of 1.65 per centum until within about 50 or 60 feet of where the wrecked motor was found, and from there on to where the motor lay it was level. The testimony of defendant's witnesses tends to prove that it left the track near the middle of the rail, and before reaching the joint; that at that point, 80 feet back of where the motor lay, a scar was visible on the face of the rail, as if made by the flange of a car wheel in passing diagonally over it, which defendant's witnesses say they did not think could have been made by the flange of a wheel of a coal car, which weighs, when loaded, only about 3 tons, whereas the motor weighed 14 tons. Some of the witnesses also say there were marks on the cross-ties made by the flanges of the motor wheels, several feet back of the joint in the rail. On the other hand, a number of plaintiff's witnesses testified to certain facts which, if the jury believed to be true, compelled them to find that the motor left the track, not near the middle of the rail, but where the two rails joined, and that it did so because of a defective joint. Cooper Lantz, a motorman in the same mine, who helped to clear up the wreck, says the rails were not in line at the joint, that "one rail stuck out a little in front of the other, and the flange of the motor struck on that rail." He further says the marks on the cross-ties, made by the motor car, did not appear back of the joint. William Berkley, a brakeman, testified that the joint was bad before the wreck; that the motor would jump as it went over it. He says that, on the Monday after the wreck, he examined the joint, and stepped on the end of the rail, and his weight caused it to sink down more than an inch below the end of the other one; and that there was a small groove on the end of the rail that looked like a wheel had struck it. He also says there were no marks of the motor wheels on the cross-ties back of the joint. Sanford Taylor, who was also a motorman in the same mine, says the joint was bad; that when the motor passed over it it would give down. Benjamin Jaggie, the plaintiff, worked in the mine, was sometimes roadman, but did not lay the rails in question. He says he was at the place before the wreck was cleared up, and examined the tracks to see if he could find out what caused it, and saw that the small rail stood out from the large one. He says the flange of the motor struck the small rail; that "a mark was there on the end of the rail." He further says there were marks on the cross-ties made by the wheels of the motor between the joint and the place where the motor stopped.

All the witnesses agree that the motor stopped six or eight feet forward of the joint in the rail, and the evidence tends to prove that at the time it was wrecked it was moving at the rate of about six miles an hour. The jury could well believe from plaintiff's evidence that the joint between the rails was in bad condition and that that caused the wreck. In view of the straight track, the downgrade, the slow rate of speed at which the motor was moving, and the proper gauge and good condition of the tracks back of the joint, plaintiff's theory as to the cause of the wreck and the place where it occurred is much more plausible than the theory of defendant. On the other hand, there is abundance of testimony tending to prove that the motor left the track about the middle of the rail and before reaching the joint. But some of defendant's witnesses testify that they examined the tracks at that point, as soon as the wreck was cleared up, and found them in good alignment and in proper gauge. So that if the motor did in fact jump the track where defendant contends it did, it would be difficult to discover the cause. There is no evidence tending to prove that the motor, or any of its parts, were out of repair or defective, or that defendant negligently overcharged the wire and thereby caused the wreck. There was some evidence tending to prove that it might have been caused by overloading the motor. But still, if that was the cause, the defendant was liable, it having been proven, and not denied, that its printed rules were silent respecting the maximum number of loaded cars to be attached to a motor. There was no rule on that subject. There is evidence tending to prove that the train, at first, consisted of 21 cars of coal, and that 4 cars of slate were later attached

to it by order of the mine foreman or his assistant, and it is argued that, if his act was the negligence that caused the wreck, it was the negligence of a fellow servant. But that is not correct, in view of the fact that the wreck would be properly attributable to the want of a proper rule on the subject as the proximate cause. The making of rules is a nondelegable duty of the master. The operator could not leave that duty to the mine foreman and then escape liability if it is not performed. The jury had a right to weigh the reasonableness of the respective theories, in connection with the conflicting testimony of witnesses in respect thereto, and determine the controverted fact according to their belief derived from all the evidence. It was also their duty to determine whether defendant had used proper diligence to keep its tracks in a reasonably safe condition.

In view of the controverted facts, the question of negligence was one for jury determination. There is sufficient evidence to support the verdict, and the court did not err in refusing to set it aside on the ground that it was contrary to the evidence, or that it was against the great weight of evidence. Although a greater number of witnesses for defendant were examined to prove its theory than were examined by plaintiff to prove his, still the weight of evidence does not depend upon mere numbers of witnesses. Where the testimony is in conflict, it is the special province of the jury to say which ones are telling the truth and which ones are not, and the court has no right to invade their province and say their judgment with respect thereto is wrong.

We have read and carefully considered the instructions, as well those given for plaintiff over the objection of defendant as those asked for by defendant and refused, and do not think the court committed any error in the matter of giving or refusing instructions. It suffices to say that the instructions fairly gave to the jury the law of the case as we have declared it to be in the foregoing opinion. A discussion of the instructions, seriatim, would be only a repetition, in another form, of what we have already decided is the law applicable to the case.

The judgment is affirmed.

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(75 W. Va. 450)

## PRICHARD v. FREELAND OIL CO.

(No. 2389.)

(Supreme Court of Appeals of West Virginia. Dec. 22, 1914. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. MINES AND MINERALS ⟹79—OIL AND GAS LEASE—CONSTRUCTION—"GAS WELL."

The words "gas well," employed in a lease for oil and gas providing that the lessor should be paid "three hundred ($300.00) dollars per year for the gas from each and every gas well drilled on said premises; said payment to be made on each well within sixty days after each well is completed, and to be paid yearly thereafter while it is a gas well," interpreted in the light of all the facts and circumstances surrounding the parties, their relation to each other, the objects and purposes of entering into the contract, and what they subsequently did under the contract, means a gas well, which considering its location with reference to any market for gas, its capacity as a gas producer, can be profitably operated as such, and not a well producing oil in large quantities and some gas and operated for many years by lessee as an oil well, and without demand for gas rental by lessor.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 209; Dec. Dig. ⟹79.

For other definitions, see Words and Phrases, Gas Wells.]

2. MINES AND MINERALS ⟹79—OIL AND GAS LEASE — CONSTRUCTION — RENTAL OF GAS WELL.

The fact that some gas is found in one or more of the sands penetrated in drilling such well, and is afterwards run from the casing head into a gas line from wells on an adjoining lease operated by the same lessee, and the gas from all utilized in operating the wells on both properties, according to a custom prevailing among oil operators, does not render the lessee in such a lease liable to the lessor for annual gas rentals provided for in such lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 209; Dec. Dig. ⟹79.]

Error to Circuit Court, Marion County.

Action by Charles A. Prichard against the Freeland Oil Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Neely & Lively, of Fairmont, for plaintiff in error. B. L. Butcher and Harry Shaw, both of Fairmont, for defendant in error.

MILLER, P. In an action by lessor against lessee to recover gas rentals, alleged to have accrued to him, from an alleged gas well drilled on his land, under his lease, the covenant of the lease relied on as the basis of his action is substantially as follows:

"In consideration of the premises, the said party of the second part covenants and agrees, 1st, To deliver to the credit of the first party, his heirs or assigns, free of cost in the pipe line * * * one eighth (1–8) part of all oil produced and saved from the leased premises; and to pay three hundred ($300.00) dollars per year for the gas from each and every gas well drilled on said premises; said payment to be made on each well within sixty days after well is completed, and to be paid yearly thereafter while it is a gas well."

On the trial plaintiff obtained a verdict and judgment for $2,669.13, and to that judgment defendant obtained this writ of error.

The lease is dated October 14, 1903. The well in question, the only one drilled on the land, was begun soon after the date of the lease and completed about August, 1904, and thereafter and up to the date of this suit, August 24, 1911, it was operated as an oil well, having produced some fifteen thousand barrels of oil, one eighth of which was delivered to the plaintiff lessor in accordance with the covenants of the lease.

Outside of his brother, who he says was a member of defendant corporation, but in what capacity he does not say, nor does it appear, and which he says was a year or two after the well was drilled, plaintiff does not pretend to have ever mentioned the subject of gas rentals, until about the time of bringing this suit. He never presented any bill, or made any demand for the gas rental. He says that about two years before giving his testimony on the trial at November term, 1912, he wrote the defendant company that he intended to make a demand for this rental, but did not tell them he expected to demand pay for five or six years back rent.

The declaration has the common counts in assumpsit, without bill of particulars, and a special count demands annual gas rentals alleged to have accrued to plaintiff under said lease, beginning with the ——— day of October, 1904, to and including the ——— day of October, 1910, at $300.00 per year, with interest on each of said payments from the day they became due respectively until paid, aggregating the sum of $2,100.00. The damage laid in the writ and declaration is $2,500.00.

[1] The sole question presented on the trial by pleadings and proofs, and by instructions given and refused, and motion for a new trial, denied, is, what is a "gas well" within the meaning of the contract and the intendment of the parties?

One of the cardinal rules of construction, where there is ambiguity or uncertainty in the meaning of the words of the contract, is to take the instrument by its four corners and read and interpret it in the light of all the facts and circumstances surrounding the parties at the time of making the contract, their relation to each other, the objects and purposes of entering into the contract, and their actions and conduct at the time and subsequently, and the things done under the contract in the execution thereof.

Literally speaking, perhaps, a gas well is any well which produces gas. But it cannot be supposed that the parties to this lease meant a well which produced gas in such quantity that when ignited it should burn like a mere taper on the sacred altar, or, as sometimes happens, should send upward a screaming, hissing shaft of flame, uncontrolled, and uncontrollable, and finally die like some great giant of self-exhaustion, a total loss to all concerned. Surely neither of these extremes could have been contemplated. Manifestly the parties contemplated a well having such a pressure and volume of gas, and considered with respect to its location, its proximity to the market, as could be operated profitably, and the gas utilized either on the leased premises, or disposed of commercially to others. True, we decided in McGraw Oil Co. v. Kennedy, 65 W. Va. 595, with respect to a lease for oil and gas for five years "and as long thereafter as oil or gas, or either of them, is produced by the party of the second part," that the lessor could not forfeit it because he thought gas was not being produced in paying quantity, the lessee claiming that it was, and being willing to pay the stipulated sum for the well as a gas well. We held that it was for the lessee to say whether gas was being produced in paying quantities, acting in good faith. The ground of that decision, was that as the lessor got the price of the gas well, he ought not to be heard to complain, if the lessee was willing to pay in good faith therefor, and to protect his lease for oil and gas from forfeiture.

To the same effect is Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027. But in Carnegie Natural Gas Co. v. South Penn Oil Co., 56 W. Va. 402, 49 S. E. 548, involving a co-operating contract, under which, if an oil well was developed by either, the oil company was to get the well, by paying the cost, and if a gas well was developed, the gas company should get it, by paying the cost thereof, we decided, in effect, that "gas well" in the contract meant a well which developed gas in paying quantities, not a mere pittance of gas, or in a quantity that could not be marketed and used profitably by the owner.

In Roberts v. Fort Wayne Gas Co., 40 Ind. App. 528, 82 N. E. 558, the lessor sued lessee for gas rentals alleged to be due him under a lease for oil and gas providing, if "gas is found in sufficient quantities to market the same," the lessor should be paid $100.00 per annum in advance for each gas well drilled, and that operations should be commenced and four wells completed within four months from date, or all paid for after that time, and that if lessee should fail to perform such work, or to pay the rental, he should in lieu thereof, and in full for damages for his default, pay annually during the term $100.00, for each of such wells. The lessee drilled the four wells within the time prescribed, and for a time produced gas in paying quantities. He also drilled an oil well. When the gas wells ceased to produce gas in paying quantities he stopped paying the annual rentals therefor, but because the oil well continued to produce oil, did not surrender the lease. The appellate court held that it was necessary for plaintiff to aver and prove that the gas wells continued to produce gas in paying quantities for the period for which rental was claimed, that the lease sued on was a lease to take the profit from land and when the profit became exhausted the liability to pay the consideration therefor was abrogated. Citing numerous cases from Indiana, Pennsylvania and Ohio.

Indiana Natural Gas & Oil Co. v. Wilhelm, 44 Ind. App. 100, 86 N. E. 86, was an action for gas rentals under a lease providing that if gas was found in sufficient quantities to market, lessor's compensation should be a certain sum per well. The complaint charged that gas was found in sufficient quantities

to be marketed, and to be piped away to market, and that there were good markets within ten miles, and others farther away, where gas could have been delivered and sold at a profit to defendant. The jury were properly instructed, so the appellate court held, that in order to recover plaintiff must, by his evidence, affirmatively answer the question:

"Did said wells, or either of them, produce gas in sufficient quantities to enable the defendant (appellant) to pipe the same away to market therefor, and realize therefrom and thereon a fair, reasonable, and just profit, everything considered?"

Now while the lease in that case provided for payment of gas rentals, if gas were found in sufficient quantities to market, a provision not in terms contained in the lease involved here, was not the plaintiff here bound to allege and prove that gas was produced in such quantities, considering the time, place, circumstances, and conditions referred to, that defendant did or could by reasonable effort have marketed, sold, or used the gas, with some reasonable profit? We think this must have been contemplated by the parties when they made their contract. And as to plaintiff, we have him admitting on cross-examination, that his understanding, at the time, was that a gas well meant one that would be profitable to operate.

[2] It is contended, however, that as the evidence shows the well was enclosed by a casing head, the gas confined, and turned into a circuit line, and connected with other wells producing gas on an adjoining lease operated by defendant, and the gas from this line used in operating the wells on both leases, regardless of whether the gas from plaintiff's lease escaped to and was consumed on the adjoining lease, or vice versa, defendant should be required to pay the gas rentals for all the years covered by the declaration. We cannot bring ourselves to the conclusion that this is a just or reasonable interpretation of the contract. We find little in the adjudged cases throwing light upon this question. There is much evidence in the record showing and tending to show a custom prevailing in this state not to charge the lessee with gas when produced in small quantities along with oil, and used for operating the well on the premises, unless the contract specifically provides otherwise. In Wright v. Coal Co., 182 Pa. 514, 38 Atl. 491, it was decided, that under the custom which prevails in the anthracite coal region, coal used by a lessee in the operation of the furnaces of the mine is not subject to royalties, unless provision is made therefor in the lease, and we think this rule ought to be made applicable to the production of oil and gas under an oil and gas lease. Applying this rule in the case in hand, what are the facts disclosed by the record? It is not alleged nor proven that defendant ever sold a foot of gas or reaped any profit from the gas produced from the well. The evidence is overwhelming that when the well in question was drilled, in 1904, there was practically no market for gas in the vicinity of this well, and there was absolutely no market for gas produced from wells of its caliber. Not a witness swears that defendant by proper effort could have sold this gas locally or to the large gas companies engaged in piping and marketing gas commercially. A well was drilled on an adjoining tract about the same time, by another company, producing oil and about the same quantity of gas from the same sands, and one of the owners of that well swears its operation as a gas well was not even considered; that there was no market for the gas produced from such wells in that vicinity. Besides, defendant company about the same time drilled other wells on the Michael lease adjoining plaintiff's land and got gas along with oil in some of them, particularly No. 5, which they say was much stronger in gas than the well on plaintiff's land, and which they made the greatest effort to dispose of as a gas well to the gas companies, but without success; that these gas companies declined to take gas from wells producing gas along with oil. There is some evidence that by using an extra string of casing in a well producing oil and gas from different sands, the gas and oil can be kept separate, but that the casing is very expensive, and unless the well is of such caliber as to be profitable, and there is a market for it, the operator would not be justified in incurring the expense of putting in a double line of iron casing.

But it is contended that defendant connected up this well by a circuit pipe line with the gas wells on the Michael lease, and used gas from the Prichard well to operate the wells on the Michael lease, and burned it in a couple of houses on the Michael land. Now the facts are that gas from the wells on the Michael lease was first piped to the Prichard well in 1905, and used to clean out that well, and to run the tools for a fishing job defendant had on hand at that well. After the work of cleaning out the well and the fishing job had been completed, that well was connected to the pipe line that had brought the gas from the other wells, and all run together for the mutual benefit of both leases, and the testimony of defendant shows, or tends to show, that the wells on the Michael lease, so joined up, produced more gas than the well on the Prichard, and that in fact the Prichard well got more gas from the Michael lease than it got from the Prichard, and that, therefore, defendant got no kind of profit, from the gas from the Prichard, as it had gas enough from the Michael lease to operate the wells on that property.

But the strongest phase of the case in favor of defendant is, that the well was operated not as a gas well, but as an oil well. There is little evidence that anyone connected with the property ever thought of treating it as a gas well, until the oil production had run so low as to bring small returns to lessor or

lessee, and gas had come more into demand. Then it was, after seven years of operating the well as an oil well, plaintiff seems to have conceived the notion that his well was also a gas well, and that he ought to have the back gas rental, as well as the oil royalty, wherefore his suit.

We do not think a case has been made entitling plaintiff to the gas rental, and we are of opinion to reverse the judgment and remand the case for a new trial.

Judgment reversed.

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(75 W. Va. 467)

## CROCKETT v. KEYSTONE COAL & COKE CO.

(Supreme Court of Appeals of West Virginia. Jan. 12, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

MASTER AND SERVANT ⟸118—SAFE PLACE TO WORK—MINE OPERATOR—DUTY—FOREMAN.

The maintenance of the car tracks in a mine is not by the statute, Code 1913, ch. 15H (secs. 460–552), cast on the mine foreman, and the owner or operator is not relieved of the common-law duty to use reasonable care to keep them safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. ⟸118.]

Error to Circuit Court, McDowell County.

Action by J. M. Crockett, administrator, etc., against the Keystone Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial on limited issue.

Anderson, Strother & Hughes and Strother, Taylor & Taylor, all of Welch, for plaintiff in error. Stokes & Sale, of Welch, and Lawson Worrell, of Northfork, for defendant in error.

ROBINSON, J. The action is one for damages arising from death by wrongful act. From the judgment in favor of plaintiff, defendant brings error.

Plaintiff's decedent, a motorman, was killed by the derailment of the motor he was driving in defendant's mines, in the course of his usual employment therein. It is charged, and the jury have so found, that the injury complained of was caused by the negligence of defendant in failing to use reasonable care to provide a safe track. The evidence in this particular warrants the finding which the jury made thereon. Whether the motor was thrown from the rails by a defective track for which defendant was negligently responsible, as plaintiff insists, or by a chain coupling, dragging from the front end of the motor, for which others were responsible, was a jury question upon the facts and circumstances proved.

The main point made by defendant against the judgment is that the statute acquits it of duty to use reasonable care in the maintenance of the tracks in the mine, and casts that duty on the mine foreman. Defendant submits that the evidence shows that it had employed a competent mine foreman, and that if he failed to keep the tracks in safe repair, the negligence was that of a fellow servant, under well known decisions of this court. But all that is settled and controlled by Jaggie v. Davis Colliery Co., 84 S. E. 941, decided at the last term. Therein we held:

"It is the duty of a mine operator to maintain his motor and motor tracks in a reasonably safe and suitable condition for the safety of his servants employed to operate the same. Section 24, ch. 15H, Code 1913 [sec. 483], does not impose upon the mine foreman the duty to see that either the motor or tracks in the mine are properly maintained and, consequently, the master is not relieved from his common law duty in respect thereto."

Complaint is made of the trial court's ruling on interrogatories and instructions to the jury, but we find no error in these particulars.

There is but one error in the case—the overruling of the demurrer to the declaration. That pleading omitted an averment of the appointment and qualification of the plaintiff as administrator. Because of this error, the judgment must be reversed and the action remanded with the verdict standing contingent upon amendment and the separate trial of any issue made on the supplied averment, pursuant to principles and directions laid down in Moss v. Campbell's Creek Railroad Co., 83 S. E. 721.

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(75 W. Va. 602)

## LOCKE et al. v. RUSSELL et al. (No. 2693.)

(Supreme Court of Appeals of West Virginia. Feb. 16, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. MINES AND MINERALS ⟸79 — OIL AND GAS LEASE — CONSTRUCTION — GAS-WELL RENTALS.

Wells producing oil, but not gas, in paying quantities, drilled and operated under an oil and gas lease, one-eighth of the oil produced and saved to be delivered free of cost in pipe lines or tanks to the credit of lessors, and $200 to be paid annually, being reserved as compensation respectively for the oil produced and saved and for the gas marketed or used off the premises from such wells, the parties to the contract having since completion of each well deemed and treated the wells as oil wells only, the lessors accepting the one-eighth royalty oil without complaint or demand for gas well rentals, do not become gas wells within the purview of the contract, entitling lessors to recover rentals prescribed by the lease therefore, solely because the lessees have, by a duly efficient process, converted into gasoline, without perceptible diminution in the oil produced, that component part thereof theretofore wasting, by evaporation, at the casing head, the utilization of which, by such process, having inured to the mutual advantage and profit of the contracting parties.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 209; Dec. Dig. ⟸79.]

*(Additional Syllabus by Editorial Staff.)*

2. WORDS AND PHRASES—"GASOLINE."

"Gasoline" is a colorless inflammable fluid, the first and highest distillant of crude petroleum. It represents the lightest portions of crude oil, and is extracted from it by distillation very much as whisky is distilled and in the same sort of apparatus. Being the most volatile compound of petroleum, it readily separates from it, and, in the process of distillation, is the oil drawn off at the lowest temperature.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gasoline.]

Error to Circuit Court, Wood County.

Action by Harlan P. Locke and others against Robert W. Russell and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Wm. Beard, of Parkersburg, for plaintiffs in error. Clyde B. Johnson, of Charleston, and F. B. Moats, of Parkersburg, for defendants in error.

LYNCH, J. Deeming themselves entitled, under the terms of an oil and gas lease, to recover $1,400, one year's rental of $200 for each of seven wells producing oil, but not gas, in paying quantities, drilled on the leased premises, Harlan P. and John W. Locke brought assumpsit against Robert W. Russell and others, remote assignees of the lessee in the contract under which the cause of action, if any, arose. The trial having terminated in a judgment upon a verdict adverse to the claim averred in the declaration, plaintiffs seek reversal upon writ of error.

Within a reasonable time after the date of the lease, seven wells were drilled on plaintiffs' lands, from each of which was, and still is, produced oil, but not gas, in paying quantities. Since completion of each of them, one-eighth of the production has regularly been delivered to the lessors pursuant to the terms of the contract; and not until the expiration of about one year after defendants became owners of the lease by assignment, whereby they became vested with the right to operate the wells, did plaintiffs demand or receive any compensation by way of rentals for the gas, if any, produced from any of the wells so drilled. Apparently, they either did not consider the wells as essentially gas wells, or were content to accept their share of the oil, when delivered to them, as sufficient compliance with the requirements of the contract in that respect; and they admit the same share has likewise regularly been delivered to them subsequent to defendants' acquisition and control of the rights and privileges granted by the lease.

[1] Though, during the early stages of development, the oil produced was substantially beneficial and mutually profitable alike to the parties to the contract and their assigns, the production had, before the assignment to defendants, and since has, materially decreased in quantity, and evidently would have become even less remunerative had not defendants and their immediate predecessors installed and connected vacuum pumps with such wells; the purpose thereof being to increase the production therefrom. This process defendants have since continued, and, at the date of the institution of this action, were by this method engaged in extracting oil from plaintiffs' lands. But, observing a marked tendency in the wells, when so pumped, to emit, at the casing head, what defendants call "vapor," they successfully attempted to utilize it, for the mutual advantage and benefit of themselves and the lessors, by a process of distillation and compression, thereby converting the escaping substance into gasoline, in addition to, and without any perceptible diminution in, the oil theretofore produced and saved from the premises. From this utilization arose the present controversy, with the result already stated; plaintiffs apparently but erroneously conceiving the notion that the manufacture of gasoline indicated the presence of gas in the several wells and that the use thereof by defendants gave them good cause of action for the gas-well rentals prescribed by the lease.

[2] We say plaintiffs misconceived the source from which gasoline emanates. Because, as properly defined, gasoline is a colorless, inflammable fluid, the first and highest distillant of crude petroleum; represents the lightest portions of crude oil; and is extracted from it by distillation, very much as whisky is distilled and in much the same sort of apparatus. Americana. Being the most volatile component of petroleum, it readily separates from it, and, in the process of distillation, is the oil drawn off at the lowest temperature. 20 Cyc. 1181; Insurance Co. v. Swigert, 11 Ill. App. 590.

Whether the process adopted by defendants is the most available scientific one or not, it is conceded, or at least not denied, that they did, by the process employed, successfully manufacture or save gasoline from the oil produced on plaintiffs' lands; and that they tendered to plaintiffs one-eighth of the proceeds from sales of the gasoline, being the one-eighth prescribed by the lease for the oil produced and saved under authority conferred by plaintiffs. This process defendant Russell thus describes in his testimony:

"There is a vacuum pump attached to the casing head of each well, which draws the vapor from the well, which is conveyed to a compressor and heated and pressed, and is then cooled in a cooling tank and separated in a separating tank, and then drawn out of the separating tank into a storage tank."

By way of qualifying himself to speak as an expert in the making of gasoline, he said:

"I was one of the first in the business, in producing gasoline, and have had practical expe-

rience"; and that the method described had been in use about four years "in this country."

Neither his knowledge or experience, nor the efficiency of the method employed as described by him, is challenged by any witness testifying in the case.

Though plaintiffs assign numerous grounds for reversal of the judgment, the only meritorious question, as we conceive it, is whether any one or more of the seven wells on the plaintiffs' lands ought to be treated as gas wells within the terms of the contract between the parties. While there is some conflict in the evidence as to the quantity of gas produced from the wells, that conflict the jury resolved in favor of defendants, thus eliminating that question from further consideration. Indeed, their finding could not consistently have been otherwise. The burden of proof rested upon plaintiffs to establish the fact, if true, that some one or more of the several wells did at some time produce, and at the date of this suit was or were producing, gas in paying quantities. They so aver, and therefore must prove the facts averred, in order to entitle them to recover in this action. That burden they have not successfully met. On the contrary, the evidence strongly tends to establish the fact to be that none of the wells produced gas except in very small quantities; and that, although this gas was utilized to some extent in operating wells on other lands in conjunction with those in controversy, none of the wells here involved fall within the definition of a paying gas well. What is such a well was discussed and determined in Prichard v. Freeland Oil Co., 84 S. E. 945, recently decided by this court. There it was held, under a contract similar to the one here and in effect containing the same covenants, that:

"Interpreted in the light of all the facts and circumstances surrounding the parties, their relation to each other, the objects and purposes of entering into the contract, and what they subsequently did under it, means a gas well which, considering its location with reference to any market for gas, its capacity as a gas producer, can be profitably operated as such, and not a well producing oil in large quantities and some gas and operated for many years by lessee as an oil well and without demand for gas rental by lessor."

Manifestly, the definition given in that case forcefully applies to and controls the case now under consideration, and justifies the conclusion that, under the circumstances, plaintiffs are precluded from maintaining this suit to recover the rentals for gas wells prescribed by the contract.

Nor is there merit in the contention, urged by plaintiffs, that the lease provides oil should be delivered in pipe lines or tanks to the credit of the lessors, from which they argue that the lease bound defendants to dispose of the productions either by delivering to their credit in pipe lines or tanks one-eighth of the oil produced, or by paying $200 for the gas from each well if gas was found therein in paying quantities. But gas was not found in any of the wells in such quantities. Nor was any demand made for payment of the gas well rentals except as noted, thus showing acquiescence forbidding a different interpretation under the circumstances now existing as to the production of the several wells. Besides, to deliver gasoline in tanks or pipe lines, evidently was impossible or impracticable. How, then, or by what consistency, can plaintiffs complain, if by their skill and ingenuity defendants have utilized that component part of petroleum which otherwise would have vaporized and escaped into the air, as it did prior to its utilization by defendants? What was theretofore a useless waste defendants, by the process applied and successfully operated, saved and converted into a profitable commercial product, to the mutual benefit and advantage of themselves and their lessors. Plaintiffs thereby evidently suffered no loss whatever. On the contrary, they were financially benefited by it. Nor is there any contention that the oil produced and saved was perceptibly diminished in quantity or value by the utilization of the escaping elements of the petroleum in fact produced from the lands. Defendants were rightfully in possession; their operations were successful and beneficial. They wasted nothing; caused no injury to the land, but did enlarge the revenues therefrom.

Clearly therefore plaintiffs were in no sense entitled to the compensation fixed by the contract for paying gas wells. No such wells were drilled or operated on their lands. No rule of law cited or found denies to defendants the right to utilize, by any available process, any useless waste from productions contemplated, so long as the lands are operated under the lease to the mutual advantage and profit of the parties; provided, however, the operator pays or tenders to the landowner his proper share or proportion of the returns from such utilization. Defendants have not only manufactured gasoline, but have tendered plaintiffs, who declined to receive it, their just and fair proportion of the net returns resulting from the product so saved, manufactured, and sold.

Perceiving no reasonable ground to do otherwise, we affirm the judgment complained of, saving, however, to plaintiffs the right to collect the share of profits so tendered, should defendants hereafter decline to retender it to them. And an order will be accordingly so entered.

(75 W. Va. 271)

WETZEL v. JONES et al. (No. 2447.)

(Supreme Court of Appeals of West Virginia. Dec. 15, 1914. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. MINES AND MINERALS ⟸97 — "MINING PARTNERSHIP"—JOINT OWNERS OF OIL AND GAS LEASE.

Where joint owners of an oil and gas lease unite in operating the demised premises thereunder, without any special agreement as to the character of their relation to each other, they constitute a mining partnership.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 222; Dec. Dig. ⟸97.

For other definitions, see Words and Phrases, First and Second Series, Mining Partnership.]

2. MINES AND MINERALS ⟸100 — MINING PARTNERSHIP — TERMINATION — DEED OF TRUST TO COPARTNER.

A mining partnership is not terminated by the execution by one partner of a deed of trust on his interest in the social property to secure to his copartner payment of a note executed to him in a transaction separate and distinct from the firm business.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 225; Dec. Dig. ⟸100.]

3. MINES AND MINERALS ⟸99 — SALE OF PARTNERSHIP INTEREST—PURCHASE BY COPARTNER.

The partner so secured cannot buy the interest covered by the trust, at a sale by the trustee thereunder, unless, in so doing, he exercise toward his copartner the utmost good faith, frankness, and fair dealing.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 223, 224; Dec. Dig. ⟸99.]

4. MINES AND MINERALS ⟸99 — MINING PARTNERSHIP—DEED OF TRUST—SALE—PURCHASE BY COPARTNER — GROUND FOR SETTING ASIDE SALE.

Where the evidence tends strongly to establish other circumstances of unfairness or a fraudulent design by the beneficiary under the trust to acquire his partner's interest thereby granted, a purchase thereof by him at a sale by the trustee will be set aside, where the price paid is grossly disproportionate to the actual value of the property.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 223, 224; Dec. Dig. ⟸99.]

Appeal from Circuit Court, Ritchie County.

Action by William Wetzel against J. N. Jones and others. From judgment for defendants, plaintiff appeals. Reversed in part, affirmed in part, and remanded.

J. W. Vandervort and R. E. Bills, both of Parkersburg, for appellant. J. N. Jones and Robinson & Prunty, of Harrisville, for appellees.

LYNCH, J. As partners, William Wetzel and J. N. Jones, some time prior to September 12, 1910, conducted drilling operations for the production of oil and gas in Ritchie and other counties of this state. They then were also joint owners in their own right of oil and gas leases on various tracts of land located in the same county, among them being lands of John Denning, on which they had drilled a paying gas well, the lands of R. R. Jones and others. The production of the Denning well they sold to the Mountain State Gas Company, and it to the Hope Natural Gas Company. Having arranged to leave for South America on that day, Wetzel executed his note for $300 at three months, payable to Jones at the Citizens' National Bank of Pennsboro, and, to secure its payment when due, gave a deed of trust on the Denning well and fixtures, including tubing and casing; C. H. Broadwater being named trustee. The note having matured on December 12th and remaining unpaid, Jones caused the trustee to advertise the property for sale, and at the sale purchased it for $440, and promptly thereafter procured a deed therefor and its recordation. The other leases, held by them under the firm name, Jones & Wetzel, either had previously lapsed because of noncompliance with their terms, or Jones thereafter permitted them to lapse and took new leases on the same tracts in his own name. Jones' purchase at the trust sale, and the procurement of the leases, were for his sole benefit.

To set aside and annul the sale to Jones, to cancel the deed to him by the trustee, and to have decreed to him an interest in the renewed leases are the objects sought by Wetzel, but which the lower court denied, and he has appealed.

As to the irregularities relied on as vitiating the sale, we are unable to perceive in what respect Wetzel was prejudiced. Of these one is that, though the grant was in trust to *H. C.* Broadwater, the notice of sale was given, the sale made, and deed executed by *C. H.* Broadwater, trustee. The transposition of initials evidently resulted from inadvertence on the part of the scrivener in preparing the deed; there being no proof or suggestion of the existence of any other person, or of an intention to select any person other than C. H. Broadwater as trustee. The other irregularity urged is that Broadwater was not present at the time and place first named in the sale notice, when, because of his inability, by reason of illness, to attend, the sale was postponed two weeks; notice thereof being published and posted together with the original, at which time the property was sold, Broadwater then personally superintending the sale.

The questions vitally affecting the validity and propriety of the sale under the trust and the purchase by Jones are whether there was such fiduciary or trust relation incident to the partnership which, viewed in the light of his conduct towards the plaintiff and the social assets, forbade the sale and purchase, and whether the price offered and paid was so disproportionate to the market value of the property as to warrant annulment of the sale and deed.

Jones and Wetzel sold the firm's drilling tools and appliances some time prior to Sep-

tember 12, 1910. Jones and his wife testified that at their home in Doddridge county before the 12th the partners settled the accounts between them, when they ascertained Wetzel owed Jones $1,140, and agreed to meet on that day at Parkersburg for final adjustment of the amount by payment in cash or by notes; Jones having received the proceeds derived from the sale of the drilling equipment. The finality of the settlement Wetzel denies. He says that, as he and Jones were not competent to make a settlement, they agreed to meet at Parkersburg and lay the accounts before R. E. Bills, an attorney, and for that purpose Jones, who had kept the firm accounts so far as any were kept and had collected and disbursed the partnership funds, agreed to produce the books and vouchers before Bills; that as he failed to bring them, and because Wetzel had made arrangements to leave for South America on that day, they entered into a partial settlement, resulting in the ascertainment of an indebtedness in Jones' favor of $1,840 instead of the amount first ascertained, in discharge of which Wetzel executed the $300 note and permitted Jones to retain the share of the money then in his hands belonging to Wetzel. In some respects, Bills corroborates Wetzel as to the purpose of the meeting, the agreement to produce the books of account, and Jones' failure to bring them. Though, as we have intimated, and as later clearly will appear, the partners claimed equal interests in the Denning well, Jones sought to explain the difference in the amounts found due him on the two settlements by saying that as he and Wetzel had become jointly liable for $1,500 advanced by Seiple for drilling the Denning well on condition that each of the three should have equal interests in its production, and as Jones had assumed payment thereof, the first sum ascertained to be due was increased to that extent. Wetzel denied liability as to this advancement on the ground that as the sole condition for such interest was payment by Seiple before the completion of the well, a condition with which Wetzel testified Seiple did not comply, having paid that amount to Jones, he, and not the partnership, received the benefit, and therefore should refund it. But the fact remains that Wetzel to some extent acceded to Jones' demand in this particular, by what occurred between them on the 12th of September.

In addition to the note and trust securing it, two other papers were then executed, one by Jones and Wetzel under seal, one by Wetzel only, but of which Jones was fully advised. The first may not improperly be treated as a division order pertaining to the rental or consideration payable to the partners for the Denning well production, whereby the gas company was directed to pay each of them his share; the other appointed C. T. Hiteshew as attorney in fact for Wetzel, and authorized him to receive and receipt for Wetzel's share of the stipulated monthly payments for gas taken from the Denning well. While the second paper did not in express terms direct Hiteshew to apply the funds so to be collected to the payment of Wetzel's indebtedness, including his note to Jones, it is apparent that Jones, Wetzel, and Hiteshew so interpreted it; Jones because, after maturity of the note, he applied to Hiteshew for payment; Wetzel because he so wrote the gas company; Hiteshew because he paid certain claims out of the collections.

[1-4] Conceding as established, by the testimony of Jones and his wife, the finality of the settlement of the firm accounts at their residence in Doddridge county, a fact as to which there remains a reasonable degree of doubt and uncertainty, there can be no doubt that it did not include the Denning lease or well. For, as to these, a partnership relation remained, whether denominated a general or a mining partnership being immaterial, as in either case the partners were still governed by the same strict rule of good faith and fair dealing towards each other in relation to the management and disposition of the social property. 27 Cyc. 760. Legally neither of them could acquire the whole or any part of the joint property, except where, upon close scrutiny and full investigation, there is found no fraud, covin, or concealment on the part of one prejudicial to the rights and interests of the other. Gore v. McBrayer, 18 Cal. 589; Lamar v. Hale, 79 Va. 147; McKinley v. Lynch, 58 W. Va. 44, 51 S. E. 4; Thorne v. Brown, 63 W. Va. 603, 60 S. E. 614; Krebs v. Blankenship, 80 S. E. 948; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. The same rule applies, though they were cotenants or co-owners merely. But working the lease together, as they did, not under any special agreement, they were partners, and, as such, subject to the jurisdiction of equity as if engaged in the prosecution of a general partnership. Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777; Blackmarr v. Williamson, 57 W. Va. 249, 50 S. E. 254, 4 Ann. Cas. 265. Though a sale or assignment by one member effects a dissolution of a general partnership (Conrad v. Buck, 21 W. Va. 396), it does not have that effect on a mining partnership (Childers v. Neely, supra; Duryea v. Burt, 28 Cal. 569; Blackmarr v. Williamson, supra; 3 Lindley on Mines, § 796; Lamar v. Hale, supra). A deed of trust by one partner on his share operates as a sale to the trustee; but it does not constitute the latter a member of the partnership. He remains bound by that confidence imposed by law to be fair and just as between the grantor and the beneficiary. The deed to him did not preclude collection by Wetzel or Hiteshew of the grantor's share of the profits from the gas well, nor the right of Wetzel to pay the debt secured, and thereby cause a restoration of the title to his interest in the well. He also had the right or

equity of redemption adhering in all trust deeds, and an equal part with Jones in the control and management of the firm property. These rights remained intact until the enforcement of the lien created by the trust; of this no doubt can arise.

Wherein, then, did Jones fail, if at all, to observe the requirement for the exercise of good faith toward his partner Wetzel? Were his dealings such as to avoid imputation to the contrary? If not, then his dereliction must be considered and weighed upon the question of inadequacy of the consideration paid by him for his partner's interest in the Denning well.

As heretofore observed, Jones knew Hiteshew had authority to receive from the gas company Wetzel's share of the proceeds from the production of the Denning well from the date of the division order. He also knew, or, what is equivalent, he had the means of knowing, that his and Wetzel's shares were equal, and that from the date of the order to December 30, 1910, the date of the interview with Hiteshaw, he had received as his share $420.13, not including the December returns, and with these returns $786.18. Wetzel's share was of like amount. With this knowledge, actual or available, on December 30th he applied to Hiteshew for payment of the note. But Hiteshew informed him that he did not then have sufficient funds to discharge the note, but was expecting remittances from Wetzel which he could and would use for that purpose. Hiteshew further testified that with this arrangement or promise Jones apparently seemed satisfied, or did not manifest any dissatisfaction with it or complain of the proposed delay; that Jones did not advise him of the advertisement of the sale then twice published in Ritchie county, or that the note was secured by a trust lien on Wetzel's interest; and that, had Jones informed him of the notice of sale, he could and would have procured or advanced the money and paid the debt. Jones, it is true, testified to the contrary, saying he did inform Hiteshew of the trust and notice. Presumably on the same day, Jones, in conversation with J. W. Roberts, did refer to the sale of Wetzel's interest in the well, when Roberts replied that, in order to prevent it, he, as Wetzel's friend, would pay the note, if necessary. To this proposal Jones replied he desired to see Hiteshew first and Roberts thereafter in relation to it. However, he did not return pursuant to his promise. This conversation Jones also denied. Again, at his instance, the Bank of Pennsboro, by its cashier, wrote a letter and delivered it to Jones to mail, advising Hiteshew of the maturity of the note and demanding payment. This letter Hiteshew testified he did not receive, though Jones said he mailed it.

Though, taken singly, these incidents seem comparatively insignificant, yet, combined, they tend to show a design on Jones' part to withhold information which, if imparted, would defeat purchase by him at the trust sale of a share in property, the returns from which he knew, as the proof shows, were then highly compensatory and valuable. Of course no legal duty required him to notify Hiteshew of the sale. But he did advise Roberts. Why not Hiteshew? Was there a reason for withholding information from one which he voluntarily imparted to the other? Or why did he not return to Roberts after his interview with Hiteshew and get his money, or put to test the faithfulness of Roberts' promise to relieve his friend's property from the incumbrance and sale? Or why did he not say to Hiteshew that the delay suggested was not satisfactory? Can these omissions on his part be explained on any theory other than that of a deliberate design to obtain exclusive control of the Denning lease? This, of course, assumes reliance on the testimony of Hiteshew and Roberts in preference to that of Jones. Why not? They were disinterested witnesses; he an interested one testifying in his own behalf. They had not financial interests to subserve; he had. They were equally as credible as he. One was a bank cashier, the other a dealer in oil properties. So far as we know, their testimony was entitled to credit. Furthermore, from his own testimony it appears Jones was anxious to eliminate Wetzel from the drilling partnership, from all the forfeited leases, and from the Denning lease by purchase at the trust sale. He had a purpose to subserve; that purpose being the acquisition of his partner's interest in property of the value of which he was abundantly informed at that time. His conduct is clearly susceptible of this construction.

Nor do we forget the claim that Jones sought to interest others in acquiring the property. They testified to his efforts in that behalf. But they did not know when or where the property would be offered for sale. Indeed, the note had not then matured. The sale was only contemplated, not pending; no notice of it had been given. Nor were the persons solicited informed by Jones, or by the published notice, of the time and place of sale. It is true there were bidders present when the property was sold, and one or two of them did make nominal offers for it. They declined, however, to purchase, because they feared some litigation would ensue. The basis of their fear they did not disclose, nor the source from which it arose.

Was the price paid so grossly inadequate as to require a court of equity to interpose its relief by cancellation of the deed to defendant? Under the circumstances, we must return an affirmative answer, notwithstanding a decree to the contrary. In view of the doubtful character of the settlement of the partnership accounts, now here only incidentally involved, the continuity of the relation of partners in the mining, requiring the ex-

ercise of the utmost good faith, the promptitude with which Jones caused the trustee to proceed with the execution of the trust, the knowledge that Wetzel was in a foreign land, whence he might return at any time, and the assurance by Hiteshew of payment upon the receipt of anticipated returns from his principal, the withholding of knowledge of the trust and of the preliminary proceedings for its enforcement from Hiteshew, the refusal to accept Roberts' offer to pay, his enmity against Wetzel, clearly established, indeed admitted, and his knowledge of the value of the property purchased, this is the only just and proper answer to be returned to the inquiry. Besides, from the date of the trust to February 2, 1911, the date of the trust sale, a period of less than five months, the returns from the Denning well were $912.88, as Jones well knew; Wetzel's share being paid to Hiteshew as attorney in fact. So Jones, for $440, acquired a half interest in property which in the last preceding period of less than five months yielded more than twice what he paid for the interest purchased. Furthermore, many witnesses, abundantly qualified by reason of prolonged experience and definite knowledge derived from the management and control of the well in controversy, testified that on February 2, 1911, the interest purchased was worth from $2,000 to $12,000, according to their several estimates; only one witness naming the lowest amount stated. They speak as of the date of Jones' purchase, the date at which the value must be determined. The accuracy of these estimates is reinforced by what the record shows. For the year preceding the trust sale the total returns from the well were $2,397.05. For the succeeding year they were nearly twice that amount. These figures speak, not the gross, but the net, receipts, and emphasize the grossly inadequate price paid for the property. They afford sufficient answer to our inquiry. They speak volubly against the acquisition of the property at a price so relatively disproportionate to its actual value. To permit the sale to stand, under such circumstances, would be unjust, unfair, unreasonable.

Did the lower court err in its decree as to the interest claimed by plaintiff in the other leases involved? Excepting the R. R. Jones lease, we think the decree, denying relief, was manifestly right. Wetzel admits the correctness of the testimony of the witness McGinnis to the effect that he did not intend to expend any more money in carrying an interest in them. He said so as a witness in his own behalf, but claimed he excluded the Jones lease. But, giving full credence to the testimony of R. R. Jones, the lessor, of the reliability of which some degree of reasonable doubt may exist, no rental was ever paid as required by the terms of the original lease by him to the partners. He so testified, and was not contradicted by any witness, or by the production of a receipt showing the contrary. If no rental was paid, the lease expired, according to its terms, in January, 1909, more than 20 months before Wetzel left for South America, and 2 years before he filed his amended and supplemental bill, wherein, for the first time, he complained of Jones' conduct as to this lease. Moreover, when the suit was instituted, Jones was actively engaged in drilling a well on the leased premises. He completed it, and found gas in paying quantities, and not until such completion did Wetzel claim any interest in the R. R. Jones lease. The only fraud charged was that, as under the partnership agreement defendant should have paid the rental, he should not be permitted to profit by his own wrong or negligence in allowing the lease to lapse. But Wetzel did nothing to protect his interest in the lease, made no provision for payment of his share of the rental, apparently manifested no interest in it, did not inquire about it, and delayed suing until Jones had tested the land and found it productive, though Wetzel must have known, or by the exercise of reasonable diligence ought to have known, the lease had lapsed, and that Jones was drilling on the land for his exclusive benefit under a lease in his own name. Nor did Wetzel, by way of amendment, tender payment, or offer to pay any part of the cost and expense of drilling the well. Under these circumstances, the lower court properly denied relief as to all the leases, except that on the Denning lands. Westerman v. Dinsmore, 68 W. Va. 594, 71 S. E. 250.

Being of opinion, for the reasons heretofore stated, to reverse the decree of February 25, 1913, in so far as it denied the prayer of plaintiff for annulment of the sale by Broadwater, trustee, on February 2, 1911, under the deed of trust executed to him by Wetzel on September 12, 1910, and the cancellation of the deed by such trustee to defendant dated February 3, 1911, and awarded costs against plaintiff, and to grant such relief, a decree will be entered here setting aside such sale and canceling such deed, remanding the cause for further proceedings in accordance with the principles herein announced, and awarding costs according to law.

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(76 W. Va. 58)

## KING v. SCOTT. (No. 2505.)

(Supreme Court of Appeals of West Virginia. March 23, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. CONTRACTS ⇐187—PERSONS ENTITLED TO SUE—PRIVITY.

Section 2, c. 71, Code 1913 (sec. 3740), does not authorize one not a party to a contract made for his benefit to sue thereon in a court of law,

unless such contract was made for his sole benefit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798–807; Dec. Dig. ⟸187.]

2. CONTRACTS ⟸187—PERSONS ENTITLED TO SUE—PRIVITY—LIEN CREDITOR OF GRANTOR—ACTION AGAINST GRANTEE.

A lien creditor of the grantor in a deed by which the land subject to the lien has been conveyed to a third person, in consideration of a certain sum in cash, and his assumption of the valid liens thereon and agreement with the vendor to settle the same, cannot maintain an action at law against the grantee, on such deed, for recovery of the amount of his lien on the land.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798–807; Dec. Dig. ⟸187.]

Error to Circuit Court, Randolph County.

Action by O. J. King against C. H. Scott. Judgment for plaintiff, and defendant brings error. Reversed, verdict set aside, and action dismissed.

H. G. Kump, of Elkins, for plaintiff in error. Arnold & Arnold, of Elkins, for defendant in error.

POFFENBARGER, J. The judgment against Scott, brought here for review, is for a debt originally made by Robert G. Read, Nora S. Read, and O. J. King in favor of the Randolph National Bank. The bank recovered a judgment against all of them, which was satisfied by King, an indorser on a note executed by Robert G. Read, payable to Nora S. Read, and first indorsed by her.

King claims Scott is liable for this debt by virtue of the provisions of a deed by which Nora S. Read and her husband conveyed to him a tract of land, in consideration of the sum of $1,000 in cash and his assumption of all of the valid liens upon it, as set out and decreed in the chancery cause of the R. D. Johnson Milling Company against W. J. Read and Nora S. Read. In that suit King appeared and set up his right to be subrogated to the benefit of the bank's judgment against Nora S. Read, and, before the date of the deed, the court, awarding the relief sought by his petition, had made his claim a lien on the land. An order of sale of the land for satisfaction of the liens thereon had been executed, but confirmation of the sale was defeated by an upset bid put in by William J. Read and C. H. Scott. Later Read and his wife conveyed the land to Scott by the deed here described. After this conveyance, there was an appeal from the decree by which the land had been ordered to be sold, but it was dismissed. Still later, by some procedure in the chancery cause, the decree of sale was set aside, and the cause again referred to a commissioner. Scott's offer of copies of these decrees and proceedings, as evidence in his behalf, was rejected, and the court, deeming his liability to have been fixed by the terms of the deed, directed a verdict against him. In so doing the court based its action on section 2 of chapter 71 of the Code, serial sec. 3740, the purpose of which was relief from a common-law defect revealed by the opinion in Ross v. Milne, 12 Leigh (Va.) 204, 37 Am. Dec. 646.

[1, 2] A stranger to a contract cannot sue on it, by virtue of this statute, unless it was made primarily for his benefit. "In case where the covenant referring in any manner to a third person or stranger was only incidental to the covenants between the parties thereto, and not intended by them to make any provision for such third person or stranger, it would be unjust to the parties and inconvenient in practice to permit such strangers to thrust themselves into the private affairs of others, and demand the production of private contracts and sue thereon." Johnson v. McClung, 26 W. Va. 659. The covenant in that case reads as follows:

"D. G. McClung and J. B. Anderson hereby assume one-half of the indebtedness for power, spinner, looms, and other machinery purchased by D. G. Johnson & Co. for the sum of $700.00 in specie of Mr. David Johnson."

Of this covenant the court said:

"Used in the connection it is, the word 'assumed' does not mean that the new members would pay that amount to David Johnson, but would pay it to D. G. Johnson & Co., the members of the old firm."

Construing said statute found in the Code of 1849 and remaining unchanged in Virginia, the Supreme Court of that state holds as follows:

"Where a debtor sells and conveys property to a purchaser, who, as part of the consideration, covenants that he will pay certain debts of his grantor, and the purchaser conveys to a second purchaser, who likewise, as a part of the consideration for the conveyance to him, covenants that he will pay the said debts of the original grantor, a motion for a joint judgment at law in favor of such creditor against the original debtor, and each of such purchasers, who have successively convenanted to pay the debts, cannot be maintained." McIlvane v. Big Stony Lumber Co., 105 Va. 613, 54 S. E. 473.

In the use of the word "sole," the Legislature seems clearly to have intended to avoid a double right of action against the covenantor or promisor, on account of a single consideration. As has been stated, the statute was passed to relieve, as far as practicable, from the defect disclosed by the opinion in Ross v. Milne, in which Judge Tucker warned against such a consequence, saying:

"But this leads to one of two consequences; either that the recovery here would not be a bar to the suit of the representative of Mrs. Smith; or it would be a bar. If it would not be a bar, then the defendant would be twice charged; if it would be a bar, then the representative of the promisee would be concluded by a proceeding to which he is no party."

This, however, was only one of the grounds upon which right of recovery in that action was denied. A technical common-law rule forbade an action upon a contract by a stranger to it, unless the consideration moved from him, even though made for his sole benefit. It might be made incidentally for his

benefit, and yet another might have a right of action upon it. In such case there would be an exposure to two actions, one by each person benefited, if the statute allowed an action to any person merely benefited. But the limitation of the right of action to the person for whose sole benefit the contract was made remedies the common-law defect without such exposure. In his discussion of the opinion in Jones v. Thomas, 21 Grat. (Va.) 96, Judge Johnson said, in Johnson v. McClung, cited:

"But I am convinced that both would not under the statute be entitled to maintain an action. If one could sue on it, the other could not. It was not intended for the benefit of both in the sense that either could sue on it."

And, though other reasons for his conclusion in that case were given, he carefully guarded against exposure to double actions for the same thing. That one who conveys property to another in consideration of the latter's assumption of a lien thereon may sue the grantee on the covenant to pay the lien is well settled. Jones v. Thomas, 21 Grat. (Va.) 96; Ross v. Milne, 12 Leigh (Va.) 204, 37 Am. Dec. 646.

The material difference between rights of action on deeds poll and deeds inter partes does not relieve the situation. As to the former, the rule is more liberal, but a promise or covenant to pay the third party, or the equivalent thereof, is essential. In Johnson v. McClung the absence of any promise to pay to David Johnson was observed and considered practically decisive. In Jones v. Thomas the instrument relied upon was under seal and signed by the obligor only. The debt it evidenced was originally due from W. A. Jones to G. W. Jones, and it bound Abijah Thomas to pay it. Though both Joneses were named in it, the court held W. A. Jones could recover the amount from Thomas on his obligation to pay it, notwithstanding the money would go ultimately to G. W. Jones. The execution of the paper was incidentally beneficial to G. W. Jones, for Thomas assumed the debt due him, but he assumed it as part of the consideration for land purchased at the same time from W. A. Jones; it having been a purchase-money lien thereon. Hence the contract was primarily for the benefit of W. A. Jones, to whom the paper was delivered, and it could not have been for the sole benefit of G. W. Jones. In Land Company v. Newberry, 95 Va. 119, 27 S. E. 899, the court expressed this view harmonizing with those here stated:

"If one of the objects of the statute was to abolish the distinction between deeds inter partes and deeds poll in the respect referred to, and to bring the former within the rule of the common law applicable to the latter, it was clearly not intended to change that part of the rule that only a person named or definitely pointed out in a deed as the beneficiary can sue thereon, and this was not its effect. The statute does not enable one who is not a party to the deed to maintain an action thereon, unless he is plainly designated by the instrument as the beneficiary, and the covenant or promise is made for his sole benefit."

The deed here involved neither names any creditors nor indicates them otherwise than by reference to the decree. The acceptance thereof bound the grantee to "assume and settle" only the valid liens so set out. Obviously this covenant was made with the grantors, and primarily for their benefit, and only for the incidental benefit of the lienholders. Moreover, the covenant was not absolute for it was to pay only the valid liens, and the covenantor was expressly relieved from payment of any lien that should be rejected on an appeal.

As interpreted by the plaintiff, the statute would permit him to recover here, on this deed, a sum of money the right to which may still be in litigation in another suit. If he has any right of action, it accrued at once on the delivery of the deed, when the right of appeal had not expired, and he could then have recovered, notwithstanding the possibility of a reversal of the decree and rejection of his claim as a lien on the land, and in spite of the provision relieving the grantee from obligation as to it, in that event. His remedy is obviously in the equity suit in which he has asserted his claim. There he will ultimately obtain such relief as he is entitled to, in such manner as will amply protect the rights of all other interested parties.

For these reasons, the judgment complained of will be reversed, the verdict set aside, and the action dismissed, but without prejudice to King's right to have recourse to the land mentioned and described in the deed, for the enforcement of any right he may have respecting the same.

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(75 W. Va. 889

## DILLON v. UNITED STATES COAL & COKE CO. (No. 2496.)

(Supreme Court of Appeals of West Virginia. Feb. 23, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ⟸150—MINOR EMPLOYÉ—DUTY OF MASTER.

The duty imposed by law requires a master to warn and instruct his minor servant of latent dangers; and if, in obeying the orders of a general superintendent, he engages in services other than those regularly assigned to and performed by him, danger from which the servant does not comprehend or appreciate because unknown to him, but of which the master knows or by the exercise of reasonable diligence ought to know, and fails so to warn and instruct, he is liable for resulting injuries to a servant free from negligence directly contributing thereto.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299–302, 305–307; Dec. Dig. ⟸150.]

2. MASTER AND SERVANT ⟸286—INJURY TO MINOR EMPLOYÉ—APPRECIATION OF DANGER—QUESTION FOR JURY.

Whether a minor servant, over 14 years old, without warning or instruction, understands and appreciates dangers incident to work

not within the scope of his regular duties, is a question of fact for the jury, under proper instructions from the court trying the case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. ⊂⊃286.]

3. MASTER AND SERVANT ⊂⊃156, 222—INJURY TO MINOR EMPLOYÉ—ASSUMPTION OF RISK—DUTY TO WARN—WAIVER.

A minor servant may, without assumption of risk or waiver of the master's duty to warn and instruct, obey the order of a general superintendent to perform specific work outside of his regular employment, unless, by reason of his capacity and experience and knowledge of the hazards of the work, he fully appreciates the dangers and the proper means of avoiding injury therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 311, 312, 648–651; Dec. Dig. ⊂⊃156, 222.]

Error to Circuit Court, McDowell County.

Action by Lon L. Dillon against the United States Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Anderson, Strother & Hughes, of Welch, for plaintiff in error. Cook, Litz & Harman and G. W. Howard, all of Welch, for defendant in error.

LYNCH, J. Lon L. Dillon, aged 16 years when employed by defendant, by his next friend brought trespass on the case for injuries received while engaged in performance for defendant of services other than those previously assigned to him and which prior to the injury had been performed by him pursuant to his contract of employment. For reversal of a judgment for $9,000 rendered on the verdict of a jury, defendant, on writ therefor, assigns numerous errors.

Though in the petition for the writ defendant complains of rulings upon demurrer, it does not in argument point out any defects in the declaration; and it seems sufficient as to the second and third counts, adjudged good by the trial court.

The cause averred in the second count, in brief, is that, although the work assigned plaintiff as his regular employment—the oiling of mine cars, separating slate and bone from the coal as it passed over the bone table at the tipple at the mine, and carrying samples of coal to defendant's offices for inspection—and which he was competent and had sufficient skill and experience to perform without risk to his personal safety, was not hazardous, defendant required him to engage, without warning or instruction, in other, perilous, and dangerous work, in the performance of which he was unskilled and incompetent of which defendant had notice, whereby, and without fault on his part, he received the injury sued for.

The third count averred, in detail, defendant's ownership of a railroad track, connected by switches, operated as part of its mining facilities in conjunction with its coal tipples and dumps; the shifting of cars thereon, the method employed in the operation of the cars on the tracks, and the character of the rails used in the construction and operation thereof; that the ends of the adjustable switch rails originally were, or by use had become, flattened "to a sharp feather edge and pointed away from the coal tipple"; that the custom was to couple and push several cars together, called a "trip," and, when so coupled, only a narrow space remained between the cars, into which space the employés, required to move the trip towards the tipple or dump, ordinarily entered and pushed with their backs against the forward car; and that plaintiff, though not employed for that work, and not being competent nor having sufficient discretion or skill therefor, was, without warning or instruction, required by defendant to engage, in the same manner, in pushing a trip, whereby, and without fault on his part he was injured.

The causes so averred are, in the main, sustained by full and competent proof. They are controverted in part only. Indeed, the only disputed fact is whether plaintiff voluntarily, or upon the direction of T. A. Wood, defendant's superintendent, engaged in helping move the trip of cars.

Though in its petition relying on many alleged erroneous rulings, defendant in argument relies only on those hereafter mentioned and discussed. Except as to rulings upon instructions, and as to the amount assessed as damages, the vital questions may readily be confined within narrow limits. The one reaching the real merits of the case is: Did plaintiff, who when injured was over fourteen years of age, presumptively have sufficient capacity to appreciate and comprehend the dangers incident to performance of the duties specially required of him, and to know the safest manner of avoiding injury from them?

Plaintiff had begun work at defendant's coal mine 18 days before the accident. As stated, his general employment was oiling mine cars, separating slate and bone from the coal as it passed over the bone table through the tipple to the place of loading on cars for shipment, and, at a certain hour each day, carrying samples of coal to Gary for inspection by defendant's officers and agents. According to his testimony, he was, on the morning of the injury, occupied in warming or melting "grease" preparatory to oiling the cars, pursuant to the direction of Anderson Dillon, his cousin and the tipple boss, under whose immediate control he worked. That duty being performed, Anderson Dillon directed him to resume his place at the bone table, when, if plaintiff's testimony is true, Wood, the general superintendent of the mine, ordered him to proceed to the assistance of other employés engaged or about to become en-

gaged in pushing towards the coal dump a "trip" of mine cars standing on the side track used in operating and shifting the cars. He says that he and Wood both hurried to that point, when the latter directed him "to get in and push," plaintiff interpreting the direction to mean a command to do as defendant's other servants did or were doing in the performance of the same service, the "trip of cars" consisting of from six to ten loaded coal cars; and that, as these men were then standing between the cars and pushing with their backs, plaintiff accordingly assumed the same position, and, upon taking it and in moving backward astride the rail near the switch, he was caught and injured in the manner hereafter described.

After stating his age, that he was "raised on a farm," and "never was about a railroad" or "any public place at all to work any" before his employment by defendant, plaintiff, as a witness in his own behalf, testified:

"Well, I went right along up there with Wood, and when he told me to get in there, of course I was in a trot; we were in a hurry to get the cars dropped down; they was a right smart distance from where we dumped the coal. We wanted to drop all the cars down together, so we wouldn't have to walk up there and get them one at a time. I didn't know there was a switch about. I was in a hurry. They never told me, the super (Wood) never had told me there was any danger; and I got in there, you know, pushing back down, just backing up, pushing the cars, and I hung my heel in the switch. Of course, if he had told me there was any danger, I wouldn't have went in there. * * * Well, the next car kept on rolling. It just rolled right on up on me. * * * The car was coming on. I didn't have time to jerk my heel out of the switch. The car ran right upon my leg. The fellow next to me threw on the brake. If the car had kept on rolling, it would have run up my leg; but he put on the brake, and it stopped the wheels from rolling. The car wheels was on my leg, and the leg was on the rail. The wheels slid, and they and my leg slid together. That is all that kept it from rolling on my body. * * * I was pushing backward, because the cars just fit you, you know, come along about your back; and if a person gets up this way (indicating) to push with their hands there is not room to stretch clean out this way. If a person gets between the cars, there is not room to push with their hands. I just turned right around and pushed with my back."

He also said the men pushing with him "turned around, pushing backward with their backs to the car"; that he did not see the switch, but probably could have seen it.

"But we were in a hurry, and I was not thinking of any danger. I didn't think he would put me in there where there was any danger. * * * The cars were just starting, you know. We were all taking short steps. We were pushing all the cars together. They were all coupled together, about six or eight of them. Five or six men were pushing. The track was nearly level, and the cars hard to start."

Though Wood admits he was present at the time and place of the injury, he expressly denies the statement that he summoned plaintiff to join in such labor. No witness corroborates either of them. They alone testify to that fact, and their statements are directly contradictory. Wood says he had not seen or spoken to plaintiff at any time that morning until he heard him cry out with pain and saw him under the wheels of the car. Apparently, they seemed equally fair and frank, and neither sought to evade or deceive, so far as we can determine; each of them testifying to the fact as he understood it to be.

Except as to the position and situation of the two rails, the track at the place of injury was not materially defective. Witnesses familiar with its condition so state; and none of them say it was unsafe or dangerous for use by one familiar with its situation and condition at that time, or that a duly prudent and cautious man in passing along and over it, even though he were engaged in moving cars in the manner stated, would probably sustain injury. But can we say, as a matter of law, no danger was likely to result to employés unaccustomed to the work performed by plaintiff? While Anderson Dillon does testify he told plaintiff to keep away from loaded coal cars for any purpose, the latter contradicts him. But, if true, Wood was the superior officer in charge of operations at the mine. Anderson Dillon's authority was not supreme. Plaintiff was therefore justified in obeying Wood's direction. And what Wood said was more than mere direction. It was an order, a command, according to plaintiff's testimony.

[1-3] Under such circumstances, did defendant fail to perform the duty to its servant to warn and instruct, and, if so, was such failure the proximate cause of the injury? Naturally and necessarily, the duty to warn and instruct, and the consequential liability ensuing the failure to perform it, vary somewhat according to the age, intelligence, capacity, and skill of the servant and the character of the employment, as does also the application of the doctrine as to the assumption of risks. Where an adult might be deemed to have assumed the risk and waived the master's duty as to safe place and appliance or dangers of the employment, no such assumption or waiver would equally be attributed to an infant. Turner v. Railroad Co., 40 W. Va. 676, 22 S. E. 83. If an adult servant and the master have equal knowledge of patent dangers incident to the particular employment, the servant, who undertakes it, assumes the risk, if he has sufficient discretion to appreciate such dangers. It is not so, however, where the defects or hazards are latent, and the master is aware, or by reasonable diligence ought to have known, of their existence. In such case, his duty requires him to warn against the danger, and his failure so to do will impose upon him liability for a resultant injury, though the employé be an adult. The same duty devolves upon the master, even where the hazards are patent, if through youth, inex-

perience, or other cause the servant is incompetent fully to understand and appreciate the nature and extent of the hazard. The master legally can absolve himself from liability for injuries to an infant servant only by warning and instructing him, and not then unless the infant has sufficient intelligence and capacity to appreciate the dangers and to contract in his own behalf. Giebell v. Collins Co., 54 W. Va. 518, 46 S. E. 569; Ewing v. Fuel Co., 65 W. Va. 726, 65 S. E. 200, 29 L. R. A. (N. S.) 487. The liability of the master for injuries sustained by an infant servant in the course of his employment depends upon the infant's capacity to comprehend and avoid the incidental dangers, and whether he is fully advised concerning them. His age, between 7 and 21 years, is only an evidential fact to be considered upon the question of capacity and intelligence. Ewing v. Fuel Co., supra. In the absence of such capacity and intelligence, the master cannot escape liability on the ground that the injury to the minor was due to accident or the negligence of a fellow servant. Ewing v. Fuel Co., supra. The duty imposed as to dangers incident to the work and not patent to the infant or of the existence of which he is not advised, or by reason of lack of capacity and experience he cannot appreciate or avoid, requires the master to respond in damages for injuries resulting from such dangers. McCarty v. Lumber Co., 80 S. E. 810.

This court has virtually said that, where a servant, though an adult, is not aware of the risk or danger of an employment, and the master knows, or if reasonably diligent ought to know, of the danger, and fails to warn, and injury results to the servant, the master must respond in damages therefor. Skidmore v. Railroad Co., 41 W. Va. 293.[1] A servant who has ordinary prudence, and believes no injury will result from performance of duties specially required of him, may engage in them; and if, while so doing, he suffers injury from a defect in the instrumentality used, he does not lose his right to complain, if not warned by the master, unless he comprehends and appreciates the dangers. Cement Co. v. Luck, 103 Va. 427, 49 S. E. 577, in which it is further said greater care is required of the master in giving warning as to the special work than if the servant was engaged in the regular line of his employment. So, in Cave v. Limestone Co., 82 S. E. 1095, we said an adult, who when injured was engaged, without warning, in work outside of his regular employment, was entitled to recover for injuries inflicted. Likewise, in Michael v. Machine Works, 90 Va. 492, 19 S. E. 261, 44 Am. St. Rep. 927, it was said that, if a servant is ordered temporarily to work in another department of the master's general business, of such a different character that it cannot be said to be within the scope of his employment, he does not, by obeying, necessarily assume the risks incident to the new work; and that, when so placed, where engrossing duties are required of him, he has a right to assume that the master will not, without proper warning, subject him to other and unknown perils from which the work exacted necessarily distracts his attention. Failure of the master so to warn is negligence, for which he is liable in case of injury sustained by the servant while so engaged. 4 Labatt on Mast. & Serv. § 1362, in effect, says a servant who is directed or commanded to perform a particular duty, in performance of which he is injured, may be deemed to have been misled and impelled to encounter the danger incident to it, and, on that ground, is relieved from the common-law bar based on assumption of risks. See, also, Gartin v. Coal & Coke Co., 72 W. Va. 405, 78 S. E. 673. As generally these authorities discuss liability for injuries to adults, it may properly be assumed that a much higher duty devolved on defendant to protect its minor and inexperienced servant.

Whether, under the circumstances established by proof, and the authorities cited as applicable to them, plaintiff had sufficient capacity and experience to comprehend the hazards of the employment, such as he described, outside of the regular work assigned to him, and did in fact appreciate the nature and extent of the dangers and know how to avoid injury therefrom, are, as we said in Cave v. Limestone Co., supra, and Neil v. Timber Co. (recently decided by this court) 84 S. E. 239, questions of fact for submission to the jury, together with such instructions as may be deemed proper for their guidance in reaching a just conclusion on the merits of the case presented to them. These questions they have resolved by a verdict, which, not being plainly wrong, cannot be disturbed upon this review.

Objection is urged against plaintiff's instruction No. 1, defining the master's duty to warn when required by the youth and inexperience of a servant; the argument being based on want of evidence to support it. A sufficient reply is that plaintiff testified he was not warned, did not know there was any switch at the place of injury, did not see it, and that if he had known of its existence and location or its dangerous character, or had been warned of its existence and the probability of injury therefrom, he would not have been injured. This evidence warranted the giving of the instruction, as it also did the refusal of defendant's instruction No. 1, also complained of.

Defendant also complains that its instructions 9, 11, and 16 were improperly refused. Under the decisions cited, an instruction saying, as No. 9 did, that, as plaintiff was over 14 years old when injured, he must be deemed to have had sufficient capacity to comprehend and avoid the dangers incident to the employment, is erroneous. The more

[1] 23 S. E. 713.

vital, and the decisive, question was whether plaintiff, although he may have possessed such capacity, did in fact, in the absence of warning or instruction, appreciate the dangers and know the safest means of avoiding them. When read in view of the facts on which it is based, Wilkinson v. Coal & Coke Co., 64 W. Va. 93, 61 S. E. 875, 20 L. R. A. (N. S.) 331, cited by defendant, does not sustain the proposition stated. The question in that case was whether the boy employed to operate chock blocks on an incline had sufficient skill and understanding to perform properly the service required, on which depended not his own safety, because he was not injured, but the safety of other employés necessarily imperiled by his lack of skill in performance of the work assigned to him. The person who was thereby injured, and not the alleged incompetent servant, sought recovery. In other words, it was of the negligent employment of an incompetent minor servant the court was speaking; while here is involved a lack of ability and skill to comprehend and avoid dangers from which the servant himself was injured through lack of warning of the perils of the employment. Instruction No. 16 restates, though somewhat more in detail, the same proposition embodied in No. 9, and was not improperly refused, for the same reason. It does not state a correct legal proposition. If true, a master would not be liable to any minor servant, under any circumstances, where the danger is patent to an adult and is "out in the world in broad daylight." Besides, what has been said as to No. 9 applies in some degree to this instruction.

Defendant's instruction No. 11, if given, would have told the jury that if on more than one occasion plaintiff had been at the place of injury, and could easily and readily have seen the switch, he cannot excuse his want of knowledge of its existence "by stating he did not know it was there and had not noticed it." The conclusion drawn does not necessarily follow from the premises. No witness stated plaintiff had any knowledge of the switch, or saw it, or by the exercise of reasonable diligence could have anticipated its dangerous position and character when concealed by coal cars standing on and over it. The cars evidently were close together, with scarcely room enough between them to observe the location of the switch or the loose end of the switch rail, or that his foot would catch between it and the permanent rail and drag him down and under the cars. And, even if he observed the situation of the two rails, his view was not then limited by the presence of the cars. He saw them, if at all, when the track was not in use; and, although an adult might have entered between the cars at his peril, it cannot be said a boy 16 years of age would or ought to have anticipated any danger from following the example of the men engaged in a like service.

Defendant criticizes as excessive the amount ascertained as damages. But, as clearly appears, the injuries were serious, and, to some extent, permanent. Plaintiff's injured leg is now shorter than it was before the accident. His foot was mashed, the bone of the leg broken, the flesh lacerated and torn from it, 27 pieces of the bone protruded and were removed from it, and evidently, and unavoidably, he must have suffered grievous pain from that time to the present, and he is still suffering pain from it. The surgeon who attended him described the injury as a compound fracture, with extensive laceration of the tissues upon the ankle and knee. He states that the bone was broken and exposed, that there is still anchylosis or stiffness in the ankle joint, and that in his opinion the ankle will always be stiff. As to the probability of any physical adjustment of the present difference in the lengths of plaintiff's legs, he said:

"The fracture—the injury—is about the middle of the long bone, and the growth is from the upper fourth and the lower fourth of the long bone; what we call epiphysis. While he is a young boy—I do not know his age—after he matures it should not be comparatively as short as it is now."

He also testified that at times he thought it would be necessary to amputate plaintiff's leg; that he suffered excruciating pain, and at times he thought it would be impossible to save his life even by an amputation; that he yet frequently dresses the leg; that the bone was badly mashed and splintered, parts of it disintegrated, and were thrown off in the process of healing. Under such circumstances, while the judgment is indeed large in amount, we cannot say it is so grossly excessive as to warrant reversal for that cause alone. Goshorn v. Mold & Foundry Co., 65 W. Va. 250, 64 S. E. 22; Ewing v. Fuel Co., 65 W. Va. 726, 65 S. E. 200, 29 L. R. A. (N. S.) 487; McCarty v. Wood, 80 S. E. 810; Farish v. Reigle, 11 Grat. (Va.) 697, 62 Am. Dec. 666. See, also, the exhaustive notes on excessiveness of verdicts in actions for personal injuries, appended to Ruck v. Brewery Co., Ann. Cas. 1913A, 1361, and Railway Co. v. Hadley, 16 Ann. Cas. 8.

The views we have expressed lead to affirmance of the judgment complained of.

(143 Ga. 302)

LOGANVILLE BANKING CO. v. FORRESTER et al. (No. 271.)

(Supreme Court of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

1. USURY ⟸ 45, 80—RESERVATION OF INTEREST—SECURITY DEED—VALIDITY.

The reserving of interest in advance by a bank at the highest legal rate of interest on a loan, whether it be a short or long term loan, is usurious; and a deed to land given to secure a promissory note for the loan is void on account of the usury.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 98, 158–160; Dec. Dig. ⟸45, 80.]

*(Additional Syllabus by Editorial Staff.)*

2. USURY ⟸12—WHAT CONSTITUTES.

To constitute "usury" within Civ. Code 1910, § 3427, it is essential that there be, at the time the contract is executed, an intent on the part of the lender to take or charge for the use of money a higher rate of interest than that allowed by law. If the intent be to take only legal interest, a slight and trifling excess, due to mistake or inadvertence, will not taint the transaction with usury, but if the purpose be to take, from the money advanced at the time of the loan, the legal maximum rate of interest, the transaction is a usurious one.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 23, 24, 146; Dec. Dig. ⟸12.

For other definitions, see Words and Phrases, First and Second Series, Usury.]

Certified Questions from Court of Appeals.

Action between the Loganville Banking Company and S. N. Forrester and others. From the judgment, the Banking Company appeals, and the Court of Appeals certifies certain questions to the Supreme Court. Questions answered in opinion.

The Court of Appeals requested an instruction from the Supreme Court in answer to the following questions:

"(1) Does the taking or reserving of interest in advance by a bank at the highest legal rate on a short-term loan render the contract usurious within the purview of section 3427 of the Civil Code, so as to make null and void a deed to realty, given to secure the payment of a promissory note representing the amount of such a loan?

"(2) What would be the maximum length of time in which a loan could run and still be a 'short-term loan,' on which interest at the highest legal rate could be taken in advance?

"(3) Is the taking of interest in advance at the highest legal rate for a period of 9 months and 11 days usurious, or is such a loan relieved of the taint of usury because of being 'a short-term loan?'"

J. H. Felker, of Monroe, for plaintiff in error. R. L. Cox and O. Roberts, both of Monroe, for defendant in error.

EVANS, P. J. [1] The legal rate of interest in this state is 7 per centum per annum, but the parties may stipulate in writing for a higher rate, not to exceed 8 per centum per annum. Our statute defines usury as "the reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest." Civil Code 1910, § 3427. The Code (section 3436) further declares:

"It shall not be lawful for any person, company, or corporation to reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than eight per centum per annum, either directly or indirectly by way of commission for advances, discount, exchange, or by any contract or contrivance or device whatever."

All laws respecting the rate of interest charged for the loan of money by individuals are applicable to banks. Civil Code 1910, § 2336. Titles to property made as a part of an usurious contract or to evade the laws against usury are void. Civil Code 1910, § 3442. That interest at the highest legal rate cannot be reserved in advance in loans extending over a year will not be controverted. Numerous decisions establish that proposition. Is there any proper ground of differentiation between reserving interest at the highest legal rate on long-term loans and in taking such interest in advance on short-term loans, within the purview of our statutes? It has been stated, in the course of the argument in several of the opinions of this court, that the taking of interest in advance on short-term loans in the usual and ordinary course of business is not usurious. MacKenzie v. Flannery, 90 Ga. 591(5), 599, 16 S. E. 710; Union Savings Bank v. Dottenheim, 107 Ga. 606, 614, 34 S. E. 217; McCall v. Herring, 116 Ga. 285, 243, 42 S. E. 468. On the other hand, it has been strongly intimated that the statutes respecting interest and usury apply alike to short and long term loans. Howell v. Pennington, 118 Ga. 494, 45 S. E. 272. But the observations in those cases are obiter dicta, and the proposition is res integra in this state. Patton v. Bank of Lafayette, 124 Ga. 965, 53 S. E. 664, 5 L. R. A. (N. S.) 592, 4 Ann. Cas. 639.

In many jurisdictions a rule has been evolved that interest may be taken in advance on short-time paper without rendering the transaction usurious. This rule of law is said to have arisen out of the custom and practice of banks. Webb on Usury, § 111; Tyler on Usury, 298. A very interesting history of the legislation respecting interest and usury in England and in the state of Georgia will be found in the opinion of Mr. Justice Cobb, in Union Savings Bank v. Dottenheim, supra. In England by St. 12 Anne, 5 per cent. was the maximum rate of interest, and all bonds and assurances for the payment of any money to be lent, whereby a greater sum was reserved or taken for interest, were declared void. The practice grew up for bankers to require payment of bank discount in addition to the highest rate of interest. In Auriol v. Thomas, 3 T. R. 62, it was held that in the discount of bills a banker may take more than the highest legal rate, if the excess be

taken only to defray the expense of remittance, provided such excess be reasonable and that it be not a cover for usurious interest. If the transaction was not a discount in the way of trade, but was merely employed as a means of obtaining more than the legal rate of interest, it would be usurious. Marsh v. Martindale, 3 Bos. & P. 154. The rules and practices of banks in this regard were extended to transactions between individuals and to paper not negotiated at a bank. The extension of the custom of banks to individuals is not allowable on any proper basis of logic, and is defensible only on the principle of uniformity. In this connection it may be well to notice that our statute applies the laws of interest and usury as affecting individuals to banks, and this affords strong ground for the conclusion that banks cannot ingraft on the law any usage or custom of banks variant with the law of usury. Perhaps a majority of the American courts are in line with the English decisions, and extend to individuals the same privilege of discount, as affecting the interest demanded in advance, as is allowed by the usage of banks. But our statute expressly forbids an increase of the maximum interest rate by way of discount; and usage cannot override a positive enactment of law. In some jurisdictions statutes prohibit banks from taking any greater rate of interest or discount on any note or draft or other security than a prescribed rate, but provide that such interest or discount may be calculated and taken according to established rules of banking. In such cases it is held that the statute permits the taking of interest in advance upon loans made by a bank according to the established rules of banking. Ticonic Bank v. Johnson, 31 Me. 414; Sanford v. Lundquist, 80 Neb. 414, 118 N. W. 129, 18 L. R. A. (N. S.) 633.

If we follow the words of the statute, there can be no legitimate differentiation of short-term from long-term loans. Interest is compensation for the use of money. In determining whether a greater sum than the maximum rate has been reserved, we look to the amount received and the interest reserved. If the borrower does not receive all of the principal stated in his obligation, because of the reservation of enough to pay the interest, he does not receive the full amount of his loan. The real principal of his obligation is the amount which he actually receives. When he pays the principal as stated in his obligation, from which the maximum rate of interest was deducted in advance, he pays a sum in excess of that which he received, and the interest on it. This is true in both short and long loans, and the only difference is that, as applied to short loans, the disparity between the sum reserved for interest and the actual interest is not nearly so great as in long loans. The rate of interest and the effect of taking more than the maximum are peculiarly the subject of statutory regulation. Our lawmakers were not content with a simple statement of the rates of interest and a general definition of usury (Civil Code 1910, §§ 3426, 3427), but undertook to denounce as unlawful for any person, bank, or other corporation to reserve or take for any loan of money any rate of interest greater than 8 per cent. per annum either directly or indirectly by way of commission, discount, exchange, or by any contract or contrivance or device whatever. The reference to discount and exchange excludes the custom of banks in making these charges additional to interest in the loan of money. The exclusion does not except short loans, and to make such an exception would be to amend and change the statute, which courts are powerless to do.

[2] To constitute usury it is essential that there be, at the time the contract is executed, an intent on the part of the lender to take or charge for the use of money a higher rate of interest than that allowed by law. Bellerby v. Goodwyn, 112 Ga. 306, 37 S. E. 376. If the intent be to take only legal interest, a slight and trifling excess, due to mistake or inadvertence, will not taint the transaction with usury. Rushing v. Willingham, 105 Ga. 166, 31 S. E. 154. But if the purpose be to take from the money advanced, at the time of the loan, the legal maximum rate of interest, the transaction is an usurious one, and a deed to land given to secure the debt is void by virtue of the statute (Civil Code 1910, § 3442), which declares:

"All titles to property made as a part of an usurious contract, or to evade the laws against usury, are void." Beach v. Lattner, 101 Ga. 357, 28 S. E. 110.

All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 291)

O'NEAL v. VEAZEY et al. (No. 258.)

(Supreme Court of Georgia. March 10, 1915.)

*(Syllabus by the Court.)*

1. PARTIES ⇐95 — DESECRATION OF BURIAL GROUND — ACTION FOR DAMAGES — AMENDMENT TO PETITION—ADDITION OF PARTIES.

Where an action for damages was brought for the desecration of a burial ground by certain persons alleging themselves to be the heirs at law and nearest of kin of the original owner, being his grandchildren and great-grandchildren, and owning the lot and easement, there was no error in allowing an amendment adding the names of certain other persons as other grandchildren and great-grandchildren, whose names had been omitted from the original petition by inadvertence and oversight of the plaintiff's attorney.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 160–166; Dec. Dig. ⇐95.]

2. CEMETERIES ⇐20—PLEADING ⇐250—DESECRATION—DAMAGES RECOVERABLE—AMENDMENT TO PETITION.

Nor, in connection with the allegations of the petition, was there error in allowing an amendment which alleged that, by the destruction of the trees and shrubbery upon the burial

ground, the defendant not only damaged the lot, but also committed an injury to the feelings and peace and happiness of the plaintiffs.

[Ed. Note.—For other cases, see Cemeteries, Cent. Dig. § 22; Dec. Dig. ⟸20; Pleading, Cent. Dig. §§ 730–733; Dec. Dig. ⟸250.]

3. VERDICT APPROVED.

The evidence authorized the verdict, and none of the other rulings complained of are such as to require a new trial.

Error from Superior Court, Greene County; J. B. Park, Judge.

Action by J. A. Veazey and others against Alex S. O'Neal. Judgment for plaintiffs, and defendant brings error. Affirmed.

Noel P. Park, of Greensboro, for plaintiff in error. Jas. Davison, of Greensboro, for defendants in error.

LUMPKIN, J. J. A. Veazey and several other plaintiffs brought suit against Alex S. O'Neal, alleging in substance as follows: The administrator of Jesse Veazey conveyed to W. C. Merritt a certain tract of land containing 117 acres, more or less, reserving a certain portion thereof as a family burying ground. O'Neal has purchased the fee to the property surrounding the burial ground, with full notice of the reservation thereof. The burial ground contains the graves of Jesse Veazey, his wife, and most of his immediate kin, and ancestors of the plaintiffs. Plaintiffs are the heirs at law and next of kin of Jesse Veazey, being his grandchildren and great-grandchildren, and have the right to be buried there if they so desire. The plaintiffs are in possession of the burial ground, and own the easement and right of burial therein. O'Neal has by himself and his agents entered upon the burial ground and injured and defaced it by cutting down and destroying six large cedar trees and one walnut tree which had been set out thereon by the wife of Jesse Veazey. By himself and his agents O'Neal has also cut and destroyed certain small shrubbery from the burial plat, and has cultivated it, thereby desecrating it and making it unfit for the purposes of the reservation in the deed to O'Neal. The trees and shrubbery made the cemetery lot valuable, and their destruction damaged the property to the extent of $500. O'Neal committed the trespasses with the full knowledge of the associations connected with the burial ground and of its value, with all it contained, to the plaintiffs. By amendment certain additional parties were made plaintiffs, they alleging that they were grandchildren and great-grandchildren of Jesse Veazey, and were omitted from the petition by inadvertence and oversight by the plaintiffs' attorney, and that each of them was interested in the suit in the manner set out in the petition. This amendment was allowed over objection, and exception was taken. The jury found for the plaintiffs $275. A motion for a new trial was overruled, and the defendant excepted.

[1] 1. The suit was for damages to a burial lot. It was brought by certain persons who alleged that they were grandchildren and great-grandchildren of the original owner, whose administrator had made a reservation of such burial lot in selling the tract of land from which it was excepted, and were the heirs of such person and owners of the lot and easement. If some of the grandchildren and great-grandchildren were inadvertently omitted from the petition, there was no error in allowing them to be added by amendment. This did not constitute the adding of new and distinct parties, but rather fell within the provisions of Civil Code 1910, § 5687, which declares:

"In all suits by or against partners, or where any two or more persons sue or are sued in the same action, and the name of any person who ought to be joined in such action as plaintiff or defendant is omitted, the omission shall, on motion, be amended by adding the proper party instanter."

The damages sought to be recovered were to the burial lot and right as a whole, and all parties entitled thereto could join in the same suit.

[2] 2. Objection was also made to amending the petition by alleging that by the destruction of trees and shrubbery O'Neal not only damaged the cemetery, but also committed an injury to the peace and happiness of the plaintiffs. There was no error in allowing this amendment. In an action of this character such damages are recoverable in addition to special pecuniary damages, especially where the injury is wanton and malicious, or is the result of a reckless disregard of the rights of others, equivalent to an intentional violation of them. In connection with the allegations of the original petition showing a willful trespass upon a burial ground, the allowance of this amendment was not error. Jacobus v. Congregation of the Children of Israel, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141; Louisville & Nashville R. Co. v. Wilson, 123 Ga. 62, 71, 51 S. E. 24, 3 Ann. Cas. 128. In this connection see Medical College of Georgia v. Rushing, 1 Ga. App. 468, 57 S. E. 1083; 1 Cooley on Torts (3d Ed.) 498, side page 280; 1 Sedg. Dam. (9th Ed.) § 431.

[3] 3. The evidence authorized the verdict, and none of the other rulings complained of are such as to require a new trial.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 301)

WILSON et al. v. SYKES. (No. 268.)

(Supreme Court of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

REFUSAL OF INTERLOCUTORY INJUNCTION.

Under the evidence submitted, there was no abuse of discretion on the part of the trial judge in refusing the interlocutory injunction.

Error from Superior Court, Decatur County; E. D. Cox, Judge.

Action between A. C. Wilson and others and William Sykes. From the judgment, the parties first named bring error. Affirmed.

A. E. Thornton and W. V. Custer, both of Bainbridge, for plaintiffs in error. T. S. Hawes, of Bainbridge, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 296)

BANK OF MAXEYS et al. v. PERRY et al. (No. 266.)

(Supreme Court of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

PLEADING ⊂=193—DEMURRER TO PETITION—EQUITABLE RELIEF.

Under the allegations in the petition, the plaintiff was not entitled to the equitable relief sought against the defendants, and the court properly sustained the demurrer and dismissed the petition as to them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 425, 428–435, 437–443; Dec. Dig. ⊂=193.]

Error from Superior Court, Greene County; J. B. Park, Judge.

Action by the Bank of Maxeys and others against Ben F. Perry, receiver, and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Noel P. Park and Lewis, Davison & Lewis, all of Greensboro, for plaintiffs in error. Jones & Chambers, of Atlanta, and Samuel H. Sibley, of Union Point, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(16 Ga. App. 227)

THOMAS v. CITY OF ATLANTA. (No. 6339.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

1. INTOXICATING LIQUORS ⊂=236 — KEEPING FOR ILLEGAL SALE—PROOF.

There was proof of one illegal sale of liquor, which was sufficient to show that the liquor sold was kept on the particular occasion for the purpose of illegal sale; and this evidence justified the conviction of the defendant under a municipal ordinance prohibiting the keeping of liquor for illegal sale. Rooney v. Augusta, 117 Ga. 709, 45 S. E. 72; Reese v. Newnan, 120 Ga. 198, 47 S. E. 560; Rice v. City of Eatonton, 15 Ga. App. 505, 83 S. E. 868, 869, and cases there cited.

(a) In Moran v. Atlanta, 120 Ga. 846, 48 S. E. 324, relied upon by the plaintiff in error, the defendant was convicted under an ordinance against "retailing spirituous and malt liquors without a license," which constituted an offense against a penal statute of this state, and this ordinance, passed under the "general welfare clause" of the charter of the city, was itself held to be invalid, and the conviction of the defendant thereunder was consequently set aside. On the other hand, municipal ordinances directed against the storage of liquor for the purpose of illegal sale have been repeatedly sustained by the Supreme Court and by this court, and proof of one sale has been repeatedly held to be sufficient to establish the purpose for which the liquor was kept. Paulk v. Sycamore, 104 Ga. 728, 31 S. E. 200; Brown v. Social Circle, 105 Ga. 834, 32 S. E. 141; Coggins v. Griffin, 5 Ga. App. 1, 62 S. E. 659; and numerous other cases.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300–322; Dec. Dig. ⊂=236.]

2. CRIMINAL LAW ⊂=1179—OVERRULING OF CERTIORARI—REVIEW.

There was evidence to support the finding of the recorder in this case, and, since the petition for certiorari assigned error only because of the alleged insufficiency of such evidence, this court will not disturb the action of the judge of the superior court in overruling the certiorari.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3001; Dec. Dig. ⊂=1179.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Henry Thomas was convicted of keeping liquor for illegal sale in violation of a city ordinance, and from the overruling of certiorari, he brings error. Affirmed.

C. G. Battle, of Atlanta, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

WADE, J. Judgment affirmed.

BROYLES, J., disqualified.

(16 Ga. App. 222)

BARNES v. CITY OF ATLANTA. (No. 6360.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

1. INTOXICATING LIQUORS ⊂=236 — KEEPING FOR ILLEGAL SALE—PROOF.

"Proof, on the trial of one accused of keeping liquor for illegal sale, that the accused made an illegal sale of liquor, is sufficient to show that the liquor sold was kept on the particular occasion for the purpose of illegal sale." Reese v. Newnan, 120 Ga. 198, 47 S. E. 560. "Such a sale shows conclusively that at least the liquor sold was kept on the particular occasion for the purpose of illegal sale." Rooney v. Augusta, 117 Ga. 709, 45 S. E. 72. See, also, Robinson v. Americus, 121 Ga. 180–182, 48 S. E. 924; Sawyer v. Blakely, 2 Ga. App. 159 (2), 58 S. E. 399; Coggins v. Griffin, 5 Ga. App. 1, 62 S. E. 659; Cooper v. Fort Valley, 13 Ga. App. 169, 78 S. E. 1097; Rice v. City of Eatonton, 15 Ga. App. 505, 83 S. E. 868, 869.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300–322; Dec. Dig. ⊂=236.]

2. CRIMINAL LAW ⊂⊃1179—OVERRULING OF CERTIORARI—EVIDENCE.

Where a petition for certiorari contains no assignment of error, except the general assignment that the conviction is without evidence to support it, and the evidence, though slight, was sufficient to support the finding of the recorder, this court will not disturb the judgment of the superior court in overruling the certiorari.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3001; Dec. Dig. ⊂⊃1179.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Ruth Barnes was convicted of keeping liquor for illegal sale in violation of a city ordinance, and from the overruling of certiorari, she brings error. Affirmed.

C. G. Battle, of Atlanta, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

WADE, J. Judgment affirmed.

BROYLES, J., disqualified.

(143 Ga. 306)

## ADAMSON v. REAGIN et al.
## REAGIN et al. v. ADAMSON.
## (No. 272.)

(Supreme Court of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

PLEADING ⊂⊃298—PLEA OF NON EST FACTUM —VERIFICATION BY ATTORNEY.

The provisions of the Civil Code 1910, § 5642, apply to a plea of non est factum (which section 5650 requires to be accompanied by an affidavit of its truth), so as to permit an attorney at law of a defendant who does not reside in the county in which the suit is pending to make oath to a plea of non est factum to the best of his knowledge and belief.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 890; Dec. Dig. ⊂⊃298.]

Certified Questions from Court of Appeals.

Action between G. R. Adamson and Gordon, Gartrell, and Harlan Reagin. From the judgment both parties brought error to the Court of Appeals, which certifies a question to the Supreme Court. Question answered in the affirmative.

The Court of Appeals certified to the Supreme Court the following question:

"Do the provisions of section 5642 of the Civil Code of 1910 apply to a plea of non est factum (which section 5650 of the Code requires to be accompanied by an affidavit of its truth), so as to permit an attorney at law of a defendant who does not reside in the county in which the suit is pending to make oath to a plea of non est factum to the best of his knowledge and belief only?"

Roop & Fielder and Adamson & Brown, all of Carrollton, and Griffith & Matthews, of Buchanan, for Adamson. Boykin & Boykin and S. Holderness, all of Carrollton, opposed.

LUMPKIN, J. By the Civil Code 1910, § 5650, it is declared:

"No person shall, in his plea or answer, be permitted to deny any deed, bill-single or penal bond, note, draft, receipt, order, or other instrument in writing, which is the foundation of the action, unless he shall make affidavit of the truth of such plea or answer at the time of filing the same."

The provisions of this section originated in the act of 1799. Cobb's Digest, 486. It was held that an affidavit to a plea of non est factum, stating that it was true to the best of defendant's "remembrance," was insufficient. Moore v. Morris, 26 Ga. 649. By the Constitution of 1868 it was provided that:

"The court shall render judgment without the verdict of a jury in all civil cases, founded on contract, where an issuable defense is not filed on oath." Constitution 1868, art. 5, § 3, par. 3.

The judges of the superior court by rule provided a form of affidavit to defenses in actions founded on contract, whereby the affiant stated that the defense was true to the best of his knowledge and belief. Code 1873, p. 947, Rule 24. It was declared that this provision of the Constitution did not destroy the existing law requiring a defendant to make affidavit to the truth of the plea of non est factum, but, as a condition to opening actions upon certain contracts to defense, required that the defense should be sworn to. Accordingly, in Martin v. Lamb, 77 Ga. 252, 3 S. E. 10, it was held that a plea of non est factum, sworn to by the defendant "to the best of his knowledge and belief," did not cast the onus upon the plaintiff, but only entitled the defendant to go to the jury and establish his defense. This decision did not deal with any question of the verification of a plea by an attorney at law of a defendant residing out of the county in which the suit was pending, but with the verification by the defendant himself which would be sufficient to change the burden of proof.

Shortly after the adoption of the Constitution of 1868, the act of March 4, 1869, was passed. Acts 1869, p. 131. It provided that:

"In all civil cases founded on contract where there is an issuable defense, and where the defendant does not reside in the county in which suit is pending, it shall and may be lawful for the agent or attorney at law of such defendant to make oath to the plea, and the same shall be as good and sufficient as if made by the defendant himself."

The second section provided that:

"When the plea is filed on the oath of the agent or attorney at law of the defendant, he may swear that what is contained in such plea is true, according to the best of his knowledge and belief."

This act is now codified. Civil Code 1910, § 5642.

In Colquitt v. Mercer, 44 Ga. 432, a plea to the jurisdiction was filed and verified by the attorney of the defendant. The question arose as to the meaning of the words "an issuable defense," as used in the act of 1869, and whether they included a plea to the jurisdiction. Two of the judges of this court held that the phrase "issuable defense" was a technical one, and meant a plea to the mer-

its, properly setting forth a legal defense, as distinguished from a plea in abatement, or any plea going only to delay the case. The Chief Justice concurred specially in the judgment. In Poullain v. Pigg, 60 Ga. 263, it was held that where a defendant to an action founded on contract had filed his plea, but had removed from the county before the trial of the case, an amendment to the plea could be verified by his agent or attorney at law. Warner, C. J., said in the opinion that the amended plea was as much within the reason and spirit of the statute as the original plea. In Fowler v. Gate City National Bank, 88 Ga. 29, 13 S. E. 831, it was held that a plea of non est factum must be sworn to, and generally the affidavit must be made by the defendant and not by an agent. It was added, "The exception, if any, is stated in section 3449 of the Code" (which appears in the present Code as section 5642). In Plant v. Mutual Life Ins. Co., 92 Ga. 636, 639, 19 S. E. 719, it was held that an attorney at law of a corporation, who did not profess to be an agent in any other capacity, was not competent to verify on its behalf an answer to a summons of garnishment; that the answer might be verified by an agent of the corporation who could and would depose positively to the facts therein stated; and that an answer sworn to by an agent "to the best of his knowledge and belief" was not properly verified without a further statement pointing out what facts he knew and what facts he believed, together with the grounds of his belief. In that case, however, the court was not dealing with a suit based on a contract, and an issuable defense thereto, but with an answer to a statutory proceeding by garnishment, which was not within the terms of the act of 1869.

From what has been said above, it will be seen that if a plea of non est factum is an "issuable defense," as that expression has been construed by this court, and if the defendant resides outside the county in which the suit is pending, the plea may be verified by his attorney; and, if this may be done, the attorney may swear that what is contained in it is true according to the best of his knowledge and belief. It cannot be doubted that a plea of non est factum is a plea to the merits. It goes to the very existence of the written contract on which the suit is based. If a suit should be brought to enforce a parol contract, and the defendant should deny that any such contract was made, no one would doubt that this was a plea to the merits, an "issuable defense." If the suit is founded upon an unconditional contract in writing, and the defendant denies the execution of any such contract, such a plea is equally a plea to the merits, and within the terms of the statute with respect to the verification of such "an issuable defense" by an attorney at law where a defendant does not reside in the county in which the suit is pending.

Accordingly, the question propounded by the Court of Appeals is answered in the affirmative. All the Justices concur, except FISH, C. J., absent.

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(143 Ga. 250)

## KITCHENS v. STATE. (No. 242.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

1. HOMICIDE ⟹122—JUSTIFICATION—DANGER TO RELATIVE—PARENT AND CHILD.

The provisions of Pen. Code 1910, § 74, that "Parents and children may mutually protect each other, and justify the defense of the person or reputation of each other," do not afford a basis for justification of a homicide upon facts showing that the danger to the relative was not impending. Hill v. State, 64 Ga. 453, 469.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 177–181; Dec. Dig. ⟹122.]

2. HOMICIDE ⟹297 — INSTRUCTIONS — EVIDENCE.

Neither under the evidence nor under the prisoner's statement was it error to omit to give in charge Pen. Code 1910, § 70.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 611; Dec. Dig. ⟹297.]

3. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

The evidence was sufficient to support the verdict, and none of the grounds relied on were sufficient to require the grant of a new trial.

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Robert Kitchens was convicted of crime, and brings error. Affirmed.

John R. Cooper, of Macon, for plaintiff in error. R. Lee Moore, Sol. Gen., of Statesboro, Warren Grice, Atty. Gen., A. L. Henson, of Atlanta, and Evans & Evans, of Sandersville, for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur except FISH, C. J., absent on account of sickness.

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(143 Ga. 293)

## BANK OF STATHAM v. NATIONAL BANK OF ATHENS. (No. 263.)

(Supreme Court of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

1. BANKS AND BANKING ⟹189—CASHIER'S CHECK—PARTIES.

A cashier's check is a primary obligation of the bank, and the holder thereof may sue the bank as maker, without joining the payee or indorsers in such suit.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 729–732, 736; Dec. Dig. ⟹189.]

2. BANKS AND BANKING ⟹189—CASHIER'S CHECK — FICTITIOUS PAYEE — RIGHTS OF HOLDER.

Where a cashier's check is made payable to the order of a real person, who has no knowledge of the transaction, and who has no interest in the check, and is not intended to become

a party to the transaction, such person may be deemed fictitious; and when the name of such person is indorsed on the check by the cashier, or with his authority, such check is deemed payable to bearer, and a holder in good faith may bring an action against the bank on which it is drawn, as maker, to recover the amount of the check. 2 Bouvier's Law Dict. (Rawle's 3d Ed.) 778 ("Fictitious Payee"); Phillips v. Mercantile National Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596; Jordan March Co. v. National Shawmut Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250; Snyder v. Corn Exchange National Bank, 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 780; 1 Dan. Neg. Inst. (6th Ed.) § 139; Drinkall v. Movius State Bank, 11 N. D. 10, 88 N. W. 724, 726, 57 L. R. A. 341, 95 Am. St. Rep. 693; 1 Parsons on Bills and Notes, 288.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 729–732, 736; Dec. Dig. ⊂⊃189.]

3. PLEADING.

The court did not err in overruling the demurrer to the petition, nor in sustaining the plaintiff's demurrer to the plea in abatement.

4. VERDICT AND DENIAL OF NEW TRIAL APPROVED.

Irrespective of any errors alleged to have been committed on the trial, the facts of this case bring it within the principles of law announced in the preceding headnotes. The verdict was demanded, and the court did not err in denying a new trial.

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action by the National Bank of Athens against the Bank of Statham. Judgment for plaintiff, and defendant brings error. Affirmed.

W. W. Stark, of Commerce, for plaintiff in error. T. S. Mell and Wolver M. Smith, both of Athens, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 296)

## ALACULSEY LUMBER CO. et al. v. SHIPPEN BROS. LUMBER CO. (No. 265.)

(Supreme Court of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

1. EMINENT DOMAIN ⊂⊃56 — CONDEMNATION —RIGHT—NECESSITY.

Section 804 of the Civil Code of 1910, relative to condemning private property for connecting a tramroad with any waterway or railway, applies only in cases of necessity. Normandale Lumber Co. v. Knight, 89 Ga. 111, 14 S. E. 882; Jones v. Venable, 120 Ga. 1, 47 S. E. 549, 1 Ann. Cas. 185; Valdosta, etc., Railroad Co. v. Adel Lumber Co., 136 Ga. 559, 71 S. E. 803.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147–160; Dec. Dig. ⊂⊃56.]

2. GRANTING OF INJUNCTION.

The court, acting on conflicting evidence, did not abuse his discretion in granting the injunction in this case.

Error from Superior Court, Fannin County; H. L. Patterson, Judge.

Action by the Shippen Bros. Lumber Company against the Alaculsey Lumber Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

C. N. King, of Spring Place, Wm. Butt, of Blue Ridge, and W. E. Mann and W. C. Martin, both of Dalton, for plaintiffs in error. T. A. Brown, of Blue Ridge, and D. W. Blair, of Marietta, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 301)

## MURRAY et al. v. CITY OF TIFTON. (No. 269.)

(Supreme Court of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

CONSTITUTIONAL LAW ⊂⊃46 — MUNICIPAL CORPORATIONS ⊂⊃917 — OBJECTIONS — VALIDITY OF STATUTE—PROCEEDINGS TO VALIDATE BONDS—VENUE.

The venue of a statutory proceeding under the Civil Code 1910, § 445 et seq., to validate municipal bonds, is in the county in which the municipality is situated. Ray v. City of Lavonia, 141 Ga. 626, 81 S. E. 884. In such a proceeding, where the judge on presentation of the petition issued a rule nisi returnable in a different county than that of the venue, and, at the time and place appointed in the rule, passed another order to the effect that the hearing was "continued and transferred" to a designated time and place in the county of the venue, but there was no publication of any notice, as required by law, that the hearing would be had at such time and place, the judge was without jurisdiction to proceed with the hearing and render final judgment.

(a) It having been held by the court, in the case above cited, that, in so far as the statute purported to authorize jurisdiction in a county other than that of the municipality, it was unconstitutional, and, the plaintiffs in error having raised the point of want of jurisdiction, it was not necessary for them, in support of the objection, again to specifically attack the act as unconstitutional.

(b) The court being without jurisdiction, it was erroneous to enter final judgment validating the bonds.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43–45; Dec. Dig. ⊂⊃46; Municipal Corporations, Cent. Dig. §§ 1913–1918, 1941; Dec. Dig. ⊂⊃917.]

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Proceedings by the City of Tifton against H. S. Murray and others. Judgment for plaintiff, and defendants bring error. Reversed.

H. S. Murray and Fulwood & Skeen, all of Tifton, for plaintiffs in error. Ridgdill & Mitchell and R. D. Smith, all of Tifton, and J. A. Wilkes, Sol. Gen., of Moultrie, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 291)

MURPHEY v. FRANKLIN. (No. 251.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

INSTRUCTIONS—DENIAL OF NEW TRIAL.

Neither the instructions of the court, complained of by the plaintiff in error, nor the rulings as to the admissibility of evidence, were erroneous for any of the reasons urged. The evidence authorized the verdict, and the refusal of a new trial was not error.

Error from Superior Court, Pike County; Robert T. Daniel, Judge.

Action between E. S. Murphey and J. R. Franklin. From the judgment, Murphey brings error. Affirmed.

C. J. Lester, of Barnesville, for plaintiff in error. E. F. Dupree, of Zebulon, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(143 Ga. 302)

EDWARDS v. STATE. (No. 270.)

(Supreme Court of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

CHANGE OF VENUE.

There was no abuse of discretion in refusing to change the venue, under the facts of the case.

Error from Superior Court, Glynn County; J. P. Highsmith, Judge.

Proceeding between George Edwards and the State. From the judgment, Edwards brings error. Affirmed.

Max Isaac, of Brunswick, for plaintiff in error. J. H. Thomas, Sol. Gen., of Jesup, and J. T. Colson, of Brunswick, for the State.

EVANS, P. J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(143 Ga. 294)

SOUTHERN RY. CO. v. PUGH. (No. 264.)

(Supreme Court of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

1. RAILROADS ⟸305, 348—FRIGHTENING OF ANIMALS—BLOW-POST LAW—PRESUMPTION OF NEGLIGENCE—REBUTTAL.

This was an action against a railroad company for damages from injury to the plaintiff and his mule, in which a verdict was rendered for the defendant. According to the allegations of the petition, the injury occurred "within a few feet" of a regular public road crossing about one mile north of the defendant's station at Buford, and outside of the town limits, about 12 o'clock in the day, but in a populous community where the presence of travelers over the crossing was to be anticipated. The crossing was at the end of a "large cut" through which there was a curve in the track. On the day of the injury the plaintiff drove his mule hitched to a buggy over the crossing. At the same time a freight train was being operated on the railroad track. The engineer, in approaching the crossing, negligently failed to observe the provisions of the blow-post law (Civ. Code 1910, § 2675), and ran upon the crossing at a "high and dangerous rate of speed, viz., 40 miles per hour, * * * willfully * * * and wantonly," and the engineer, while seeing and being aware of the plaintiff's perilous position, willfully and maliciously and unnecessarily gave the whistle of the engine several loud and shrieking blasts while on the crossing, which caused the mule to become frightened and run away, producing the injury for which damages were sought. By amendment it was alleged that it was negligence to erect and maintain "a station blow post" at the public crossing where the injury occurred, for the reason that it was unnecessary and unusual, and particularly because of the location of the crossing in reference to "the cut" and the curve in the track immediately north of the crossing. The plaintiff testified, in effect, that while in his buggy, driving the mule, he had passed over the crossing before the train came in sight, had gone a distance of 110 feet to a store, and had stopped and got out and called for a hammer to fix a bolt on his buggy, when the train approached through the cut without any warning, and ran over the crossing at 30 or 35 miles an hour, and while on the crossing the engineer gave one long blast of the whistle, causing the mule to become frightened and run away while plaintiff was holding the checkreins, which resulted in the injury. He was in plain view, but could not say that the engineer saw him. The defendant offered uncontradicted evidence to the effect that for the operation of its trains station signal posts are located at designated distances from each station; that the signal post at this crossing was situated at the required distance; that the blast of the whistle while on the crossing was the usual station signal; and that the engineer did not see the plaintiff when the blast was given, and the train was not making any unusual or unnecessary noise in passing over the crossing. *Held*, according to the decisions of this court, relatively to a traveler on a public road at a grade crossing, driving an animal attached to a vehicle, a railroad company is under a duty to obey the requirements of Civ. Code 1910, § 2675, as a precautionary measure to prevent injury resulting from the animal taking fright and running away, when the act of crossing is about to begin, is in progress, or has just been completed. Bowen v. Gainesville, etc., R. Co., 95 Ga. 688, 22 S. E. 695; Atlanta, etc., Ry. Co. v. Durham, 108 Ga. 547, 34 S. E. 332; Willingham v. Macon, etc., R. Co., 113 Ga. 374, 38 S. E. 843.

(a) It follows from this construction of the statute, as announced in the cases above cited, that it has no application to a case like the present, where the driver of the vehicle had passed over the crossing, and had gone a distance of 110 feet, and stopped at a store, before the train came in sight.

(b) The case is not controlled by the rulings announced in Southern Ry. Co. v. Pope, 129 Ga. 842, 60 S. E. 157; Southern Ry. Co. v. Brock, 132 Ga. 858, 64 S. E. 1083, and similar cases involving injuries to person and property run down by an engine on the railroad after passing the blow post and before reaching the crossing, and not to a traveler on a highway caused by the frightening of an animal driven by him.

(c) Inasmuch as the defendant owed the plaintiff no duty under the blow-post law, its duty to him with respect to the operation of its train was not different from what it would have been anywhere along the line of railroad where the highway might parallel the track at a similar distance from it. Relatively to the plaintiff, under the uncontradicted evidence as to the operation of the train and the giving of the station

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

signal, the defendant was acting within its rights and was not negligent with respect to him.

(d) As the uncontradicted evidence showed affirmatively that the blow-post law was not applicable, and that the defendant was operating its train, relatively to the plaintiff, in a manner which it had a right to do, any presumption of negligence arising against the defendant under the provisions of Civ. Code 1910, § 2780, upon proof of injury (Georgia, So. & Fla. Ry. v. Shobe, 142 Ga. 767, 83 S. E. 786), was successfully rebutted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 968–971, 1138–1150; Dec. Dig. ⊂⊃305, 348.]

2. GRANTING NEW TRIAL.

The verdict for the defendant was demanded by the evidence, and it was erroneous to grant a new trial on account of supposed error in charging that the provisions of the blow-post law were inapplicable.

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Action by T. B. Pugh against the Southern Railway Company. Verdict for defendant, new trial granted, and defendant brings error. Reversed.

Jno. J. & Roy M. Strickland, of Athens, Dobbs & Wisdom, of Buford, and D. M. Byrd, of Lawrenceville, for plaintiff in error. C. N. Davie and A. C. Wheeler, both of Gainesville, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 297)

## HUSON ICE & COAL CO. v. THORNTON.

(No. 267.)

(Supreme Court of Georgia. April 13, 1915.)

*(Syllabus by the Court.)*

1. CORPORATIONS ⊂⊃80 — STOCK — PURCHASE-MONEY NOTE — DEFENSE — SUFFICIENCY OF PLEA.

Suit was brought on a promissory note payable to the order of the plaintiff. The defendant pleaded, in brief, as follows: The note was given for the purchase of two shares of stock in a corporation, but the stock has never been delivered or tendered to him, and the consideration of the note has wholly failed. The plaintiff represented that it was organizing a corporation for the purpose of making ice at a point named; that the business was profitable; that the plaintiff was furnishing the machinery and appliances therefor for stock in the company; that the machinery and appliances were complete, in good condition and practically as good as new, had been in use only two years, and had a capacity for manufacturing 15 tons of ice per day; and that the plaintiff was moving the machinery from the town where it then was, because the plant was too small for the business at that place, and the plaintiff was replacing it with a larger plant. These representations were knowingly and willfully false and fraudulent. In truth the business was unprofitable, the machinery was old, rusted, and worthless, and the plaintiff was insolvent, and was not moving and replacing the machinery with a larger plant. The plant did not produce 15 tons of ice per day, and did not average one ton per day. After 90 days of trial, the new company was insolvent, the business abandoned, and the stock worthless. The entire plant, including real estate and buildings as well as machinery, was sold at public sale for $1,000, being not more than one-half of the debts, though the machinery had been put in for stock at the price of $10,000. *Held*, that there was no error in overruling a demurrer to the plea.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244, 246–264, 1407, 1407½; Dec. Dig. ⊂⊃80.]

2. CORPORATIONS ⊂⊃90 — STOCK — PURCHASE-MONEY NOTE—SUFFICIENCY OF EVIDENCE.

Although the evidence might have authorized a different verdict, it cannot be declared as matter of law that a verdict for the defendant was unsupported.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 245, 383–419; Dec. Dig. ⊂⊃90.]

3. TRIAL ⊂⊃295—INSTRUCTIONS—SUFFICIENCY AS A WHOLE.

While there may have been some slight inaccuracies in the charge, yet, when the portion complained of is considered with the entire charge, it does not require a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703–717; Dec. Dig. ⊂⊃295.]

4. INSTRUCTIONS.

Some of the requests to charge were properly refused, and others were sufficiently covered by the general charge.

Error from Superior Court, Greene County; J. B. Park, Judge.

Action by the Huson Ice & Coal Company against T. R. Thornton. Judgment for defendant, and plaintiff brings error. Affirmed.

The Huson Ice & Coal Company brought suit against T. R. Thornton on a promissory note, payable to the order of the plaintiff, and dated September 28, 1909. The defendant pleaded failure of consideration, and fraud in the procurement of the contract. He alleged, in substance, as follows: The note was given by the defendant to the plaintiff for the purchase of three shares of stock in the Union Point Ice Company. The stock has never been delivered or tendered to him, and the consideration of the note has wholly failed. The note was procured by means of fraudulent representations inducing the defendant to buy the stock. The plaintiff represented that it was organizing the Union Point Ice Company for the purpose of making ice at Union Point; that the business was profitable; that the plaintiff was furnishing the necessary machinery and appliances for stock in the company; that such machinery and appliances were complete and in good condition—practically as good as new—and had been in use only two years, and had a capacity for manufacturing 15 tons of ice per day; and that the plaintiff was moving it from Covington to Union Point only because the plant was too small for the business at the former place, and it was replacing such machinery with a larger plant at that point. The truth was that the business was unprofitable, the plaintiff was insolvent, was not replacing the plant with a larger one at Covington, and has never done so, and was not moving the plant because it

was too small, but because it was old and worthless. The ice plant sold by the plaintiff to the Union Point Ice Company was not practically as good as new, had been used for much more than two years, and was secondhand when plaintiff bought it. The pipes were rusted and weak, the ammonia plant would not stand sufficient pressure to make ice successfully, the pumps were worn out and worthless—one not running at all, and another giving out after a little use. A number of the ice cans were missing, and the others were old and dilapidated. The boiler was old and rusty, and no part of the apparatus was good and effective. The plant was incapable of making 15 tons of ice per day, and at no time produced more than 7 tons, and did not average one ton per day; so that it was impossible to operate it without great loss. It proved wholly worthless and the business unprofitable, and after 90 days of trial the Union Point Ice Company was insolvent, the business was abandoned, and the stock was worthless. The false representations were made by the plaintiff willfully for the purpose of getting rid of a worthless plant, and the entire transaction was fraudulent. The defendant was wholly inexperienced in the ice business, and knew nothing of such business or of machinery for making ice. At the time when the contract was made, the ice plant was at Covington, more than 50 miles away, where he could not have inspected it, if inspection would have revealed anything to him; but the defects were largely latent, and not apparent on inspection, but only developed when the effort was made to use the machinery. The organization of the Union Point Ice Company was a mere means adopted by the plaintiff for selling its worthless machinery. The misstatements were known to be untrue by the agent of the plaintiff who negotiated the transaction, and were made for the purpose of misleading and defrauding the defendant.

The plaintiff demurred to the plea, and also to that portion of it which set up fraud in the transaction. The demurrer was overruled, except as to certain allegations not material here. The jury found for the defendant. The plaintiff moved for a new trial, which was denied, and it excepted. Other facts are stated in the opinion.

Rogers & Knox, of Covington, for plaintiff in error. Saml. H. Sibley, of Union Point, for defendant in error.

LUMPKIN, J. (after stating the facts as above). [1] 1. The plea does not present the somewhat ordinary case of a purchaser of stock who finds it not worth as much as he thought it was, and claims a failure of consideration, or a breach of warranty; or the other quite common case of one who is induced by fraud to make a purchase, and, having received something of value, seeks to obtain rescission without restoration or prompt offer thereof. It alleges a case where the owner of a badly worn, rust-eaten, and practically worthless ice plant sought to unload it upon others by means of fraudulent representations and through the device of organizing a corporation to take over the property, and the sale of stock to be issued by it. The representations averred were not mere expressions of opinion as to the value or salableness of property, nor mere boasting in regard to merchandise. They were false statements as to facts, charged to have been knowingly and willfully made. It did not appear from the allegations that the purchaser relied on his own judgment, or was so negligent in making the trade as to prevent relief.

When the defendant gave his note, there was no Union Point Ice Company. The note was alleged to have been given to the plaintiff for the purchase of stock, and not for the machinery itself. According to the allegations of the plea, this agreement was procured by fraud, and the defendant has never received the stock, and it is worthless. The demurrer to the plea was properly overruled. It was based on an apparent misconception of the substantial defense set up.

[2] 2. There may have been evidence on which the jury could have found a different verdict. But it cannot be held that they were not authorized to find, as they did, for this defendant. He testified, among other things, that the note was given to the plaintiff for two shares of stock; that he never received any stock or anything at all for his note, though he signed a list, and certain certificates were made out in his name (which were held and produced in court by the plaintiff); and that he was not an officer in the new company after it was organized. There was sufficient evidence to support a finding that a fraud was perpetrated on the defendant, and there was no error in submitting that issue to the jury. On the trial a written contract between the plaintiff and the Union Point Ice Company, the latter signing through its secretary and treasurer, was introduced by the plaintiff. It was an agreement by that company to buy from the plaintiff a secondhand ice machine, with a "rated capacity" of 15 tons, for the price of $10,000. The defendant testified that he never heard of such a contract before the trial. It was argued that this contract effectually destroyed the defense. The defense, however, was, not that the defendant bought the machine and that it was not of the character represented or warranted, but that he gave his note to the plaintiff, before the new company was organized, for two shares of stock which he was to receive; that he was entrapped into so doing by fraud; and that the stock was worthless, and he never received it, and had nothing of value to tender back. The contract between the new company and the plaintiff was made nearly

two months after the note was given, and after the new company had been organized. This was not a suit by the company on a stock subscription, and the ruling in South Georgia & Florida R. Co. v. Ayres, 56 Ga. 230 (2), is not controlling. Nor did the evidence of a member of the plaintiff company, as to receiving the note from the new company as part payment for the machinery, necessitate a finding for the plaintiff, in view of the other evidence. Whether the defendant was guilty of laches in repudiating the agreement with the plaintiff was a question for the jury, and we cannot say that their finding was without support in the evidence, so as to be erroneous as matter of law.

[3, 4] 3, 4. Some of the rulings of the court may not have been entirely beyond criticism. For example, the charge as to whether "the defect, if any, in not making the amount of ice stated, was due to a deficiency in the water supply," standing alone, may not be an apt expression. But, when taken in connection with the entire charge, it does not require a new trial. Some of the requests to charge were properly refused, and others were sufficiently covered by the general charge.

The seventh and eighth grounds of the motion for a new trial were not referred to in the brief of counsel for the plaintiff in error, and will be treated as abandoned.

Upon the whole, there was no error in overruling the motion for a new trial.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(143 Ga. 236)

## FLOYD v. STATE. (No. 239.)

(Supreme Court of Georgia. March 9, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸639—PROCEEDINGS—VALIDITY—SOLICITOR GENERAL.

The assignments of error, based on objections to the solicitor general of the Middle circuit acting in his official capacity, after the transfer to the Augusta circuit of the county where the trial occurred, are concluded by the rulings in Godbee v. State, 141 Ga. 515, 81 S. E. 876.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1485–1495; Dec. Dig. ⟸639.]

2. CRIMINAL LAW ⟸363 — EVIDENCE — RES GESTÆ.

Acts and circumstances forming a part or continuation of the main transaction are admissible as res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804; Dec. Dig. ⟸363.]

3. HOMICIDE ⟸340 — HARMLESS ERROR — PREFACE TO INSTRUCTION.

The reading in its entirety of Pen. Code 1910, § 70, defining justifiable homicide, under the circumstances of the case, will not require a new trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715–717, 720; Dec. Dig. ⟸340.]

4. CRIMINAL LAW ⟸1166½—HARMLESS ERROR—PREFACE TO INSTRUCTION—STATEMENT OF ACCUSED.

By way of preface to his instruction on the law of the prisoner's statement, the court remarked that the defendant had made a statement in "explanation" of the crime alleged against him in the indictment. Such prefatory remark is no sufficient ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114–3123; Dec. Dig. ⟸1166½.]

5. CRIMINAL LAW ⟸720½, 730—ARGUMENT OF COUNSEL—CURE OF ERROR.

There was no error in refusing to grant a mistrial because of alleged improper remarks of the solicitor general.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1677, 1693; Dec. Dig. ⟸720½, 730.]

6. HOMICIDE ⟸294—INSTRUCTIONS ON INSANITY—EVIDENCE.

Neither the evidence nor the prisoner's statement authorized a charge on either total or delusional insanity.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 605; Dec. Dig. ⟸294.]

7. INSTRUCTIONS AND VERDICT APPROVED.

In so far as the requests to charge were legal and pertinent, they are covered by the general charge. Assignments of error on the charge are not of a character to require a new trial. The evidence warranted the verdict.

Error from Superior Court, Jenkins County; B. F. Walker, Judge.

Henry Floyd was convicted of murder, and brings error. Affirmed.

Chas. G. Reynolds and Leroy Cowart, both of Millen, and J. McSwain Woods, of Atlanta, for plaintiff in error. R. Lee Moore, Sol. Gen., of Statesboro, Warren Grice, Atty. Gen., and A. L. Henson, of Atlanta, for the State.

EVANS, P. J. [1] 1. The plaintiff in error was convicted of the murder of Berta Perdue, in the superior court of Jenkins county. In his writ of error complaint is made that various steps in the trial were illegal, because it was conducted by the solicitor general of the Middle circuit, after the passage of the act transferring Jenkins county from the Middle to the Augusta circuit. The various demurrers, motions, and pleas of the plaintiff in error on this subject are substantially the same as were made in the case of Godbee v. State, 141 Ga. 515, 81 S. E. 876, and are controlled by the rulings made in that case.

[2] 2. The testimony introduced by the prosecution tended to show that the defendant went to the house of a friend of the deceased, where the deceased was on the porch engaged in combing the hair of a child of her host. When he reached the gate of the yard he called to the deceased to come to him, and said he wished to tell her something. The deceased replied that she would come when she had finished combing the child's hair. The defendant repeated his demand, and the deceased made the same

reply. The defendant then said, "I have got to go off," and the deceased said, "I will hear it when you come back." The defendant said, "I ain't going off," jumped upon the porch, threw the deceased down, and beat her with his fists. He jerked her down the steps and siezed a long-tooth iron rake and struck her over the head several times with it. In striking her with the rake he broke the handle, threw down the broken piece, and walked through the gate; then immediately turned round, came into the yard, and discharged his pistol three times into her prostrate body. The eyewitnesses testified that the tines of the rake penetrated the skull, and that the woman was dead when he fired his pistol at her body. The defendant moved to reject the testimony relating to the shooting, on the ground that the woman was dead when he shot her body. The court refused the motion. There was no error in so doing. The indictment charged the murder as having been caused "by beating the said Berta Perdue with a certain farming tool commonly called a rake, and by shooting said Berta Perdue with a pistol." The beating of the victim with a rake and discharging his pistol into her prostrate body were the defendant's continuous acts, and everything that was done at the time of the homicide entered into the res gestæ of the transaction. Moreover, the firing of the pistol into her lifeless body tended to illustrate his state of mind, and that his whole conduct was inspired by an abandoned and malignant heart.

[3] 3. Preliminary to his instruction on the law of justifiable homicide, the court read to the jury in its entirety section 70 of the Penal Code. Exception is taken to the reading of so much of that section as relates to justifiable homicide to prevent a forcible invasion of habitation, as being inapplicable to the facts. The criticism is well taken, but the error is harmless. The court should have read only so much of the section as related to homicide in self-defense, or in defense of person against an impending felony. But the defendant could not possibly have been harmed by reading the whole section. At most, he was given the benefit of an instruction upon a phase of justifiable homicide to which he was not entitled, and which in no wise prejudiced his case. See Brown v. State, 125 Ga. 281, 54 S. E. 162.

[4] 4. The court prefaced his instruction relative to the prisoner's statement as follows:

"Now the defendant in this case has appeared before you and made a statement in explanation of the charge made and alleged in the indictment against him."

The prefatory remark of the judge is contended to have had the effect of leading the jury to believe that the defendant admitted the charge as alleged in the indictment, and was trying to explain it away. We think the criticism hypercritical, especially in view of the fact that the court immediately followed it up with a full and correct instruction concerning the law of the prisoner's statement, as contained in the Penal Code, § 1036.

[5] 5. Counsel for the accused moved for a mistrial, on the ground that the solicitor general had declared in his argument to the jury that, in his opinion, the defendant was guilty of a diabolical crime. When the motion was made, the solicitor general stated that if he had expressed his opinion to the jury he would withdraw it. Thereupon the court admonished the jury to disregard the personal opinion of the solicitor general, and refused to declare a mistrial. In a prosecution for a homicide, a statement by the prosecuting attorney in his argument, expressive of his opinion of the defendant's guilt, and his characterization of the crime as being diabolical, should be construed to mean that the testimony led him to this conclusion, and that the jury should reach the same conclusion. In the absence of anything to the contrary, the solicitor's remarks will be regarded as a deduction from the evidence. State v. Armstrong, 37 Wash. 51, 79 Pac. 490; Thacker v. State, 3 Okl. Cr. 485, 106 Pac. 986; Valentine v. State, 108 Ark. 594, 159 S. W. 26. What the law condemns is the injection into the argument of extrinsic and prejudicial matters which have no basis in the evidence. Thus, in Brosnack v. State, 109 Ga. 514, 35 S. E. 123, counsel employed to assist in the prosecution declared in the course of his argument that "he would not appear in the case if he did not believe the defendant to be as guilty as any man that was ever tried in the courthouse." The assertion of counsel in that case was the conclusion he had reached when he was employed as counsel before the trial of the case, a conclusion clearly not referable to the evidence adduced on the trial. Had there been room for any misapprehension on the part of the jury in this case, as to whether the statement was made as a deduction from the evidence, or as an effort to introduce a substantive fact outside of the evidence, the withdrawal of the remarks by counsel and the ruling of the court obviated the danger.

[6] 6. Though requested in writing, the court refused to give the following charge:

"I charge you that if the defendant was, at the time of the commission of the alleged crime, insane to such an extent that he did not know right from wrong, he would not be legally responsible for his acts, and you would be bound to acquit him. I charge you, further, that if the accused did have sufficient reason to distinguish between right and wrong, if his will, in consequence of some delusion brought about by mental disease, was overmastered so that there was no criminal intent as to the act in question, and if it also appears that the killing was connected with the peculiar delusion under which the accused was laboring, you should find him not guilty."

In the assignment of error it is contended that such charge was authorized by the statement of the accused, that:

"About seven years ago I was hit on the head with the sweep of a timber cart, and at times I didn't know what I was doing. The woman had worried me so about living with her until I was very near crazy, and I could not have helped killing her if I had wanted to."

This testimony was wholly insufficient to raise the issue of either total or delusional insanity. The defendant began his statement to the jury by declaring that he had "lived with this woman as a husband of hers." And it is clearly inferable from the record that the motive for the homicide was the deceased's termination of her illicit relations with the accused. The defendant in his statement claimed that the deceased was advancing upon him with a knife, and that he struck her with the rake and shot her with the pistol in defense of his person. The isolated statement that several years ago he had sustained a wound, and that at times he did not know what he was doing, is utterly insufficient to raise the defense of insanity.

[7] 7. Several excerpts from the charge are criticized, but, when considered in connection with their context, they are not open to the criticism made against them. The requests to charge, in so far as they were pertinent and legal, were covered by the general charge. The evidence warranted the verdict, and there was no abuse of discretion in refusing a new trial.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

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(16 Ga. App. 232)

GATLIN v. STATE. (No. 6366.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT ⟸67 — VIOLATION OF LABOR CONTRACT ACT — BURDEN OF PROOF.

"In a prosecution for a violation of the Labor Contract Act [Pen. Code 1910, § 715], the state, to complete its presumptive case, must show that there was no good reason why the contract was not performed, or no good reason why the accused did not return the money advanced to him. Without this proof the case for the state is incomplete, because the prosecution has failed to create the evidentiary presumption necessary to rebut the presumption of innocence." Lewis v. State, 15 Ga. App. 406 (4) 83 S. E. 439. It does not affirmatively appear in this case that the failure to perform the services contracted for or to return the money advanced was without good and sufficient cause.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. ⟸67.]

2. MASTER AND SERVANT ⟸67—LABOR CONTRACT ACT—PROSECUTION—PROOF OF CONTRACT.

Before one can be lawfully convicted of a violation of the Labor Contract Act, supra, it is necessary to show that there was a distinct and definite contract for service, showing not only when the term of service shall begin and end, but all other necessary particulars thereof (Wilson v. State, 124 Ga. 22, 52 S. E. 82; Presley v. State, 124 Ga. 446, 52 S. E. 750; Watson v. State, 124 Ga. 454, 52 S. E. 751); and where it is alleged that the labor was to be performed on the turpentine farm of another in a named county, the particular farm must be so located and identified by the evidence as to establish a contract to labor on a certain and definite farm of this character, in order to show that there was such a contract between the parties as would afford a basis for the prosecution, or, in other words, that the minds of the parties met as to the particular turpentine farm where the work contracted for was to be performed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. ⟸67.]

3. MASTER AND SERVANT ⟸67 — VIOLATION OF LABOR CONTRACT ACT—INDEFINITE CONTRACT—PROOF.

Under the rulings in Thorn v. State, 13 Ga. App. 10–13, 78 S. E. 853, Solomon v. State, 14 Ga. App. 115, 80 S. E. 215, and Lewis v. State, supra, the contract as set out in the indictment in the case under consideration was too indefinite to be the basis of a criminal prosecution; and while there was no demurrer by the defendant, nevertheless the evidence for the state was insufficient to warrant a conviction, inasmuch as it failed to show upon what particular "turpentine farm" belonging to the prosecutor and located in the county named the defendant agreed to cut boxes at a stipulated price between certain alleged dates.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. ⟸67.]

4. VIOLATION OF LABOR CONTRACT ACT.

The identity of the particular farm whereon it was alleged the accused contracted to work was not directly established by evidence, nor did it appear that the defendant ever began his labors thereon, and thus sufficiently recognized, identified, and agreed to the particular farm on which the labor was to be performed, as in the case of Mitchell v. State, 15 Ga. App. —, 84 S. E. 205.

5. ASSIGNMENTS OF ERROR.

Under the rulings above, it is unnecessary to discuss or pass upon the remaining specific assignments of error.

Error from City Court of Dublin; J. B. Hicks, Judge.

Wash Gatlin was convicted of violating the Labor Contract Act, and brings error. Reversed.

R. Earl Camp, of Dublin, for plaintiff in error. S. P. New, Sol., of Dublin, for the State.

WADE, J. Judgment reversed.

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(16 Ga. App. 210)

THORNTON v. STATE. (No. 6248.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

CRIMINAL LAW ⟸953 — NEW TRIAL — DISMISSAL OF MOTION—SERVICE.

An acknowledgment of service of an order merely continuing the hearing of a motion for a new trial to another date will not dispense with service of a copy of the motion itself and of the rule nisi, as required by the original order of the trial judge, or be a compliance with the requirements of section 6080 of the Civil

Code of 1910, and the court did not err in dismissing the motion because such service had not been made upon counsel for the state. Civ. Code, § 6080; Tyler v. Arnett, 13 Ga. App. 595, 79 S. E. 482; Smedley v. Williams, 112 Ga. 114, 37 S. E. 111; McMullen v. Citizens' Bank, 123 Ga. 400, 51 S. E. 342.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2359–2362; Dec. Dig. ⟸ 953.]

Error from City Court of Nashville; C. A. Christian, Judge.

Proceeding between W. L. Thornton and the State. From the judgment, Thornton brings error. Affirmed.

Wm. Story, of Nashville, for plaintiff in error. J. H. Gary, Sol. of Nashville, for the State.

WADE, J. Judgment affirmed.

(16 Ga. App. 212)

## PARSONS v. STATE. (No. 6257.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

1. WEAPONS ⟸14, 17—POINTING AT ANOTHER—WHAT CONSTITUTES OFFENSE—REQUISITES OF ACCUSATION.

To warrant a conviction, under section 349 of the Penal Code of 1910, of pointing a weapon at another, it must be charged that the gun or pistol was intentionally pointed or aimed at another (Herrington v. State, 121 Ga. 141, 48 S. E. 908), or the language used in the accusation or indictment must be such as to raise no other implication than that the pointing and aiming was intentional (Livingston v. State, 6 Ga. App. 208, 64 S. E. 709); and this intent must appear also from the proof (Woodruff v. Woodruff, 22 Ga. 237), though it is not essential for the state to show that the pointing of the weapon was done with an intention to shoot (Winkles v. State, 114 Ga. 449, 40 S. E. 259), and the motive actuating the person who intentionally points the weapon is wholly immaterial (Gossett v. State, 6 Ga. App. 439, 65 S. E. 162). The purpose of the statute is to protect life and limb from the reckless and careless pointing of guns and pistols at another (Irvin v. State, 9 Ga. App. 865, 72 S. E. 440); but an accidental or unintentional pointing is not penalized by this section.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 19, 20, 22–33; Dec. Dig. ⟸14, 17.]

2. CRIMINAL LAW ⟸1159—WEAPONS ⟸14, 17—APPEAL—PROOF OF INTENTION.

Generally intention may be manifested "by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused" (Pen. Code 1910, § 32); and where a gun or pistol is pointed at another, the jury may infer intention from the circumstances surrounding the pointing. Where the evidence disclosed that the accused in fact pointed a gun at and towards another, with whom he was angry at the time, not only would the presumption of law be that he intended to do what he in fact did (Vann v. State, 83 Ga. 44; Freeman v. State, 70 Ga. 736; Marshall v. State, 59 Ga. 154; Foster v. Leeper & Menafee, 29 Ga. 294), but the jury was authorized so to find, and especially where it appeared that the accused did not in his statement set up the defense that the weapon was unintentionally pointed, but denied altogether that he pointed it at all (Winkles v. State, supra). "The question of intent with which an act was done is one for the jury, and when they have said that such intent was criminal, with some evidence to support their verdict, this court will not interfere." Russell v. State, 68 Ga. 785 (2).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. ⟸ 1159; Weapons, Cent. Dig. §§ 19, 20, 22–33; Dec. Dig. ⟸14, 17.]

3. POINTING WEAPON AT ANOTHER.

Regardless of whether or not it is necessary for the state, in order to establish the guilt of one charged with pointing a weapon at another, to affirmatively show that the weapon intentionally aimed or pointed was not so pointed "in a sham battle by the military, and not in self-defense, or in defense of habitation, property, or person, or other instances standing upon like footing of reason and justice," as alleged in the accusation, it is enough to say that there was sufficient evidence to authorize the inference, drawn by the jury, that the accused was neither excused nor justified in pointing the weapon because of or under any of these exceptions named in the statute, and to exclude any idea of excuse or justification; and this is true, notwithstanding that the witnesses did not in so many words deny that the gun pointed by the accused was pointed in a sham battle, or in self-defense, etc.

4. ASSIGNMENTS OF ERROR.

The evidence authorized the verdict returned, and there is no merit in the various assignments of error.

Error from City Court of Tifton; R. Eve, Judge.

Tevus Parsons was convicted of pointing a weapon at another, and brings error. Affirmed.

B. C. Williford and R. D. Smith, both of Tifton, and Hendricks, Mills & Hendricks, of Nashville, for plaintiff in error. Jas. H. Price and J. S. Ridgdill, Sol., both of Tifton, for the State.

WADE, J. Judgment affirmed.

(16 Ga. App. 213)

## JACKSON v. STATE. (No. 6260.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

1. INTOXICATING LIQUORS ⟸159, 167—FURNISHING TO MINOR—WHAT CONSTITUTES OFFENSE—PRINCIPAL AND ACCESSORY.

One who buys intoxicating liquor from another for a minor, and who delivers it to the minor, is guilty of furnishing intoxicating liquors to a minor, unless he proves that he exercised due diligence to find out the age of the minor, and was honestly mistaken as to his age. There being no accessories in misdemeanors, one who aids or abets in the selling or furnishing of intoxicating liquors to a minor is guilty as a principal. Newsome v. State, 1 Ga. App. 790, 58 S. E. 71; Stoner v. State, 5 Ga. App. 720, 63 S. E. 602; Campbell v. Thomasville, 6 Ga. App. 236, 64 S. E. 815; Hardu v. State, 10 Ga. App. 48, 72 S. E. 513.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 171–175, 182, 183; Dec. Dig. ⟸159, 167.]

2. INTOXICATING LIQUORS ⟸238—FURNISHING TO MINOR—QUESTION FOR JURY.

Whether the seller or furnisher of intoxicating liquors to a minor exercised due diligence to find out the age of the minor, and was hon-

estly mistaken as to his age, is a question for the determination of the jury. Reich v. State, 63 Ga. 617 (4); Harkey v. State, 89 Ga. 478, 15 S. E. 552; Burnett v. State, 92 Ga. 474, 17 S. E. 858; Askew v. State, 4 Ga. App. 446, 61 S. E. 737. In this case the evidence was abundantly adequate to authorize the jury to find that the accused did not exercise sufficient diligence on this point, and that he did not honestly believe the minor to be of age.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 324–330; Dec. Dig. ⟸ 238.]

3. CRIMINAL LAW ⟸1172—HARMLESS ERROR —INSTRUCTIONS.

The excerpts from the charge, complained of, when considered in connection with the entire charge, contain no error of which the plaintiff in error can complain, since mere error must be accompanied by injury, and the court imposed only a single sentence, although the verdict found the defendant guilty on both counts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. ⟸1172.]

4. CONVICTION AND DENIAL OF NEW TRIAL APPROVED.

The evidence amply authorized the conviction of the accused on both counts of the indictment, and the trial judge did not err in overruling the motion for a new trial.

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

John Jackson was convicted of furnishing intoxicating liquors to a minor, and brings error. Affirmed.

M. C. Tarver, of Dalton, for plaintiff in error. Sam P. Maddox, of Dalton, and J. M. Lang, Sol. Gen., of Calhoun, for the State.

BROYLES, J. Judgment affirmed.

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(16 Ga. App. 216)

## WRIGHT v. STATE. (No. 6282.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

1. INDICTMENT AND INFORMATION ⟸3, 5—NECESSITY—BLACKMAIL.

The charge of blackmail can only be preferred by indictment or presentment of a grand jury, and it is not within the power of one accused of this offense to waive the court's lack of jurisdiction in advance of an accusation preferred by a grand jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 9–23, 28; Dec. Dig. ⟸3, 5.]

*(Additional Syllabus by Editorial Staff.)*

2. COURTS ⟸1, 17—"JURISDICTION"—"JURISDICTION OF THE SUBJECT-MATTER."

"Jurisdiction" is the power of hearing and determining causes and doing justice in matters of complaint. "Jurisdiction of the subject-matter" is the power to deal with the general subject involved in the action. It can be given only by law and cannot be conferred by consent.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1–4, 6–9, 46–50, 52, 91–106; Dec. Dig. ⟸1, 17.

For other definitions, see Words and Phrases, First and Second Series, Jurisdiction; Jurisdiction of the Subject-Matter.]

Error from City Court of Statesboro; Remer Proctor, Judge.

Charles Wright was convicted of blackmail, and brings error. Reversed.

Francis B. Hunter, of Statesboro, for plaintiff in error. Homer C. Parker, Sol., of Statesboro, for the State.

RUSSELL, C. J. Wright, after expressly waiving indictment or presentment by a grand jury and lack of jurisdiction in the city court of Statesboro, was tried therein on an accusation preferred against him for the offense of blackmail. Upon the return of a verdict of guilty the defendant filed a motion in arrest of judgment, and attacked the jurisdiction of the court to try him for the offense of blackmail without an indictment or presentment of a grand jury first having been returned against him, even though he had expressly waived the same.

[1] The only question which presents itself, therefore, is whether one can, by waiver or consent, confer jurisdiction upon a city court to try him upon an accusation for the offense of blackmail, as defined in section 118 of the Penal Code, which section, after describing the offense of blackmail, provides:

"That no court in this state shall have jurisdiction to inquire into any case under this section before presentment made, or indictment found, by the grand jury of the county in which the offense has been committed."

[2] We are of the opinion that he cannot. Jurisdiction is the power of hearing and determining causes and doing justice in matters of complaint. This Code section says that *no* court shall have such power in cases of blackmail except upon indictment or presentment by a grand jury. Jurisdiction of the subject-matter is the power to deal with the general subject involved in the action, in the present case the crime of blackmail; and such jurisdiction is given only by law, and cannot be conferred by consent. 17 Am. & Eng. Enc. Law, 1060. Jurisdiction of the subject-matter of a suit cannot be waived. Watson v. Pearre, 110 Ga. 320, 35 S. E. 316. See, also, Blocker v. Boswell, 109 Ga. 230, 34 S. E. 289, and Smith v. Ferrario, 105 Ga. 51, 54, 31 S. E. 38. Jurisdiction which is not given to a court by law cannot be conferred upon it by waiver or consent of the parties; much less can such waiver or consent confer jurisdiction in cases where the jurisdiction is expressly or impliedly inhibited by the Constitution, by statute, or by policy of the law. See 8 Enc. Dig. Ga. Rep. 375, 376. Parties cannot, by consent or stipulation, invest a court with jurisdiction or power not authorized by law or conferred upon it by Constitution. 11 Cyc. 673, citing Ga. Loan & Mut. Asso. v. McGowan, 59 Ga. 811; Central Bank v. Gibson, 11 Ga. 453; Pilotage Com'rs v. Low, R. M. Charlt. 298. Sections 385, 386, and 387 of our Penal Code, describing certain other misdemeanors, are followed in section 388 by the same proviso relative to

indictment or presentment as is the description of blackmail in section 118, and it was said in Flint v. State, 12 Ga. App. 172, 76 S. E. 1032, that the offenses there described "cannot be tried on accusation." See, also, Progress Club v. State, 12 Ga. App. 174, 76 S. E. 1029. One of the essential prerequisites of the trial of a case of blackmail is that an indictment or presentment be first returned, and until this is done *no* court has jurisdiction to try such a case. Not only upon a strict construction of criminal law (and all criminal law must be strictly construed), but upon the authorities above cited, we can but hold that the court erred in overruling the motion to arrest the judgment.

Our peculiar statute in regard to blackmail was evidently based upon a controlling public policy designed to prevent troubles that might be bred by various neighborhood Rancy Sniffles; but whatever the object, the mandate is plain.

Judgment reversed.

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(16 Ga. App. 211)

## SIMS v. STATE. (No. 6255.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

1. BASTARDS ⟸92—APPEAL—DISCRETIONARY RULING—ADMISSION OF EVIDENCE.

The discretion of the court in admitting legal evidence at any stage of the trial before the verdict is rendered will not be controlled unless it appears that the defendant, in consequence of the discharge of his witnesses or from some other cause, has been injured. John v. State, 16 Ga. 200 (5); Williams v. State, 60 Ga. 368 (3), 27 Am. Rep. 412; Glasco v. State, 137 Ga. 336, 73 S. E. 578; Caswell v. State, 5 Ga. App. 483 (3), 63 S. E. 566; Chatman v. State, 8 Ga. App. 842 (2), 70 S. E. 188; Abbott v. State, 11 Ga. App. 44 (5), 74 S. E. 621; Mathis & Wharton v. Colbert, 24 Ga. 384, 389; 38 Cyc. 1368 (V).

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 228–239; Dec. Dig. ⟸92.]

2. BASTARDS ⟸63—PROOF OF PARENTAGE—DEMONSTRATIVE EVIDENCE.

In a bastardy case, while testimony of a witness that the alleged bastard in appearance resembled the accused is not admissible (McCalman v. State, 121 Ga. 492 (5), 496, 49 S. E. 609), and while there is considerable conflict in the decisions of the courts of other states upon the question of whether the bastard child may be exhibited to the jury as evidence of the relationship to the accused, the weight of authority seems to be in favor of such exhibition. 52 L. R. A. 502; State v. Smith, 54 Iowa, 104, 6 N. W. 153, 37 Am. Rep. 192; Finnegan v. Dugan, 14 Allen (Mass.) 197; Young v. Makepeace, 103 Mass. 50, 54; Scott v. Donovan, 153 Mass. 378, 26 N. E. 871; Gilmanton v. Ham, 38 N. H. 108; State v. Saidell, 70 N. H. 174, 46 Atl. 1083, 85 Am. St. Rep. 627; Gaunt v. State, 50 N. J. Law, 490, 14 Atl. 600; State v. Woodruff, 67 N. C. 89; Crow v. Jordan, 49 Ohio St. 655, 32 N. E. 750; State v. Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 618; Jones v. Jones, 45 Md. 145; Re Jessup, 81 Cal. 408, 418, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Paulk v. State, 52 Ala. 427, 429; Kelly v. State, 133 Ala. 195, 32 South. 56, 91 Am. St. Rep. 25; 1 Greenleaf, Ev. 29, § 13c (b); 1 Wigmore, Ev. 166; 2 Wigmore, Ev. § 1154 (2); Land v. State, 84 Ark. 199, 105 S. W. 90, 120 Am. St. Rep. 25; Shailer v. Bullock, 78 Conn. 65, 61 Atl. 65, 112 Am. St. Rep. 87.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 172, 173; Dec. Dig. ⟸63.]

3. BASTARDS ⟸73 — MISTRIAL — GROUNDS — WAIVER.

During the trial of the accused on the charge of bastardy, and after both sides had closed, and the argument of counsel had been made and the judge had delivered his charge, one of the jurors asked the court if the jury could see "the babies." Whereupon the judge ordered the alleged bastards brought around so that the jury could see them, which was done, and the jury inspected them. No objection to this proceeding was made by the defendant, or his counsel, until after the jury had retired to make up their verdict, when counsel for the accused moved the court to declare a mistrial. This the court declined to do, and the defendant excepted. *Held*, that no error was committed.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 189, 190; Dec. Dig. ⟸73.]

Error from City Court of Newnan; W. A. Post, Judge.

Arthur Sims was convicted of crime, and brings error. Affirmed.

W. C. Wright, of Newnan, for plaintiff in error. W. L. Stallings, Sol., of Newnan, for the State.

BROYLES, J. Judgment affirmed.

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(16 Ga. App. 196)

## SAVANNAH ELECTRIC CO. v. FOSTERLING. (No. 5780.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

1. TRIAL ⟸252 — INSTRUCTIONS — PLEADING AND PROOF.

Where a contention of a party to a suit, set forth in his pleadings, is not supported by evidence, it is not only not incumbent upon the court to charge specifically upon that subject, but it is error to do so.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. ⟸252.]

2. CARRIERS ⟸348—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE — SUBMISSION OF ISSUES—EVIDENCE.

The evidence was not such as to require a specific submission to the jury of the issue that "the plaintiff could not recover if his injuries were due to the fact that he went upon the platform of the street car when there was no necessity therefor, and under such circumstances that it was negligence for him to go thereupon"; nor was the evidence such as to require an instruction to the jury that "if the plaintiff, without cause or good reason therefor, went upon the platform at a time and under such circumstances as that the going would constitute negligence, and the plaintiff's injuries were caused thereby, the jury would be authorized to find for the defendant." The proximate cause of the plaintiff's injury was the sudden jerking and lurching of the car, caused by the negligence of the defendant's motorman, after the plaintiff had gotten upon the platform; and the consequences of this negligence—the throwing of the plaintiff from the car, thereby causing his inju-

ries—could not have been avoided after it became existent and operative.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1403–1405; Dec. Dig. ⟸348.]

3. INSTRUCTIONS.

Construed in connection with the entire charge, there was no error in any of the excerpts therefrom of which complaint is made in the motion for a new trial.

4. CARRIERS ⟸318—INJURY TO PASSENGER—SUFFICIENCY OF EVIDENCE.

The evidence strongly authorized the verdict.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307–1314; Dec. Dig. ⟸318.]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by G. E. Fosterling against the Savannah Electric Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Osborne & Lawrence, of Savannah, for plaintiff in error. Oliver & Oliver, of Savannah, for defendant in error.

BROYLES, J. G. E. Fosterling sued the Savannah Electric Company for alleged injuries received by him while a passenger on one of the cars of the defendant. The jury found for the plaintiff; motion for a new trial was made and overruled by the court; and the defendant excepted.

[1] 1. Where a contention of a party to a suit, set forth in his pleadings, is not supported by the evidence, it is error for the court to charge specifically upon that subject. Wylly v. Gazan, 69 Ga. 507 (3 and 4); Livingston v. Hudson, 85 Ga. 835 (8), 12 S. E. 17; Robinson v. Stevens, 93 Ga. 535 (1), 21 S. E. 96; Heard v. Coggins, 134 Ga. 52, 67 S. E. 429; Southern Railway Co. v. Parham, 10 Ga. App. 531 (4), 73 S. E. 763. In this case, the contention of the defendant, in its answer, that the plaintiff's injury was due to his own negligence and want of care, in attempting to alight in a negligent manner from a moving car, was not supported by any evidence. Upon this point counsel for defendant in error, in their brief, make the assertion that:

"During the trial of this case, no contention was made that the plaintiff was seeking to alight from a moving car. It did not occur to counsel for either party, or to the court, that the testimony could be construed into any such contention."

This assertion was not denied in the reply brief of counsel for plaintiff in error. We have carefully searched the record, but can discover no evidence which would have authorized the jury to find that the plaintiff, at the time he was injured, was attempting to alight from a moving car. And hence the court did not err in failing to present this issue specifically to the jury, or in failing to charge thereupon. None of the decisions cited by counsel for the plaintiff in error are in conflict with this ruling. In Georgia Railway & Electric Co. v. Baker, 1 Ga. App. 832, 58 S. E. 88, which is especially stressed in their reply brief, the holding on this point is as follows:

"It is error for the court to omit to charge the principles of law applicable to proper contentions of either party to a cause, where such contentions are authorized by the pleadings and are *sustained by testimony* [italics ours], and thus become issues in the case."

[2] 2. Counsel for plaintiff in error, in the third and fourth grounds of the motion for a new trial, complain that the court did not submit to the jury the issue that the plaintiff could not recover "if his injuries were due to the fact that he went upon the platform when there was no necessity therefor, and under such circumstances that it was negligence for him to go thereupon;" and that "the court did not instruct the jury that if the plaintiff, without cause or good reason therefor, went upon the platform at a time and under such circumstances as that the going would constitute negligence, and the plaintiff's injuries were caused thereby, the jury would be authorized to find for the defendant." In our opinion the evidence in this case was not such as to require a specific submission of this issue, or that such instructions be given to the jury. The evidence was that Fosterling was a passenger upon a car of the defendant company; that he was in a closed street car, about 9 or 10 o'clock at night; that as the car was approaching a sharp curve (described by some of the witnesses as a "right angle curve") he arose from his seat in the car and stepped through the door upon the front platform; that he tapped the motorman upon the back and told him that he wished to get off at Charlton street, which was some two or three blocks distant; that the car was then moving at a speed of from 5 to 12 miles an hour (as testified to by different witnesses); that the motorman turned and saw Fosterling, and, according to his (the motorman's) own testimony, saw his condition, and knew that if the car "hit the curve" the slightest sway of the car would throw Fosterling off, unless he held on to something, and yet he released the brakes, put on two more points of current, and "hit the curve" with such speed that the car jerked and lurched, threw Fosterling from the top of the platform and caused his injury. There was some evidence on the part of the defendant that Fosterling was partially intoxicated, but on this point there was sufficient rebutting evidence to authorize the jury to find that he was not under the influence of intoxicants on the night in question; he having drunk only three glasses of beer. According to common repute, it would be a most extraordinary occurrence if any citizen of Savannah became intoxicated after having imbibed only three "beers." However, as this observation of ours is based entirely

upon hearsay, and possibly prejudiced testimony, we withdraw it, and apologize for having made it.

In this case, though, it is immaterial whether Fosterling was partially intoxicated or entirely sober; it was the defendant's duty, while he was a passenger upon its car, to use extreme care to protect him and prevent him from being injured, whatever his condition may have been. According to the great preponderance of the evidence, no such care was exercised; on the contrary, as shown by the testimony of the defendant's own motorman, the negligence of the motorman in releasing the brakes, in putting on more current, and in entering upon the curve with such speed as to cause the car to jerk and lurch, *after* he saw the plaintiff's dangerous position upon the platform, was the proximate cause of the plaintiff's injury. Going upon the platform of a street car, moving at the rate of from 5 to 12 miles an hour (as the record shows this car was moving), is not negligence per se for a passenger. Going and standing upon the platform of a street car is quite different from going and standing upon the platform of a railway car. The railway train travels ordinarily at a speed of from 20 to 60 miles per hour, and its stops are few and far between, as compared to those of a street car. This court will take judicial cognizance of the fact that it is a common and ordinary thing for passengers on street cars to go upon the platform, when the car is approaching their destination, for the purpose of quickly alighting when their destination is reached. Our courts have held, even as to railway trains, that it is not negligence per se for a person to be upon the platform of a railway car, or to attempt to alight from a railway car, even when in motion. Augusta R. Co. v. Snider, 118 Ga. 146, 44 S. E. 1005; Suber v. G., C. & N. Ry. Co., 96 Ga. 42, 23 S. E. 387; Coursey v. Southern Ry. Co., 113 Ga. 297, 38 S. E. 866.

In Myrick v. Macon Railway & Light Co., 6 Ga. App. 38, 64 S. E. 296, where a passenger went upon the platform of a street car and stood upon the *step*, before his destination was reached, and fell and was injured, this court held:

That he "was not attempting to alight, for he had not quite reached his destination. His presence upon the step was, at most, but preparation to alight when the point should be reached at which the car ought to have been stopped, and, according to his statement, his being thrown from the car was not caused by any effort upon his part to alight, but by the sudden jerk or increase of speed in the running of the car."

When a passenger is in a closed street car, at night, as in the case at bar, it is often very difficult for him to determine when his destination has been reached, and, under such circumstances, for him to arise from his seat and go upon the platform, for the purpose of finding out where he is, and to notify the motorman that he desires to get off at a certain point, is not in itself negligence. And it is not necessary, under these facts, that the court should charge specifically upon this point, unless there has been a timely written request for him to do so, when he has substantially and correctly charged the principles of law involved. In this case there was no such written request, and the court's general charge upon the subject that the plaintiff must be free from negligence, and must exercise ordinary care, etc., was sufficient. Upon this subject the court charged as follows:

"Now a plaintiff cannot recover if the company shall make it appear that its agents have exercised extraordinary diligence, or if the injury to himself is done by his consent, or is done by his own negligence, or if both parties were at fault, and he, by the exercise of ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, if it was negligence."

Again the court charged that:

"The plaintiff cannot recover in case of personal injuries, no matter what the injury was, if the proof shows that he could, by the exercise of ordinary care, have avoided the consequences to himself, caused by the defendant's negligence, if the defendant was negligent, or if the injury was caused by his own negligence."

The court charged also:

"If the company exercised the degree of care which was required of it by the law, in regard to the matters about which he [plaintiff] complains, or if he was not injured by its negligence, or if he was injured on account of his own negligence, or if he could, by the exercise of ordinary care and diligence, have avoided the consequences of the defendant's negligence, if it was negligent, then he cannot recover."

Again the court charged:

"The [defendant] company would be liable, if that negligence [the defendant's] was the proximate cause of the injury, provided, of course, that the plaintiff could not, by the exercise of ordinary care and diligence, have avoided the consequences of the defendant's negligence."

The only negligence which it was contended the plaintiff was guilty of was in going upon the platform; and hence all the excerpts from the charge relating to his alleged negligence, or want of ordinary care, could have referred to nothing else than his presence upon the platform. In the absence of a timely written request to charge more specifically upon this subject, we think the instructions of the court were sufficient. See Seaboard Air Line Ry. v. Andrews, 140 Ga. 254 (3 and 4), 78 S. E. 925, Ann. Cas. 1914D, 165; Southern Ry. Co. v. Hill, 139 Ga. 550 (5), 555, 77 S. E. 803; Savannah Elect. Co. v. Lackens, 12 Ga. App. 765, 79 S. E. 53. The decisions cited by counsel for the plaintiff in error do not conflict with this ruling. In Atlanta Ry. Co. v. Gardner, 122 Ga. 82, 49 S. E. 818, the seventh and eighth headnotes are as follows:

"(7) Under the pleadings and the evidence in this case it was erroneous not to charge the principle that if the plaintiff, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence, she could

not recover, although the court was not requested to so charge by the defendant."

"(8) The court should not only state the contention of a party to the jury, but should also state the law applicable to such contention."

And in the opinion on page 92 of 122 Ga., on page 822 of 49 S. E., in discussing the error referred to in the seventh headnote, the court said:

"Another ground of the motion for a new trial is that the court erred in failing to charge the jury that if the plaintiff, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence, she could not recover. Under the evidence in this case, the court should have given this principle of law in charge to the jury, and this ground of the motion alone was sufficient to require the grant of a new trial."

And on the point dealt with in the eighth headnote it was said:

"It is one thing to state what a party contends, and another and a very different thing to state the law applicable to such contention. To state to the jury, as the court did, that the defendant contended that it had not 'been guilty of any neglect, and that, if the plaintiff was hurt, it was done under such circumstances that the plaintiff, by the exercise of ordinary care and diligence, could have avoided any injury, if in fact she was injured, and that therefore the defendant [was] not liable,' was far from being equivalent to charging the law laid down in the Civil Code, § 3830."

The decision in that case does not conflict with our ruling in the case at bar, for here the judge did charge the jury repeatedly that if the plaintiff, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence, he could not recover; and he charged also the law laid down in the Civil Code, § 4426 (formerly section 3830). In that case the judgment was reversed because the court did not charge the very principles of law which the court in this case did charge.

We have already pointed out, in another place, that the case of Georgia Railway & Electric Co. v. Baker, 1 Ga. App. 833 (7), 58 S. E. 88, is not in line with this case. The defendant, in its answer, did not specifically set up the defense that the plaintiff was guilty of negligence in going upon the platform of the car. However, the plaintiff having alleged that he was wholly free from fault, and this allegation having been denied by the defendant, the pleadings were sufficient to raise the issue as to whether the plaintiff could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence; and this principle was clearly and repeatedly charged by the court in this case.

We think that the charge of the court was more favorable to the defendant than the evidence warranted, for the jury evidently accepted the version of the transaction given by the plaintiff and the defendant's motorman; and, if that be the truth, the immediate and proximate cause of the plaintiff's injury was the negligence of the motorman in increasing the speed of the car after he had seen the perilous position of the plaintiff on the platform, and just as he was about to enter upon a sharp and dangerous curve, thereby throwing the plaintiff from the platform and causing his injury, under such circumstances that the consequences of this negligence could not have been avoided after it became existent. Under this theory, the rule of law requiring the plaintiff to exercise ordinary care to avoid the consequences of the defendant's negligence was not applicable. See Savannah Electric Co. v. Lackens, 12 Ga. App. 771, 79 S. E. 53; Georgia, Florida & Alabama R. Co. v. Sasser, 4 Ga. App. 276, 283, 284, 61 S. E. 505.

[3] 3. The instructions complained of in the fifth, sixth, seventh, eighth, and ninth grounds of the amendment to the motion for a new trial are not objectionable, when considered in connection with the pleadings, the evidence, and the entire charge of the court. There was no error in any of them requiring the grant of a new trial. The charge, as a whole, was, in our opinion, a full and fair presentation of the law applicable to the case and of the respective contentions of the parties.

[4] 4. The evidence in this case strongly authorized, if it did not demand, the verdict. When, to use a homely expression, we put all the evidence "in the pot" and "boil it down," what remains is the unmistakable fact that the plaintiff's injury was caused by the gross negligence of the defendant's motorman, after the plaintiff had gotten upon the platform of the car; and that this negligence occurred after the motorman saw and realized the plaintiff's peril. Under any theory of the evidence, the jury were compelled to find that the plaintiff's injury resulted directly from this negligence of the motorman in increasing the speed of the car as it entered upon a sharp and dangerous curve, thereby causing the car to suddenly jerk and lurch, which threw the plaintiff from the platform and caused his injury.

The court did not err in overruling the motion for a new trial.

Judgment affirmed.

(16 Ga. App. 208)

MATHEWS, Warden, v. SWATTS.
(No. 6162.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸995 — SENTENCE AND JUDGMENT—ORAL STATEMENTS.

The oral statements of a judge, in passing sentence, which are not incorporated in the written judgment signed by him, are no part of the sentence or judgment, whether they are made before or after the signing of the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518, 2521, 2523–2526, 2528½, 2530, 2536–2543; Dec. Dig. ⟸995.]

2. CRIMINAL LAW ⟸996 — JUDGMENT — AMENDMENT.

A judge has no authority to amend his judgment in any particular after the term of court at which it was passed has expired; and, when amended at that term, it must be before the execution of the sentence has begun, and it must be done in writing and be signed by the judge. There is no such thing in law as an oral amendment of a judicial sentence or judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2519; Dec. Dig. ⟸996.]

3. HABEAS CORPUS ⟸72—PETITION SHOWING LAWFUL DETENTION — QUASHING OF WRIT.

Where a petition for habeas corpus clearly shows on its face that the detention is lawful, there is nothing to investigate, and the writ should be quashed.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 64; Dec. Dig. ⟸72.]

*(Additional Syllabus by Editorial Staff.)*

4. CRIMINAL LAW ⟸995 — "JUDGMENT" — WHAT CONSTITUTES.

A "judgment" is a decision or sentence of the law pronounced by the court and entered on its docket, minutes, or record. A mere oral decision is not a judgment until it has been put in writing and entered as such.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518, 2521, 2523–2526, 2528½, 2530, 2536–2543; Dec. Dig. ⟸995.

For other definitions, see Words and Phrases, First and Second Series, Judgment.]

Error from City Court of Cairo; J. R. Singletary, Judge.

Habeas corpus by H. T. Swatts against W. C. Mathews, Warden. Judgment for plaintiff, and defendant brings error. Reversed.

M. L. Ledford, of Cairo, for plaintiff in error. J. S. Weathers and Ira Carlisle, both of Cairo, for defendant in error.

BROYLES, J. H. T. Swatts brought habeas corpus proceedings for the release of John Donald from the chain gang of Grady county, alleging that he was wrongfully detained by W. C. Mathews, warden of Grady county convicts. Mathews produced the body of Donald and filed his return, and moved to quash the writ. The motion was overruled, and the case proceeded to a hearing. At the conclusion of the evidence the judge passed an order directing the discharge of Donald. It appears from the petition that Donald was given two sentences on April 27, 1914, each being for a term of service of six months upon the chain gang, to be relieved upon the payment of $50 in each case, provided the payment was made within five days. It was stipulated in the second sentence that it was to begin at the expiration of the first sentence. Donald served the first sentence, and on October 27, 1914, Swatts paid W. J. Willie, the solicitor of the court, $37.50, as in full payment of the fine imposed upon Donald for the second sentence; this being the date when the first sentence expired. It is further alleged in the petition that, at the time the sentences were imposed upon Donald, the judge stated in open court that the defendant would be relieved of the sentences upon the payment of $37.50 for each of the offenses of which he had been convicted, but that by inadvertence the clerk of the court made the fine in each instance $50; that the payment of the $37.50 in behalf of Donald was received by W. J. Willie, the solicitor of the city court, in full satisfaction of the second fine and sentence.

[1, 4] 1, 2. It is well settled that oral announcements of a judge are no part of his judgment in a case. And the decisions are without exception that a trial judge cannot amend or modify a sentence after it has been duly entered up and signed by him and the term of court has passed. An oral announcement made before or after he has signed the judgment will be treated as mere surplusage. A judgment of a court of record can only be shown by its records. Where there is no record, there is no judgment.

"A judgment is a decision or sentence of the law pronounced by the court and entered upon its docket, minutes, or record. A mere oral decision is not a judgment * * * until it has been put in writing and entered as such." Easterling v. State, 11 Ga. App. 134, 74 S. E. 899.

"What the judge orally declares is no judgment until it has been put in writing and entered as such." Freeman v. Brown, 115 Ga. 27, 41 S. E. 385.

[2] In this case the valid alternative sentence was a fine of $50, not $37.50, and any evidence to the effect that during the trial the judge orally stated that the defendant would be released upon the payment of $37.50 was irrelevant and incompetent, and on motion should have been ruled out. The effect of the discharge of Donald, under the state of facts shown, was clearly to commute a penalty, and to usurp executive power vested in the Governor alone. As was said in Rutland v. State, 14 Ga. App. 751, 82 S. E. 293:

"According to the weight of authority, the rule is that a judgment or decree can be amended or corrected only where there is sufficient record evidence, or evidence quasi of record, to sustain the amendment, and that extraneous evidence cannot be received for this purpose. In this connection it is generally considered that the notes and minutes made by the judge upon his docket are record evidence; but the amendment cannot be based on the judge's knowledge or recollection of the facts, or his affidavit in regard to the error to be corrected. 23 Cyc.

879, subpar. "g." In Dixon v. Mason, 68 Ga. 478 (2), it was held that a judgment must be amended by an inspection of the record, including the verdict and pleadings. Parol proof cannot furnish a ground of amendment not in the record. For this reason, * * * we are of the opinion that neither the evidence of the clerk in regard to the oral announcement of the judge, nor the testimony of the judge himself, should have been considered in determining the question of whether the judgment should be amended. A judge cannot be a witness in his own court; nor should his judgment be affected by his own knowledge of the facts affecting the issue."

The record shows that the term of the court expired without the sentence or judgment of the court having been legally amended or modified; and, of course, under the law, the judge would have no authority afterwards to amend it.

As was said by Lord Coke:

"Yet during the terme wherein any judicial act is done the record remaineth in the breast of the judges of the court, and in their remembrance; and therefore the roll is alterable during the terme, as the judges shall direct; but when that terme is past, then the record is in the roll, and admitteth no alteration, averment, or proof to the contrarie." Coke, Litt. 260a; 12 Cyc. 784, note 8.

[3] 3. The writ of habeas corpus is a "writ of right," and its beneficent effects ought not to be dissipated by subtle objections and technical niceties, and the technical rules of pleading are not applicable in such a proceeding. After the writ is issued, and the respondent has appeared in answer to it, the sufficiency of the petition cannot be tested by a demurrer; but, if the petition clearly shows on its face that the detention is lawful, there is nothing to investigate, and the writ should be quashed. Simmons v. Georgia Iron & Coal Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739; Hansford v. State, 7 Ga. App. 196, 66 S. E. 400. Under the facts of this case, the petition for the writ of habeas corpus clearly showing on its face that the detention of Donald was lawful, the judge should have quashed the writ.

Judgment reversed.

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(16 Ga. App. 207)

## WOODWARD v. GRESHAM. (No. 6150.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

CERTIORARI ⇐16 — GROUNDS — ERRORS IN FINAL JUDGMENT—GRANT OF NONSUIT—MUNICIPAL COURT.

The writ of certiorari lies only for the correction of errors in a final judgment of a cause, and it is always available to review any final judgment of an inferior judicatory, but the act of 1913 (Acts 1913, p. 167), creating the municipal court of Atlanta, provides no other method of review in that court of a judgment rendered therein in the first instance by a single judge than by a motion for a new trial; and consequently in that court the grant of a nonsuit (in exception to the general rule) may be reviewed by a motion for a new trial, and the judge of the superior court did not err in overruling the certiorari, which raised only the specific point that the grant of a nonsuit in the municipal court of Atlanta could not be reviewed by a motion for a new trial, but was reviewable only by certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 31, 32; Dec. Dig. ⇐16; Appeal and Error, Cent. Dig. § 103.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by S. D. Woodward against M. L. Gresham. Judgment for defendant. From the overruling of certiorari, plaintiff brings error. Affirmed.

R. E. Church, of Atlanta, for plaintiff in error. M. Herzberg and D. K. Johnston, both of Atlanta, for defendant in error.

BROYLES, J. Judgment affirmed.

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(16 Ga. App. 221)

## GRAHAM v. STATE. (No. 6319.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⇐564—LARCENY ⇐55—VENUE—PROOF.

The circumstances in proof, taken in connection with the confession of the accused, were sufficient to authorize the inference that he stole the cow described in the indictment, and that the theft was committed in Irwin county, Ga., and to exclude every other reasonable hypothesis than that of his guilt. Venue may be shown by circumstantial evidence, as well as by direct proof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 726, 1277–1284; Dec. Dig. ⇐564; Larceny, Cent. Dig. §§ 152, 164, 165, 167–169; Dec. Dig. ⇐55.]

*(Additional Syllabus by Editorial Staff.)*

2. LARCENY ⇐40 — LARCENY OF COW — INDICTMENT—"BLUE AND WHITE SPECKLED"—"BLUE."

An indictment for larceny of a cow, which describes the cow as being "blue and white speckled" may include a cow which is black and white speckled; "blue," as applied to a cow, generally denoting either a modified shade of black, or black with white intermingled, or dark gray, dove, or slate color, which, in contrast with some decided color or with white, suggests and somewhat resembles blue.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102–126, 160; Dec. Dig. ⇐40. For other definitions, see Words and Phrases, Blue.]

Error from Superior Court, Irwin County; W. F. George, Judge.

Edmund Graham was convicted of larceny of a cow, and brings error. Affirmed.

Philip Newbern and H. J. Quincey, both of Ocilla, and Haygood & Cutts, of Fitzgerald, for plaintiff in error. Jos. B. Wall, Sol. Gen., of Fitzgerald, for the State.

WADE, J. Edmund Graham was convicted of the larceny of a cow described in the indictment as "one blue and white speckled fe-

male cow about 2½ years old, with horns, unmarked, of the personal property of T. M. Paulk," etc. His motion for a new trial was based on the general grounds and on one special ground, in which it is insisted that the evidence failed to establish that the offense was committed in the county of Irwin, and therefore the venue of the alleged crime was not shown.

[1] The prosecutor testified that on or about September 11, 1914, he lost the cow described in the indictment; that he last saw the cow in the morning of that day, in Irwin county, near Coochee creek, where the cow ranged; that about two weeks thereafter he discovered signs a quarter of a mile from where he had last seen the cow indicating that a cow or some other animal had been butchered there; that two or three weeks after the cow was missed he saw a cow's hide that had been dug up in the garden of Isaiah Spicer, about half a mile from where he had last seen the cow; that it was "long enough" to be the hide of the lost cow, and was a "white speckled hide," and there "were indications that it was the color" of his cow, though the hide was partially decomposed, and the hair had begun to slip from it, and he could not swear that it was, in fact, the hide from his lost cow. He testified further that the place where he last saw the cow on September 11, 1914, the place where a cow appeared to have been butchered, and the place where the hide was discovered in Spicer's garden, were all within the limits of Irwin county. He testified that the defendant was shot by some one on Friday night about the 11th of September, though he did not hear of it until Sunday or Monday thereafter. Isaiah Spicer, testifying for the state, said that he knew the defendant, and remembered the Friday night when the defendant was shot, as he himself did the shooting; that he saw the defendant pass by his house alone in the evening, riding a mule, with a gun on his shoulder, and going in the direction of Anderson Alexander's house; that during that night he heard a vehicle pass his place, going back in the direction of Coochee creek, and about 15 minutes after it passed he went into his house and got his shotgun and went in the direction in which the vehicle appeared to be going, as he thought "they" had one of his hogs; that when he "got there" he heard a buggy coming towards him, and he stopped under an oak tree, and the persons with the buggy came directly towards and to the left side of the tree; that one Cook was leading the mule hitched to the buggy, and the defendant was walking along by the buggy with a gun, and there was beef in the buggy, cut up "like you bring it to market"; that when Cook and Edmund Graham, the defendant, got within a few steps of where the witness was standing, the witness called out, "Hey, Edmund," and the defendant replied, "Who in the God damned hell is that?" and "pulled his gun and shot" at the witness twice, and then the witness shot back at him; that Graham and Cook ran, and the witness ran off also, and the mule pulled the buggy against a tree and broke loose and ran away. The witness further said that the shooting took place about half past 8 or 9 o'clock at night, and that he did not see the defendant again that night, but saw him the next evening, when the defendant said that the beef in the buggy was his (the defendant's) beef, and that he supposed it was some one else who hailed him, and this was why he shot at the witness; that the defendant told the witness when he saw him the day after the shooting to go to his brother-in-law's house and tell his brother-in-law "to go down there and get the beef," as "he was hurt and could not manage, and his wife could not manage it," and he wanted his brother-in-law to take the beef up to the house of the witness and to Anderson's house and let them have some of it, and bring the remainder to him; that the defendant then told the witness that the hide "was smelling," and directed that the witness and the defendant's brother-in-law should bury it; that, when Spicer and Cook (the brother-in-law) reached the place where the beef was, they found the defendant's hat and shoe, and they took the hide, and Cook buried it in Spicer's garden, as the defendant had instructed; that the beef was spoiled, and not in condition to sell, and the hide was smelling, as both had stayed in the woods all night; that the defendant claimed to the witness that the cow he had butchered was his, and that he could prove this fact by his brother-in-law; that he (Spicer) told the sheriff where the hide was buried, and was there when the hide was dug up (about two weeks later), and it was then in bad shape, and most of the hair had slipped off; that you could tell that the cow had "black and white" on her, but not what sort of cow the hair came from.

T. M. Pollock, sworn for the state, testified that on the day of the commitment trial he asked the defendant "who killed that cow down there where they found that hide buried," and he said, "I killed it," and added that it was Mr. Tim Paulk's cow, and he (the defendant) knew it was Mr. Paulk's cow when he killed it.

W. A. Tucker, sheriff of Irwin county, testified that the defendant had talked to him several times about the cow alleged to have been stolen; that soon after the defendant was shot, he and others went to see the defendant, but could get no information from him, but that later, after the hide was dug up, and the defendant was arrested and brought to jail, he said to the defendant, "Edmund, we have got you," and the defendant replied, "Yes; you have got me;" and, in answer to questions, stated that the cow he had butchered was "Mr. Tim Paulk's cow, a speckled heifer, about 2½ years old"; that he knew it was Mr. Paulk's cow, and that sev-

eral other persons he named were to meet him there that night and help skin the beef; "that he killed it about two hours by sun, and went back to Aaron's and got the mule and buggy, and the other boys did not come; that he used a flashlight in butchering the beef; that somebody halted him that night, and he shot them twice; that Isaiah was justified in shooting him because he shot first."

The defendant in his statement admitted that he had confessed the stealing of the cow to different persons, including the solicitor (who did not testify), but claimed that the cow was not Paulk's cow, but was his, and said that he had several witnesses who could prove where he got the cow, two of whom were "down there at that time, and there ain't nobody seen them since I got shot." No witness was introduced in his behalf.

It appears from this testimony, which we have given almost in full, that there were ample circumstances from which the jury could infer the defendant's guilt to the exclusion of reasonable doubt. Obviously, the beef in his buggy when he was detected by Spicer was stolen beef. His conduct in firing his gun at Spicer because Spicer hailed him cannot be explained on any other theory. He must have been in a highly wrought-up state of mind, nervous and excited, and fearful of discovery; for not only did he shoot at Spicer without any sufficient cause, but, when Spicer fired back and wounded him, the defendant, instead of announcing who he was or making any effort to prevent the firing of further shots towards him, or doing anything more to protect his mule and buggy and the beef in the buggy, turned and fled, and it does not appear that he made any effort to have the buggy and the considerable supply of fresh meat that he left in it cared for until the evening of the following day, when he saw Spicer and requested him to remove the beef and hide, and instructed him how to dispose thereof—possibly fearing that his buggy would be recognized, and that the decaying beef in it would attract attention and direct suspicion towards him. It will be noted that Spicer testified that the defendant especially instructed him to bury the hide, assigning as a reason that it was "smelling," and at the same time directed that the beef be divided among Spicer, his brother-in-law, and himself. Why the defendant should have directed that the hide be buried, assigning as a reason that it was "smelling," when he regarded the beef itself as fresh and suitable for food, is hard to understand, except on the theory that beef could not be identified, and that the hide unburied might serve to criminate him.

[2] The defendant's confession appears to have sufficiently shown that he killed a cow belonging to Tim Paulk, a speckled heifer about 2½ years old. The indictment charged him with stealing a blue and white speckled female cow about 2½ years old, which had horns, was unmarked, and belonged to T. M. Paulk. So it appears that his confession of itself did not absolutely identify the cow, which he admitted stealing, as being the particular cow belonging to Paulk which was described in the indictment; but, according to the testimony, Paulk had only lost one cow, the cow described in the indictment, and the defendant several times admitted that he knew that the cow he had stolen belonged to Paulk; so from this it would appear that the cow he admitted stealing and the cow described in the indictment must have been the same. Again, the hide dug up in Spicer's garden two or three weeks after the loss of the cow, though somewhat decayed, was described by the prosecutor as a "white speckled hide," with "indications" that its color was the same as that of the lost cow; and Spicer asserted that, while he could not tell the sort of cow the hide came from, he was able to determine that the cow "had black and white on her." While the indictment described the cow as "one blue and white speckled" cow, this description would include equally well a cow which was black and white speckled, since it is a matter of common knowledge that, literally speaking, no cow on this mundane sphere is actually "blue," though cows of that color may possibly browse through the valleys of the moon, graze along the banks of the canals that seam the face of the planet Mars, or disport themselves in the realms of fairyland. According to the vernacular of the woods and fields, of "Crackerdom" at least, "blue," as applied to a cow or other animal, generally denotes either a modified shade of black, or black with white intermingled, or dark gray, dove, or slate color, which, in contrast with some decided color, or with white, suggests and somewhat resembles blue; and this court, "to the manner born," cannot affect ignorance of the general meaning of the adjective "blue" when used in such a connection, but must hold that a "blue and white" speckled cow and a "black and white" speckled cow may be one and the same, and a jury would be authorized so to find. When the hide was found, after having been buried two weeks, it appeared to be black and white speckled; and, considering the changes which may have resulted from the partial decay of the hide itself (to which the black and white, or blue and white, speckled hair was attached), or from the fact that it had been buried in earth which may have soiled and partially discolored the hair, the jury were authorized to infer that the "black and white speckled" hide had been taken from the "blue and white speckled" cow described in the indictment, especially in view of the fact that the defendant admitted stealing a cow belonging to Paulk, and Paulk had lost but one cow, and that cow one which had a blue and white, or, in other words, a modified black and white, speckled hide. Without discussing all of the evi-

dence in detail, it seems plain that there was ample proof to identify the cow butchered by the defendant as the cow stolen from the prosecutor, and there was no material variance between the allegations and the proof.

It is insisted by the plaintiff in error that there was not sufficient proof of the venue. It is well settled that "venue may be proved by circumstantial evidence as well as by direct proof, if the circumstances proved equally satisfy the mind." Dyer v. State, 6 Ga. App. 390 (1), 65 S. E. 42. In Cook v. State, 9 Ga. App. 208, 70 S. E. 1019, it was said that proof that certain stolen hogs were on a range in Miller county shortly prior to their asportation was sufficient evidence, when taken in connection with the fact that the hogs were found in the possession of the defendant, to authorize the inference that the taking was in Miller county. In this case it appears that the cow ranged in Irwin county, and was seen for the last time in that county, and only a short distance from where the accused was later discovered in the possession of a hide which practically corresponded with the description of the hide of the stolen cow, and also in possession of a quantity of fresh beef. It further appears that the place where this cow or some other animal had been butchered was discovered at a point within the county of Irwin a short time after the loss of the cow described in the indictment, and that the hide found in the possession of the defendant was found only a short distance away from where the cow was last seen, and also a short distance from where some animal appeared to have been butchered, and the place where the hide was buried was likewise near where the cow was last seen, and all these points or places were in Irwin county.

Under the ruling in the Cook Case, supra, and taking not only the circumstances mentioned immediately above, but the entire evidence, with the confession of the accused, it is clear that the evidence was sufficient to exclude any hypothesis other than that the cow was stolen and butchered in the county of Irwin.

Judgment affirmed.

RUSSELL, C. J. (concurring specially). Under the authorities cited and others that could be mentioned, I think the evidence was sufficient to establish the venue. I think, too, the fact adverted to by my Brother Wade that Paulk had lost only one cow, coupled with the confession of the defendant that the cow he killed was Paulk's established larceny as alleged. In the conclusion reached by the court, therefore, I concur, though I am unable to express any opinion as to the extramundane localities referred to, and furthermore I am unwilling to state that it rests within my judicial knowledge that there are not cows that can be properly denominated as "blue" cows. I do not commit myself to the proposition that a blue cow can be called a black cow, or vice versa, or that the only fundamental basis upon which the designation of blueness depends is the commingling of black and white hairs. With this cautionary proviso, I fully agree with the decision of the court.

(16 Ga. App. 218)

## RAMSEY v. STATE. (No. 6307.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

ADULTERY ⟸14—SUFFICIENCY OF EVIDENCE.

No error of law is complained of, and the circumstances proved were amply sufficient to exclude every other reasonable hypothesis than that of the guilt of the accused.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 77–81; Dec. Dig. ⟸14.]

Error from City Court of Louisville; W. L. Phillips, Judge.

Preston Ramsey was convicted of adultery, and brings error. Affirmed.

Frank Hardeman, of Louisville, for plaintiff in error. J. R. Phillips, Sol., and R. G. Price, both of Louisville, for the State.

WADE, J. Preston Ramsey, the accused, was a married man, living on a farm, and Pearl Sims was a married woman living separate and apart from her husband on a different farm, belonging to a different owner. Pearl's house was a double-pen house, with two rooms, one occupied by her and the other by her grandmother. The rooms did not connect, but "you had to go out of one room to the ground to enter the other." About 11 or 12 o'clock at night, on or about the date named in the indictment against Ramsey, a witness, accompanied by the husband of the woman, passed along the path which led "right by the door" of Pearl's house. The door of her room was open, and a lamp was burning on her center table, which enabled the witness to see into the room and observe that there were two beds in the room, and that Pearl Sims and the defendant, neither of whom was undressed, were lying across a bed talking. Soon thereafter this witness borrowed a bicycle from Ramsey, and Ramsey told him, when he "started to return it that night, to take it to Pearl Sims' house, where he [Ramsey] would be." The witness took the bicycle, as instructed, to the house of Pearl Sims at night, and when he reached her house it was dark, and there was no light in the house. He called, and the defendant came to the door of Pearl Sims' room and opened it. The defendant "had off his clothes (that is, he was in his nightclothes)," and the witness saw Pearl Sims in bed. The defendant did not come from the other room of the house, but came from Pearl Sims' room, and, "from the light"

(evidently made by the defendant after the witness called him, since he stated that there was no light in the house when he called), the witness could see the bed not occupied by Pearl Sims, and observed that the cover thereon was not disturbed. This witness further testified that on another occasion he passed the house of the Sims woman and called, and, though he saw no one, he heard the defendant's voice as he answered from the house. The defendant made a statement which occupies but three lines of the record, in which he simply denied any undue or intimate relations with Pearl Sims, and said he had merely been on a visit to her and never was in bed with her at any time.

It hardly seems necessary, on this statement of facts, to say more than that the circumstances proved appear to us to preclude any reasonable hypothesis of innocence on the part of the accused, who, from the evidence, was present in a dark room, unoccupied by any other person but his alleged paramour; and though, according to his statement, he had come from his own home and family to merely pay a social visit to the woman, he had found it necessary, after his arrival, to remove his clothing and to put on his night clothes, blow out the light, and innocently (?) entertain his female friend, then reclining at length in bed. Why the defendant thought it necessary to remove his clothing and to blow out the light does not appear, for since the accusation charges him with the commission of the crime of adultery on the 6th day of February, 1914, it is apparent that, according to common knowledge as to the seasons, the weather could not have been so oppressively warm as to require the removal of his outer clothing for comfort merely, nor could the light in the room have been extinguished to guard against attracting mosquitoes or other insects, not troublesome at that time of the year. We are constrained to believe that the defendant on this visit was not exclusively engaged in high-minded discourse with the woman, and that platonic friendship did not account altogether for the situation in which they were discovered. While there is no proof that the woman was a woman of established reputation for lewdness, the facts were nevertheless more convincing than in the Long Case, 5 Ga. App. 176, 62 S. E. 711, for in that case there was a lamp in the room, though turned low, and, while neither of the parties had on shoes when interrupted, they were otherwise dressed. There was an inside door, which, though closed, connected with an adjoining room. There were two beds in the room, but the cover had not been turned down on either, though one appeared somewhat rumpled, and the pillow thereon was indented and felt warm. The parties were in a room connected by a door with an adjoining room, in which there were three other persons who knew of the presence of the defendant and the woman in question. In this case, it is true, the grandmother occupied the other room of the two-room cabin, but it does not appear that she was aware of the presence of the defendant in the room with her granddaughter, and it does appear that there was no inside or direct connection between the two rooms, and the room was in total darkness immediately before the defendant opened the door in response to a call from the witness. In the Long Case, supra, as already stated, the parties were not undressed, though their shoes had been removed, and one of the material reasons which apparently led this court to hold that the evidence in behalf of the state was insufficient to authorize the conviction of the defendant was that:

"From the proved facts, the inference is as likely that the parties were about to commit the offense alleged in the accusation, and were prevented by the arrival of the two policemen, as that the act had already been consummated."

Even from this conclusion Powell, J., dissented, on the ground that the "rumpled bed and warm pillow" spoke "more strongly of consummation experienced than of mere preparation thwarted." The circumstances of the case under consideration indicate that the defendant, when he went to the door of the woman's room in his night clothes, had but just left the bed in which the woman was then seen to be reclining, and that, after his short conversation at the door with the witness, he returned to that bed and to the arms of his paramour. Whether the crime had been consummated or not before the witness appeared at the door and called the defendant, no reason appears why it could not have been thereafter consummated during the remainder of the night; and, according to all natural and human probabilities, we are compelled to assume that it was consummated either before or after the arrival of the witness.

The circumstances proved in the case of Cummings v. State, 14 Ga. App. 441, 81 S. E. 366, were by no means as conclusive as those appearing in the present case, and the evidence in this case is fully as satisfactory as in the case of O'Neal v. State, 15 Ga. App. 487, 83 S. E. 861. In the case last mentioned, the defendant did attempt to offer an explanation which was somewhat plausible at least, whereas in the present case the explanation of the defendant that he was simply visiting the woman, and neither then nor at any time was unduly familiar with her, when considered in the light of the undisputed testimony showing that he was present alone with her, late at night, in a dark room, in his night clothes, where she was seen to be occupying the only one of two beds in the room that had apparently been used, appears, in the light of human experience and in the absence of any other testimony explaining his presence and accounting for the scantiness of his garb, to be absolutely incredible, especial-

ly since the defendant himself did not deny the truth of any of the evidence, and nothing was shown to negative the inference that he remained alone in the room with the woman for the rest of the night.

Judgment affirmed.

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(16 Ga. App. 203)

## WESTERN UNION TELEGRAPH CO. v. KNIGHT. (No. 5880.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

TELEGRAPHS AND TELEPHONES ⊂⊃68—FALSE STATEMENT IN TELEGRAM—ACTION FOR DAMAGES—PETITION—SUFFICIENCY AGAINST DEMURRER.

The petition does not set forth a cause of action; the allegations being, in substance: That in December, 1913, the plaintiff lived with her husband in Columbus, Ga., where her husband was engaged in business. That some days prior to December 4, 1913, she went on a visit to Adel, Ga. That she sent from there to her husband the following telegram: "Adel, Ga. Dec. 4, 1913. C. B. Knight, Rankin Hotel, Columbus, Ga. Had no letters for three days. Am anxious. Answer at once. Mrs. C. B. Knight, Collect." That this telegram was received at the Columbus office of the company at 5:02 p. m. on the same day. That it was sent by the telegraph company to the Rankin Hotel, but was put in an envelope marked: "Paid. Pay no charges on this message." That the clerk at the hotel received the message and was ready to pay, and would have paid, the charges, had any been demanded but no demand was made. That the telegram was delivered to her husband upon his arrival at the hotel from his office. That on the following day, December 5th, the telegraph company sent from its office in Columbus to its office in Adel, Ga., a message as follows: "Yours 4th, Knight, signed same. We failed to put charges on message when message was delivered yesterday, and Mr. Knight has left town. Please try to collect again and advise. Columbus, Ga., 12/5." That upon the arrival of this message it was delivered to Mrs. Knight, whereupon she paid the charges for her telegram of the previous day. That upon receipt of this telegram from Columbus she became greatly disturbed, excited, and distressed by reason of the statement in it that her husband had left the city where he resided, and she suffered the most excruciating pain and agony, knowing of no reason why her husband should have left his home, no notice having been given her of such intention upon his part. That she, not knowing what else to do, went to Waycross, to the home of her husband's father, to ascertain, if possible, the whereabouts of her husband. That upon reaching Waycross she failed to get any information about her husband. That the strain upon her nervous system became too great for her to bear, and she became ill, and suffered great physical, as well as mental, pain and anguish, and for a period of two days her sufferings were such that she took no nourishment of any kind. That prior to the time referred to she was a woman of excellent health, but the ordeal through which she passed greatly impaired her bodily health, and since that date she has never regained her normal strength and vigor. That all the bodily pain and sickness, as well as the mental anguish, that she endured, was caused by the carelessness, negligence, and improper conduct of the defendant, its agents, servants, and employés: (1) In marking the first telegram as "paid," and (2) in sending the second telegram stating that her husband had left his home, which statement was absolutely false and without any foundation whatever. That, by reason of these acts of negligence, and the false, misleading, and inexcusable statement of the telegraph company and its agents, servants, and employés, she has been injured and damaged as aforesaid to the amount of $1,000.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 69, 70; Dec. Dig. ⊂⊃68.]

Error from City Court of Waycross; J. C. McDonald, Judge.

Action by C. B. Knight against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed.

Bolling Whitfield, of Brunswick, for plaintiff in error. Parker & Walker and E. R. Smith, all of Waycross, for defendant in error.

BROYLES, J. The general rule of law in this state is that damages cannot be recovered for mental anguish and physical pain resulting from mere negligence, unaccompanied by any physical injury to the person or pecuniary loss. If the physical injury resulting from mental anguish is one which would be a natural and reasonable consequence of the tortious act of the defendant, or if the wrong against the plaintiff was wanton, malicious, or willful, the defendant may be held liable for the natural and directly resulting effects. As was said in Goddard v. Watters, 14 Ga. App. 726, 82 S. E. 306:

"It appears that no recovery can be had on account of fright alone, caused by less than such gross negligence on the part of one acquainted with the condition of the plaintiff, or with the facts and circumstances surrounding the plaintiff, as would authorize the conclusion that the defendant must have known that certain definite physical injuries would naturally flow from or follow the fright or nervous excitement brought about by him, or unless the fright, resulting in physical injuries or impairment of health, should have been brought about deliberately, maliciously, or wantonly by the defendant, through an utter disregard of the natural and probable consequences to the injured party, or from a willful intent so to injure the party."

None of the cases cited by the learned counsel for the defendant in error are applicable to the facts in this case. Most of the cases so cited were where the feelings of passengers on railway trains or street cars had been wounded by the insulting and malicious conduct of conductors or other agents of the defendants, as in Mabry v. City Electric Co., 116 Ga. 624, 42 S. E. 1025, 59 L. R. A. 590, 94 Am. St. Rep. 141, where Chapman v. Western Union Telegraph Co., 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, is distinguished from it. In the Mabry Case the court said:

"The case at bar, however, is based upon the wrongful commission of an overt act which in itself involved the feelings, susceptibilities, and, in a measure, the reputation, of the plaintiff; an act tending to degrade her in the estimation of other persons present at the time. The in-

jury alleged is not the failure to carry the plaintiff to her destination, but her expulsion from the car over her protestations of her right to remain thereon."

In our opinion, the case at bar is controlled by the decision in the Chapman Case, supra. In the opinion in that case (88 Ga. 772, 15 S. E. 903, 17 L. R. A. 430, 30 Am. St. Rep. 183) the Supreme Court said:

"The law protects the person and the purse. The person includes the reputation. Johnson v. Bradstreet Co., 87 Ga. 79 [13 S. E. 250]. The body, reputation, and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But, outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings, or the happiness of every one, by giving recovery of damages for mental anguish produced by mere negligence. There is no right capable of enforcement by process of law to possess or maintain without disturbance any particular condition of feeling. The law leaves feeling to be helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving * * * compensation for their violation. Perhaps the feelings find as full protection as it is possible to give in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries."

See, also, Williamson v. Central of Georgia R. Co., 127 Ga. 125, 131, 56 S. E. 119; Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 846, 59 S. E. 189; Seifert v. Western Union Tel. Co., 129 Ga. 181, 58 S. E. 699, 11 L. R. A. (N. S.) 1149, 121 Am. St. Rep. 210.

In the Goddard Case, supra, the petition made out a much stronger case against the defendant than does the petition in the case at bar; for in that case it was alleged that the defendant's tort was willful and malicious; that at the time the tort was committed the plaintiff was pregnant with child, and that the defendant knew she was in this condition, and that his wrongful act (in assaulting her husband) so frightened her as to cause a great nervous shock, and, in her weak and nervous condition, was such as to prostrate her and cause great pain and suffering, and caused her to be delivered prematurely of her child—three days after the assault—and caused her much unnecessary pain and suffering, and permanently injured her. In that case the trial judge sustained a general demurrer and dismissed the petition, and this court affirmed his judgment, holding that the petition set forth no cause of action. In the case at bar there is no allegation in the petition that the defendant's tort was either willful, wanton, or malicious.

In our opinion, the mental anguish and consequent physical illness of the plaintiff was not the natural or reasonable consequence of the defendant's tort, nor could the defendant have anticipated that such a consequence would naturally or reasonably flow therefrom. The defendant's tort consisted in its false statement that the plaintiff's husband had "left town." It is manifest that this telegram or statement was not slanderous or libelous. It is no crime or disgrace for a man to "leave town." If the defendant company had stated that the plaintiff's husband had "left town with another woman," or that he had "left town to escape his creditors," or made some other such derogatory or libelous assertion about his departure from town, our ruling might be different. But the simple statement that the defendant company could not collect the charges on the plaintiff's telegram, sent to her husband "Collect," because her husband "had left town," contains not the slightest accusation or insinuation against him of anything wrong or disreputable. We do not see how the defendant company could have anticipated that this statement, false though it was, could have caused the mental suffering and pain, and the consequent physical illness, of the plaintiff.

This case is quite different from the Glenn Case (Glenn v. Western Union Tel. Co., 1 Ga. App. 821, 58 S. E. 83), where it was held that it was error to sustain a general demurrer and dismiss the petition, which set forth a breach of contract, implied from the public duty on the part of the defendant, and which, if proved, would have entitled the plaintiff to recover nominal damages, if no more. The suit in that case was based upon the failure of the telegraph company to transmit a telegram which it had accepted, and, in gross violation of its duty, failed to transmit. In the case at bar the telegraph company had promptly delivered the message, and had committed no breach of contract, and the suit is based upon a tort committed outside of the contractual relations between the parties.

In our opinion, the petition did not set forth a cause of action, and the lower court should have sustained the general demurrer and dismissed the petition.

Judgment reversed.

(16 Ga. App. 214)

TENNYSON v. STATE. (No. 6288.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

MASTER AND SERVANT ⊂=67—VIOLATION OF LABOR CONTRACT ACT—BURDEN OF PROOF.

In a prosecution for the violation of section 716, Pen. Code (known as the "Labor Contract Act"), while the act provides that "satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money so advanced, with interest thereon, at the time said labor was to be performed, without good and sufficient cause, and loss or damage to the hirer, shall be deemed presumptive evidence of the fraudulent intent," yet the burden is on the state to prove all of these facts before the presumption arises.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. ⊂=67.]

Error from City Court of Millen; Thos. L. Hill, Judge.

John Tennyson was convicted of cheating and swindling, in violation of the Labor Contract Act, and brings error. Reversed.

F. G. Rabb, of Millen, for plaintiff in error.

BROYLES, J. John Tennyson was convicted of the offense of cheating and swindling, under section 716 of the Penal Code, commonly known as the "Labor Contract Act," in that he obtained from the prosecutor, H. D. Brinson, an advance of $2 upon an alleged contract to cut four cords of wood at 50 cents per cord on the lands of the prosecutor; this labor to be performed between the 20th and 25th of July, 1914. From the testimony of the prosecutor it appears that Tennyson was a share cropper with Brinson, and that Brinson paid him wages of $12 per month; that after Tennyson had secured, on July 18, 1914, the advance of $2, he continued to work on his crops, and continued in the employment of Brinson until some time in October, 1914, when after "a little scrap" and "a thrashing" administered to the defendant by Brinson, he turned over all of his crop to Brinson, and left the place withqut cutting the wood in question, or returning the $2 advanced on the alleged independent contract.

To establish the essential elements of the offense alleged in the accusation, the burden is upon the state to prove, among other things, that the accused had no good and sufficient cause for failing to perform the contract, or for failing to return the money advanced; and also that loss to the person advancing the money resulted therefrom. In the case at bar the prosecutor testified:

"John Tennyson was working with me as a share cropper, and had been working with me since December, 1913. He continued to work on in his crop until some time in October, when we had a little scrap, and I gave him a thrashing. He was working in the share crop which he was running at the time, but after I gave him the whipping, over at the oil mill, he left and went away. He had turned over to me all of his crop, and I have not sold all of it yet. He owed me a right smart, and all of his crop sold at market price will not begin to pay me. He had no cause for not doing the work in cutting the wood."

The defendant, in his statement, said that he left because Brinson beat him and told him to leave.

It cannot be said, as a matter of law, that the administration of the "thrashing" by the prosecutor was not a good and sufficient reason for the defendant's going away and failing to perform his contract, and failing to return the money advanced; and, inasmuch as the prosecutor obtained the entire crop of the defendant, and had not sold all of it, or accounted for any part of it, testimony from Brinson as to his actual or eventual loss is, of course, a mere conclusion (as likewise is his statement that the defendant had no cause for not cutting the wood), and is not of sufficient evidentiary value to rebut the presumption of the defendant's innocence, and remove all suspicion that the strong arm of criminal process was being invoked for the collection of a debt. See, in this connection, Glenn v. State, 123 Ga. 585, 51 S. E. 605; Johnson v. State, 125 Ga. 243 (3), 247, 54 S. E. 184; Brown v. State, 8 Ga. App. 212, 68 S. E. 865; Thorn v. State, 13 Ga. App. 10 (2), 13, 78 S. E. 853; Hudson v. State, 14 Ga. App. 490, 81 S. E. 362; Lewis v. State, 15 Ga. App. 405, 83 S. E. 439.

The prosecution having failed to adduce proof to meet the tests to which we have referred, and there being otherwise no evidence of a fraudulent intent, the trial judge erred in overruling the motion for a new trial.

Judgment reversed.

(16 Ga. App. 216)

JONES v. STATE. (No. 6278.)

(Court of Appeals of Georgia. April 20, 1915.)

*(Syllabus by the Court.)*

MASTER AND SERVANT ⊂=67 — LABOR CONTRACT ACT—ELEMENTS OF OFFENSE—BURDEN OF PROOF.

An essential element of the offense of violating section 716 of the Penal Code of 1910 (known as the "Labor Contract Act"), and one which the state must prove, is that the accused failed to perform the services contracted for, or failed to return the money advanced, "without good and sufficient cause." Glenn v. State, 123 Ga. 585, 51 S. E. 605; Johnson v. State, 125 Ga. 243, 54 S. E. 184; Brown v. State, 8 Ga. App. 212, 68 S. E. 865; Thorn v. State, 13 Ga. App. 10, 78 S. E. 853; Hudson v. State, 14 Ga. App. 490, 81 S. E. 362; Lewis v. State, 15 Ga. App. 405, 83 S. E. 439; and Tennyson v. State, supra, this day decided.

The record does not show that this material fact was proved; consequently the conviction of the accused was unauthorized, and the judgment of the court below overruling the motion for a new trial must be reversed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75; Dec. Dig. ⊂=67.]

Error from City Court of Tifton; R. Eve, Judge.

Jack Jones was convicted of violating the Labor Contract Act, and brings error. Reversed.

R. D. Smith, of Tifton, for plaintiff in error. Jas. H. Price and J. S. Ridgdill, Sol., both of Tifton, for the State.

BROYLES, J. Judgment reversed.

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(100 S. C. 465)

## STATE ex rel. GASQUE v. SINGLETON. (No. 9061.)

(Supreme Court of South Carolina. April 16, 1915.)

1. DISTRICT AND PROSECUTING ATTORNEYS ⟸ 2—APPOINTMENT OR ELECTION — CONSTITUTIONAL AND STATUTORY PROVISIONS—"OFFICER OF EXECUTIVE DEPARTMENT."

Const. art. 5, § 29, declares that there shall be one solicitor for each circuit to be elected by the qualified electors thereof for a term of four years. Civ. Code, § 682, defines the executive department to consist of the Governor, the Attorney General, and solicitors, etc. Section 683 provides for the filling of a vacancy in the office of Attorney General, etc. Section 694 provides that the Governor shall appoint circuit solicitors upon vacancies in such offices. Section 695 provides that he shall appoint to a vacancy in an office of the executive department until it is filled by general election, or by the General Assembly, etc. And section 722 declares that the office of circuit solicitor shall become vacant if he ceases to reside in the county. *Held*, that the solicitor was an "officer of the executive department," and that the Governor had no power to appoint a solicitor for a time extending beyond the first general election held after the vacancy occurred.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 2–9; Dec. Dig. ⟸2.]

2. DISTRICT AND PROSECUTING ATTORNEYS ⟸2—APPOINTMENT TO ELECTIVE OFFICE—CONSTITUTIONAL PROVISIONS.

Such provisions, if construed to empower the Governor to appoint a circuit solicitor for the full unexpired term, would be void, since, when an office is made elective by the Constitution and a vacancy arises, the Governor cannot fill it by appointment, except temporarily, where the Constitution gives him no such express power, or change the term of an office by appointment for the full unexpired term which would be less than if the vacancy was filled by a general election for a full term.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 2–9; Dec. Dig. ⟸2.]

"To be officially reported."

Proceeding by the State, on the relation of L. M. Gasque, against L. B. Singleton, to determine the right to the office of circuit solicitor of the Twelfth judicial circuit. Judgment for relator.

L. D. Lide, of Marion, for petitioner. Robert B. Scarborough, of Conway, for respondent.

GARY, C. J. This proceeding was instituted for the purpose of determining whether the petitioner or the respondent is the duly qualified solicitor of the Twelfth judicial circuit. Walter H. Wells was elected solicitor in 1912, and, after entering upon the discharge of his duties, died in January or February, 1913. On the 4th of February, 1913, the respondent L. B. Singleton was appointed by the Governor to fill the entire unexpired term of Walter H. Wells; and, since his appointment, he has discharged the duties of that office. At the general election of 1914, the relator L. M. Gasque was elected solicitor, and has received a commission from the Governor.

In order to determine the question under consideration, it will be necessary to refer to the constitutional and statutory provisions relating to the office of solicitor.

Section 29, art. 5, of the Constitution is as follows:

"There shall be one solicitor for each circuit, who shall reside therein, to be elected by the qualified electors of the circuit, who shall hold his office for the term of four years, and shall receive for his services such compensation as shall be fixed by law. In all cases where an attorney for the state of any circuit fails to attend and prosecute according to law, the court shall have the power to appoint an attorney pro tempore."

Sections 682, 683, 694, 695, and 722, of the Code of Laws are as follows:

"Sec. 682. The executive department of this state is hereby declared to consist of the following officers, that is to say: The Governor and Lieutenant Governor, the Secretary of State, the Treasurer of the State of South Carolina, the Attorney General and solicitors, Adjutant and Inspector General, Comptroller General, State Superintendent of Education, Commissioner of Agriculture, Commerce and Industries and the Insurance commissioner.

"Sec. 683. In case any vacancy shall occur in the office of Secretary of State, Treasurer, Comptroller General, Attorney General, Adjutant and Inspector General or State Superintendent of Education, by death, resignation, or otherwise, such vacancy shall be filled by election by the General Assembly, a majority of the votes cast being necessary to a choice. If such vacancy occur during the recess of the General Assembly, the Governor shall fill the vacancy by appointment, until an election by the General Assembly at the session next ensuing such vacancy."

"Sec. 694. The Governor, by and with the advice and consent of the Senate, shall appoint the following officers: * * * Circuit Solicitors; when there is a vacancy in such office by reason of death, resignation, ceasing to reside in the circuit, or otherwise. Any vacancies which may happen in any of the said offices during the recess of the Senate, may be filled by the Governor, who shall report the appointment to the Senate at the next session, and if the Senate do not advise and consent thereto at such session, the office shall be vacant. * * *

"Sec. 695. The following officers shall be appointed by the Governor: (1) Any vacancy in an office of the executive department, occurring during a recess of the General Assembly. The term of such appointment to be until the vacancy be filled by a general election, or by the General Assembly, in the mode provided by law."

"Sec. 722. In case any circuit solicitor shall cease to reside in his circuit, his office shall become vacant. In case any vacancy shall occur in such office by death, resignation or otherwise, the vacancy thereby created shall be filled by

the Governor, by and with the advice and consent of the Senate. The judge residing in the circuit of the solicitor, whose office shall thus become vacant, shall certify such vacancy to the Governor."

[1] These statutory provisions must be construed together, and, if possible, such a construction should be placed upon them as will give force and effect to all. The solicitor is an officer of the executive department, and therefore the provisions of section 695 are applicable to him. Neither section 694 nor section 695 prescribes the length of time for which the appointment is to be made by the Governor. This, however, is fixed by section 695, which limits the duration of the appointment as to solicitors until the vacancy can be filled by a general election, as it is an elective office. When the foregoing sections are construed together, it is manifest that the Legislature did not intend to confer upon the Governor power to appoint a solicitor for such a length of time as would extend beyond the first general election held after the vacancy occurred. This is the only construction by which all the sections can be harmonized.

[2] But even if it was intended by the statutes to empower the Governor to appoint a solicitor for the full unexpired term, when a vacancy arose, such an enactment would be void. When an office is made elective by the Constitution and a vacancy arises, the Governor cannot fill it by appointment, except temporarily, unless the Constitution gives him such power. And there is no such provision in the Constitution as to the office of solicitor. If the Legislature had attempted to empower the Governor to appoint for a term extending beyond the first general election after the office became vacant, such a statute would contravene the provisions of the Constitution in two respects. It would be an attempt to make an office appointive, which the Constitution had declared to be elective; and it would be an attempt to change the term of office, as the appointment for the full unexpired term of office would necessarily be less than four years; yet, if the vacancy was filled by a general election, the term of office would be for four years. It would be against the letter as well as the spirit of the Constitution to hold that the Governor's appointment to an elective office should continue of force after the vacancy had been filled in the manner contemplated by the Constitution, to wit, by an election expressing the choice of the qualified electors of the circuit. The propositions herein announced are fully sustained by the case of Smith v. McConnell, 44 S. C. 491, 22 S. E. 721, and the cases therein mentioned.

It is the judgment of this court that the petitioner is entitled to the relief for which he prays.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(100 S. C. 423)

## COONER et al. v. GOODWIN et al.

(No. 9057.)

(Supreme Court of South Carolina. April 9, 1915.)

INTOXICATING LIQUORS ⟸128—DISPENSARY—LOCATION.

The town of Batesburg lies partly in Lexington county and partly in Saluda county; by far the greater portion of such town's territory, population, and taxable property lying in Lexington county. The sale of intoxicants is prohibited in Saluda county, but authorized in Lexington county. *Held*, that an action could not be maintained by taxpayers of the county of Saluda, living in Batesburg, to enjoin the establishment of a dispensary in the Lexington county end of the township, more than one-half mile from the Saluda county line.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. ⟸128.]

Appeal from Common Pleas Circuit Court of Lexington County; J. W. De Vore, Judge.

"To be officially reported."

Action prohibiting the defendants from establishing a dispensary in the town of Batesburg, in Lexington county, by J. W. Cooner and C. B. Bates against G. A. Goodwin and others, as members of the County Dispensary Board for Lexington County, and A. H. Blease, as County Dispenser.

The following agreed statement of facts was made between the parties:

"It is agreed by and between the parties hereto that the following shall constitute the facts upon which the case herein is to be heard and determined: The town of Batesburg was first incorporated under an act of the Legislature entitled 'An act to incorporate the town of Batesburg, in the county of Lexington,' approved May 31, 1877, a copy of which act is hereto attached, marked Exhibit A. This charter was later surrendered, and a new charter was taken under the general law of the state, with references to incorporation of towns and cities under date of the 9th day of September, 1901, a copy of which latter charter is hereto attached, marked Exhibit B. The area embraced within the corporate limits of the town of Batesburg lies partly in Lexington county and partly in Saluda county, about nine-tenths of which is in Lexington county and one-tenth in Saluda county. About nine-tenths of the population of the town of Batesburg is in Lexington and about one-tenth in Saluda county; and all except about one-fiftieth of the taxable property lies in Lexington county. All municipal tax levies are made on property in that portion of Batesburg, in Saluda county, as well as in Lexington county, and for that portion in Saluda from the treasurer of Saluda county. The railroad offices (passenger and freight), the express office, the telegraph office, the post office, and all of the banks, mercantile establishments, and other business offices and establishments are in Lexington county, as are also the churches, schools, municipal offices, and residences of all school officials and municipal officials, except one of the commissioners of public works, who lives in Saluda county. That residence in Lexington county is not a prerequisite to holding office in said town. That a public cotton weigher is provided for in the town of Batesburg in section 2363 of volume 1, Code of Laws of South Carolina (1912), to which reference is made. The schools in the town of Batesburg are under the supervision of the county superintendent of education for Lexington county, and said town is made a general election pre-

cinct in said county of Lexington. That the first mayor elected in Batesburg was a resident of Saluda (then Edgefield) county, and, from time to time, wardens have been residents of that portion of the town. That, under the law, the sale of alcoholic liquors and beverages is prohibited in Saluda county, but it is authorized in Lexington county. That on the 27th day of September, 1913, the Lexington county dispensary board, by proper resolution, authorized the establishment of a dispensary at Batesburg, in the county of Lexington, and thereafter, to wit, on the 27th day of September, 1913, elected A. H. Blease dispenser for said dispensary; and on the 6th day of April, 1914, the said dispensary board rented a building for the purpose of conducting the sale of alcoholic liquors and beverages on Oak street, in the town of Batesburg, which building is situated wholly in the territory belonging to Lexington county, and is more than one-half mile from the Saluda county line."

The order by the court dismissing the complaint was as follows:

"This action is for the purpose of prohibiting the defendants from opening and establishing a dispensary in the town of Batesburg, in Lexington county. On the 7th of April, 1914, Judge Prince issued a rule requiring the defendants to show cause before me why an order should not be issued enjoining the defendants, pending this action, from opening a dispensary in the town of Batesburg. At the hearing, I dismissed the rule to show cause. At the Summer term of court for the above county, 1914, the case was heard by me upon its merits, on an agreed statement of facts, which I have before me, marked Exhibit A. Without going into details, it is enough to say that the undisputed facts, applied to the law as stated in the case of Croxton v. Truesdale, in 75 S. C. 418, 56 S. E. 45, shows that the plaintiff's complaint must be dismissed; and it is so ordered. It is further ordered that defendants have judgment against the plaintiffs for the costs of this action."

From such order, plaintiffs appeal. Affirmed.

W. H. Sharpe, of Edmund, and Thurmond, Timmerman & Callison and C. M. Efird, all of Lexington, for appellants. B. W. Crouch, of Saluda, and J. Fraser Lyon, of Columbia, for respondents.

GARY, C. J. The judgment of the circuit court is affirmed for the reasons therein assigned.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

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(100 S. C. 435)

## FITZGERALD v. J. I. CASE THRESHING MACH. CO. (No. 9060.)

(Supreme Court of South Carolina. April 9, 1915.)

1. TRIAL ⇐188—USE OF STREETS—COLLISIONS BETWEEN TRAVELERS—EVIDENCE—INSTRUCTIONS.

Where, in an action for death of a traveler struck by an automobile, the evidence showed that decedent riding in a wagon jumped therefrom and was struck by the automobile, and that he jumped because he believed that a collision was imminent, because of the negligence of the operator of the automobile, a charge that if decedent was lawfully traveling on the street, exercising ordinary care, and he was suddenly confronted with a situation which he honestly believed to be one of peril, and which a person of ordinary prudence would so believe, and such situation of supposed peril was brought about by the negligence of defendant, and decedent through fright or any other mental emotion acted unwisely, he was not guilty of negligence on that account, was not erroneous as drawing an inference from the facts and submitting the same to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 412, 496; Dec. Dig. ⇐188.]

2. APPEAL AND ERROR ⇐216 — FAILURE TO GIVE INSTRUCTIONS—REQUESTS—NECESSITY.

Failure to charge the principles of law applicable to an issue cannot be assigned as error, unless the party complaining presented requests to charge embodying the principles on which he relied.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⇐216; Trial, Cent. Dig. § 627.]

Appeal from Common Pleas Circuit Court of Charleston County; H. F. Rice, Judge.

"To be officially reported."

Action by Kate Fitzgerald, as administratrix of John Fitzgerald, deceased, against the J. I. Case Threshing Machine Company of Racine, Wisconsin. From a judgment for plaintiff, defendant appeals. Affirmed.

Mordecai & Gadsden & Rutledge, of Charleston, for appellant. Logan & Grace, of Charleston, for respondent.

GARY, C. J. This is an action for damages, alleged to have been sustained through the wrongful acts of the defendant, in causing the death of plaintiff's intestate.

The allegations of the complaint, material to the questions under consideration, are as follows:

"That as plaintiff is informed and believes, on or about the 14th day of March, 1912, plaintiff's intestate, John Fitzgerald, was riding in a wagon coming down Meeting street, one of the public streets of the city of Charleston; that, as said wagon was proceeding down said Meeting street, the occupants of said wagon noticed an automobile coming down said Meeting street at a very high and dangerous rate of speed, and going from side to side of the street; that said wagon drew off to the extreme right of said street, but said automobile continued to come down and upon said wagon; that the said John Fitzgerald was seated on the tail end of said wagon facing said automobile; that said automobile suddenly came down almost upon said wagon, and the said John Fitzgerald, as plaintiff is informed and believes, seeing and believing that a collision was imminent, and being placed in a position of extreme peril, and an emergency having arisen, leaped from said wagon, and, as he did so, was struck by said automobile, dragged for a considerable distance, and received such fearful and terrific injuries that he shortly thereafter died; that said automobile was owned, managed, controlled, and operated by said defendant corporation, its agents and servants, in the following particulars, to wit: (a) By causing and allowing the said automobile to be operated on Meeting street at a high and dangerous rate of speed, and at a rate of speed greater than ten miles an hour, in violation of section 625 of the City Ordinances of the city of Charleston. (b) In causing and allowing the said automobile to be operated in such a manner as to run down and upon said

John Fitzgerald while he was on a public street of the city of Charleston. (c) In failing and omitting to have thorough control of said automobile, so as to have stopped the same and prevented said accident. In violation of section 624 of the City Ordinances of the city of Charleston."

The defendant denied the allegations of the complaint, and set up the defense of contributory negligence, alleging that it was so gross as to amount to willfulness. The jury rendered a verdict in favor of the plaintiff for $20,000, of which $5,000 was for punitive damages.

[1] The defendant appealed upon two exceptions, the first of which is as follows:

"That the court committed error in charging the plaintiff's fifth request, as follows: 'The jury are instructed that if they believe from the testimony that plaintiff's intestate, John Fitzgerald, was lawfully traveling upon a public highway, exercising that degree of care which a man of ordinary prudence and caution would exercise, was suddenly confronted with a situation which he honestly believed to be one of extreme peril, and which a person of ordinary prudence and reason would have so believed, and such situation of supposed peril was brought about through the negligence of the defendant, or its servants, and deceased through fright, or any other mental emotion or operation, acted unwisely or erroneously, that would not be negligence on his part.' The error being that his honor erred in charging on the facts in saying that the acts of a person under the circumstances mentioned in said request would not constitute negligence."

The appellant's attorneys in their argument say:

"It is respectfully submitted that in this portion of the charge, to which objection is made, the judge practically summed up the controverted facts, and stated to the jury that, in view of these facts, the deceased would not have been guilty of negligence, thus drawing an inference from the facts, and submitting the same to the jury."

Reference to the said request will show that the proposition for which the appellant's attorneys contend is based upon a misapprehension of the facts.

That portion of the request which charged that if the deceased, through fright or any other mental emotion or operation, acted unwisely or erroneously, that would not be negligence on his part, was dependent upon two issues of fact, which were submitted throughout the charge to the jury, to wit: (1) Whether "the deceased was suddenly confronted with a situation which he honestly believed to be one of extreme peril"; and (2) whether "a person of ordinary prudence and reason would have so believed." The charge was intended to instruct the jury as to the right of the deceased to act upon appearances, when he honestly believed that he was in extreme peril, and the appearances were such as to justify a person of ordinary prudence and reason in reaching that conclusion. In other words, that the right of the plaintiff to recover damages was not dependent upon the fact that if the deceased had remained in the wagon (as the others did), he would not have been injured. Just as in the criminal law, where the rule is that a person assaulted has the right to act upon appearances; for instance, if a pistol is pointed at him, although it may not be loaded, nevertheless, if he believes that he is in danger of losing his life, or suffering serious bodily injury, and the circumstances were such as to justify an ordinary person in reaching the same conclusion, he would not be guilty in acting on appearances.

In the case of Lawson v. R. R., 91 S. C. 201, 74 S. E. 473, an exception assigning error in the refusal to charge the following request was sustained:

"Lawson, plaintiff's intestate, traveling upon the public highway and having exercised that degree of care, caution, and prudence which a man of ordinary prudence and caution would have exercised, went upon the track of Southern Railway Company where it crosses the public highway, and he was then and there confronted by sudden peril and danger, to which the negligence of said company or its servants subjected and exposed him. * * * He acted unwisely or erroneously, that would not be negligence or gross or willful negligence on his part."

This exception is overruled.

[2] The second exception is as follows:

"Because the court committed error in not charging the jury, in respect to the principles upon which damages are allowed in cases of this character, and allowing the jury to draw their conclusions as to the proper legal principles to be applied in such cases."

The rule is too well settled, to call for the citation of authority to show, that the failure of his honor, the presiding judge, to charge the jury in the manner specified in the exception, cannot be assigned as error, unless the appellant presented requests to charge embodying the principles upon which it relied.

Judgment affirmed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(100 S. C. 397)

## BRYAN v. BOYD et al. (No. 9053.)

(Supreme Court of South Carolina. April 7, 1915.)

1. APPEAL AND ERROR ⟸1068 — HARMLESS ERROR—REFEREE'S STATEMENT.

It is not reversible error for a referee to state too strict a rule, if the true rule shows that the appellant is not entitled to the relief for which he asks.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225–4228, 4230; Dec. Dig. ⟸1068.]

2. MORTGAGES ⟸32 — ABSOLUTE DEED AS MORTGAGE—SECURITY FOR DEBT.

A conveyance intended as a security for a debt is a "mortgage," whatever may be its form.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60–66, 84–94; Dec. Dig. ⟸32.

For other definitions, see Words and Phrases, First and Second Series, Mortgage.]

3. MORTGAGES ⟸36 — ABSOLUTE DEED AS MORTGAGE—PRESUMPTION.

A conveyance absolute in form is presumed to be an absolute conveyance, and, to estab-

lish its character as a mortgage, the evidence must be clear, unequivocal, and convincing.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 95, 96; Dec. Dig. ⊂⊃36.]

4. Mortgages ⊂⊃38 — Absolute Deed as Mortgage — Sufficiency of Evidence—"Redeem."

Evidence, in a mortgagor's action to redeem land purchased by a mortgagee on foreclosure sale, *held* not sufficient to show that the sheriff's deed was a mortgage, so that plaintiff might redeem; "redeem," in a popular sense, meaning to buy back, recover by purchase, repurchase.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108–111; Dec. Dig. ⊂⊃38.

For other definitions, see Words and Phrases, First and Second Series, Redeem.]

Appeal from Common Pleas Circuit Court of Williamsburg County; Frank B. Gary, Judge.

Action by James Bryan against M. L. Boyd and others. Decree for defendants, and plaintiff appeals. Affirmed.

Kelley & Hinds, of Kingstree, for appellant. Louis W. Gilland, of Kingstree, for respondents.

FRASER, J. This is an action to redeem. The appellant owned an interest in a tract of land. The appellant gave two bonds, which were secured by two mortgages executed by appellant and his cotenants. The mortgages were foreclosed and the premises ordered to be sold. On the day of sale, the appellant and one D. Z. Martin, one of the mortgagees, had a conference, and, as a result of that conference, Mr. Martin bought in the land, deed dated December 14, 1899. This was a deed from the sheriff.

Several witnesses said that Mr. Martin said he had bought in the whole land, and, if Mr. Bryan ever got able to redeem it, he would let him have it back. Mr. Martin died March 14, 1908. This action was commenced January 2, 1911. The land brought enough to pay the debts and about $102 more. This Mr. Bryan and his cotenants turned over to Mr. Martin. Mr. Martin was the bachelor uncle of Mr. Bryan's wife, and there is but little doubt that he intended, at the time of the sale and afterwards, to allow Mr. Bryan to purchase it from him when he "got able." There were several houses on the place, one of which was used by Mr. Bryan. All the property, except this small portion actually occupied by himself, Mr. Bryan turned over to Mr. Martin. Mr. Martin collected the rent for it.

The issues were referred to a referee, who found that there was not sufficient evidence that the deed from the sheriff to Martin was intended as a mortgage. On exceptions to the referee's report, the cause was heard by his honor, Judge Frank B. Gary. He sustained the referee's report, and from this decree this appeal is taken.

Appellant's argument contains the following:

"These exceptions will be first discussed, because they raise the question which, in our opinion, should first be disposed of, to wit, whether or not a deed executed by an officer under an order of court can, in a proceeding like this, be declared a mortgage. From a review of the record in this case, the court will perceive that this question has cast a shadow upon all the other issues and prevented the referee and his honor, the presiding judge, from giving to the merits of the case the careful consideration and mature deliberation which they deserve. If this court concludes that the referee and the presiding judge erred in passing upon this question, we are relieved of the disadvantage under which we would otherwise labor on account of the concurrence of the referee and the presiding judge in the conclusions of fact. We contend that the referee and the presiding judge both erred in holding that the deed in question cannot be declared a mortgage, because it was executed by the sheriff of Williamsburg county under an order of court to sell and convey the land in question."

There are 25 exceptions covering 12 pages of the case. There is just one issue, to wit: Is there sufficient evidence that the deed from the sheriff to Martin was intended as a mortgage? Judge Gary held very clearly, "Chancery suffers itself to feel little embarrassed with the forms which any transaction may assume;" and his decree was not clouded by the form.

[1] It is not reversible error for the referee to state too strict a rule, if the true rule shows that the appellant is not entitled to the relief for which he asks.

[2, 3] The true rule is that a conveyance that is intended as a security for a debt is a mortgage, whatever may be its form; but, where the conveyance is absolute in form, then it is equally true that the presumption is that the deed is what on its face it purports to be—an absolute conveyance—and, to establish its character as a mortgage, the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail. See Williams v. McManus, 90 S. C. 493, 73 S. E. 1088, and Brownlee v. Martin, 21 S. C. 400.

Where there is a conveyance and an agreement to reconvey taken at the same time, as in Brown v. Bank, 55 S. C. 70, 32 S. E. 824, it was held that:

"Whether any particular transaction amounts to a mortgage or to an absolute sale, with an agreement allowing the vendor to repurchase the land at a special price within a time limited, 'must to a large extent depend upon its own special circumstances.'"

Here also the proof that the transaction was intended as a mere security for a debt must be clear, unequivocal, and convincing.

[4] In this case, all that is claimed is that Mr. Martin took the title and agreed to allow the appellant to purchase it from him. The time allowed for a reconveyance was indefinite. It is only an inference from the relationship of the parties that the price of the reconveyance would have been the purchase price. The appellant was entitled to possession, as against all the world, but his

cotenants, of the whole tract. Immediately after the sale, the appellant surrendered his possession of all but a very small part to Martin. If this transaction was intended as a mortgage, then the appellant was entitled to possession and rents until default. The expressed intention of Mr. Martin to provide a home for the appellant and his wife fully accounts for possession of that part retained by appellant. The testimony is not all one way as to whether the appellant was to and did pay rent or not. There is no evidence that any claim of right was asserted during the life of Mr. Martin. Years have elapsed without any assertion of claim. It cannot be said that the evidence is "clear, unequivocal, and convincing," that the deed was taken as a security for a debt, and therefore that the absolute deed is a mortgage.

The relationship of debtor and creditor between Mr. Bryan and Mr. Martin was extinguished by the foreclosure sale, and, if the relation existed after the sale, it must have been created by some other agreement, and there is not one word of testimony to show that Mr. Bryan ever agreed to assume a debt (except rent) to Mr. Martin on account of the sale. Even if it be true that Mr. Martin bought in the property intending to allow Mr. Bryan to repurchase it at a subsequent date, that did not create the relationship of debtor and creditor. There was no debt, and hence nothing to secure. There is no room for holding that there is suspicion of oppression, because Mr. Bryan's brother was there ready to buy, and Mr. Martin seems to have faithfully carried out his agreement to allow Mr. Bryan ample time to buy it back, if he could have done so, but he could not and did not. This court is not only asked to declare this absolute deed to be a mortgage, but to find that the verbal agreement does not mean what it plainly says. Much stress is put on the word "redeem." Mr. Martin was not a lawyer. "Redeem," in popular use, means: (1) To buy back; recover by purchase; repurchase. Cent. Dictionary.

The failure of appellant to establish the controlling fact in this case renders the other questions academic, and they do not properly arise.

The judgment appealed from is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

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(100 S. C. 415)

## MUTUAL LUMBER CO. v. SOUTHERN RY. CO. (No. 9055.)

(Supreme Court of South Carolina. April 7, 1915.)

1. CARRIERS ⟸94—CARRIAGE OF GOODS—DELIVERY—ORDER OF CONSIGNEE—PLEADING.

In an action by a consignee of lumber against a railroad for misdelivery, an allegation in the defendant's answer, to the effect that the timber was sent to destination and the consignee notified, and that he gave an order to the carrier to deliver the shipment to a third person, which was done, the allegation was material to plaintiff's right of action, since delivery by a carrier upon order of a consignee is a complete bar to an action for misdelivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367–395, 456; Dec. Dig. ⟸94.]

2. PLEADING ⟸364—REDUNDANCY—SPECIAL PLEA—MOTION TO STRIKE.

Under Code Civ. Proc. 1912, § 210, providing that redundant matter in a pleading may be stricken out on motion, and that when the allegations of a pleading are uncertain the court may require that they be made certain, where, in an action against a carrier for misdelivery of goods, defendant pleaded delivery to order of the consignee, although such defense might have been shown under the general denial, that fact alone did not render the plea so redundant as to render its striking proper.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1156–1162; Dec. Dig. ⟸364.]

3. APPEAL AND ERROR ⟸1042—REVIEW—INTERLOCUTORY DECISIONS — STRIKING OF PLEADING.

Where the striking of matter in defendant's answer, rendering the plea redundant, was harmless since the facts were provable under the general denial, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110–4114; Dec. Dig. ⟸1042.]

Appeal from Common Pleas Circuit Court of Richland County; W. A. Holman, Special Judge.

Action by the Mutual Lumber Company against the Southern Railway Company for misdelivery of a consignment of lumber. Plaintiff moved to strike from defendant's answer the following:

"And with reference thereto defendant alleges that said shipment was billed out on open bill of lading, and that the consignee, the plaintiff herein, attached to a draft the said bill of lading, and also an order on defendant's agent at Norfolk, Va., to divert the car to Owen M. Bruner Company; that the Owen M. Bruner Company was notified by plaintiff of what they had done, and in turn said Owen M. Bruner Company issued and delivered an order to defendant's agent at Norfolk, Va., to deliver said car to the Atlantic Creosoting & Wood Preserving Works; that in compliance with said orders defendant's agent at Norfolk, Va., delivered said car to the Atlantic Creosoting & Wood Preserving Works. Defendant further alleges, on information and belief, that when said car of lumber was unloaded by the Atlantic Creosoting & Wood Preserving Works it was discovered that two-thirds of the lumber was unfit for the purpose for which it was bought, and thereupon said Atlantic Creosoting & Wood Preserving Works notified the Owen M. Bruner Company of such fact, and of the fact that the government inspector would not pass but 11 pieces of the same, leaving 89 pieces on its hands; that said Owen M. Bruner Company, after being advised of the condition of said lumber, as above stated, refused to honor the draft of the plaintiff made upon it."

Motion granted, and defendant appeals. Dismissed.

B. L. Abney and E. M. Thomson, both of Columbia, for appellant. C. S. Monteith, of Columbia, for respondent.

GAGE, J. The appeal is by the defendant, and from an order of the circuit court. Thereby a portion of the answer was stricken out, upon a motion by the plaintiff charging that it was irrelevant and redundant. All told, there are five persons concerned in the transaction, though only two such are parties hereto. The railway company carried from Pomaria, in this state, to Norfolk, Va., a lot of timber alleged to be worth $281.60. The timber was sent from Pomaria by one Shealy, and it was sent to the Mutual Lumber Company (the plaintiff) at Norfolk. From the plaintiff the timber is alleged to have gotten into the possession of the Bruner Company. From the Bruner Company the timber is alleged to have gotten into the possession of a creosoting company. The plaintiff, the Bruner Company, and the creosoting company all reside in Norfolk; and so must the defendant, also. The delict charged was also done at Norfolk, but the action is brought here. Shealy, of Pomaria, is in no way involved in the transaction. It does not appear if the plaintiff paid Shealy for the timber; the assumption is it did. The wrong charged, without setting out the three causes of action alleged, is that the timber reached Norfolk, and the defendant there converted the same to its own use; how, it is not alleged. The plaintiff demanded judgment for the value of the timber; also, $1,000 for a willful tort; also, $1,408.08 for the penalty imposed by our statute. The defendant admitted the receipt and carriage of the timber from Pomaria to Norfolk, but denied the alleged wrongful act of conversion. The defendant also pleaded the words which have been stricken out. These words were inserted in the answer to each of the three causes of action. The exceptions make only three issues which it is necessary to consider at this stage of the procedure, and they are these: Are the words irrelevant, are they redundant, and did the judge abuse his discretion in striking them out. The other questions made by the exceptions involve the merits, and may be made at the trial of the cause. The words will be reported, they are involved in statement, and their meaning is not readily apparent.

[1] But it becomes manifest on reflection that the defendant in fact alleged this: That the timber was sent by Shealy to Norfolk to the plaintiff, and it reached that destination; that the plaintiff attached a bill of lading to a draft on the Bruner Company and an order on the defendants to deliver the timber to the Bruner Company; that the plaintiff notified the Bruner Company of its action; that the Bruner Company ordered the defendant to deliver the timber to the creosoting company; that the timber was so delivered; that the timber was defective, and the creosoting company so advised the Bruner Company; that the Bruner Company then declined to pay the draft the plaintiff had drawn on it against the timber. Manifestly, if this be true, the defendant has done the plaintiff no wrong, but has done with the timber that which the plaintiff directed it to do. The allegation so made is therefore relevant, because it makes an issue which has vital connection with the plaintiff's cause of action. Pomeroy's Remedies, § 551.

The plaintiff's counsel maintains that:

"This paragraph of the answer stated facts inconsistent with the facts stated by the plaintiff, but the facts do not constitute a defense."

If the facts alleged by defendant be inconsistent with those alleged by the plaintiff, and about the same transaction, they may constitute a defense.

[2] The plaintiff's counsel, moreover, concedes that:

"If the carrier (defendant) can show that the delivery of freight was upon an order of the consignee (plaintiff), it cannot be held liable, and such proof can be shown under the general denial."

That is a concession that the defense which is now sought to be pleaded by the exceptionable words can be made in exoneration of the defendant, but that such defense may be proven under the general denial which is pleaded, and there need not be made the exceptionable plea, and because that plea is redundant. The plaintiff's counsel admits therefore that the facts alleged in the exceptionable plea may be proved under the general denial. That truth alone ought not in every instance to render the plea so redundant as to be stricken out. Alexander v. Du Bose, 73 S. C. 29, 52 S. E. 786. The same section of the Code of Procedure which empowers the court to eliminate redundant pleas empowers it also to require the plea to be made more definite. Section 210. In both cases the court may strike out or make full. The two provisions should be co-ordinated, so that one shall not impinge upon the other. The exceptionable plea here might have been accepted as a distinct advantage to the plaintiff; it may now inquire of the Bruner Company and the creosoting company if the things alleged be true; there will now be no surprise about those matters at the trial.

[3] But striking out the allegation will work no harm to the defendant. Their insertion in the answer was not necessary to protect the rights of the defendant. The facts recited in the allegations are the evidence only of defendant's lawful conduct. The court below regarded them as redundant, and struck them out in the exercise of a wise discretion, and we shall not gainsay it.

The appeal is dismissed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(100 S. C. 421)

BROWN et al. v. CALDWELL, Clerk of Court, et al. (No. 9056.)

(Supreme Court of South Carolina. April 9, 1915.)

APPEAL AND ERROR ⊂=957—REVIEW—REFUSAL TO OPEN DEFAULT—DISCRETION.

To disturb a refusal to open a default judgment and allow an answer, a satisfactory showing of erroneous exercise of discretion must be made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. ⊂=957.]

Appeal from Common Pleas Circuit Court of Cherokee County; J. W. De Vore, Judge.

"To be officially reported."

Action by E. G. Brown and others against Thomas M. Caldwell, Clerk of Court, and others, to set aside a default judgment. From an adverse order, plaintiffs appeal. Appeal dismissed.

J. Frank Clinkscales, of Spartanburg, for appellants. H. K. Osborne, of Spartanburg, for respondents.

GARY, C. J. This is an appeal from an order refusing a motion to open a judgment by default and allow the defendant to answer.

The appellant has failed to satisfy this court that his honor, the presiding judge, erroneously exercised his discretion.

Appeal dismissed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(100 S. C. 440)

BANK OF INMAN v. ELLIOTT et al. (No. 9061.)

(Supreme Court of South Carolina. April 9, 1915.)

BILLS AND NOTES ⊂=256 — INDORSEMENT — SURETYSHIP—DISCHARGE FROM LIABILITY.

One signing a note on the back thereof before delivery is liable thereon, though time of payment is extended, unless he shows that he signed as surety, and that the payee knew that fact at the time of the delivery of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 581–599; Dec. Dig. ⊂=256.]

Appeal from Common Pleas Circuit Court of Spartanburg County; J. W. De Vore, Judge.

"To be officially reported."

Action by the Bank of Inman against Mrs. L. H. Elliott and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Carson & Boyd, of Spartanburg, for appellants. Johnson & Nash and Lyles & Daniel, of Spartanburg, for respondent.

GARY, C. J. This is an action on a promissory note. The complaint alleges:

"That for value received, on January 15, 1910, the defendants above named did make and deliver their promissory note unto the plaintiff, whereby six months after date they did promise to pay to the order of Bank of Inman the sums of $1,000, with discount before and interest after maturity at the rate of 8 per cent. per annum and 10 per cent. attorney's commission in case of suit or collection by attorney. That the name of defendants L. B. Belcher and Mrs. N. C. Ballenger were written on the back of said note, and the name of Mrs. L. H. Elliott on the face of the same before it was accepted by said Bank of Inman, and in order to induce said bank to accept the same. That no part of said note has been paid except the interest up to October 15, 1910, and the same is now past due and unpaid, and the sum due is $1,000, with interest at 8 per cent. from October 15, 1910, and 10 per cent. attorney's commissions."

The defendants admitted that no part of the note had been paid, and alleged:

"That on January 15, 1910, the defendant L. H. Elliott made a note to Bank of Inman for $1,000, due six months after date. That the defendants L. B. Belcher and N. C. Ballenger signed their names on the back of said note before delivery of same to the plaintiff; that said note was entirely for the benefit of Mrs. L. H. Elliott, and this defendant N. C. Ballenger signed and indorsed same as surety, which fact was known to the plaintiff at the time said note was delivered."

They also alleged:

"That on or about July 15, 1910, the plaintiff received from the defendant Mrs. L. H. Elliott the sum of $20 as interest on said note for the period of three months, and in consideration of said sum agreed to extend, and did thereby extend, the time for payment of same to October 15, 1910, all of which was without the knowledge or consent of this defendant. That by reason of the payment and receipt of said interest in advance and agreement to extend the time for the payment of said note and said new contract, the plaintiff released this defendant from payment of said note and all liability thereon."

There was no testimony tending to show that the defendant N. C. Ballenger signed the note as surety, nor that such fact was known to the plaintiff at the time said note was delivered. His honor the circuit judge, therefore, properly directed a verdict in favor of the plaintiff.

Judgment affirmed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(100 S. C. 443)

E. W. KIMBRELL CO. v. MILLS & YOUNG CO. (No. 9062.)

(Supreme Court of South Carolina. April 9, 1915.)

CHATTEL MORTGAGES ⊂=150—MORTGAGE ON CROPS—RIGHT OF PURCHASER WITHOUT NOTICE—STATUTE.

Under Civ. Code 1912, § 4106, providing that no mortgage on any crop or crops shall be good and effective to convey to the mortgagee any interest therein, unless the land whereon such crops are to be raised shall be described or mentioned in said mortgage, which said mortgage, when so taken and indexed or recorded as required by law, shall constitute a lien upon the crops therein described in preference to all subsequent mortgages, where a third person executed to plaintiff a chattel mortgage upon "all my crops of cotton, etc., and all other crops of whatever character now planted and to be planted by me during the year 1913," which was duly recorded previous to any sale of such

crops by the mortgagor, such mortgage had no efficacy to give plaintiff title as against a purchaser in good faith and for value, since the land was not described or mentioned in the mortgage, while the evident purpose of the statute was to require its identification with reasonable certainty.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 246–252; Dec. Dig. ⟸ 150.]

Appeal from Common Pleas Circuit Court of York County; Ernest Moore, Judge.

"To be officially reported."

Action by the E. W. Kimbrell Company against the Mills & Young Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The following is the decree of the circuit court:

On March 13, 1913, to secure the payment of his note, "for value received," in the sum of $450, to plaintiff made payable, due November 1, 1913, bearing interest after maturity at 8 per cent. per annum, payable annually, as well as "any other debt which I may now owe or may hereafter contract with the said E. W. Kimbrell Company," one J. O. Hall executed and delivered to plaintiff a chattel mortgage upon "all my crops of cotton, cotton seed, corn, hay, oats and all other crops of whatever character now planted and to be planted by me during the year 1913." The note is dated at Ft. Mill, S. C., and the mortgage recites that J. O. Hall is "of the county of Lancaster, state of South Carolina," and contracts to deliver said crops at "Ft. Mill, S. C.," at the maturity of the debt. On June 10, 1913, to secure the payment of his note "for value received" in the sum of $75, to the plaintiff made payable, due November 1, 1913, bearing interest after maturity at 8 per cent. per annum, payable annually, as well as "any other debt which I may owe or may hereafter contract with the said E. W. Kimbrell Company," the said J. O. Hall executed and delivered to plaintiff his certain other chattel mortgage upon "all my crops of cotton, cotton seed, corn, hay, wheat and all other crops of whatsoever character now planted and to be planted by me during the year 1913." This note is likewise dated at "Ft. Mill, S. C.," and the mortgage recites that the mortgagor is "of the county of Lancaster, state of South Carolina," and contracts to deliver said crops "at Ft. Mill, S. C.," at the maturity of the debt. The first chattel mortgage above mentioned was filed and indexed in R. M. C. office for Lancaster county, S. C., on March 14, 1913, and the second mortgage above mentioned was recorded in said R. M. C. office on June 17, 1913, as appears by official certificates indorsed on said mortgages.

After the maturity of these notes, about January, 1914, the defendant, Mills & Young Company, bought from the said J. O. Hall one bale of cotton and paid value for the same, which bale of cotton is the subject of this action. This bale of cotton was part of the crops planted in the said year 1913 upon the farm of the said J. O. Hall, in Lancaster county, S. C.; the same being the only lands cultivated by the said J. O. Hall during the said year. Thereafter the plaintiff brought this action in the court of a magistrate for the recovery of the said bale of cotton as being a part of the crops covered by the said mortgages. Upon a first trial thereupon had, the judgment upon the verdict of the jury was for the defendant, but a new trial was granted by this court upon a ground which has no relation to the question now presented. Upon a new trial then had in the court of a magistrate, the verdict was in favor of the plaintiff for the retention of the said bale of cotton which had been taken under claim and delivery proceedings by the plaintiff and stored at Ft. Mill, S. C., or for the sum of $52.14, the value thereof, in case a delivery could not be had.

A motion duly made by the defendant for a new trial was refused, and judgment was awarded by the magistrate in favor of the plaintiff upon the verdict so rendered. Thereupon the defendant appeals to this court upon numerous grounds set forth in the record. It will only be necessary to consider, however, the several grounds which impute error to the magistrate in refusing to direct a verdict in favor of the defendant upon the ground that the evidence showed that the defendant was an innocent purchaser for value of the said cotton, without either actual or constructive notice of any mortgage lien by the plaintiff.

The evidence was clear, positive, and uncontradicted that the defendant purchased this cotton in open market for value and paid the purchase money for same, having no actual notice or knowledge of any mortgage held thereon by the plaintiff nor any notice or information to put the defendant upon inquiry as to any rights of the plaintiff therein. Such being the facts, the title of the defendant to this property, as a bona fide purchaser thereof, is a good title, unless the indexing and recording of the mortgages above mentioned operated as constructive notice to the defendant of the rights of the plaintiff.

By section 4106 of the Civil Code, it is provided that "no mortgage of any crop or crops shall be good and effective to convey to the mortgagee any interest" therein, "unless the land whereon said crop or crops are to be raised shall be described or mentioned in said mortgage, which said mortgage, when so taken, when indexed or recorded as required by law, shall constitute a lien on the crops therein described in preference to all subsequent mortgages on said * * * crops."

The evident purpose of this statute, when construed in connection with the statutory provisions as to recording mortgages, is to render it necessary, in order to the validity of such mortgage as against subsequent purchasers or incumbrances, that the land on which the crops are to be grown shall be either "described" or "mentioned" in some manner as will serve to identify the same. In other words, so far as concerns the rights of subsequent purchasers without actual notice, the effect of this statute is to render the record of any such mortgage of no force or effect, unless the land upon which such crops are to be grown is "described" or at least "mentioned" in such a way as will point it out with reasonable definiteness and certainty.

In the mortgages here under consideration, there is not only no description of any land but there is not even a mention of any land whatsoever. In each mortgage, the only language by way of description expresses an intention to pledge "all my crops of whatever character now planted or to be planted by me during the year 1913." The description of the crops would no doubt be sufficient, if the land upon which the same was to be grown had been either described or mentioned, but nothing is either stated or indicated as to where or on what land such crops are planted or to be planted, and there is not even an intimation as to the location at which such crops may be grown. There would be no necessary inference even that the crops were to be grown in any particular county or state; and certainly the land where the same were planted or to be planted is neither mentioned or described. Neither mortgage contains any mention of or reference to any lands whatsoever. Certainly the mere fact that

the reference to "my crops" involves a suggestion that such crops are to be grown upon the lands falls short of a compliance with the requirement that the lands shall be described or mentioned, as otherwise such a requirement would be entirely futile and unavailing.

Even if it is conceded, then, that such a mortgage as is here under consideration could be held as good between the parties, it could only be so held in equity to effectuate the intention; but at law these mortgages must be held as insufficient under section 4106 of the Civil Code, so far as concerns the rights of third parties not having actual notice or knowledge thereof. Being good only in equity, the record thereof could not operate as notice.

There is no case in this state which passes upon the question here presented as to the effect of this provision of section 4106 of the Civil Code; and, since the question arises upon the proper meaning and construction of this statute, practically no aid can be derived from the decisions of other states where no such statute is of force.

Clearly, however, the provisions of this section, when construed in connection with the recording statutes of this state, require the holding that no mortgage of future crops is valid against subsequent purchasers or incumbrances, unless the same shall be indexed or recorded, and unless the lands upon which such crops are to be raised are either described or mentioned in the mortgage. Unless the express terms of this statute are to be abrogated by judicial legislation, it must be held that the record of a mortgage of future crops, which neither describes nor mentions the lands upon which the same are to be grown, is not constructive notice to subsequent bona fide purchasers for value without actual notice of such mortgage, and that the same is not good nor effective against such a purchaser. To hold otherwise would be to disregard the plain language of the enactment, which declares that "no mortgage shall be good and effective to convey to the mortgagee any interest in any crops unless the land whereon said crops are to be raised shall be described or mentioned in said mortgage."

In the case at bar no land whatever is described nor is any land whatsoever mentioned in the mortgage. It is true the mortgagee does declare that he thereby incumbers "all my crops" of certain kinds and also "all other crops now planted or to be planted by me during the year 1913." Manifestly, however, while there is involved in this declaration an implication that such crops are to be planted on lands of some description, no such lands are described or even mentioned. There is no necessary implication even that the unmentioned lands are to be found in any particular county or state, or that it was then known where such crops were to be planted. The crops are mentioned, but no lands are mentioned or described, either directly or by necessary intendment.

If it were held that the reference to "my crops" was sufficient without any description or mention of the lands upon which they were to be grown, such a holding would manifestly nullify the statutory requirement that the land must be described or at least mentioned, or otherwise that no such mortgage shall be "good or effective to convey to the mortgagee any interest in such crops." The statutory provision does not say that the existence of the land may be inferred; but, on the contrary, the express requirement is that it must be described or mentioned. The evident purpose of the statute was to require such a description or mention of the lands upon which the crops were to be grown as would serve to identify the same with reasonable certainty. Failing of such description or mention of the lands, the positive provision of the statute is that no such mortgage shall be good or effective to convey to the mortgagee any interest in the crops sought to be mortgaged. Certainly, therefore, in the absence of such mention or description of the lands, it must be held that, as against subsequent purchasers, "no such mortgage shall be good and effective," since that is the very requirement of the statute.

These conclusions necessitate the reversal of the judgment of the court below, and it is accordingly ordered that the judgment of the court of the magistrate be reversed, and that the defendant have judgment against the plaintiff for the recovery of the bale of cotton in dispute, or of the sum of $52.14, the value thereof, in case a delivery cannot be had in kind, and for the costs and disbursements of this action, and that judgment be entered and execution issued accordingly.

In the due course of time the plaintiff served their notice of intention to appeal from the order of the circuit judge on the following grounds:

Exceptions.

(1) His honor erred in holding that the defendant purchased this cotton without having any actual knowledge or notice of any mortgage held by the plaintiff nor any notice or information to put defendant upon inquiry as to any rights of the plaintiff therein. The error being that the mortgages referred to as Exhibits A and A were duly recorded in the office of the clerk of court and register of mesne conveyances of Lancaster county in volume A of Chattel Mortgages, and he should have held that this was sufficient notice to put the purchaser of the property on inquiry.

(2) His honor erred in holding that under section 4106 of the Civil Code, unless the property on which the crop or crops are grown shall be described or mentioned in the said mortgage and the said mortgage recorded, in so far as the rights of subsequent purchasers are concerned it renders the record of any such mortgage of no force or effect. The error being that section 4106 only affects the rights as between the mortgagor and mortgagee, and it is a right personal to the mortgagee that, if the description is not properly made, he may ask that the mortgage be set aside, and, should the mortgagee decide that the validity of the mortgage be not attacked, then subsequent purchasers purchase this property at their peril and are not relieved from the necessity of making the necessary inquiry as to the standing between the parties.

(3) His honor erred in holding that the mere fact that the reference to "my crop" involves a suggestion that such crops are to be grown upon lands falls short of the compliance with the requirement that the lands shall be described or mentioned. The error being that any reference in the chattel mortgage to "my crops" would be some information to a purchaser that this party had lands upon which he was raising a crop, and should the purchaser inquire, as the law requires him to do, the information could then be secured.

(4) His honor erred in his construction of section 4106 when he held that said section requires that it shall describe or mention the land where said crop or crops are to be raised. The error being that section 4106 specifically says: "Any mortgage of any crop or crops shall be good and effective to convey to the mortgagee any interest in any crop or crops other than the crop or crops to be raised during the year in which said mortgage is given, and unless the land whereon said crop or crops are to be raised shall be described or mentioned in said mortgage," etc. The error being that the testimony shows that the cotton purchased and mortgaged was the cotton raised during the year that the mortgage was given, and which in said section was not necessary that the land shall be described or mentioned in said mortgage.

Dunlap, Dunlap & Hollis, of Rock Hill, for appellant. Spencer, Spencer & White, of Rock Hill, for respondent.

GARY, C. J. The judgment of the circuit court is affirmed for the reasons therein assigned.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

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(100 S. C. 403)

## CARTER v. SOUTHERN RY.—CAROLINA DIVISION. (No. 9054.)

(Supreme Court of South Carolina. April 7, 1915.)

1. CARRIERS ⟸307 — STIPULATION AGAINST LIABILITY—NEGLIGENCE.

A common carrier may not stipulate for exemption from liability for its negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252, 1259, 1491; Dec. Dig. ⟸ 307.]

2. MASTER AND SERVANT ⟸100—LIABILITY FOR INJURY—VALIDITY OF CONTRACT.

Where contract relations exist between an active corporation and a passive corporation, and where both have servants, the two corporations may not contract between themselves to relieve the active corporation from responsibility for injury from its negligence to the servants of the passive corporation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 166–170; Dec. Dig. ⟸ 100.]

3. MASTER AND SERVANT ⟸100—PERSONAL INJURIES — LIMITATION OF LIABILITY — LEGALITY—PUBLIC POLICY—INJURY TO PULLMAN EMPLOYÉ.

A contract declaring that the employé of a Pullman Company knew that it operated its cars on defendant's lines, and that contracts existed and were to be made between the two corporations, whereby the Pullman Company was to save the defendant harmless against liability to plaintiff in such cases as the contract might provide, and whereby the employé ratified such contracts and agreed to hold the Pullman company harmless for all money the defendant might have to pay her for injury, and gave the defendant such contracts as a defense to any suit by her, was invalid, and no defense to her action for injury from a collision between defendant's train and a standing Pullman, the floor of which she was scrubbing.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 166–170; Dec. Dig. ⟸ 100.]

Appeal from Common Pleas Circuit Court of Charleston County; R. W. Memminger, Judge.

Action by Sarah Carter against the Southern Railway-Carolina Division. From an order overruling a demurrer to a third defense, the plaintiff appeals. Reversed, and demurrer sustained.

The contract was as follows:

"Be it known, that I, the undersigned, hereby accept employment by and enter into or continue from this date in, the service of, the Pullman Company, upon the following express terms, conditions and agreements, which in consideration of such employment and the wages thereof, I do hereby make with the said Pullman Company, to wit:

"First. So long as I shall remain in said employment and service, I will fully comply with all regulations, rules and orders of said company, or its agents, issued for the government of its employés, go wherever I may be required in said service, and will faithfully and honestly perform all duties assigned to me.

"Second. My wages shall at all times be calculated and paid at the monthly rate per day for the number of days I shall have been actually employed, and I may quit or resign, or may be suspended or discharged from such employment and service, at any time, or at any place, without previous notice.

"Third. If said company shall suffer any loss or damage of any nature or character whatever resulting from the violation of any regulation, rule or order of said company, or its agents, or any fault, neglect, dishonesty or incompetency on my part, or in case any commissary supplies are placed in my custody and not returned or paid for by me in accordance with the rules of said company, I will immediately, upon notice thereof, make with the proper officer of said company a satisfactory settlement of such loss, damage, default or deficit, or failing so to do, the said company is hereby expressly authorized, at any settlement made with me, to deduct from my wages the full amount of each and every such loss, damage, default or deficit, and to appropriate the same to its own use as liquidated damages. The value of commissary supplies shall be the prices shown on the luncheon check at the time; and it is hereby expressly agreed that each and every such loss, damage, default or deficit shall be finally determined by the proper officer of said company, and adjusted as hereinbefore provided.

"Fourth. I assume all risks of accident or casualties by railway travel or otherwise, incident to such employment and service, and hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge the Pullman Company, and its officers and employés, from any and all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me in such employment or service.

"Fifth. I am aware that said the Pullman Company secures the operation of its cars upon lines of railroad, and hence my opportunity for employment, by means of contracts wherein said the Pullman Company agrees to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to the employés of said the Pullman Company in cases provided for in such contract, and I do hereby ratify all such contracts made or to be made by said the Pullman Company, and do agree to protect, indemnify and hold harmless said the Pullman Company with respect to any and all sums of money it may be compelled to pay, or liability it may be subject to, under any such contract, in consequence of any injury or death happening to me, and this agreement may be assigned to any such corporation or person and used in its defense.

"Sixth. I will obey all rules and regulations made or to be made for the government of their own employés by the corporations or persons over whose lines of railroad the cars of said the Pullman Company may be operated while I am traveling over said lines in the employment or service of said the Pullman Company; and I expressly declare that while so traveling I shall not have the rights of a passenger with respect to such corporations or persons, which rights I do expressly renounce, and I hereby, for myself, my heirs, executors, administrators or legal representatives, forever release, acquit and discharge any and all such corporations and persons from all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me while in said employment or service.

*"I have read and understand every word of this paper.* Sarah Carter. [Seal.]

"Signed, sealed and delivered in the presence of: C. C. Freet.

"The person signing the within paper should answer in his own handwriting the following questions, and then subscribe his answer: Question. Did you read the within paper before signing it? Answer: Yes.

"[Signature] Sarah Carter."

Logan & Grace, of Charleston, for appellant. Joseph W. Barnwell and N. B. Barnwell, both of Charleston, for respondent.

GAGE, J. Action for tort to the person; answer, amongst other things, which pleaded in bar a contract inter alios; demurrer thereto by plaintiff; demurrer overruled; appeal here from that order, and that is the sole issue.

History: The plaintiff is a colored woman, a cleaner of Pullman cars in the city of Charleston; at the instant such a car was on one of defendant's tracks near the Union Station, detached; the plaintiff was on her knees in the car scrubbing the floors of it; one of defendant's trains ran into the Pullman and hurt the woman.

This is the plea, not yet the proof.

As a third and complete defense to the action, defendant set up a contract betwixt the plaintiff and the Pullman Company, signed by her but not by that company. That contract will be reported, and will therefore not be much quoted from herein. It is a work of art, wholly beyond the conception of the ordinary laborer. There are six paragraphs of the contract, and at the end of it the plaintiff declared she had "read and understood every word" of it.

The last and sixth paragraph is that upon which the controversy here turns, and the last six lines of it make the kernel of the case.

The fifth paragraph of the contract seems akin to the sixth paragraph: but the answer pleads the words of the sixth paragraph. They are, in substance, these:

> And I hereby for myself * * * forever release, acquit and discharge (the Southern Railway Company) from all claims for liability of any nature or character whatsoever, on account of any personal injury * * * to me while in said employment—of the Pullman Company.

We venture to think that a speedier administration of justice would have been achieved had the verdict of a jury been taken on the issuable facts, and had the question of law now made been reserved, to sustain or to defeat any verdict which may have been rendered for or against the defendant. We think there is no warrant for the plaintiff's contention "that the contract in question did not contemplate any such state of facts as in the case at bar." The last six lines of the sixth paragraph are comprehensive enough to include a woman on her knees scrubbing the floor of a car. It is perhaps best that the issue now made should be made for one circumstanced as she was. The appellant's counsel frankly states that which is true; that the view of the circuit court "is unquestionably sustained by many authorities." The preponderance of decisions is with the respondent, but we venture to think the preponderance of reason is against it. It is true that persons ought to have, and generally are permitted to have, the right to make their own contracts. Courts and judges ought not to interfere thereabout except for paramount reasons. They ought to interfere when such reasons do exist. But in our view, the issue here is not whether the contract shall be ignored, but what is the contract?

[1] There is now no difference of opinion anywhere about the pronouncement that a common carrier may not stipulate for exemption from liability for its negligence. Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627. Thereby and therefore it would not have been lawful for the plaintiff and the defendant to have stipulated that the defendant would not be liable to the plaintiff for the consequences of its negligent act, whereby its train was run into a coach of the Pullman Company standing on tracks in its yards. That was frankly admitted by the respondent's counsel. Plainly, if the contract here set up is, in legal effect and essence, of such a character, then it cannot operate to discharge the defendant.

[2] The courts at the outstart had held that when there exists contract relations betwixt what we shall term an "active corporation" and a "passive corporation," and where both had servants, the two corporations might not contract *between themselves* to relieve the active corporation from responsibility for hurt to the servants of the passive corporation resulting from the negligence of the active corporation (Brewer v. N. Y. R. R., 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647, cited in Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 518, 20 Sup. Ct. 385, 44 L. Ed. 560), and upon the ground that the servant was not a party to the contract.

[3] In time there followed, in addition to a contract between the two corporations, a contract betwixt the servant of the passive corporation and that corporation, to save harmless the active corporation from injuries to the servant of the passive corporation, resulting from the negligence of the active corporation. Of such is the contract in issue. The first four paragraphs of it have to do exclusively with the relations of the servant with the Pullman Company; the last two paragraphs of it have to do exclusively with the interdependent relations of the servant and the two corporations.

The party for whose benefit the fifth and sixth paragraphs were made is the defendant here. The Pullman Company, if indeed it is a party to the contract, is merely a person in whose name a contract is made for the benefit of another; and the defendant is that other, and is the real party in interest, and

now and here actually claiming under it. The fifth paragraph of the contract lends strength to this construction. That paragraph contains two predicates: (1) That Carter (the plaintiff) knows that the Pullman Company operates its cars on the southern lines, and that contracts exist and are to be made between the two corporations whereby the Pullman Company agrees to save harmless the Southern Company against liability of Southern Company to Carter, in such cases as the contract may provide; and (2) that Carter *ratifies* such contracts, and agrees to hold harmless the Pullman Company for all money the Southern Company may have to pay Carter for injury, and the Southern Company may have this contract in defense of a suit against it by Carter. If the Southern Railway shall lose by this action, then by the terms of the contract here, and by the terms of the other contract it has with the Pullman Company, which we have not seen, but which it referred to in this contract, it has recourse against the Pullman Company.

We have followed with interest the learned and able argument of the respondent's counsel; but we are of the settled conviction, upon reason, that this contract is none other than that which was prescribed in the Lockwood Case; "the voice is Jacob's voice, but the hands are the hands of Esau."

It is therefore adjudged that the order of the circuit court be reversed, and the demurrer to the third defense of the answer be sustained.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(100 S. C. 371)

BROWN et al. v. RANKIN et al. (No. 9049.)

(Supreme Court of South Carolina. April 1, 1915.)

1. CHATTEL MORTGAGES ⟸150 — RECORDATION—EFFECT.

A chattel mortgage, filed with the proper officer for recordation, is constructive notice to all the world, and the mortgagee may pursue the property, though mortgagor transfer it to another, while all persons, though they discover the mortgage or not, are charged with notice.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 246–252; Dec. Dig. ⟸150.]

2. TRIAL ⟸252—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In a suit for mortgaged mules, the evidence without dispute showed that they were sold to the mortgagor, the sellers and mortgagees reserving a chattel mortgage for the balance of the purchase price. *Held*, that the instructions, based on the hypothesis of a sale by the mortgagees to a person other than the mortgagor, which declared that in such case the mortgage would not be constructive notice, were improper and prejudicial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. ⟸252.]

Appeal from Common Pleas Circuit Court of Oconee County; John S. Wilson, Judge.

Action by William M. Brown and William J. Stribling, partners doing business as Brown & Stribling, against John J. Rankin and C. L. Angel. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

E. L. Herndon, of Walhalla, for appellants. R. T. Jaynes and J. R. Earle, both of Walhalla, for respondents.

WATTS, J. This was an action by plaintiffs against the defendants for the wrongful and willful taking possession of and selling and converting two mules alleged to be the property of the plaintiffs under a chattel mortgage made by C. L. Angel to the plaintiffs. Plaintiffs seek to recover possession of the mules or the alleged value thereof, $450, and for damages in the event a delivery cannot be had. Angel did not answer. The defendant Rankin by his answer interposes a general denial, and alleges that Angel did not purchase from plaintiffs the mules described in the chattel mortgage, and that the sale was pretensive, null, and void, and the notes and mortgage executed by Angel to plaintiffs were without consideration, and the mules were never delivered to Angel, but were really the property of one S. L. Richardson, from whom he purchased the mules without any notice or knowledge of plaintiffs' claim, and alleges that the description in the mortgage was indefinite and insufficient, and claims that he tendered the mules to plaintiffs before commencement of the action, and that plaintiffs by their conduct are estopped from now asserting their claim. The case was tried by Judge Wilson and a jury at the March term of court, 1914, for Oconee county, and resulted in a verdict in favor of the defendant. After entry of judgment plaintiffs appeal, and by 12 exceptions seek reversal.

[1] The first exception questions the ruling of the circuit judge in allowing C. R. D. Burns, Esq., to testify that he searched the records for a chattel mortgage by S. L. Richardson, and the refusal of the circuit judge to strike out or exclude this evidence. There was undisputed evidence that Angel executed and delivered to the plaintiffs a chattel mortgage, and there was evidence that the mules sued for were embraced and described therein, and that these mules were delivered to Angel, and that this mortgage was duly recorded in Oconee county, wherein Angel duly resided at that time. When the plaintiffs recorded this mortgage in the proper county it was constructive notice to the whole world, and they did all that the law required them to do, and whosoever took possession of the property after that time took it subject to this mortgage, as was said by Mr. Justice Gary (now Chief Justice) in Grafton v. Patrick, 77 S. C. 420–426, 58 S. E. 1, 2 (122 Am. St. Rep. 586):

"After the plaintiff placed his mortgage on record, he did not owe any further duty to persons having dealings concerning the horse, oth-

er than not to mislead them by his conduct. He did not owe them the duty of giving them that information which the record of the mortgage disclosed and the testimony does not show that he failed in any other duty."

This principle of law is settled beyond dispute in the clear and lucid opinion of Chief Justice Gary in the case of Bingham v. Harby & Co., and cases therein cited, 91 S. C. 122, 74 S. E. 369. So it did not make any difference if Richardson was in possession of the property in dispute, and if the defendant did not know of the existence of the mortgage given by Angel to the plaintiffs, if such mortgage was in existence and duly recorded and was given by Angel for the purchase price of the mules, whoever got possession of the property acquired it subject to the duly recorded mortgage of the plaintiffs, and plaintiffs would be entitled to follow the property itself or recover the value thereof. The fact that the defendant found no record of mortgage against Richardson cannot avail him as a defense against a mortgage given by Angel, and the admission of the evidence complained of was harmful and prejudicial, and this exception must be sustained.

[2] The exceptions in the case cover eight pages of printed matter, and are 12 in number and need not be considered separately, but the eighth and ninth exceptions, which are as follows:

"(8) For that it was error on the part of the circuit judge to charge defendants' first request as follows: 'That if the jury find the mules in dispute were sold by plaintiffs to S. L. Richardson, and failed to take a chattel mortgage on said mules from S. L. Richardson and have such chattel mortgage duly recorded in the clerk's office of Oconee county, then and in such event a purchaser from S. L. Richardson, for value and without notice, would acquire a valid and legal title to said mules'—for the reason that there was no evidence showing the sale of the said mules to S. L. Richardson, but on the other hand, the uncontradicted evidence showed that the mules were sold to the defendant C. L. Angel by the plaintiffs, and a chattel mortgage by the defendant C. L. Angel was immediately made to plaintiffs to secure the balance of the purchase price therefor, and duly recorded, and that the said S. L. Richardson was present and indorsed the notes of the defendant C. L. Angel therefor, and had full knowledge that plaintiffs were parting with their property, in consideration of the security of the said notes and chattel mortgage, and said charge was inapplicable, and tended to confuse the jury, and was highly prejudicial to the plaintiffs.

"(9) For that it was error on the part of the circuit judge to charge defendants' eleventh request as follows: 'That a sale of personal property to John Doe, and the taking and recording of a chattel mortgage from Richard Roe on such property, would not constitute constructive or statutory notice as against subsequent purchasers for value and without notice from John Doe, the legal owner'—for the reason that the uncontradicted evidence shows that the sale of the mules in dispute was made to the defendant C. L. Angel, and that the chattel mortgage of plaintiffs was immediately executed to plaintiffs by the said C. L. Angel for the balance of the purchase price therefor, and said mortgage was duly recorded, and that plaintiffs parted with the possession of their property in consideration of security of the said chattel mortgage and the notes of said C. L. Angel, indorsed by S. L. Richardson, and said charge was inapplicable and tended to confuse the jury, and was highly prejudicial to plaintiffs"

—must be sustained for the reason given in the authorities quoted in sustaining exception 1.

Judgment reversed, and new trial granted.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

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(100 S. C. 311)

## FARISH-STAFFORD CO. v. LEXINGTON COUNTY. (No. 9044.)

(Supreme Court of South Carolina. March 31, 1915.)

1. COUNTIES ⟸150 — DEBTS EXCEEDING FUNDS—STATUTORY CLAIMS.

Claims against a county for salaries of officers fixed by statute, for examination of lunatics, care of prisoners, payment of ferrymen, and other charges imposed by statute on the county and for supplies furnished to enable the commissioners to perform their statutory duties, are not debts contracted in violation of the statute forbidding the making of contracts in excess of funds on hand.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 165, 166, 215-217; Dec. Dig. ⟸ 150.]

2. COUNTIES ⟸223 — DEBTS EXCEEDING FUNDS—SUFFICIENCY OF EVIDENCE.

In an action on claims against a county, evidence *held* not sufficient to show that the orders for the payment of claims were approved by the supervisors at a time when there were no funds on hand with which to pay them.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 360-362; Dec. Dig. ⟸ 223.]

3. COUNTIES ⟸190—CLAIMS AGAINST COUNTY—EXCEEDING FUNDS—POWER OF LEGISLATURE.

Where a county has received the benefit of services rendered, but the orders for payment are invalid because there were no funds to meet them at the time they were drawn, the Legislature has power to compel the county to levy an assessment to meet such claims, just as it might order an assessment to meet claims which the state was under a moral obligation to pay.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 303, 304; Dec. Dig. ⟸ 190.]

4. COUNTIES ⟸207—CLAIMS AGAINST COUNTY—EXCEEDING FUNDS—STATUTE.

The supply act of March 1, 1913 (28 St. at Large, p. 245), which provided for a two-mill levy in a certain county for the payment of outstanding claims against the county, provided the claimants should establish their claims in court, authorizes the payment of such claims to those entitled thereto, notwithstanding the invalidity of orders issued for their payment, because there were no funds to meet them, since the issuance of void orders could not affect the legality of the claims.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 324, 335, 336; Dec. Dig. ⟸ 207.]

Appeal from Common Pleas Circuit Court of Lexington County; J. W. De Vore, Judge.

Action by the Farish-Stafford Company against the County of Lexington. Decree for the plaintiff, and defendant appeals. Affirmed.

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The decree of Judge De Vore in the circuit court was as follows:

This action was brought to establish certain claims against the county of Lexington under the provisions of an act to provide for the levy of taxes for county and school purposes for the fiscal year beginning January 1, 1913, in the subdivision referring to Lexington, approved March 1, 1913 (28 St. at Large, p. 211).

The complaint, in paragraphs 3 and 6, sets out the claims held by the plaintiff. The defendant county in its answer admits that the jurors and witness certificates mentioned in paragraph 6, and the claims upon which warrants had been issued for the year 1912, set out in paragraph 3, are valid claims, but in information and belief denied the ownership of these claims by the plaintiff, and set out as a defense against the claims of 1911, which are set out in the complaint in paragraph 3, and for which orders had been issued, that the supervisor of the county had made contracts and drawn warrants for the fiscal year for an amount in excess of the appropriation for the various county purposes for that fiscal year, and further that the orders or warrants drawn upon the county treasurer were so drawn at a time when there were no funds in the treasury to pay the same, and the statutory provisions relating thereto were pleaded as a defense.

An order of reference was made to R. E. Carwile, Esq., to take the testimony and report upon the validity of the claims. He has filed his report, and finds therein that the plaintiff is the owner and holder of the said county claims set out in the complaint. He further reports that the jurors and witness certificates, and the warrants issued for the fiscal year 1912, are proper and valid claims against the county. The referee further found that the claims set out in the complaint as having been approved and allowed by the county commissioners for the year 1911 were valid county claims. To this report the defendant county filed exceptions, to that portion of the same with regard to the claims which were approved by the county board for the fiscal year 1911, and for which orders had been made upon the treasury, but made no exceptions in any way to the findings as to the jurors and witness certificates, and to the orders issued for the fiscal year 1912, or any other finding of fact.

The two exceptions raised by the defendant county are that the referee erred in holding that the testimony of the witnesses and the books and records offered in evidence for the purpose of showing that there were no funds appropriated or available to pay the warrants issued by the county supervisor between October 1, 1911, and January 1, 1912, was irrelevant and incompetent; and, second, because the referee erred in holding that the warrants set out in the complaint are valid claims, and that the county of Lexington was justly indebted to the plaintiff in the sums therein set out, when he should have held all the warrants drawn between October 1, 1911, and February 1, 1912, by the county supervisor, are illegal and void because in excess of the appropriation made for which said warrants were drawn.

Under an order passed on the ——— day of January, 1914, by consent of the respective counsel, the county treasurer has paid, upon presentation of a certified copy of such order, the certificates and warrants issued in 1912. So that the question now presented before me is as to the correctness of the report of the referee as to the county claims approved and allowed for the fiscal year 1911.

In the argument or at the hearing, counsel for the county admitted that the first exception would be of no avail unless the second exception was sustained. I therefore will consider at once the second exception.

The referee found from the testimony introduced in evidence, that the services for which these county claims were made were rendered in good faith, and the county received the benefit therefrom, and that the plaintiff was the owner and holder thereof for value. As no exception has been made to this finding of fact, it is necessary, therefore, to give the history of the transactions resulting in the ownership of these claims by assignment from the Lexington Savings Bank through W. P. Roof, its executive officer, as collateral for the advance of $7,500 actually made to the county of Lexington, and that Roof, to secure his indorsement thereon, and that the plaintiff came by agreement with the said Lexington Savings Bank as such indorser into the ultimate absolute ownership of these county claims. I shall therefore proceed immediately to dispose of the first objection raised by exception No. 2, which is set out in the answer, that these warrants, upon these county claims, were contracts made by the supervisor of Lexington county in excess of the appropriation for the purposes for which the indebtedness was incurred, and, after approval by the county board, the warrants or orders were drawn.

[1] The estimates upon which the Legislature of 1911 based the levy contained in the supply bill were, according to statutory law, forwarded to the comptroller general before the return for taxes upon personal property for 1911 had closed, and in fact the valuation of the railroad property in Lexington county and in other counties of the state was not made or assessed until some time in June. The claims which were presented to the referee by the plaintiff and sought to be established in this case include, upon inspection thereof, $1,297.35 for salaries of county officers. These offices are created by statute, and their terms of office and their salaries per annum are fixed. Whether the county board had anything but a ministerial duty to do in allowing the claims need not be here discussed. These claims which were issued on December 4, 1911, and January 4, 1912, represent the salaries of such county officers as the county treasurer, county supervisor, county auditor, county commissioners, county superintendent of education, magistrates, constables, etc. There certainly could be no violation of the statutory law in these cases of making contracts in excess of appropriations, because the county commissioners made no such contracts. They were the creation, so far as the features of a contract inhered in them, of the Legislature, and it certainly was not illegal for these kind of county claims to be allowed or approved by the county board. Further, $1,361.35 of these claims also represent necessary services fixed by the statute, and did not constitute any contract at all but arose from the statutory duties imposed by law, and the compensation was fixed by statute. These are, for example, the examination of lunatics, payment of ferrymen, dieting of prisoners, and payment of convict hire and guards.

The supply bill of 1911 contemplated the building of a bridge and the permanent repair of the roads. In the remainder of these claims is to be found such as for the construction of bridges and expenses necessary thereto, chain gang on the working of roads, and further for supplies furnished to the poorhouse of the county and which of necessity the county commissioners were in statutory duty bound to make.

The testimony, as reported, does not show what month this work was contracted for or supplies were furnished. It only shows that the work was done "during the fiscal year 1911," but the claims were approved on December 4, 1911, and January 4, 1912. I am of the opinion, therefore, that the question as to whether the county commissioners exceeded their authority in making the contracts raised by the answer may be disregarded, not only as unproven, but that such county claims had been created by

statute or were imposed as a part of the statutory duty of the county commissioners of Lexington county.

[2] The next question raised by the exception is whether the warrants or orders which were issued upon these claims, after they had been itemized, audited, allowed, and approved, were valid because at the time no report from the treasurer that there were no funds appropriated to pay them was before the board. As a matter of fact, there is no direct proof that these warrants or orders were drawn by the supervisor when there were no funds to meet them upon presentation, or that they had been presented at the time they were issued. It appears in the testimony that the levy for ordinary county purposes and permanent roads was six mills, and that the levy was made upon a total valuation of $5,601,987, which produced $33,611.38. Now it is to be noted that not only the money advanced by the plaintiff, $7,500, but an equal amount, had been raised about the latter part of June from other sources for the purpose of current expenses. Taxes were payable by statute from the 15th of October to the 15th of March, and it must be assumed that they were being paid, certainly when these orders were issued on the 4th of December and 4th of January. Neither the treasurer nor his books were presented to show that, at the time the orders were dated, there was no money in the county treasury or on deposit for the county subject to payment of these claims. Mr. Wingard, clerk of the board, testified that there was only some rumor that there was not money in the treasury to meet the claims which were allowed on December 4th and January 4th, but he reiterates time and again that he had no personal knowledge whatever as to whether there was any money in the county treasury or not to meet the orders that were drawn in payment of these approved claims.

Without further notice of this testimony, I reach the conclusion that it does not appear that the charge that there was not money or funds on hand to pay the claims at the time they were issued were proven.

[3] But I do not consider that these grounds are well taken, even if I should assume that they had been established as a matter of fact, which I do not. The complaint alleges the itemization, presentation, auditing, and allowance or approval of these county claims, and that orders were issued directed to the county treasurer to pay them. The existence of the debt against the county was not destroyed by the illegal issuance of the order. The obligation to pay the claims still existed, both at law and as a moral obligation. As heretofore shown, appropriation had been made for such claims, the services and supplies had been rendered and furnished to the county, an examination in accordance with the statutory law had been made of the claims presented, and the board of county commissioners had allowed them. The complaint therefore proceeded upon the allegation of the existence of these claims. The orders, as set out, are only the mere evidence of the claims, and that the officers of the county had approved and directed that the same be paid. If these orders were illegal, the mere issuance of them could not destroy the obligation of the county to pay them. That there was no money in the treasury was not a fact of which these claimants could have knowledge or that the appropriation had been exhausted to pay them. An order may not have been given at the time of the allowance of the claim, but could have been given thereafter, when funds were applicable to pay the same. It was proven by an exhibition of the books, as well as the admission of the attorneys representing the county, and by the testimony of Mr. Wingard, the clerk of the board, that claims were bona fide in every respect, and that the county owed them.

Many cases, state and federal, declare that power exists in the Legislature of the state to provide for and compel the payment of county debts where the claimant has acted in good faith and the county has received the full benefit of the transaction and the claimant has suffered the equivalent loss unless repaid. Without citation of authority, it may be said that where a public corporation or municipal corporation has received the benefits of a transaction, either by the purchase of goods, the receipt of money, or the performance of services, and the same may not be enforceable at law on account of some irregularity or violation of some statutory direction with regard to its payment, the Legislature of the state is clothed with full authority to compel a payment of the obligation in any manner in which it may provide by levy for the collection of taxes with which to meet the obligation.

"The power of the Legislature to compel a municipality to recognize moral obligations which have an equitable but not a strictly legal basis seems to be coincident with its general power to recognize such obligations as matters over which it has direct jurisdiction; that is, the Legislature may compel a municipality or local subdivision to recognize a moral obligation resting on such municipality or local subdivision, if that moral obligation is of a class which the Legislature may recognize in a claim against the state." Gray on Limitation of Taxing Power, § 634; Abbott on Public Securities, par. 31.

In view of the unanimity of the authorities upon this point, it would be useless to cite further authority.

The county received all the benefits of these services and of these supplies. The county board of commissioners examined into such claims as they had authority to do, audited and approved the same. These were not contracts which they had made in excess of any appropriation. They were contracts directly made and fixed by the statute itself. It is expressly stated, and agreed on all hands, that there was not, and is not now, any taint of fraud whatever in the transactions, but it is claimed that two statutory provisions have not been complied with, which I think has no application to these claims, because of the terms of the act of 1913.

[4] In this condition, there being no power in the county board to levy the taxes and pay the claims, the matter was brought to the Legislature, and the Legislature passed the provisions of the supply act of March 1, 1913, which were set out in the complaint and are as follows: "Two mills for payment of outstanding claims against the county, for face value and interest thereon from the date of approval, provided the holders of said county claims shall establish such claims in the court of common pleas for Lexington county." It is to be observed that they are not for the payment of warrants issued in violation of any provision of the statute, but they are for the payment of claims against the county that may be established as such.

I was advised by counsel in argument of the case that there were no other claims than the claims set out in the complaint and nearly an equal amount held by the Palmetto National Bank, and on which the same kind of action was brought, and was taken up and heard immediately after this cause. The power of the Legislature to pass such an act is beyond question. The claims contemplated by it were just such claims as these claims, which were bona fide incurred. The county of Lexington has received the full benefit of these transactions, and it will be unjust and unfair to permit the county of Lexington to reap the benefit and escape the moral obligation involved in the claims here presented. I am therefore of the opinion that the report of the referee must be confirmed, and the exceptions thereto overruled.

It is therefore the judgment of this court that these claims have been duly established as debts

against the county of Lexington, in accordance with the terms of the act of the General Assembly, approved March 1, 1913, and entitled "An act to provide for the levy of taxes for county and school purposes for the fiscal year beginning January 1, 1913." It is also ordered and adjudged that the plaintiff have judgment for $7,499.19, the amount of the claims set out in the complaint, with interest thereon from their dates to the date of payment, from which shall be deducted the amount heretofore paid by the county treasurer under the order of this court of date ——— day of January, 1914. It is further ordered that the plaintiff may present a certified copy of this judgment establishing said claims to the county treasurer of Lexington county, and demand payment thereof, which said county treasurer shall pay the same out of said taxes so levied and in accordance with the terms of said act.

C. M. Efird and J. B. Wingard, both of Lexington, for appellant. B. L. Abney, of Columbia, for respondent.

WATTS, J. For the reasons stated by his honor, Judge De Vore, in his circuit decree, it is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

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(100 S. C. 353)

## EDENS v. GIBSON et al. (No. 9012.)

(Supreme Court of South Carolina. March 1, 1915.)

1. BILLS AND NOTES ⟸509—ACTIONS—EVIDENCE.

Letters between the maker and payee of a note were not admissible in an action on the note by one who thereafter purchased it unless knowledge of the contents of the letters was brought home to him.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1740–1745; Dec. Dig. ⟸509.]

2. EVIDENCE ⟸354 — DOCUMENTARY EVIDENCE—ENTRIES IN BOOKS.

In an action on a note by an indorsee thereof, defendant on the ground of failure of consideration and on the ground that plaintiff was not an innocent purchaser of the note for value before maturity, a ledger sheet, showing the account between plaintiff and the payee and an entry on the stub of the payee's checkbook, stating that the note was placed with plaintiff for collection, were properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432–1483; Dec. Dig. ⟸354.]

3. BILLS AND NOTES ⟸365 — DEFENSES AVAILABLE AGAINST BONA FIDE PURCHASERS.

That the payee of a note acted in bad faith does not prevent a recovery by an innocent purchaser for value and before maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 944, 958, 959; Dec. Dig. ⟸365.]

4. BILLS AND NOTES ⟸537—ACTIONS—DIRECTION OF VERDICT—FAILURE OF PROOF.

In an action on a note by an indorsee thereof, in which defendants alleged a failure of consideration and that plaintiff took the note after maturity with knowledge thereof, where there was no evidence to make out the attempted defense, a verdict for plaintiff was properly directed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862–1893; Dec. Dig. ⟸537.]

Appeal from Common Pleas Circuit Court of Orangeburg County; Ernest Moore, Judge.

Action by H. T. Edens against J. L. Gibson and another. Judgment for plaintiff. and defendants appeal. Affirmed.

The entry on the stub of the checkbook mentioned in the opinion was as follows:

Note Gibson & Robinson ret'd and placed with H. T. Edens for collection.
Chge H. T. Edens 129.09.

Raysor & Summers, of Orangeburg, E. B. Friday, of North, and A. J. Hydrick, of Orangeburg, for appellants. Adam H. Moss, of Orangeburg, for respondent.

WATTS, J. This was an action on a note brought by the plaintiff against the defendants. The complaint alleges that the defendants made and delivered their promissory note dated June 26, 1912, to the Carolina Machinery & Manufacturing Company, payable November 15th after date for $129.09, with interest after maturity at the rate of 8 per cent. per annum until paid, together with the costs of collection and attorney's fees, and that before maturity for a valuable consideration the Carolina Machinery & Manufacturing Company sold and delivered the said note to the plaintiff, and that he is the lawful owner and holder thereof, and that the full amount is due thereon with interest, etc., as provided in said note. The defendants by their answer deny the allegations of the complaint and set up a failure of consideration of the note, alleging the facts in detail, and allege when plaintiff purchased the note and when it was transferred to him he had knowledge of these facts, and that the note was transferred to him after maturity of the note, and that he was not an innocent purchaser of the same for value before maturity. The case came on for trial before Judge Moore and a jury, and at the conclusion of the testimony his honor held there was no testimony to go to the jury, and he directed a verdict for the plaintiff. After judgment was entered, the defendants appealed, and by 14 exceptions allege error on the part of his honor. At the hearing of the case in this court the fifth exception was withdrawn and abandoned.

[1-3] Exceptions 1, 2, 3, 4, and 6 complain of error in excluding certain letters of the Carolina Machinery & Manufacturing Company of date of July 3, 1912, and November 8, 1912, and letter of plaintiff to defendants, dated November 13, 1912, and ledger sheet showing account of plaintiff with the Carolina Machinery & Manufacturing Company, and stub of checkbook of the Carolina Machinery & Manufacturing Company dated November 13, 1912. Plaintiff testified that he bought the note a few days before maturity

without any notice of any defect for value, and Moise, the secretary and treasurer of the Carolina Machinery & Manufacturing Company, corroborated him. It does not make any difference if the Carolina Machinery & Manufacturing Company did write letters to the defendants before they sold the note. This would not be competent to affect plaintiff's rights who purchased after that time, unless it was brought home to him that he had knowledge of the contents of the letters, and nothing of that sort is developed in the testimony, and his honor was clearly right in excluding these letters. In excluding the ledger sheet and stub of checkbook his honor was following the law as laid down by this court in Wells v. Hays, 93 S. C. 170, 76 S. E. 195, 42 L. R. A. (N. S.) 727, and cases therein cited by Mr. Justice Hydrick, who wrote the opinion of the court. It does not matter if the party who transferred the note acted in bad faith; if the party who purchased it acted in good faith and was an innocent purchaser for value before maturity, then he would be entitled to recover. There is nothing in the evidence to show that the plaintiff had notice of any defect before purchase by him. There was no proof of bad faith on the part of the plaintiff, who was the holder of the note, or proof of such facts that would put a prudent man on inquiry.

[4] The other exceptions complain of error on the part of his honor in directing a verdict. We have held that he was correct in excluding the evidence attempted to be introduced by the defendants, and with that excluded there was nothing left in the case to make out the attempted defense, and the court was correct in directing a verdict for the plaintiff. Bank v. Stackhouse, 91 S. C. 455, 74 S. E. 977, 40 L. R. A. (N. S.) 454; Bank v. Wallace, 97 S. C. 52, 80 S. E. 460; Bank v. Grimes, 98 S. C. 220, 82 S. E. 420.

All exceptions are overruled.

Judgment affirmed.

GARY, C. J., and FRASER and GAGE, JJ., concur. HYDRICK, J., disqualified.

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(100 S. C. 452)

## PALMETTO NAT. BANK v. LEXINGTON COUNTY. (No. 9036.)

(Supreme Court of South Carolina. April 9, 1915.)

1. COUNTIES ⟸207—COUNTY CLAIMS—PAYMENT.

Act March 1, 1913 (28 St. at Large, p. 245), levying the taxes for the fiscal year commencing January 1, 1913, levied for the county of Lexington two mills for the payment of outstanding claims against the county for face value and interest thereon from the date of approval, provided the owner of such claims should establish them in the county court of common pleas. The county treasurer discounted a note with a private banker and placed the proceeds to his credit on the understanding that he would buy county warrants and take them to the county treasurer, and in payment therefor receive the treasurer's check on the fund. The banker purchased claims with his own means, and, on his bankruptcy and on plaintiff bank's surrender of its claims against him, pledged them to plaintiff. *Held*, that as the fund was to be used only by the county treasurer, the county's payment of the note was not a payment of the claims, and that the banker was not bound to deliver them to the county treasurer, but might pledge them, so that the plaintiff bank as pledgee might recover thereon.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 324, 335, 336; Dec. Dig. ⟸207.]

2. COUNTIES ⟸167—WARRANTS—RIGHTS OF ASSIGNEE—EQUITIES.

In such case, and even if the treasurer's agreement bound the private banker to deliver the warrants purchased by him to the treasurer, so that the county acquired an equity against the warrants rendering the transfer thereof null and void, it was not such an equity as would follow the nonnegotiable warrants into the hands of the pledgee acquiring them without knowledge of such agreement, who took subject only those equities which existed between the county itself and the original obligees or payees of the warrants.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 249; Dec. Dig. ⟸167.]

3. ESTOPPEL ⟸72—INNOCENT PARTIES.

Such situation was also controlled by the equitable maxim that where one of two innocent parties must suffer because of the act of a third person, the loss must fall on the one who made it possible for the third person to do the wrongful act which would cause the injury, as in this case it was the act and agreement of the treasurer which made it possible for the banker to acquire the warrants and pledge them to plaintiff.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 188; Dec. Dig. ⟸72.]

Appeal from Common Pleas Circuit Court of Lexington County; J. W. Devore, Judge.

"To be officially reported."

Action by the Palmetto National Bank against the County of Lexington. Judgment for plaintiff, and defendant appeals. Affirmed.

The judgment of the circuit court was as follows:

[1] This matter came on to be heard before me, having been marked "Heard," at the summer term of said court, and was argued this day, Messrs. Weston & Aycock representing the plaintiff, and Messrs. C. M. Efird and J. B. Wingard representing the defendant. The action is brought under the act of March 1, 1913, levying the taxes for the fiscal year commencing January 1, 1913 (28 Statutes at Large, 245), wherein there is levied for the county of Lexington: "Two mills for payment of outstanding claims against the county for face value and interest thereon from the date of approval, provided the holder of such county claims shall establish such claims in the court of common pleas for Lexington county," etc. It is not denied that the claims on which the action is brought are of those referred to in the complaint as held by plaintiff, and it is admitted that they were legal and valid obligations of Lexington county when the orders or warrants in evidence were issued. The defense is set up in the answer, however, that "the same have been paid by the defendant paying the note which was issued by it for the purpose of paying these said claims in the first instance." The matter was referred, by consent, to T. C. Sturkie, Esq., who has taken the testimony and reported the same to this court.

It seems that the plaintiff in due course of

business acquired these and other claims by virtue of a note dated March 5, 1912, and signed by Lexington Savings Bank, which was owned and operated by W. P. Roof. Mr. Roof being in bankruptcy and being indebted to the plaintiff, an arrangement was effected whereby the plaintiff surrendered its claims against him and was permitted to retain the county warrants or claims in its possession. On these this action is based. On June 19, 1911, the treasurer of Lexington county discounted a note in the sum of $7,500 at the Lexington Savings Bank, and the proceeds were placed to his credit. It was understood that Mr. Roof was to buy county warrants and, when he had acquired a batch of them, was to take them to the county treasurer and receive from him, in payment therefor, the latter's check on that fund. Mr. Roof proceeded to acquire county warrants, but instead of taking them to the county treasurer, he pledged them with plaintiff, as above appears. It is contended by defendant that by reason of this understanding, it was Mr. Roof's duty to deliver these warrants to the treasurer, and that he had acquired them for that purpose alone, and that he consequently had no title to them capable of being transferred to the plaintiff. So it is claimed the warrants constitute no claim against the county and are already fully paid. I cannot accede to this view. There was no agreement or understanding that Mr. Roof was to use the funds of the county in his bank in acquiring the warrants. He was to acquire them, and was to be paid for them when he presented them to the treasurer. The fund was to be used only by the treasurer, who was to draw his check for that purpose. It would have been contrary to the treasurer's duty to make an arrangement that would permit any other person to draw checks on county funds, and it does not appear that he made such an arrangement. Mr. Roof purchased these warrants with his own means, and was in a position to pledge them with plaintiff if he wished to do so.

[2] Again, even if the treasurer made an agreement with Mr. Roof which bound the latter to deliver the warrants purchased by him to the treasurer so that the county acquired an equity against the warrants which rendered a transfer of them null and void, it was not such an equity as would follow the warrants into the hands of the plaintiff. These warrants are not negotiable, as is admitted by plaintiff in argument, but the plaintiff acquired them without knowledge of any agreement between Mr. Roof and the county. If an equity at all, it prevailed between the maker of the obligation, to wit, Lexington county, and a holder of the obligations who was intermediate between the maker and the present holder who has brought the action. Under the authorities, the county can set up against this plaintiff only those equities which exist against the original obligees or payees of these warrants. In other words, nonnegotiable paper carries along with it into the hands of a bona fide holder without notice only those equities which exist between the original parties, to wit, the obligor and the obligee. English v. Nixon, 3 McCord, 549, referred to and approved in Perry v. Mays, 2 Bailey, 354. This principle is recognized, among other cases, in the following: Patterson v. Rabb, 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831; Maxwell v. Foster, 67 S. C. 385, 45 S. E. 927; Westbury v. Simmons, 57 S. C. 481, 35 S. E. 764; Stevenson v. Bethea, 68 S. C. 246, 47 S. E. 71, and possibly others.

[3] This matter is also controlled by the familiar maxim in equity that if one of two innocent parties must suffer because of the act of a third person, the loss must fall on the one who made it possible for the third person to do the wrongful act which will cause the injury. In this case the county treasurer made the arrangement with Mr. Roof; the plaintiff knew nothing of it, and if anybody was wronged by him, it was the act of the treasurer which made it possible for Mr. Roof to acquire these warrants and dispose of them to the plaintiff.

It is therefore ordered and adjudged that the warrants herein sued on are valid and binding obligations of Lexington county, and that the plaintiff have judgment against the defendant for the sum of $2,758.79, together with the interest thereon from the 5th day of June, 1911; for the sum of $2,041.67, with interest thereon from the 30th day of June, 1911, and for the sum of $1,048.37, with the interest thereon from the 7th day of August, 1911.

Exceptions.

(1) His honor erred in applying to the facts of this case the law of nonnegotiable instruments; the error being in treating the warrants as notes or bonds.

(2) His honor erred in not holding that the warrants sued on were simply orders on the county treasurer payable on day drawn, or at most, within the fiscal year.

(3) His honor erred in not holding that the Lexington Savings Bank, in purchasing the warrants, was using the county's money in paying for them under a contract with the county treasurer and the county supervisor to pay for them as the agent of the county, and that by such payment the bank acquired no title to the warrants.

(4) His honor erred in not holding that the Lexington Savings Bank purchased the warrants with the money of the county under a contract to so use the funds deposited in the bank and to deliver them to the county treasurer upon demand, and that the contract was breached by the Lexington Savings Bank.

(5) His honor erred in not holding that the warrants were payable on demand, or at least during the fiscal year in which they were issued, and that when they were offered to plaintiff as collateral to the note of the Lexington Savings Bank after the expiration of the fiscal year in which issued, this was sufficient to put the plaintiff on inquiry as to the manner in which they were held by the Lexington Savings Bank, and for the reason that county warrants could only lawfully be issued against funds in hand, and the utmost limit of the payment of such orders or warrants was January 1, 1912.

(6) His honor erred in holding that the warrants were left in the possession of the Lexington Savings Bank by the negligence of the county treasurer when he should have held that the county treasurer used due diligence in trying to get possession of them.

The plaintiff served notice that it would rely on the following additional ground to sustain the ruling of the circuit judge on the appeal, to wit:

That under the act of 1913 (28 Statutes at Large, 245) the defendant is liable on the warrants sued on for their face value and the interest thereon, inasmuch as it is not disputed that the claims on which they are based were legal and valid obligations of Lexington county when the warrants were issued.

J. B. Wingard and C. M. Efird, both of Lexington, for appellant. Weston & Aycock, of Columbia, for respondent.

GARY, C. J. The judgment of the circuit court is affirmed, for the reasons therein stated, and for the additional reason that the findings of fact by his honor the circuit judge are not reviewable by this court.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(100 S. C. 227)

FICKLING v. SOUTHERN RY. CO. MARTIN v. SAME. PREACHER v. SOUTHERN EXPRESS CO. (No. 9031.)

(Supreme Court of South Carolina. March 13, 1915.)

Appeal from Common Pleas Circuit Court of Hampton and Barnwell Counties; Geo. W. Gage, Judge.

Actions by C. J. Fickling against the Southern Railway Company, H. H. Martin against the Southern Railway Company, and H. A. Preacher against the Southern Express Company. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. Henry Johnson, of Allendale, and Barron, McKay, Frierson & Moffatt, of Columbia, for appellants. J. W. Vincent, of Hampton, A. H. Ninestein, of Blackville, W. W. E. Matthews, of Barnwell, R. C. Alston, of Atlanta, Ga., and E. F. Warren, of Hampton, for respondents.

HYDRICK, J. The decision in each of the above-entitled cases is governed by the decision of this court in Varnville Furniture Co. v. Railway, 98 S. C. 63, 79 S. E. 700.

Judgment affirmed.

GARY, C. J., and WATTS and FRASER, JJ., concur. GAGE, J., disqualified.

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KENDALL v. RICHLAND DRUG CO. (No. 9079.)

(Supreme Court of South Carolina. April 20, 1915.)

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by Henry T. Kendall against the Richland Drug Company. From a judgment for plaintiff, defendant appealed. On motion of counsel for the parties, orders of the Supreme Court for the trial of issues in the court of common pleas are revoked, and the decree and judgment of the court of common pleas vacated and set aside.

Melton & Belser, B. L. Abney, and W. H. Townsend, all of Columbia, for appellant. Weston & Aycock and John J. Earle, all of Columbia, for respondent.

GARY, C. J. Dismissed by consent.

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(168 N. C. 577)

FARMER-COLE PLUMBING CO. v. WILSON HOTEL CO. (No. 254.)

(Supreme Court of North Carolina. April 14, 1915.)

JUDGMENT ⟸126—DEFAULT—ASSESSMENT OF DAMAGES—EVIDENCE.

Where plaintiff sought recovery for the balance due on a contract for the installation of plumbing at an agreed price, and alleged full performance of the contract, and also asked for the reasonable value of extra work done, the default of the defendant admitted the contract and its performance, and, on inquiry as to the damages, no evidence could be admitted by the referee that the plaintiff had not properly performed his contract.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 223, 224, 228–230; Dec. Dig. ⟸ 126.]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by the Farmer-Cole Plumbing Company against the Wilson Hotel Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

This is a civil action, heard by Whedbee, J., at December term, 1914, superior court of Wake county, upon exceptions to report of referee and motion to set aside a judgment by default and inquiry, rendered at December term, 1913, by Cooke, J., and a judgment of September term, 1914, confirming the report; no exceptions thereto having been filed. His honor declined to set aside this judgment by default and inquiry, but set aside the judgment of September, 1914, confirming the report, and permitted the defendant to file exceptions thereto.

Whereupon the defendant filed exceptions as follows:

(1) That the said referee excluded evidence of the cost and expenses incurred by the defendant in placing the fixtures in position and in installing the same; the plumbing amounting to $450.

(2) The referee excluded evidence that the plaintiff had performed its work so negligently and carelessly, and had failed to comply with the contract to an amount in excess of $250.

(3) That the referee found that the defendant was indebted to the plaintiff in any sum whatever.

And in support of these said exceptions, the defendant refers to the affidavit of S. A. Woodward filed in this case at this term, and his motion to set aside the judgment of December, 1913.

Upon hearing the exceptions, his honor overruled them, and, by consent, allowed a credit of $55, and adjudged that the plaintiff recover $648.87, with interest and costs.

The defendant excepted and appealed.

S. A. Woodard, of Wilson, and Winston & Biggs, of Raleigh, for appellant. J. C. Little and Allen J. Barwick, both of Raleigh, for appellee.

BROWN, J. The plaintiff alleges in the complaint:

(1) That heretofore, to wit, on or about the 14th day of September, 1912, the plaintiff contracted with the defendant to install the plumbing and furnish the roughing-in material in the annex of the New Briggs Hotel, in the city of Wilson, county of Wilson, state of North Carolina, at the agreed price of $1,650.

(2) That, in pursuance of said contract, the plaintiff installed plumbing, and furnished roughing-in material, and completed said work according to contract on the New Briggs Hotel, and fully complied with its part of the contract.

(3) That from time to time the defendant paid to said plaintiff the sum of about $1,200, leaving due and unpaid the sum of $450.

(4) That, over and above the work on the contract hereinbefore referred to, there was extra work done on the said hotel, and materials furnished; said work and materials being of the value of $253.87.

As we understand this case, the exceptions relate exclusively to matters foreclosed by the judgment by default and inquiry, which are set out in sections 1, 2, and 3 of the complaint. These sections alleged a contract to install plumbing in defendant's hotel at an agreed price; that the work was properly done in pursuance of, and in accordance with, the contract; that so much was paid on it; and that there is a balance due of $450 on the contract.

The exceptions are confined to alleged error in excluding evidence as to costs and expenses incurred by defendant in placing the plumbing in and installing the same, and in excluding evidence of the negligent manner in which the plaintiff contractor had done his work. These are matters of defense relating to the proper performance of the contract, and should have been properly pleaded. The judgment by default and inquiry for want of an answer bars defendant from setting up such defense upon the inquiry as to damages. The referee very properly confined the inquiry under those allegations of the complaint to the amount due under the contract.

The default is an admission of every material and traversable allegation of the declaration or complaint necessary to the plaintiff's cause of action. 23 Cyc. 752. It admits all the material averments properly set forth in the complaint, and, of course, everything essential to establish the right of the plaintiff to recover. Any testimony, therefore, tending to prove that no right of action existed, or denying the cause of action, is irrelevant and inadmissible. Garrard v. Dollar, 49 N. C. 176, 67 Am. Dec. 271; Lee v. Knapp, 90 N. C. 171; Blow v. Joyner, 156 N. C. 140, 72 S. E. 319; Graves v. Cameron, 161 N. C. 550, 77 S. E. 841.

Affirmed.

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(168 N. C. 579)

## ATLANTIC COAST LINE R. R. v. BUNTING. (No. 176.)

(Supreme Court of North Carolina. April 14, 1915.)

RAILROADS ⟸73 — RIGHTS OF WAY — RIGHT IN.

Under its charter, the right of way of plaintiff railroad company extended for 100 feet each way from the center of its track. Soon after completion of the line, buildings were erected along the track and fronting it, leaving a space of about 65 feet between the buildings and the track, which space was used as a public street. Defendant, who owned an abutting lot and had placed an old warehouse on it, removed the warehouse preparatory to erecting another building. This building would not increase the hazards of the operation of the railroad. *Held*, that the railroad company was not entitled to an injunction to restrain defendant from erecting the building, for while a right of way, when once acquired, may be occupied and used by the company to its full extent, whenever the proper management of the road requires, yet land covered by the right of way, not then required for the purposes of the road, may be used by the owner in a manner not inconsistent with the full enjoyment of the easement.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 179–182; Dec. Dig. ⟸73.]

Walker and Brown, JJ., dissenting.

Appeal from Superior Court, Pitt County; Peebles, Judge.

Action by the Atlantic Coast Line Railroad against J. R. Bunting. From a judgment for plaintiff, defendant appeals. Reversed.

Civil action to enjoin erection of a brick building on plaintiff's right of way, heard on return to preliminary restraining order. On the hearing, the restraining order was made permanent, and enjoining defendant from further proceeding with the building, whereupon defendant excepted and appealed.

Jarvis & Wooten and F. G. James & Son, all of Greenville, for appellant. L. G. Cooper and Harry Skinner, both of Greenville, for appellee.

HOKE, J. Our decisions are to the effect that a railroad right of way, when once acquired, may be occupied and used by the company to its full extent, whenever the proper management and business necessities of the road may so require, and the company is made the judge of such necessity. Railroad v. McLean, 158 N. C. 498, 74 S. E. 461; Earnhardt v. Railroad, 157 N. C. 358, 72 S. E. 1062; Railroad v. Olive, 142 N. C. 273, 55 S. E. 263. And, further, that, to "the extent that the land covered by the right of way is not presently required for the purposes of the road, the owner may continue to occupy and use it in a manner not inconsistent with the full and proper enjoyment of the easement." Lumber Co. v. Hines, 126 N. C. 254, 35 S. E. 458; Railroad v. Sturgeon, 120 N. C. 225, 26 S. E. 779. Both positions will be found stated and approved in the more recent cases of Coit v. Owenby, 166 N. C. 136–138, 81 S. E. 1067, and Hendrix v. Railroad, 162 N. C. 9, 77 S. E. 1001, and it is further established in this state, both by statute and precedent, that, when the company has acquired and properly entered on the enjoyment of its easement, the further appropriation and use of the right of way, as indicated, may not be destroyed or sensibly impaired by reason of the occupation of the owner or other person. Revisal, § 388; Beattie v. Railroad, 108 N. C. 432, 433, 12 S. E. 913; Railroad v. McCaskill, 94 N. C. 746.

A correct application of these principles to the facts in evidence, about which there is no substantial dispute between the parties, is, in our opinion, against the ruling of the court below on the question presented. From these facts, it appears that plaintiff is now operat-

ing a railroad through or by the town of Bethel, and that, under its various charters, its right of way extends for 100 feet each way from the center of its track; that formerly the town was some further away, but soon after the completion of the road, about 1885, the business portion was moved towards the southern side of the track, and a substantial block of business buildings, including a bank, two hotels, and some large brick stores, were erected along said track and fronting the same, leaving a space of 65 feet between said buildings and the track, which space was used as a public street known as Railroad street, the principal business street of the town, and had been since the before mentioned date, 1885; that defendant, owning one of the lots on this street, had bought an old warehouse from the company and placed it on the lot and had used it as a business house or warehouse for several years, till the fall of 1914, when he tore it down with intent to erect on the lot a brick business building, this being substantially in line with the buildings already along the street and situate, for some distance, on plaintiff's right of way. In making our present decision, we must not be understood as holding that, under usual or ordinary circumstances, the owner of property, subject to such an easement, would be justified in building a permanent brick structure on the plaintiff's right of way, but there is nothing in this record which shows or tends to show that plaintiff company has any present purpose of putting in a double track, or that the proposed building will tend to interfere with the proper and efficient operation of the road, or that it will sensibly increase the hazards incident to its operation, and, in the absence of some such evidence, we must hold, as stated, that, on the facts presented, there is nothing to indicate that the proposed building or its contemplated use will, in any way, tend to interfere with the "full and proper enjoyment of plaintiff's easement," the test suggested in Coit v. Owenby, supra, and the authorities cited in its support. It was only a business building in line with the other buildings on the block, and, so far as appears, it did not even sensibly increase the obstruction to the view, at times desirable for the safe operation of plaintiff's trains.

The case of Coit v. Owenby was cited on the argument as authority for the position that, on the facts in evidence, the plaintiff might have some proprietary interest in that portion of defendant's lot on the right of way, which it might rent or lease for warehouse or other business purposes to some patron of the road. Owing to the fact that the testimony on that point in Coit v. Owenby, supra, was somewhat obscurely stated, in the case on appeal, the decision may, in some aspects of the evidence, permit of such an interpretation, and we deem it well, therefore, to say that, in the case referred to, the court never intended to hold that a railroad had the right to rent out the right of way to an individual for strictly personal or private business purposes. The decision was made to rest on that aspect of the testimony which permitted the interpretation and tended to show that the right of way had been let to a patron of the road as a terminal facility for receipt and shipment of freight, and it was held that the company might do this to the extent that it did not interfere with the facilities for serving the public. A railroad company would not be permitted to sell or farm out any portion of its right of way to an individual for any purposes extraneous to its chartered rights and duties.

We find there was error in the judgment rendered, and, on the record, the same must be reversed.

Reversed.

WALKER and BROWN, JJ., dissenting.

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(168 N. C. 611)

## SHAW v. NORTH CAROLINA PUBLIC SERVICE CORPORATION.

(No. 364.)

(Supreme Court of North Carolina. April 14, 1915.)

1. ELECTRICITY ⟸19—ACTIONS—BURDEN OF PROOF.

Plaintiff, who asserted that his injuries from an electric current were due to the negligence of the defendant electric company, has the burden of proof.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ⟸19.]

2. TRIAL ⟸165—JURY QUESTION—EVIDENCE.

In determining whether the evidence is sufficient to go to the jury, plaintiff is entitled to the most favorable construction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. ⟸165.]

3. TRIAL ⟸260—INSTRUCTIONS—REFUSAL.

The refusal of prayers substantially covered by those given is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⟸260.]

4. ELECTRICITY ⟸19—ACTION FOR INJURIES—PROOF—FAILURE TO MAKE.

The failure of the defendant electric company to show that its transformer was in good repair, although it was charged with allowing an unusual current to be carried into the building where plaintiff worked, will warrant the jury in finding that the appliance was defective, for the matter is one peculiarly within defendant's knowledge.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ⟸19.]

5. ELECTRICITY ⟸14—DUTY OF CARE.

An electric company, while not an insurer of the safety of its patrons and their servants, is bound to exercise the highest degree of care possible to protect such persons.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. ⟸14.]

6. ELECTRICITY ⟸19—NEGLIGENCE—RES IPSA LOQUITUR.

Where an electric company agreed that the current transmitted inside a building should not exceed 119 volts, the mere happening of an accident from a powerful current makes out a

prima facie case of liability, under the doctrine of res ipsa loquitur.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ⟸19.]

7. APPEAL AND ERROR ⟸1033 — REVIEW — HARMLESS ERROR.

A party cannot complain of error in his favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052–4062; Dec. Dig. ⟸1033.]

Appeal from Superior Court, Guilford County.

Action by Roy Shaw against the North Carolina Public Service Corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

The defendant is a corporation engaged in the business of furnishing electricity to the inhabitants of the city of Greensboro for lighting purposes, and, as such, it contracted with the Cook-Lewis Foundry Company to supply it with electricity for said purpose; the current not to exceed 119 volts. Plaintiff was employed by the Cook-Lewis Foundry Company as an apprentice in the molding department of its business, and was, besides, learning the trade of molding. On July 15, 1914, while in the performance of his duty of cleaning out molds, the plaintiff was required to use and hold in his hand an electric lamp or bulb attached to a wire cord, which was connected with the current of electricity furnished by the defendant to his employer, and, while holding the bulb close to the mold for the purpose of cleaning it, "he was suddenly hurled from his feet with great force and violence, and was knocked unconscious by the electric current fed to the lamp which he was holding," and received serious and painful injuries, which proved to be of a permanent nature, disfiguring his hand and impairing to some extent its usefulness. He alleged that he had used and handled the electric lamp in the same way for several years, without the slighest harm to himself, and that his injuries were caused by a sudden and considerable increase of the current of electricity by defendant, far in excess of the voltage contracted for by his employer, and that this was the result of a defect in what is known as a "transformer," an instrument devised to control the current, by raising or lowering it, and attached to one of defendant's poles in the street near the foundry. It is also charged that this defect was due directly to the negligence of the defendant in not properly inspecting the transformer and keeping it in proper condition, that instrument being wholly within the control and management of defendant and belonging to it. It was also alleged and shown that the increase of the current was so great and it became so energetic and powerful that when one of his coemployés, who had come to his relief, touched his body, he was knocked 10 feet away, and plaintiff could not be separated from the wires until the lever or switch had been turned and the current entirely cut off. The defendant averred that plaintiff's injuries were not caused by its negligence, but by that of his employer, whose electrical appliances in the foundry were defective and unsafe, and that its transformer was in good condition, as it was examined immediately after the accident by its experts, and found to be in perfect condition and in good working order, and that the real and proximate cause of the plaintiff's injuries, if he sustained any, was that the socket of the lamp which he was handling was defective and not properly insulated; that one of the wires upon the inside of said socket was broken and defective; that the cord from which said socket was suspended had become, through use and age, worn and uninsulated; that the plaintiff, who was standing upon the damp and wet ground, which accelerated or increased the current of electricity, did, by reason of the conditions of the ground as aforesaid, and by reason of the defective socket and cord as aforesaid, receive the full voltage of electricity going into the said building, which, under the circumstances and conditions above set out, is very dangerous and likely to produce injury; that the socket in use in the building of the Cook-Lewis Foundry Company is not the proper socket for the purposes for which it was used; and that it should have been protected by a porcelain or a wooden cover or guard, which is the proper socket covering, when it is to be handled, and especially is this true when the person handling the same is standing upon a damp or wet floor or surface. The defendant further, on information and belief, alleges that the electrical wiring and appliances had been installed in the building of the Cook-Lewis Foundry Company many years prior to the alleged injury to the plaintiff, as set out in his complaint, and that during all these years the said wiring and appliances had never been inspected by the Cook-Lewis Foundry Company, or by any one for it; that, had an inspection been made of said wiring and appliances, the defects as hereinbefore set out could and would have been readily detected. Defendant also averred that the foundry company had furnished its own electric appliances inside its building, and had full charge and control of the same.

There was evidence to support the respective contentions of the parties. The jury found that plaintiff was injured by the negligence of defendant, and assessed his damages at $4,000. From the judgment upon the verdict, the defendant appealed.

J. I. Scales, of Greensboro, for appellant. C. C. Frazier and R. C. Strudwick, both of Greensboro, for appellee.

WALKER, J. (after stating the facts as above). [1, 2] The case seems to have been

reduced practically to a question of fact, whether the plaintiff's injuries were due to the defective transformer or to the defective incandescent lamp attached to the cord, which he carried in his hands and used for throwing light on the moulds, so that he could see how to clean them. The feed wire of the defendant, from which it supplied the current of 119 volts to the foundry, carried as much as 2,300 volts, which is not only a dangerous, but a very deadly, current. It appears by strong inference from the evidence that the defective transformer was the cause of the injury, because if it was due to a defect in the lamp, or its socket, it is strange that the accident had not occurred before, as the lamp had been used for a long time for the same purpose and under like conditions. But this question was fairly submitted to the jury, with proper instructions; the burden of proof having been placed upon the plaintiff to establish his cause of action. The court properly overruled the motion for a nonsuit. There certainly was evidence of negligence on the part of the defendant, and the plaintiff was entitled to the most favorable construction of it, upon such a motion. Brittain v. Westhall, 135 N. C. 492, 47 S. E. 616; Freeman v. Brown, 151 N. C. 111, 65 S. E. 743; Lloyd v. Railroad Co., 166 N. C. 24, 81 S. E. 1003. The court told the jury that, if the accident was due to a defect in the extension cord or in the socket, plaintiff could not recover, and they should answer the issue accordingly, but that if it was, on the contrary, due to a defect in the transformer caused by the negligence of the defendant, their verdict should be the other way. The charge was full, direct, and intelligible, and instructed the jury strictly in accordance with previous decisions of this court in like cases. Most of the charge, or at least a large part of it, was given at the request of the defendant, and covered the case in all material respects. There is therefore no ground for complaint left to the defendant as to this part of the charge, which was responsive to its own requests for instructions.

[3] But it is stated that the court refused to give its third and thirteenth prayers. If the defendant was entitled to have them given as they were framed, which is doubtful, the court gave them substantially in its general charge, and the defendant received the full benefit of the principles of law they embodied. It is not required that they be given in their very language, but the judge can modify the phraseology and use his own language, provided he does not thereby weaken their legal force and effect. A substantial compliance with a request to charge is sufficient, as we have often held. Rencher v. Wynne, 86 N. C. 268; Graves v. Jackson, 150 N. C. 383, 64 S. E. 128. If the general charge of the court is examined with the utmost scrutiny, nothing will be found therein that militates against the law of the case. It was correctly and amply stated throughout.

[4] But the defendant urges that if the injury was caused by a defect in the transformer, whereby a strong and deadly current was sent into the foundry, even in violation of the stipulation of the contract that it should not exceed 119 volts, it has not been shown that the defective condition of the transformer was due to its negligence, as there is no evidence that it knew of such condition before the accident occurred and in time to prevent it. While there may be no evidence that it actually knew of it, there is some evidence that it should have known of it, and would have known of it, if it had exercised proper care and diligence in respect to it. There are two answers to this contention.

First. Where it appears on the trial of a case that a certain fact, especially if defensive or exculpatory in its character, is peculiarly within the knowledge of the defendant, his failure to give to the jury the benefit of such knowledge, when, were the facts in his favor, he would naturally do so, is a sufficient circumstance to justify the inference that the fact is, in truth, against him, and, if he wishes to avoid this inference being made, he should proceed or go forward with his proof. McKelvey on Ev. p. 71, and cases in note 11. He is not concluded by his silence, but he leaves it open for the jury to decide the fact against him, or, in other words, he exposes himself to an adverse finding as to the facts.

[5, 6] Second. We have very recently had occasion to discuss and decide the question as to when it may be necessary for one of the parties to proceed with his proof, if he would not take the risk of a disappointing or unfavorable verdict. We said in Ridge v. Railroad Co., 167 N. C. at page 518, 83 S. E. at page 766:

"This maxim of the law, res ipsa loquitur, extends no further in its application to cases of negligence than to require the case to be submitted to the jury, upon the face of the evidence as affording some proof of the fact in issue. The jury are not bound to decide accordingly; but if they think proper to do so, when applying their reason and common sense to the case, they may reject the conclusion that there was negligence and ascribe the injury to some other cause. It merely carries the case to the jury for their consideration, and is bottomed upon this logical principle, as decided in many cases: When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the control of it use the proper care, it furnishes evidence, in the absence of explanation by the defendant, that the accident arose from want of such care. Ellis v. R. R., 24 N. C. 138; Aycock v. R. R., 89 N. C. 321 (sparks falling on right of way); Stewart v. Carpet Co., 138 N. C. 60 [50 S. E. 562], and Womble v. Grocery Co., 135 N. C. 474 [47 S. E. 493] (elevator cases); Ross v. Cotton Mills, 140 N. C. 115 [52 S. E. 121, 1 L. R. A. (N. S.) 298], and Morrisett v. Mills, 151 N. C. 81 [65 S. E. 514] (sudden and unexpected starting of machines); Haynes

v. Gas Co., 114 N. C. 203 [19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786], and Turner v. Power Co., 154 N. C. 131 [69 S. E. 767, 32 L. R. A. (N. S.) 848] (loose or unguarded wires charged with electricity); Fitzgerald v. R. R., 141 N. C. 530 [54 S. E. 391, 6 L. R. A. (N. S.) 837] (where a piece of coal fell from the tender); Knott v. R. R., 142 N. C. 242 [55 S. E. 150] (where sparks flew from the engine, as in the Aycock Case); and numerous other like cases which the present Chief Justice has collected in a note to the Aycock Case, 89 N. C. (Anno. Ed.) at marg. p. 331."

We then referred to Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815 Ann. Cas. 1914D, 905 (citing and quoting with approval from Stewart v. Carpet Co., supra), to this effect:

"In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking; but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they may make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."

Now we understand what the rule is and its extent. If a thing happens which ordinarily does not occur if due care is used, it is not only a natural but a common sense inference that there must have been a lack of such care. It is only prima facie and does not necessarily establish a want of care, but is some evidence of it for the jury to consider, and in this sense of the term, res ipsa loquitur, it is a question for the defendant, or the party against whose interests the inference may be drawn, to consider whether he will take his chance before the jury without explanation of the unusual circumstance, or whether, especially if the fact be otherwise than the situation and circumstances imply, he will proceed to explain it by proof that there was no negligence, or that, if there was, it was not his negligence.

In Haynes v. Gas Co., 114 N. C. at page 208, 19 S. E. at page 345 (26 L. R. A. 810, 41 Am. St. Rep. 786), Justice Burwell (quoting from Whitaker's Smith on Negligence 423) said:

"If the accident is connected with the defendant, the question whether the phrase 'res ipsa loquitur' applies or not becomes a simple question of common sense."

And again, speaking of an electric wire which was trailing in a street of the city of Raleigh, he said:

"Guided by the principle announced in these cases, we come to the conclusion that this plaintiff should have been allowed to say to this defendant: 'The wire you put in the street killed my son while passing along the highway, as he had a right to do. If you are not in default, show it, and escape responsibility.'"

He did not mean to lay down the broad principle that this was an affirmative defense, the nonexistence of negligence, but that the circumstances pointed to the defendant as the responsible party, and as he had peculiar knowledge of the facts, fairness and justice required that he should come forward and give some explanation if he was not in fault, or his failure to do so might afford some proof to the jury in confirmation of the prima facie case and deepen their conviction of his guilt. Turner v. Power Co., 154 N. C. 131, 69 S. E. 767, 32 L. R. A. (N. S.) 848. The Haynes Case also decides that an electric company must use the highest degree of care in protecting persons against the deadly agency which they handle in their business. But this proposition is more fully stated in Mitchell v. Electric Co., 129 N. C. 169, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735:

"The defendant company was engaged in the business of manufacturing producing, leasing, and selling light made from the use of electricity, which is the most deadly and dangerous power recognized as a necessary agency in developing our civilization and promoting our comfort and business affairs. It differs from all other dangerous utilities. Its association is with the most inoffensive and harmless piece of mechanism if wire can be classified as such, in common use. In adhering to the wire, it gives no warning or knowledge of its deadly presence; vision cannot detect it; it is without color, motion, or body; latently and without sound it exists, and being odorless the only means of its discovery lie in the senses of feeling communicated through the touch, which, as soon as done, becomes its victim. In behalf of human life and the safety of mankind * * * it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition."

This was approved by us in Hicks v. Telegraph Co., 157 N. C. 519, 73 S. E. 139. See, also, Turner v. Power Co., supra; Fisher v. New Bern, 140 N. C. 512, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857; Houston v. Traction Co., 155 N. C. 4, 71 S. E. 21; Harrington v. Wadesboro, 153 N. C. 437, 69 S. E. 399; Starr v. Telephone Co., 156 N. C. 435, 72 S. E. 484; Benton v. Public Service Corporation, 165 N. C. 354, 81 S. E. 448.

The maxim res ipsa loquitur applies in many cases, for the affair speaks for itself. It is not that in any case negligence can be assumed from the mere fact of an accident and an injury, but in these cases the surrounding circumstances which are necessarily brought into view, by showing how the accident occurred, contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof that the injured person is able to offer or that it is necessary to offer. Sh. & Redf. on Neg. § 59. The case of Turner v. Power Co., supra, seems to be "on all fours" with this one, as the facts of the two cases are strikingly alike. It was there held, approving Electric Co. v. Lawrence, 31 Colo.

308, 73 Pac. 39, that, while a corporation furnishing electric light to others for private gain may not be regarded as an insurer, it owes its patrons the duty to protect them from injury by exercising the highest skill, most consummate care and caution, and utmost diligence and foresight in the construction, maintenance, and inspection of its plant and appliances which is attainable, consistent with the practical operation of its plant. This doctrine is well sustained, not only by our own cases, but by many in other jurisdictions. What the court said in Electric Co. v. Letson, 68 C. C. A. 453, 135 Fed. 969, quoted and approved by this court in Houston v. Traction Co., supra, is a full and complete answer to defendant's contention, although we are not required to assent to the whole of it, in order to use it as an authority:

"The contention of the company amounts to this: That if the wires were properly installed it cannot be held responsible for their being out of repair unless it is proved they got out of repair through its own fault. But this loses sight of the duty of the company not only to make the wires safe at the start, but to keep them so. They must not only be put in order, but kept in order. The obligation is a continuing one. The safety of patrons and public permits no intermission. Constant oversight and repair are required and must be furnished. Customers who contract for a harmless current to light their houses are entitled to rely on such inspection and repairs as will effectually guard them against a dangerous current. They cannot guard themselves. Any attempt to do so would expose them to immediate peril. They must take and use the current on trust, relying upon the protection of the company. In view of this, when a deadly current enters a customer's house and kills him, it is not too much to call upon the company to explain the existence of the defect which caused the tragedy."

We see from these references, and they might be greatly multiplied, that those who use and control so dangerous and subtle an agency as electricity in their commercial pursuits must not be permitted to theorize in regard to its probable effects or speculate upon chances as to results, when the danger to human life is so great and may be so disastrous. It is not too much to require of them the highest practicable degree of care and vigilance in the management of their appliances which carry and conduct this deadly current, for no ordinarily prudent man would bestow less in such circumstances. If it raises expenses to be more watchful and cautious than in ordinary cases, where there is no such dangerous agency employed, and thereby profits are reduced, it is far better that it be so, than that the toll of human life be alarmingly increased. While the dealer in electricity may not be an insurer of safety in its use by customers, and other persons coming in contact with it, the care, exacted by the law, is raised to the highest degree, in order to be commensurate with the great danger involved and to safeguard the public. All authorities agree that there must be frequent, if not constant, inspection and unremitting vigilance, and in this case there is evidence from which the jury could infer that, in this respect, the defendant had failed in its duty, and, if it really had not, it should have come forward with the proof that the defect in the transformer, for the jury have evidently found that it was defective, and not the socket or cord of the lamp, was not discovered in time to repair it after having made the inspection which the law required, or that it was not discoverable, and that the accident occurred without its fault, or was unavoidable by the exercise of the highest degree of care. This was not shown, and, in its absence, the defendant cannot complain of the verdict, for it was warranted by the evidence as it stood.

The defendant had contracted to furnish a current not exceeding in power 119 volts, and, as plaintiff had no control or supervision of the transformer, he could not be expected to know whether it was in order or not. It was in the sole charge of the defendant, upon whom alone rested the duty of inspection and to whom only was it accessible for such purpose. Proper care would, ordinarily, have kept it in good condition and prevented the injury, and defendant alone knew whether that care had been used, or whether the injury was due to something beyond its control, a latent or undiscoverable defect, or inevitable accident. The situation surely called for some rational explanation.

The questions to the expert were correctly framed upon the facts in evidence, and properly submitted. Summerlin v. Railroad Co., 133 N. C. 554, 45 S. E. 898; Parrish v. Railroad Co., 146 N. C. 125, 59 S. E. 348. The question put to defendant's witness C. E. Scott was competent for the purpose of contradiction or to impeach his credibility, even if not to show a change in the appliance, as substantive evidence of negligence, under the rule stated in Lowe v. Elliott, 109 N. C. 581, 14 S. E. 51; Myers v. Lumber Co., 129 N. C. 254, 39 S. E. 960; Aiken v. Manufacturing Co., 146 N. C. 328, 59 S. E. 696. The evidence of the declaration of Scott was competent for the same reason, and does not come within the rule excluding the statements of agents made after the fact.

The court distinctly instructed the jury in its general charge, and also in response to defendant's prayer, using its own language, that defendant would not be liable if the injuries were caused by a defective cord or defective socket, and, if they found that to be the case, they should answer the first issue, as to negligence, "No," and that they could only answer it, "Yes," if they were caused by the transformer which defendant negligently permitted to be defective or out of order.

[7] While we have stated that defendant cannot complain of the charge, so far as it assumed that, if the plaintiff's injuries were caused wholly or in part by a defective cord or socket attached to the incandescent lamp,

the defendant would not be liable because if that assumption was correct, the charge in respect thereto was without error, we do not wish to be understood as passing upon the question of defendant's liability, if there was a defect in the lamp, but leave that open for future consideration. As the charge was in favor of defendant, so far as the defect in the lamp is concerned, if the assumption was erroneous there was no resultant harm to the defendant, and when we have referred to the charge in this respect, as being in accordance with our former decisions, we mean merely that it was correct in so far as it dealt with the general principles of negligence, as declared in previous decisions of this court. Our conclusion in this case is based entirely upon the defect in the transformer. Besides, the jury have evidently found, under the charge, that there was no defect in the lamp. The charge as to the measure of damages was correct.

No error.

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(169 N. C. 314)

## STATE v. SILER. (No. 353.)

(Supreme Court of North Carolina. April 14, 1915.)

1. PHYSICIANS AND SURGEONS ⟸5 — REGULATION OF PRACTICE—LEGISLATIVE AUTHORITY.

The state has power to regulate the practice of medicine, and may require those holding themselves out as practitioners for a fee to first procure a license.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 5; Dec. Dig. ⟸5.]

2. PHYSICIANS AND SURGEONS ⟸6—REGULATION OF PRACTICE — STATUTES — CONSTRUCTION.

Under Laws 1907, c. 764, as amended by Laws 1913, c. 92, providing for the examination and licensing of nondrug-giving physicians, known as osteopaths, or other nondrug-giving school of practice, and making it a misdemeanor for an osteopath or other nondrug-giving practitioner to practice without a license, one practicing chiropractic and suggesto-therapy must obtain a license.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 6–11; Dec. Dig. ⟸6.]

Appeal from Superior Court, Guilford County; Devin, Judge.

O. V. Siler was charged with practicing without a license, and, from a judgment of acquittal, the State appeals. Reversed.

The Attorney General, for the State. Roger W. Harrison and Thos. C. Hoyle, both of Greensboro, for appellee.

CLARK, C. J. The defendant was tried and found guilty in the municipal court of Greensboro for practicing for fee and reward, without license, as "a nondrug-giving physician." On appeal to the superior court of Guilford, upon a special verdict finding the facts, the judge held the defendant not guilty, and the state appealed.

The special verdict states that the defendant was tried under the act of March 8, 1907, being chapter 764, as amended by chapter 92, Laws 1913. It is agreed that the defendant was resident in Greensboro April 14, 1914, and on that day was engaged in the practice of "chiropractic and suggesto-therapy" as a nondrug-giving physician and received compensation therefor; that chiropractic is a system of treating human diseases without use of drugs by manipulating the spine, and that suggesto-therapy is a system of treating nervous diseases without the use of drugs by mental suggestion; that the defendant has not been examined nor licensed as an osteopath under chapter 764, Laws 1907, or chapter 92, Laws 1913, amendatory thereof.

It is further agreed and found as a part of the special verdict that:

"The defendant was not practicing osteopathy, nor was he practicing, pretending or attempting to practice or use, the science or system of osteopathy in treating diseases of the human body, and that he did not hold himself out in any manner as engaged in the practice of osteopathy."

The state contends that section 2, c. 764, Laws 1907, makes it unlawful to practice any nondrug-healing system as an osteopath without taking the required examination and being licensed thereunder, and that chapter 92, Laws 1913, requires examination and license of "all nondrug practitioners by whatever name known and of whatever school they claim to be graduate of," and that the defendant is guilty of a misdemeanor by virtue of said act of 1913.

The defendant contends that the act of 1907, as amended by the act of 1913, does not require nondrug-giving physicians, other than osteopaths, to pass examination or take out license, and that, if it did, such act would be unconstitutional.

Laws 1907, c. 764, § 8 (now Pell's Revisal, § 4505a), defines osteopathy to be "the science of healing without the use of drugs, as taught by the various colleges recognized by the American Osteopathic Association." Section 2 of said act (now Pell's Revisal, § 4505h), requires "any person, before engaging in the practice of osteopathy in this state," to obtain a certificate and license to practice osteopathy from the board therein designated. Section 9 of said act (now Pell's Revisal, § 4505m) provides that that chapter shall not prevent or interfere with "any person engaging in the art of healing in any manner taught by any school of medicine or science, except such as claim to be osteopaths, or practice osteopathy as herein defined."

Laws 1913, c. 92, amends the aforesaid chapter 764, Laws 1907, in several particulars, and especially strikes out above-cited section 9 (Pell's Revisal, § 4505m), and adds to section 2 (now Pell's Revisal, § 4505h) the following:

"The provisions of this section shall apply to all other nondrug-giving practitioners by whatever name known or call themselves, or of what-

ever school they claim to be graduates or hold diplomas, and to any one who holds himself or herself out as being able to diagnose, treat, operate or prescribe for any human diseases, pain, injury, deformity or physical condition, and who shall offer or undertake by any means or method to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition without the use of drugs, but shall not apply to those practicing their profession as licensed physicians, nor to Christian Scientists or masseurs or any one following in his or her practice the orders of licensed drug-giving physicians; provided, however, that all such persons so applying to said board for examination shall be examined only on the subjects of anatomy, physiology, pathology, and diagnosis, by said board, but no license shall be issued by said board to those who claim to be correspondence school course graduates to practice in this state."

Chapter 764, Laws 1907, provided that any person who should practice or attempt to practice that particular method of healing (osteopathy) without having complied with the provisions of the act should be guilty of misdemeanor. Laws 1913, c. 92, § 5, after inserting above amendment to section 6, which brought, under the provisions of the act of 1907, "all other nondrug-giving practitioners by whatever name known or call themselves," added the following at the end of said section 6 of the act of 1907: "And the punishment prescribed in this section shall likewise apply to others embraced in the provisions of this amended act and violating any of its provisions." This simply makes the violation of the act, as amended, a misdemeanor.

There are other amendments to the act of 1907, set out in said chapter 92, Laws 1913. But the above shows the purport of the legislation. In chapter 764, Laws 1907, the General Assembly provided for the examination and licensing of nondrug-giving physicians, known as osteopaths, in order to protect the public against incompetents and imposters professing to be osteopaths. The act of 1913 (chapter 92) simply extends the act of 1907 to require the examination and licensing of "all other nondrug-giving practitioners by whatever name known," and makes those violating this statute guilty of misdemeanor to the same extent as those had been who practiced as osteopaths without complying with the requirements of the act of 1907.

[1] The power of the Legislature to pass such statutes has been fully discussed and settled in State v. Call, 121 N. C. 643, 28 S. E. 517, and State v. Van Doran, 109 N. C. 864, 14 S. E. 32, as to practitioners of medicine and surgeons. In State v. Call, supra, 121 N. C. 646, 28 S. E. 517, are enumerated many "other callings, whether skilled trades or professions, affecting the public and which require skill and proficiency," whose members must be examined and licensed. Since then the Legislature has required examination and license for following many other vocations.

The subject has been fully and more recently discussed in sustaining the constitutional authority of the Legislature to regulate the practice of dentistry by Mr. Justice Walker. State v. Hicks, 143 N. C. 689, 57 S. E. 441.

In State v. Biggs, 133 N. C. 729, 46 S. E. 401, 64 L. R. A. 139, 98 Am. St. Rep. 731, and in State v. McKnight, 131 N. C. 723, 42 S. E. 580, 59 L. R. A. 187, this court held that the object of such legislation was not to give special or exclusive privileges to any special body of men, but solely for the protection of the public, and to prohibit imposition by any one passing himself off as competent to engage in a practice or calling of a public nature when he was incompetent to do so. Therefore it was held that the act in regard to the practice of medicine and the examination prescribed therefor could not embrace osteopaths who did not prescribe drugs or other medicine.

[2] By the act of 1907 (chapter 764) it was intended to protect the public against imposition by those claiming to heal diseases without the use of drugs as osteopaths. Since then those claiming to heal without prescribing drugs have taken various and numerous appellations, and thus avoided the protection intended to be afforded the public as to "nondrug-giving physicians" by the act of 1907. In consequence the act of 1907 was amended in 1913 to add after the word "osteopathy" the words "or other nondrug-giving school of practice." The act also, as above set out, fully and elaborately prescribes that it should apply to all practice of healing of every kind that was not drug-giving, excepting only "Christian Scientists or masseurs or any one following in his or her practice the orders of licensed drug-giving physicians."

The object of the act of 1913 is simply to extend the protection to the public given by the act of 1907 as against all other nondrug-giving practitioners of healing, with the exception just quoted. That this is the scope of the act, and that it is not intended to make compliance therewith a monopoly in the hands of "osteopaths," the act prescribes an examination only in the following subjects: "Anatomy, physiology, pathology and diagnosis." Less could not be required reasonably of any one holding himself out as competent to prescribe for "the ills that flesh is heir to."

The statute makes a violation of the act of 1907 a misdemeanor, and the act of 1913 makes a violation of the act in its extended scope, taking in other nondrug-giving practitioners, "likewise a misdemeanor." The object of the act, as already said, is not to give "osteopaths" or any schools of practice a monopoly but to protect the public by requiring of all nondrug-giving practitioners, with the exceptions named, the prescribed examination and license. To give this statute any effect, it was necessary to make its violation a misdemeanor. The power of the Legislature to pass such enactments has been already considered in the cases above cited,

and the intent of this statute is clearly and solely for the protection of the public. An uneducated, ignorant, and incompetent doctor turned loose on a helpless community is as deadly as a park of artillery. Upon the special verdict, the court should have held the defendant guilty.

Reversed.

(168 N. C. 654)

FRICK CO. v. BOLES. (No. 315.)

(Supreme Court of North Carolina. April 14, 1915.)

1. TRIAL ⇐250 — SUBMISSION OF ISSUES — PLEADING AND PROOF—ACTION FOR PRICE.

Where, in an action for the purchase price of machinery, wherein defendant pleaded breach of warranty, and it appeared that defendant had failed to give notice of any defect in the machinery within five days after receiving same as required by the contract, there was neither allegation nor proof that the five-day period was not a reasonable time for the examination of the machinery, it was error to submit to the jury whether such period was a reasonable time.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584–586; Dec. Dig. ⇐250.]

2. SALES ⇐285—ACTION FOR PRICE — DEFENSE — BREACH OF WARRANTY — NOTICE OF DEFECTS.

Where, in an action for the price of machinery, defendant's own evidence showed that, though within five days he learned of the defects complained of, he failed to notify plaintiff of same as required by the sale contract, plaintiff's alleged breach of warranty was not available as a defense.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 806–808, 810; Dec. Dig. ⇐285.]

3. SALES ⇐445—ACTION FOR PRICE—SUBMISSION OF ISSUE—EVIDENCE.

Where, in an action for the price of machinery bought under a contract containing a warranty as to its condition and requiring that notice of defects be given within five days, the evidence showed that defendant retained the machinery without complaint for nearly three years, and, to secure an extension of time, represented that it was in good condition, and promised to pay for same if given time, and that he collected insurance on a portion which was destroyed and later sold the remainder, recommending to the purchaser that it was "good of its kind," it was error to submit to the jury whether the machinery came up to the specifications of the contract and what was the difference between its value as delivered and its value had it come up to the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1303–1308; Dec. Dig. ⇐445.]

Appeal from Superior Court, Surry County; Lyon, Judge.

Action by the Frick Company against J. E. Boles. From the judgment, plaintiff appeals. Reversed.

This is an action to recover the balance due on notes executed for the purchase price of certain machinery and to subject certain property conveyed to the payment thereof. On the 25th day of June, 1908, the plaintiff, through its agent, Dellinger of Salisbury, together with E. A. Griffeth of Winston-Salem, sold to the defendant Boles a portable engine and thresher, the purchase price to be $875. The machine was delivered on the 6th of July, 1908, and the defendant paid cash $100 at the time of the delivery, and executed three notes of $194, all dated July 6, 1908, and due as follows, November 1, 1909, November 1, 1910, and one note for $193 due November 1, 1911, and also a deed of trust in which the defendant secured said notes by the conveyance of the engine and attachments and the thresher and attachments for which the notes were executed as purchase money. It was admitted by the plaintiff that, in addition to the $100 cash, the defendant Boles had paid all of the purchase-money notes except $194 due November 1, 1910, and on this note he had paid, April 13, 1911, $27.92, and on May 22, 1911, he had also paid $38.96, and also a further unpaid note for $193 due November 1, 1911.

The material parts of the contract of sale are as follows:

Frick Company makes the following warranty with respect to machinery above mentioned, to wit:

(1) That it is well built, of good material, and when properly operated will, under like conditions, perform as well as any other machinery of the same size and rated capacity.

(2) If, after notice as hereinafter provided, and opportunity given to make machinery fulfill terms of warranty, it fails to make said machine or attachment, or defective part thereof, perform according to contract, it agrees to take back such machine or attachment, or defective part, and at its option refund the money, notes, etc., received therefor, or replace the same.

(3) If any part of the machinery proves to be defective within six months after being put into operation, it will furnish a duplicate thereof free, except freight, if said part is properly presented to agent through whom purchased, or at factory; and such defect clearly appears to be due to workmanship or material.

The purchaser agrees as follows, to wit:

(a) If machinery does not fulfill terms of warranty, to give notice in writing to the agent through whom purchased, and by registered letter to Frick Company, Waynesboro, Pa., within five days from first putting same in operation, stating in what respect said machinery fails to perform. If defects reported are such as can be remedied by purchaser, Frick Company may, by letter, suggest remedy. If such purchaser still fails to make same perform, he will immediately notify Frick Company again, at Waynesboro, Pa., by telegram or registered letter, and allow reasonable time to remedy defects, rendering at all times friendly assistance.

(b) To return machinery to place where received, if Frick Company fails, after notice as above, to make same fulfill terms of warranty.

(c) If machinery is used longer than five days from first putting same in operation, without notice of failure to fulfill warranty as required in paragraph (a) above, or if used at all after Frick Company is alleged to have failed to remedy defects, it shall operate as an acceptance of same and as a fulfillment of the terms of warranty.

The jury returned the following verdict:

(1) In what amount is the defendant indebted to the plaintiff? Answer: $160.61, with interest on same from May 22, 1911, and $193, with interest on same from July 6, 1908.

(2) Is the plaintiff entitled to the possession of the property? Answer: Yes.

(3) Did the defendants give notice in writing to the agent through whom he purchased the machinery and by registered letter to the plaintiff at Waynesboro, Pa., within five days from

first putting same in operation, stating that the machinery was defective, and in what respect it was defective, and asking the plaintiff to remedy the defect? Answer: No.

(4) If so, did plaintiff, after such notice from defendant, induce the defendant to keep and operate the machinery and try to remedy such defects? Answer: No.

(5) Was five days a reasonable time in which to test the machinery delivered to defendant? Answer: No.

(6) Did the machinery delivered by the plaintiff to defendant come up to the specifications and requirements of the written contract? Answer: No.

(7) What was the difference between the value of the machinery as delivered to defendant, and its value had it come up to contract? Answer: $200.

The plaintiff excepted to the submission to the jury of the fifth, sixth, and seventh issues. The plaintiff moved for judgment on the first, second, third, and fourth issues, which was refused, and it excepted. Judgment was entered upon the verdict, and the plaintiff appealed.

Watson, Buxton & Watson, of Winston-Salem, and Winston & Biggs, of Raleigh, for appellant. J. H. Folger, of Mt. Airy, for appellee.

ALLEN, J. [1] There was error in submitting the fifth issue to the jury because there is neither allegation nor proof that the time provided in the contract was not a reasonable time for the examination of the machinery purchased, and the question as to whether five days is a reasonable time in contracts like the one before us does not arise.

[2] On the contrary, the evidence introduced by the defendant shows that he knew of the defects of which he now complains, if they existed on the first day the machinery was operated, and that, instead of its condition improving, it grew worse.

The defendant himself testified:

"That Dellinger, the agent, was present when the machinery was set up. That the machine cut the grain of the wheat as it threshed, and defendant told him about it. Dellinger said he would remedy that. He took out one of the concaves, and after this was done he discovered that the wheat was left in the straw and it would go out of the gin with the straw and chaff to some extent. That he ran the machine, but it got worse; the engine would not pump; it was hard to make it steam; the center crank was always bending; the pump would not force water into the boiler."

And the brother of the defendant testified:

"That the machine did not do good work at the start. That he heard his brother tell Dellinger that it did not work, and he saw him take out the concave and tell him that it would get better, but in the opinion of the witness it got worse and never threshed more than half of the wheat a machine should thresh. It would get hot and stop, and a good deal of time was wasted. It didn't have the power. That he threshed his wheat the second season and he could see no difference; it wasted the wheat."

If therefore the defendant knew within the five days provided for in the contract that the machinery did not fulfill the terms of the warranty of the plaintiff, it became his duty to notify the plaintiff, as he had agreed to do, in order that the plaintiff might make repairs or supply him with new machinery, and upon failure of the plaintiff to perform this duty he agreed that he would return the machinery.

The jury has found without objection upon the part of the defendant that he failed to give this notice, and, if so, he cannot, under the authorities, have relief upon his alleged breach of warranty. Piercy v. Moore, 46 N. C. 131; Main v. Field, 144 N. C. 307, 56 S. E. 943, 11 L. R. A. (N. S.) 245, 119 Am. St. Rep. 956; Piano Co. v. Kennedy, 152 N. C. 197, 67 S. E. 488; Robinson v. Huffstetler, 165 N. C. 459, 81 S. E. 753; Oltman v. Williams, 167 N. C. 314, 83 S. E. 348.

In Robinson v. Huffstetler, supra, the court, after citing with approval 35 Cyc. 437, and Manufacturing Company v. Lumber Company, 159 N. C. 510, 75 S. E. 718, says:

"It seems therefore to be settled that when there is an express warranty in the sale or exchange of personal property, and it is a part of the contract of sale that the property is to be returned within a specified time, if not as warranted to be, that the complaining party can have no redress by reason of the warranty, in the absence of fraud, without offering to return the property within the time named."

And in the later case of Oltman v. Williams:

"It is well settled that a party relying upon and setting up a written warranty of quality in the sale of personal property is bound by the terms of that warranty and must comply with them, in order to be entitled to redress in an action to recover the purchase price. Bank v. Walser, 162 N. C. 54 [77 S. E. 1006]; Main v. Griffin, 141 N. C. 43 [53 S. E. 727]; Robinson v. Huffstetler, 165 N. C. 459 [81 S. E. 753]."

[3] Not only did the defendant fail to give notice to the plaintiff, but it appears from the record that 57 letters passed between them beginning in November, 1908, and ending in September, 1911, and that in no letter written by the defendant did he make complaint that the machinery did not satisfy the terms of the warranty. He repeatedly requested indulgence upon his notes, made frequent promises to pay, and represented the machinery to be in good condition. He wrote the plaintiff:

On November 25, 1908: "I will certainly pay you if you can wait on me. If not you will have to take the machine. It is in good condition."

On January 9, 1909: "I hope the company will wait on me a while longer. The machine is in good shape and was not used but a short time."

On January 22, 1909: "I am not in shape to pay it now, but if you will give me a chance I will certainly pay you, and if you can't wait here is the machine in good shape, well cared for, nothing broken in any way."

On November 1, 1909: "Do the best you can for me, for I am in a very close place for money. The machine is in good condition, well cared for."

And on January 3, 1910: "Hope you can wait on me a little while longer. The machine is in nice shape, in good condition."

It also appears from the evidence of the defendant that the thresher was burned in

1910, and that he collected the insurance money of $150, and he only claims to have paid $100 of the insurance to the plaintiff; and that since the commencement of this action he sold the engine and recommended it, "good of its kind," to the purchaser.

If therefore the machinery did not satisfy the terms of the warranty and the defendant knew of the defects within the five days stipulated in the contract, and if he failed to give notice to the plaintiff in order that it might make such changes as were necessary, and if the contract required the defendant to return the machinery if such changes were not made, the defendant cannot now, after retaining the machinery three or four years without complaint, rely upon a breach of the warranty, and it was therefore error to submit the sixth and seventh issues to the jury, and the plaintiff was entitled to judgment upon the first, second, third, and fourth issues.

Reversed.

(168 N. C. 582)

## MORTON et al. v. WASHINGTON LIGHT & WATER CO. (No. 40.)

(Supreme Court of North Carolina. April 14, 1915.)

WATERS AND WATER COURSES ⊂=206—WATERWORKS COMPANY—LIABILITY OF.

Where a waterworks company agreed with the city to furnish a given pressure for fire protection, citizens whose property was destroyed through fire, owing to the company's failure to furnish the required pressure, may recover against it, the contract being for their benefit.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 301; Dec. Dig. ⊂= 206.]

Walker and Hoke, JJ., dissenting.

Appeal from Superior Court, Beaufort County.

Action by Charles L. Morton and another against the Washington Light & Water Company. From judgment for plaintiffs, defendant appeals. Affirmed.

This action is a consolidation of two actions originally brought and entitled "Charles L. Morton v. Washington Light & Water Co." and "W. B. Morton, Trading as W. B. Morton & Co. v. Washington Light & Water Co." The alleged damage, in each instance, was based upon the same alleged negligence, and at the trial of the action the two causes were consolidated by consent. The plaintiff Charles L. Morton was originally suing for the destruction of a store building owned by him by fire, which occurred on the night of July 27, 1911, and the plaintiff W. B. Morton was suing for the destruction or loss of a stock of goods contained in the store at that time, and owned by the said W. B. Morton. Both plaintiffs in their complaint alleged that the defendant entered into a contract with the town of Washington in 1901 to build and maintain a waterworks system, and to furnish a certain pressure with which to fight fires; that on the night of July 27, 1911, a fire originated in a building adjoining the building of the plaintiff Charles L. Morton, and that, by reason of the negligent failure of the defendant company to furnish the pressure which it contracted to furnish, the fire, originating in the George Morton building (that is, the building adjoining the Charles L. Morton building), spread to and destroyed or burned the building of the plaintiff Charles L. Morton and the stock of goods therein owned by the plaintiff W. B. Morton. The contract stipulated that it was—

"to afford a supply of water for the use of the citizens of the town of Washington, and in order to furnish protection from fire to the property of said citizens."

The buildings were separated by a wooden partition. The building owned by Charles L. Morton was insured for the sum of $4,000, which insurance he collected. The stock of goods owned by W. B. Morton was insured for $1,000, which insurance he collected. The plaintiff Charles L. Morton in his original complaint sued for $2,000 for damage to the building, and the plaintiff W. B. Morton sued for $1,500 for loss of personal property. At the time and upon the day the cause was set for trial, the plaintiff Charles L. Morton, for the first time, asked leave of the court to amend his complaint. The court, in its discretion, over the objection of the defendant, permitted the amendment. The defendant thereupon moved the court for a continuance of the cause until the next succeeding term. This motion the court refused, but continued the cause until the next succeeding day, or for a period of about 24 hours. The following verdict was rendered by the jury:

"1. At the time of the injury to and destruction of the property of plaintiffs by fire, had the defendant water company undertaken to furnish the city of Washington a supply of water according to the plans and specifications contained in the agreement and contract of December 11, 1901, as set out in the complaint, in the quantity, under the pressure, and for the purposes therein recited? Answer: Yes.

"2. At such time was said defendant company engaged in supplying water to said city of Washington under and pursuant to said agreement and contract, and in the exercise and enjoyment of the privileges of the same, and demanding and collecting from the said city the price stipulated in the said agreement for furnishing water, at its customary times for making such collections, during the year and period in which plaintiff's loss accrued? Answer: Yes.

"3. At the time of the injury to and destruction of the property of the plaintiffs by fire, did the defendant water company fail and neglect to furnish the quantity and pressure of water it had agreed to furnish on occasion of fire in its said contract with the city of Washington? Answer: Yes.

"4. If so, was the property of the plaintiffs injured and destroyed by the negligence of defendant as alleged in the complaint? Answer: Yes.

"5. If so, what damages, if any, is the plaintiff Charles L. Morton entitled to recover of the defendant? Answer: $2,500.00 with interest.

"6. If so, what damages, if any, is the plain-

iff W. B. Morton entitled to recover of the defendant? Answer: $1,000.00, with interest."

The defendant raised the question as to its liability to the plaintiff by exception to the judgment, prayers for instruction, and by motion for judgment of nonsuit. There are other exceptions relied on which will appear in the opinion of the court. There was judgment for the plaintiffs, and the defendant appealed.

Rodman & Bonner and W. B. Rodman, Jr., both of Washington, N. C., and W. A. Wilcox, of Scranton, Pa., for appellant. Daniel & Warren and A. D. MacLean, all of Washington, N. C., for appellees.

ALLEN, J. The principles announced in Gorrell v. Water Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598, established the liability of the defendant to the plaintiffs upon the facts found by the jury and those admitted in the pleadings, and the defendant, realizing this, asks us to overrule that case. We have therefore reexamined the decisions in this and other jurisdictions, and the arguments and reasoning upon which they rest, and after full consideration have determined to adhere to the former ruling of this court. It may be conceded, as contended by the defendant, that the weight of authority, measured by number, is against the decision in the Gorrell Case, but this was known and considered at the time of its rendition, and since then, instead of receding from the position then taken, the doctrine has been affirmed in Fisher v. Water Co., 128 N. C. 357, 38 S. E. 912; Lacy v. Webb, 130 N. C. 546, 41 S. E. 549; Gastonia v. Eng. Co., 131 N. C. 368, 42 S. E. 857; Wadsworth v. Concord, 133 N. C. 594, 45 S. E. 948; Voorhees v. Porter, 134 N. C. 602, 47 S. E. 31, 65 L. R. A. 736; Kernodle v. Tel. Co., 141 N. C. 445, 54 S. E. 423, 8 Ann. Cas. 469; Helms v. Tel. Co., 143 N. C. 393, 55 S. E. 831, 8 L. R. A. (N. S.) 249, 118 Am. St. Rep. 811, 10 Ann. Cas. 643; Wood v. Kincaid, 144 N. C. 395, 57 S. E. 4; Clark v. Bonsal, 157 N. C. 275, 72 S. E. 954, 48 L. R. A. (N. S.) 191; Brady v. Randleman, 159 N. C. 436, 74 S. E. 811, and in Jones v. Water Co., 135 N. C. 554, 47 S. E. 615.

In the last case the contract was similar to the one now before us and the court said upon the right to sue:

"There can be no real contention that the plaintiff, a citizen and taxpayer, and one of the beneficiaries in the purview of this contract, cannot prosecute this action. He is the real party in interest. He is taxed with payment of his pro rata of the annual rental. The town cannot maintain this action for the loss sustained by him by reason of the defendant's failure to perform the provisions of the contract above recited. For this injury the plaintiff alone can sue. This point was discussed and settled in Gorrell v. Water Co., 124 N. C. 328 [32 S. E. 720], 46 L. R. A. 513, 70 Am. St. Rep. 598, which has been followed in Fisher v. Water Co., 128 N. C. 375 [38 S. E. 912], and cited and approved in Lacy v. Webb, 130 N. C. 546 [41 S. E. 549] and Gastonia v. Engineering Co., 131 N. C. 366 [42 S. E. 857], in which last the doctrine is elaborated. The same principle had been often affirmed prior to Gorrell's Case, to wit, that the beneficiary of a contract, though not a party to it nor expressly named therein, can maintain an action for a breach of such contract causing injury to him, if the contract was made for his benefit."

It also appears that the case has been followed in Mugge v. Tampa Waterworks, 52 Fla. 371, 42 South. 81, 6 L. R. A. (N. S.) 1171, 120 Am. St. Rep. 207, Springfield Ins. Co. v. Graves County Water Co., 120 Ky. 40, 85 S. W. 205, and in Guardian Trust Co. v. Fisher, 200 U. S. 57, 26 Sup. Ct. 186, 50 L. Ed. 367. The court, affirming the principle, says:

"It is true that a company contracting with a city to construct waterworks and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure on the part of the company. It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act, but if the company proceeds under its contract, constructs, and operates its plant, it enters upon a public calling. It occupies the streets of the city; acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling; and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort."

Another reason for refusing to sustain the position of the defendant is that it entered into the contract with the city of Washington in 1901, two years after the Gorrell Case was decided, and as all laws relating to the subject-matter of a contract enter into and form a part of it as if expressly referred to or incorporated in its terms (Lehigh Water Co. v. Easton, 121 U. S. 391, 7 Sup. Ct. 916, 30 L. Ed. 1059; Wooten v. Hill, 98 N. C. 53, 3 S. E. 846), it was within the contemplation of the parties at the time the contract was made that the defendant would be liable to the citizen for loss by fire caused by its negligent failure to perform the terms of the contract, as held in the Gorrell Case, and to hold otherwise now would relieve the defendant of a responsibility which it knowingly assumed.

The other exceptions relied on by the defendant will be considered in the order in which they are discussed in the briefs.

1. The amendment to the complaint, which was filed by permission of the court on the day before the trial, only added an additional item of damage, and did not charge the issues raised by the pleadings, and it does not appear in the record that the time allowed the defendant to prepare its evidence

was not ample. The rule as to a continuance when new parties are made or amendments allowed, is correctly stated in Watson v. Railroad, 164 N. C. 180, 80 S. E. 175, where the court says:

"If new parties are made or amendments allowed, which change the issues, and a party is not prepared with his evidence to meet the changed conditions, he is entitled to a continuance as a matter of right (Dobson v. Railroad, 129 N. C. 291 [40 S. E. 42]), but ordinarily the ruling of the judge upon a motion for continuance is a matter of discretion, and not reviewable, and in this case it appears that there was no change in the pleadings or issues, and no suggestion that it would be more prejudicial to the defendant to try at that time than at any other."

It does not appear that the defendant has been prejudiced, or that the discretion rested in the trial judge has been abused, and the exception to the refusal to continue must therefore be overruled.

2. The plaintiffs introduced evidence tending to prove that the capacity of the defendant's plant had decreased since its installation, and the defendant's evidence was that it had at all times complied with its contract. The plaintiffs further introduced evidence, the defendant objecting thereto, that the defendant had failed to supply water according to its contract at other fires before the fire which destroyed the property of the plaintiffs. This evidence does not fall under the condemnation of the rule, which forbids the proof of other negligent acts as evidence of the negligence complained of, and was competent upon the question as to the condition and capacity of the plant at the time of the fire. There were no exceptional circumstances connected with the other fires; and, so far as the evidence disclosed, the plant was in its usual condition. If so, and the capacity had decreased, as the plaintiffs contend, the fact that it did not furnish water according to the contract at other fires would be some proof that it could not do so at the time of the fire complained of. The evidence comes within the principle of the case of Blevins v. Cotton Mills, 150 N. C. 493, 64 S. E. 428.

3. A witness for the plaintiff was asked a question by the defendant on cross-examination which the court refused to permit the witness to answer; but, as there is nothing to indicate what the answer of the witness would have been, the exception to the action of the court cannot be considered. Wallace v. Barlow, 165 N. C. 676, 81 S. E. 924.

4. The defendant introduced its president and superintendent, each of whom testified substantially that the plant of the defendant was at all times properly equipped and maintained, and the plaintiffs were permitted to prove, upon cross-examination and by other witnesses, declarations of the president and superintendent, made after the fire, tending to contradict their testimony. This does not come within the principle excluding the declarations of an agent as to a past occurrence, and the evidence was properly admitted. The rule and the exception are applied in Pate v. Steamboat Co., 148 N. C. 573, 62 S. E. 614, as follows:

"Of course, the declarations of the boat hand, made after the occurrence, are incompetent for the purpose of proving the dangerous condition of the bateau. Southerland v. Railroad, 106 N. C. 100 [11 S. E. 189]. But, having been examined by the defendant as its witness as to the condition of the bateau, it was competent to impeach or contradict his evidence upon that point by his declarations on that subject to Glover. To lay the foundation for offering such impeaching evidence, it was proper to ask the witness on cross-examination the question objected to."

5. The plaintiffs introduced evidence of the value of the property destroyed by the fire. The defendant introduced the complaint, in which it is alleged that this property was valued for taxation at its *true value*, and then offered the tax list for the purpose of proving the value for taxation to be less than as shown by the evidence for the plaintiffs, which the court excluded. Authority can be found in support of the general proposition that the tax list is inadmissible upon the question of value, but in none of the cases was the fact present as in this that the party against whom it was offered had alleged that the tax list showed the true value. If the plaintiff had made a declaration as to value on the streets, no one would question the right to offer this declaration against him, nor would the right to look at the tax list to ascertain the value be denied if it had been attached to the complaint as an exhibit. If so, it can make no difference as to the competency of the evidence that the true value appeared on the tax list in the office of the sheriff or of the register of deeds instead of attaching the list to his complaint; and, in our opinion, the evidence ought to have been received.

This entitles the defendant to a new trial, but it is restricted to the issue of damages.

Partial new trial.

BROWN, J. (concurring in result). I recognize the fact that the overwhelming weight of authority, including that of the Supreme Court of the United States, is against the decisions of this court in the Gorrell, Fisher, and Jones Cases, cited in the opinions in this case. But all three of those cases were decided and the opinions published before the contract in this case was entered into. Those decisions were well known to be the law of North Carolina when the franchise given to the defendant was applied for, and when it was agreed upon and its terms accepted. Whether those cases were correctly decided or not, they were the accepted law of this state at that time, and upon well-established principles entered into and formed a part of the contract under which the defendant operated, unless there is something to be found in the contract excluding such hypothesis. In referring to this well-settled rule of law, Mr. Justice Walker says in Hill v. Railroad,

143 N. C. 576, 55 S. E. 854, 9 L. R. A. (N. S.) 606:

"We adopted that rule in Long v. Walker, 105 N. C. 109 [10 S. E. 858], where it was held that a former adjudication of the court, in construing a statute or the organic law, should stand when it has been recognized for years, and in such a case the principle settled or the meaning given to the statute becomes a rule for guidance *in making contracts*, and also a rule of property, and that it should not be disturbed even though the conclusion reached may not be satisfactory to the court at the time the same matter is again presented."

Under the decisions of this court, the contract was made by the city for the benefit of its citizens, and they had a right to sue on it for a breach thereof. It was perfectly competent for the defendant to have inserted a clause in the contract excluding such right, or providing that the defendant would indemnify and hold harmless the city, or that the city only should sue. It could easily have been made to appear from the contract, if such was the agreement of the parties, that the defendant was dealing exclusively with the city, and was accountable only to it. Taking this contract as a whole, there is nothing in it from which we can infer that the city alone must sue for its breach.

WALKER, J. (dissenting). The quotation from the contract between the town of Washington and S. S. Spruks, predecessor of defendant, which appears in the opinion of the court, was taken from the first preamble of the agreement, and is of no special significance when viewed in the light of subsequent provisions, as it should be (Gudger v. White, 141 N. C. 507, 54 S. E. 386; Triplett v. Williams, 149 N. C. 394, 63 S. E. 79, 24 L. R. A. [N. S.] 514; Beacom v. Amos, 161 N. C. 357, 77 S. E. 407), and considered with reference to the principles of law recognized and applied by *all* the authorities. I have said *all* the authorities because it will be found, upon the most cursory examination, that the cases to which the court refers in its opinion do not present the facts we have in this case. but those which are essentially different, as I will show. It is well, in the beginning of the discussion, to understand precisely the terms of this contract, so that I may make it perfectly clear that it bears no legal analogy to those contracts which were involved in the cases relied on by the court. An analysis of the contract will place the matter squarely before us, upon its own legal merits, and without regard to the construction or enforcement of agreements having different phraseology and therefore susceptible of a different meaning. The general scope of the contract shows that it was made for the purpose of supplying the town of Washington with water for the domestic use of its citizens, for use at public fountains, for the operation of its sewer system, if it should be established during the life of the contract, and for fire protection. The consideration for these public benefits was to be paid by the town, in the form of rent for the hydrants, at so much for each of them per year, and in addition thereto "a franchise or license" to construct and operate the contemplated system of waterworks for 30 years and to use the streets of the town for that purpose. It is recited in the contract that the town granted the franchise and agreed "to rent the hydrants," not less than 50 in number, in consideration of the benefits that will be derived by the town and its inhabitants and the water supply for public use. Provision is also made for an additional number of hydrants at the same price as for the original ones. Then come the provisions:

(1) "The commissioners for the town of Washington agree to use the said hydrants for the extinguishment of fires only except as hereinafter provided. It is expressly agreed that if said rent be not paid when due as above specified, then the water supply may be cut off without any liability to any one from said company."

(2) "A constant water pressure equal to fifty pounds per inch for ordinary service shall be maintained, which upon the occasion of fires shall, *if necessary*, be increased by means of suitable pumps to seventy-five pounds per inch." (In order to meet this requirement, a pump-house, with machinery, fixtures, and power sufficient to supply 360,000 gallons of water per day and standpipe with a capacity of 50,000, are agreed to be maintained.)

(3) "Water from the fire hydrants may be used for the extinguishment of fire and for the necessary fire practice only, provided that not more than two companies be allowed to practice on the same day without permission from the water company, and provided further, that said practice shall not be oftener than once in each (week) and not more than two hydrants shall be open at one time. The fire hydrants rented by the town of Washington shall constantly furnish effectual fire streams without the aid of portable engines. The said fire hydrants shall be kept constantly supplied with water for fire service, and shall be maintained in effectual working order."

(4) It is then provided that the fire hydrants shall be under the control and inspection of the chief of the fire department of the town, and if any hydrant shall be out of order at any time, after notice thereof, the owner is required to repair the same, and upon their failure to do so, a deduction of $5 per week from the rental shall be made and continue until the proper repairs are made, "which shall be the limit of any damage or liability."

(5) The owner, after the system shall be completed and in operation, "shall not suffer the suspension of the supply of water, either for fire or domestic purposes, unless the same shall be caused by accident or cause beyond his control; and, in case of accident or other cause, said Spruks shall forthwith proceed with all possible diligence to repair and put the same in successful operation, and if said Spruks, his associates or assigns suspend or fail to make such repairs, as herein required, then the rights and privileges granted hereby shall be forfeited."

(6) The contract was evidenced by an ordinance of the town, which was accepted by S. S. Spruks, and with reference thereto it is provided as follows: "This ordinance shall become binding upon the town of Washington in the event that the said S. S. Spruks, his associates or assigns, shall, within thirty days after the passage and publication of this ordinance, file with the town clerk of the said town of Washington, its written acceptance of the terms, obligations and conditions of this ordinance, and upon the filing within thirty days thereafter, of

a bond, to be approved by the board of commissioners for the town of Washington in the penal sum of $2,500.00, conditioned for the faithful performance of the erection of said plant as is herein provided for, and thereupon this ordinance shall constitute the contract, and shall be the measure of the rights and liabilities of the town of Washington and of the said S. S. Spruks, his associates and assigns."

There is a provision in the contract that if S. S. Spruks or his assigns "cannot get a supply of water, such as is required by section 2 of this ordinance, at a reasonable expense, (he) shall have the right to surrender the franchise and the ordinance shall be void."

Section 2 refers to the pure quality of the water for domestic purposes.

The plaintiffs allege that the alleged cause of action accrued to them by reason of the defendant's negligent failure to furnish sufficient water and pressure at the hydrants.

In view of the above provisions of the contract *now* under consideration, it may be well to state, at the outset, that it bears no legal resemblance to those which were construed in Gorrell v. Water Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598, Fisher v. Water Co., 128 N. C. 357, 38 S. E. 912, Mugge v. Tampa Waterworks, 52 Fla. 371, 42 South. 81, 6 L. R. A. (N. S.) 1171, 120 Am. St. Rep. 207, Springfield Ins. Co. v. Graves County Water Co., 120 Ky. 40, 85 S. W. 205, and Guardian Trust Co. v. Fisher, 200 U. S. 57, 26 Sup. Ct. 186, 50 L. Ed. 367, the cases mainly relied on by the court. As to the other cases cited, viz., Lacy v. Webb, 130 N. C. 546, 41 S. E. 549, Gastonia v. Eng. Co., 131 N. C. 368, 42 S. E. 857, Wadsworth v. Concord, 133 N. C. 594, 45 S. E. 948, Voorhees v. Porter, 134 N. C. 602, 47 S. E. 31, 65 L. R. A. 736, Kernodle v. Tel. Co., 141 N. C. 445, 54 S. E. 423, 8 Ann. Cas. 469, Helms v. Tel. Co., 143 N. C. 393, 55 S. E. 831, 8 L. R. A. (N. S.) 249, 118 Am. St. Rep. 811, 10 Ann. Cas. 643, Wood v. Kincaid, 144 N. C. 395, 57 S. E. 4, Clark v. Bonsal, 157 N. C. 275, 72 S. E. 954, and Brady v. Randleman, 159 N. C. 436, 74 S. E. 811, they merely refer to the general doctrine that, within a certain limit, a person for whose benefit a contract is made may sue upon it, and the limitation of the principle is that the contract must have been made *directly* for his benefit. The Gorrell and Fisher Cases involved the construction of one and the same contract between the city of Greensboro and the Water Supply Company, which contained this clause:

"Said water company shall be responsible for all damage sustained by the city, or any individual or individuals, for any injury sustained from the negligence of the said company, either in the construction or operation of their plant."

And the same may be said of the other two cases cited, Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536, and Mugge v. Tampa Waterworks, 52 Fla. 371, 42 South. 81, 6 L. R. A. (N. S.) 1171, 120 Am. St. Rep. 207. In the Kentucky case, there was a separate contract between the consumer and the water company, which required the fire pressure to be furnished, and in the Florida case there was an express provision in favor of the consumer. That case was heard on demurrer and, of course, we understand that the facts stated in the declaration are to be taken as admitted, and the allegation is therein made that the company stipulated that it would protect the property of the consumer against injury or destruction by fire or, at least, exercise reasonable care to do so. This special understanding was broadly stated in the complaint and admitted by the demurrer. It is conceded in the opinion of the court in that case that the great weight of authority is contrary to its ruling, and a large number of cases decided in the other states are cited which hold the other way. Referring to the Kentucky case, the Supreme Court of Louisiana strongly criticizes it. The position of the Louisiana court in 1900, as stated in Planters' Oil Mill v. Monroe Waterworks Co., 52 La. Ann. 1243, 27 South. 684, was much like that taken in the Paducah and Gorrell Cases, but in 1905 that case was overruled, without a dissent, in Allen & Currey Mfg. Co. v. Shreveport Waterworks Co., 113 La. Ann. 1091, 37 South. 980, 68 L. R. A. 650, 104 Am. St. Rep. 525, 2 Ann. Cas. 471, a majority of the court having taken part in the earlier decision. In the later case, the court says:

"We conclude that the engagement of the defendant company to the city of Shreveport to furnish water to her for the use of her fire department was not a stipulation pour autrui. We have discussed the case thus far as if the question it involves were res nova; but the exact question has been decided repeatedly in other jurisdictions, and once already by this court. Upon the latter decision—Planters' Oil Mill v. Monroe Waterworks & Light Co., 52 La. Ann. 1243, 27 South. 684—the plaintiff places much reliance. But for the reasons hereinabove given, we are not satisfied with the conclusion there reached, and we have concluded to overrule it. By doing so we take this court from among a slender minority, and range it among the very large majority, of the courts of the country which have had occasion to consider this question."

This was said after a very able and learned discussion of the matter from every possible standpoint and the citation of all the cases upon the subject, with a careful review of many of them. A petition to rehear that case was filed and afterwards denied by the court. We have specially referred to the case, as it contains an unusually clear and logical treatment of the question, and the conclusion, which was most carefully considered; involved the overturning of a prior decision. But the court did not hesitate to do this and place itself in line with the numerous cases which were in direct conflict with its former ruling. In Lovejoy v. Bessemer Waterworks Co., 146 Ala. 374, 41 South. 76, 6 L. R. A. (N. S.) 822, 9 Ann. Cas. 1229, the Chief Justice considers the question at length, and reviews the entire range of authorities. He says:

"The overwhelming weight of authority is against the right of the plaintiff to maintain this action. The reason why he may not do so

is that there is a want of privity between him and the defendant which disables him either from suing for a breach of the contract or for the breach of duty growing out of the contract. It is impossible, at this late day, to say anything new upon the subject, and it would be affectation to attempt any elaborate discussion of the question involved. * * * Only two courts in the United States, as far as we can ascertain, have sustained an action of this kind. The first case is Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340 [12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536], which cited no authorities, and in which the holding was unnecessary, since there was in that case a private contract between the water company and the consumer which required the fire pressure to be furnished. The later Kentucky cases but followed the first decision. In Gorrell v. Greensboro Water Supply Co., 124 N. C. 328 [32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598], it was held by a divided court that a similar action would lie. The decision was rested upon the principle, stated by the court in general terms, that one not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach, and many cases are cited which are assumed to sustain the general proposition, which was stated without qualification. It is not true, however, that the principle can be maintained to the full extent and in the unqualified terms stated by the Supreme Court of North Carolina in the Gorrell Case."

The Florida case had not been reported, if it had been decided, at that time. The court, in Hone v. Presque Isle Water Co., 104 Me. 217, 71 Atl. 769, 21 L. R. A. (N. S.) 1021, delivered a strong opinion, denying the right of a consumer to recover upon such a contract as we have in this record. Referring to the cases to the contrary, it said:

"On the other hand, three cases are cited in support of the plaintiff's contention that such an action for negligence is maintainable in favor of an individual owner of property against a water company under contract with the municipality to furnish a supply of water. The first case in which this doctrine is held is Paducah Lumber Co. v. Paducah Water Co., 89 Ky. 340 [12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536]. But it distinctly appears in the opinion in that case that there was a private contract directly between the water company and the plaintiff lumber company, and no cases are cited in the opinion, and the case itself is not an authority, to sustain the plaintiff's contention at bar. Gorrell v. Greensboro Water Supply Co., 124 N. C. 328 [32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598], and Mugge v. Tampa Waterworks Co., 52 Fla. 371 [42 South. 81, 6 L. R. A. (N. S.) 1171, 120 Am. St. Rep. 207], follow the Paducah Case in Kentucky, although the facts are materially different. It is sufficient to observe that the reasoning in those cases is not satisfactory."

Speaking for myself, I do not concur in the last comment of that court with reference to the Gorrell and Mugge Cases. The special clause in the Gorrell contract making the company liable to the consumer was not reported, and therefore the court was misled as to its true nature. It is set out in German Alliance Ins. Co. v. Home Water Co., 226 U. S. 220, 33 Sup. Ct. 32, 57 L. Ed. 195, 42 L. R. A. (N. S.) 1000 (to which we will hereafter refer), and some stress laid upon it, as, perhaps, differentiating it from the other cases, and in the Mugge Case, as I have already shown, the plaintiff stated the contract his own way, according to his conception of it, and the demurrer admitted the allegation, which contained a clause of special liability to the consumer. The Paducah, Gorrell, and Mugge Cases may therefore be sustained upon this ground, provided it is sound doctrine that it is within the power of a municipal corporation to make such a contract for the individual inhabitant of the town or city, which some of the cases seriously question, but it is not necessary that I should pause to discuss that matter. It is stated in note to Howsmon v. Trenton Water Co., 23 L. R. A. at page 147:

"The general doctrine deducible from all opinions is that the waterworks company is not liable for the inadequate supply of water for fire purposes, under a contract with a city or corporation to furnish water for the extinguishment of fire."

The same is substantially said in 21 L. R. A. (N. S.) 1021, where all the more recent cases on the subject are collected, presenting a uniform course of decision, the three cases deciding otherwise being exceptional in their character, because of the special clause by which the water company stipulates for its responsibility directly to the consumer. At page 1021 of 21 L. R. A. (N. S.) note to Hone v. Water Co., supra, the following conclusion, after a minute consideration of all the cases, is thus stated:

"The great weight of authority denies the right of a property owner to maintain an action against the water company for loss of his property proximately resulting from its failure to provide sufficient water for fire purposes, as required by its contract with the municipality."

In order to show the practical unanimity of the courts upon the principle just stated, I have cited some of the leading cases in a note appended to this opinion.

But a very luminous discussion of the question will be found in a case recently decided by the Supreme Court of the United States (German Alliance Insurance Co. v. Home Water Co., 226 U. S. 220, 33 Sup. Ct. 32, 57 L. Ed. 195, 42 L. R. A. (N. S.) 1000 [December 2, 1912]), in which the opinion was written by Mr. Justice Lamar. It is of great practical value, as the matter is considered from the viewpoint of the difference between the contracts passed upon in the Paducah, Gorrell, and Mugge Cases and those upon which a large number of the cases were decided. It also shows conclusively that the case of Guardian Trust Co. v. Foster, 200 U. S. 57, 26 Sup. Ct. 186, 50 L. Ed. 367, opinion by Mr. Justice Brewer, which is much relied on in the opinion of the court in the case at bar, is really no authority for the position now taken. The question in the Fisher Case related entirely to the character of the cause of action therein, whether in contract or tort, and the court simply followed the construction of our statute upon the subject by this court. Referring

to the Fisher Case, the court in G. A. Insurance Co. v. Home Water Co., says:

"It was urged, among other things, by the bondholders that the suit in the state court was really for breach of contract, and that entering the judgment as for a tort did not change the nature of the action so as to entitle the plaintiff to the benefits of the North Carolina statute. It was that question alone, as to the character of the suit and judgment, which was before this court. What was said in the opinion must be limited, under well-known rules, to the facts and issues involved in the particular record under investigation. The Fisher Case could not have decided the primary question as to the right of the taxpayer to sue, for that issue had been finally settled by the state court. It raised no federal question, and was not in issue on the hearing in this court. Neither did the Fisher Case overrule the principle, announced in National Bank v. Grand Lodge, 98 U. S. 123, 124 [25 L. Ed. 75], that a third person cannot sue for the breach of a contract to which he is a stranger, unless he is in privity with the parties and is therein given a direct interest."

That disposes of the Fisher Case, 200 U. S. 57, 26 Sup. Ct. 186, 50 L. Ed. 367, as an authority against my view. Justice Lamar, in the later case of G. A. Ins. Co. v. H. Water Co., just cited by me, shows conclusively that the doctrine upon which the plaintiff relies cannot be sustained. He says (226 U. S. at page 230, 33 Sup. Ct. at page 35, 57 L. Ed. 195, 42 L. R. A. [N. S.] 1000):

"Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit. For, as said by this court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, they 'may have had an indirect interest in the performance of the undertakings, but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names.' Nat. Bk. v. Grand Lodge, 98 U. S. 123, 124 [25 L. Ed. 75]; Hendrick v. Lindsay, 93 U. S. 143, 149 [23 L. Ed. 855]; National Savings Bank v. Ward, 100 U. S. 195, 202, 205 [25 L. Ed. 621]. Here the city was under no obligation to furnish the manufacturing company with fire protection, and this agreement was not made to pay a debt or discharge a duty to the Spartan Mills, but, like other municipal contracts, was made by Spartanburg in its corporate capacity, for its corporate advantage, and for the benefit of the inhabitants collectively. The interest which each taxpayer had therein was indirect—that incidental benefit only which every citizen has in the performance of every other contract made by and with the government under which he lives, but for the breach of which he has no private right of action. He is interested in the faithful performance of contracts of service by policemen, firemen, and mail contractors, as well as in holding to their warranties the vendors of fire engines. All of these employés, contractors, or vendors are paid out of taxes. But for the breaches of their contracts the citizen cannot sue, though he suffer loss because the carrier delayed in hauling the mail, or the policeman failed to walk his beat, or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed by fire. 1 Beven, Negligence in Law (3d Ed.) 305; Pollock on Torts (8th Ed.) 434, 547; Davis v. Clinton, 54 Iowa, 59, 61 [6 N. W. 126, 37 Am. Rep. 185]. Each of these promisors of the city, like the water company here, would be liable for any tort done by him to third persons. But for acts of omission and breaches of contract he would be responsible to the municipality alone. To hold to the contrary would unduly extend contract liability, would introduce new parties with new rights, and would subject those contracting with municipalities to suits by a multitude of persons for damages which were not, and in the nature of things could not have been, in contemplation of the parties."

He directs attention to the special feature in the Gorrell contract, by which the water company undertook to become directly responsible to the injured consumer, as one of its patrons, and this applies equally to the Paducah, Gorrell, and Mugge Cases. The contract, as shown in this record, is substantially like the one construed in Insurance Co. v. Home Water Co. I have quoted somewhat at length from the latter case, as it is a weighty authority and some of the reasons for the conclusion reached by the court are very clearly and strongly stated. The opposing cases may well stand as correct decisions upon the particular facts presented in them, but they cannot be regarded as authorities for the plaintiff's right to recover in this case, where the contract is substantially different.

In Jones v. Water Co., 135 N. C. 553, 47 S. E. 615, the plaintiff appealed, and a new trial was given because of an erroneous charge of the judge in regard to the stipulation of the contract as to notice. The validity of the cause of action was not questioned, though discussed incidentally, the court treating the contract as one made for the direct benefit of the consumer. There was a provision in that contract for a forfeiture of the rent, and a cancellation of the contract if the water company failed to furnish an adequate supply of water for extinguishing fires, but this clause was not adverted to, and the judgment of this court, giving a new trial, was based on the single error in the charge. The contract now before us, as will be seen by reference to the statement of facts, provides a specific remedy in case of a breach. Speaking of a contract like the one herein sued on, Page on Contracts, § 1313, says that the great weight of authority holds that there can be no recovery, citing many cases in the note to sustain the text.

Every case should be tried by the touchstone of its own facts, and there should be no other criterion by which to test the correctness of its decision and its scope and influence as a precedent. Expressed in homely phrase, "Every tub must stand upon its own bottom." The contract in this case, when read as a whole and without severing any particular clause from its context, evidences a purpose on the part of the water company to avoid liability for such damages as are now claimed, and to so word the agreement as to confine the remedy for a breach to a forfeiture of the rents, or if continued for the specified time of 30 days, to a forfeiture of all rights under the contract, or to restrict any damages for a breach to those re-

coverable by the town alone. The parties undoubtedly had the right to make such a contract, and it should be construed as they have written it, and the case should not be governed by precedents based upon an entirely different state of facts. We are not at liberty to make a contract for the parties, but can only enforce the one they have made for themselves.

In the case of Ancrum v. Water Co., 82 S. C. 284, 64 S. E. 151, 21 L. R. A. (N. S.) 1029, a case analogous to this one in its facts, the court, by Justice Woods, in a well-considered opinion, held:

"The obligations of a water company to a citizen of a city with which it has contracted to furnish water for fire protection for damage sustained by negligent failure of the company to supply sufficient water pressure during a fire are limited by the contract between the city and the company."

The contract between the city of Camden and the water company, it was further held, did not create any liability on the part of the latter to an individual, who was an inhabitant and taxpayer of the city, for a loss sustained by fire, which would have been extinguished if the water company had not neglected to comply with its contract in keeping the proper pressure on its water pipes. The court also stated that when the city employed the water company to construct and operate the waterworks, instead of doing so itself, under the *permission* given in its charter, the liability of the water company was exactly that of the city, under similar circumstances, and no more, and, further, that the parties could provide in the contract what should be the damages if there was a breach. "Equally free were the city and water company to agree on such sanctions and penalties as they saw fit for the enforcement of the obligations assumed by the water company" is the language of the court.

The cases in at least 30 out of 34 states of the Union, which have passed upon the question, hold that the water company is not liable: (1) Because there is no privity of contract where there is no obligation, except the general one to furnish water and pressure for the extinguishment of fires, and no agreement of the company to be directly responsible to the citizen for losses by failure to do so; (2) that the municipality is under no legal duty to contract for a supply of water for such a purpose, unless it is imposed by its charter, and therefore no liability to an inhabitant could arise out of such a contract when there is such a claim; (3) that the town has no power to make any such contract in behalf of its citizens, except collectively and in discharge of its public duty, as it is not within its corporate capacity to do so; (4) that where there is no special provision, as in the Gorrell, Paducah, and Mugge Cases, creating a liability to each inhabitant, who suffers a loss from fire, the contract is restricted, in its operation, to damages suffered by the municipality itself, on account of a breach to supply the necessary quantity and pressure to protect property. "The violation of a contract entered into with the public, the breach being by mere omission or nonfeasance, is no tort, direct or indirect, to private property of an individual, though he is a member of the community and a taxpayer to the government. We are unable to see how a contractor with the city to supply water to extinguish fires commits any tort by failure to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law." Fowler v. A. C. Waterworks, 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313. There are other reasons assigned, but those stated are the principal ones. All will be found in the authorities cited in the note to this opinion, and especially in G. A. Ins. Co. v. Home Water Co., 226 U. S. 220, 33 Sup. Ct. 32, 57 L. Ed. 195, 42 L. R. A. (N. S.) 1000; Hone v. P. I. Water Co., 104 Me. 217, 71 Atl. 769, 21 L. R. A. (N. S.) 1021; Holloway v. M. G. & Water Co., 132 Ga. 387, 64 S. E. 330; Ancrum v. Water Co., 82 S. C. 284, 64 S. E. 151, 21 L. R. A. (N. S.) 1029; Hall v. Passaic, 83 N. J. Law, 771, 85 Atl. 349, 43 L. R. A. (N. S.) 750; Fitch v. S. Water Co., 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; and Davis v. C. Waterworks, 54 Iowa, 57, 6 N. W. 126, 37 Am. Rep. 185; where there is an elaborate discussion of the question, with a collation of all the cases, many of which have not been cited herein.

It is suggested that all contracts are presumed to be made with reference to existing law, and Hill v. Railroad Co., 143 N. C. 576, 55 S. E. 854, 9 L. R. A. (N. S.) 606, is cited in support of this suggestion. The doctrine may be conceded, but it has no application here, as this court had not decided the law to be as is now asserted. In Gorrell v. Greensboro Water Supply Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598, which is mainly relied on, the contract was radically different from this one, and expressly provided for the protection of individual property and afforded a remedy for a breach of the stipulation, as we have shown. The premise of this argument is therefore disproved, for it assumes something in regard to the law which has no existence in fact, and the deduction, therefore, by reasoning from it, must be erroneous.

In view of the above reasons and the overwhelming weight of authority in the federal and state courts supporting the view herein expressed, I am compelled, regretfully, to differ with my Brethren of the majority, and to dissent from the opinion of the court and its judgment, as I think there should be a nonsuit, instead of a new trial.

HOKE, J., concurs in this dissent.

NOTE.

Boston Safe Dep. Co. v. Salem Water Co. (C. C.) 94 Fed. 238; Metropolitan Trust Co. v. Topeka Water Co. (C. C.) 132 Fed. 702; Love-

joy v. Bessemer Waterworks Co., 146 Ala. 374, 41 South. 76, 6 L. R. A. (N. S.) 429, 9 Ann. Cas. 1068; Collier v. Newport Water L. & P. Co., 100 Ark. 47, 139 S. W. 635, Ann. Cas. 1913D, 458; Town of Ukiah v. Ukiah Water Co., 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107; Nickerson v. Bridgeport Hydraulic Co., 46 Conn. 24, 33 Am. Rep. 1; Holloway v. Macon Gaslight & Water Co., 132 Ga. 387, 64 S. E. 330; Bush v. Artesian, etc., Water Co., 4 Idaho, 618, 43 Pac. 69, 95 Am. St. Rep. 161; Davis v. Clinton Waterworks Co., 54 Iowa, 57, 6 N. W. 126, 37 Am. Rep. 185; Becker v. Keokuk, 79 Iowa, 419, 44 N. W. 694, 18 Am. St. Rep. 377; Peck v. Sterling Water Co., 118 Ill. App. 533; Rostad v. Chicago, 163 Ill. App. 63; Fitch v. Seymour Water Co., 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; Mott v. Cherryvale Water & Mfg. Co., 48 Kan. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. Rep. 267; Allen & Currey Mfg. Co. v. Shreveport Water Co., 113 La. Ann. 1091, 37 South. 980, 68 L. R. A. 650, 104 Am. St. Rep. 525, 2 Ann. Cas. 471; Hand v. Brookline, 126 Mass. 324; Hone v. Presque Isle Water Co., 104 Me. 217, 71 Atl. 769, 21 L. R. A. (N. S.) 1021; Wilkinson v. Light, Heat & Water Co., 78 Miss. 389, 28 South. 877; Howamon v. Trenton Water Co., 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; Metz v. Cape Girardeau Waterworks Co., 202 Mo. 324, 100 S. W. 651; Eaton v. Fairbury Waterworks Co., 37 Neb. 546, 56 N. W. 201, 21 L. R. A. 653, 40 Am. St. Rep. 510; Ferris v. Carson Water Co., 16 Nev. 44, 40 Am. Rep. 485; Hall v. Passaic, 83 N. J. Law, 771, 85 Atl. 349, 43 L. R. A. (N. S.) 750; Smith v. Great S. Bay Water Co., 82 App. Div. 427, 81 N. Y. Supp. 812; Wainwright v. Queens, 78 Hun, 146, 28 N. Y. Supp. 987; Akron Waterworks Co. v. Brownless, 10 Ohio Cir. Ct. R. 620; Blunk v. Dennison, 71 Ohio St. 250, 73 N. E. 210, 2 Ann. Cas. 852; Lutz v. Tahlequah Water Co., 29 Okl. 171, 118 Pac. 128, 36 L. R. A. (N. S.) 568; Thompson v. Springfield Water Co., 215 Pa. 275, 64 Atl. 521, 7 Ann. Cas. 473; Ancrum v. Camden Water, Light & Ice Co., 82 S. C. 284, 64 S. E. 151, 21 L. R. A. (N. S.) 1029; Cooke v. Paris Mt. Water Co., 82 S. C. 235, 64 S. E. 157; Foster v. Lookout Water Co., 3 Lea (Tenn.) 42; House v. Houston Waterworks Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; Wilkins v. Rutland, 61 Vt. 336, 17 Atl. 735; Nichol v. Huntington Water Co., 53 W. Va. 348, 44 S. E. 290; Britton v. Green Bay Waterworks Co., 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856; Krom v. Antigo (Wis.) 140 N. W. 41.

(168 N. C. 621)

## KING v. McRACKAN et al. (No. 282.)

(Supreme Court of North Carolina. April 14, 1915.)

1. ACKNOWLEDGMENT ⟸37 — EXECUTION OF DEEDS BY WIFE—VALIDITY.

A deed executed by a married woman alone and without private examination is not valid.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 183, 199–216; Dec. Dig. ⟸37.]

2. ADVERSE POSSESSION ⟸71—"COLOR OF TITLE"—DEED OF MARRIED WOMAN.

A deed of a married woman without private examination is, if otherwise sufficient, "color of title," so that possession thereunder for the statutory period will ripen into title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415–429; Dec. Dig. ⟸71.

For other definitions, see Words and Phrases, First and Second Series, Color of Title.]

3. DEEDS ⟸86—RECORDING—EFFECT OF DEFECTS.

A deed defectively probated will be treated as unregistered, though placed on the registry.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 226; Dec. Dig. ⟸86.]

4. ADVERSE POSSESSION ⟸82—COLOR OF TITLE — "PURCHASER FOR A VALUABLE CONSIDERATION."

Under the Connor Act of 1885 (Laws 1885, c. 147), an unregistered deed is valid as between the parties and as to all others except purchasers for value and creditors, and is not color of title as against a subsequent "purchaser for a valuable consideration," which means a purchaser paying a fair and reasonable price according to the common mode of dealing between vendors and purchasers.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 468–471; Dec. Dig. ⟸82.

For other definitions, see Words and Phrases, First and Second Series, Purchaser for a Valuable Consideration.]

5. EVIDENCE ⟸353 — RECITALS IN DEEDS — EVIDENCE AS AGAINST THIRD PERSONS.

A recital in a deed of payment of consideration is only evidence of payment as between parties, and is not competent as to a stranger.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404–1428, 1430, 1431; Dec. Dig. ⟸353.]

6. VENDOR AND PURCHASER ⟸244 — COLOR OF TITLE—PURCHASER FOR VALUE.

Evidence *held* to show that a purchaser was not a purchaser for value; and hence an unregistered deed under which one claimed possession was color of title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 609–611; Dec. Dig. ⟸244.]

7. APPEAL AND ERROR ⟸959 — QUESTIONS REVIEWABLE—DISCRETION OF TRIAL COURT —ALLOWANCE OF AMENDMENTS OF PLEADINGS.

Allowance of an amendment to the complaint to conform to the proof is not reviewable in the absence of an abuse of discretion of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825–3831; Dec. Dig. ⟸959.]

Appeal from Superior Court, Columbus County; Allen, Judge.

Action by D. F. King against Donald McRackan and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action to recover land in which the plaintiff claims title under the following chain of title:

(1) Deed from Shade Wooten to his wife, Sarah E. Wooten, dated August 4, 1880, registered June 7, 1882. It was admitted that the defendants claimed title under a deed from Sarah E. Wooten and her husband, Shade Wooten.

(2) Deed from Sarah E. Wooten to Jessie D. Wooten, dated June 20, 1893, registered December 30, 1893. The defendants objected to this deed on the ground that it is insufficient to pass the title to the land therein described. Shade Wooten, the husband of Sarah E. Wooten, did not join in the execution of this deed, nor was the private examination of Sarah E. Wooten ever taken.

(3) Deed from Jessie D. Wooten to O. L. Clark, dated December 15, 1898, registered September 1, 1906. The defendants objected to this deed.

(4) Deed from O. L. Clark and wife, dated February 6, 1901, to P. Lennon. This deed was registered October 4, 1906. The defendants objected to this deed.

(5) Deed from P. Lennon and wife to D. F. King, plaintiff, dated October 3, 1903, registered January 30, 1905. The defendants objected to the introduction of this deed.

(6) Deed from P. Lennon and wife dated September 6, 1904, to D. F. King, registered January 30, 1905. The defendants objected to the introduction of this deed.

(7) Deed from P. Lennon and wife to D. F. King dated March 21, 1905, registered July 3, 1905.

The defendants claim title under the following conveyances:

(1) Deed from Shade Wooten and wife, Sarah E. Wooten, to Arthur Council, dated the ——— day of August, 1906, filed for registration August 18, 1906, and registered August 20, 1906. When this deed was registered the conveyance from Jessie D. Wooten to O. L. Clark, registered September 1, 1906, Exhibit C, and the deed from O. L. Clark and wife, registered October 1, 1906, Exhibit D, two links in the plaintiffs' chain of title, were not on record.

(2) Deed from Arthur Council and wife to J. B. Schulken for an undivided one-third interest in said land, registered September 23, 1906.

(3) Deed from Arthur Council and wife and J. B. Schulken and wife to defendant Donald McRackan, registered February 16, 1911.

The defendants contend that the deed from Jessie D. Wooten to O. L. Clark and the deed from O. L. Clark to P. Lennon and the three deeds from P. Lennon to D. F. King, while not registered, were not color of title, and the plaintiff, D. F. King, cannot tack onto his possession, if he had any, from the date of registration of his deeds, the possession of his grantor, whose deed was not on record, and make up the necessary seven years' possession under color of title.

After the execution of the deed by Jessie D. Wooten to O. L. Clark said Jessie D. Wooten intermarried with Arthur Council, and the deed from Shade Wooten and wife to the said Council was thereafter executed. The deed from Jessie D. Wooten to the said Clark was registered prior to the registration of the deed from Arthur Council and wife to J. B. Schulken, and prior to the registration of the deed from Council and wife and J. B. Schulken and wife to the defendant McRackan.

The defendants, in addition to denying the title of the plaintiff, relied upon an estoppel by judgment in an action by Arthur Council against Ray and Pridgen, tenants of the plaintiff, to which action the plaintiff was not a party. There was evidence of seven years' adverse possession by Jessie D. Wooten, Clark, and Lennon.

His honor charged the jury that the deed from Sarah E. Wooten to Jessie D. Wooten was color of title, and the defendants excepted. His honor also charged the jury that the possession of Clark and Lennon could be added to the possession of Jessie D. Wooten to make out a seven years' adverse possession, and the defendants excepted. He also charged the jury that the plaintiff was not estopped, and the defendants excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendants excepted and appealed.

Schulken, Toon & Schulken, of Whiteville, Jackson Greer, of Wilmington, and Walter Clark, Jr., of Raleigh, for appellants. Irvin B. Tucker, of Whiteville, and Manning & Kitchen, of Raleigh, for appellee.

ALLEN, J. [1] The deed from Sarah E. Wooten to Jessie D. Wooten was considered in Council v. Pridgen, 153 N. C. 444, 69 S. E. 404, and it was then held that it was not a valid conveyance on account of the failure of the husband of the grantor to join in its execution, and because the private examination of the grantor, a married woman, had not been taken, and, as this deed is a necessary link in the plaintiff's title, he must rely on adverse possession under color.

The defendants objected to the introduction of this deed upon the ground that it was neither valid as a conveyance nor as color of title, and to the deeds from Jessie D. Wooten to Clark, and from Clark to Lennon, because they were not registered until after the conveyance to Council, contending that they could not be relied on as color of title until registered.

[2, 3] The deed of a married woman without private examination, if otherwise sufficient, is color of title (Norwood v. Totten, 166 N. C. 648, 82 S. E. 951), but the rule prevails as to all deeds that, if they are placed upon the registry upon a defective probate, they are to be dealt with and treated as if unregistered. De Courcy v. Barr, 45 N. C. 181; Todd v. Outlaw, 79 N. C. 235; Johnson v. Lumber Co., 147 N. C. 250, 60 S. E. 1129; Smith v. Fuller, 152 N. C. 13, 67 S. E. 48. We must therefore treat the deeds upon which the plaintiff relies as color of title as unregistered.

[4] Prior to the Connor Act of 1885 (Laws 1885, c. 147) an unregistered deed was in all cases color of title if sufficient in form (Hunter v. Kelly, 92 N. C. 285), but after the passage of that act it was held in Austin v. Staton, 126 N. C. 783, 36 S. E. 338, that an unregistered deed was not color of title.

The question was again considered in Collins v. Davis, 132 N. C. 106, 43 S. E. 579, and the ruling in the case of Austin v. Staton was modified so that it only applied in favor of the holder of a subsequent deed executed

upon a valuable consideration, and the court has since then consistently adhered to the latter decision. Janney v. Robbins, 141 N. C. 400, 53 S. E. 863; Burwell v. Chapman, 159 N. C. 211, 74 S. E. 635; Gore v. McPherson, 161 N. C. 644, 77 S. E. 835.

In the Collins Case Justice Connor, the author of the Connor Act, says:

"The learned counsel for the plaintiff, in an able and interesting argument, asks us to reverse the decision in Austin v. State, supra. It is not clear that the Legislature intended or contemplated this radical change of the law in this respect. The court recognizes the fact that the question presented was 'new and important.' We would not be disposed to give to that decision any other or further effect than was necessary in that and other cases coming clearly within the same principle. The proposition, as stated by the Chief Justice, may be broader than was necessary to the disposition of that case, and, while we are not disposed to disturb it in so far as we have suggested, we think it well to restate the principle as confined in its application to the case before us. We therefore hold that, where one makes a deed for land for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder, and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee in a subsequent deed for a valuable consideration who has duly registered his deed. We use the term 'purchaser for a valuable consideration' in the sense in which it is defined by this court in Fullenwider v. Roberts, 20 N. C. 420, 'a fair and reasonable price according to the common mode of dealing between buyers and sellers,' or, as said by Pearson, C. J., in Worthy v. Caddell, 76 N. C. 82: 'The party assuming to be a purchaser for valuable consideration must prove a fair consideration, not up to the full price, but a price paid which would not cause surprise or make any one exclaim, "He got the land for nothing; there must have been some fraud or contrivance about it."'

"Except in cases coming within this rule, the rights acquired by adverse possession for seven years under color of title are not disturbed or affected by the act of 1885."

In other words, the Connor Act has substantially the same legal effect upon deeds that the Act of 1819 had upon mortgages and deeds in trust (Robinson v. Willoughby, 70 N. C. 362), leaving them, although unregistered, valid as between the parties and as to all others except purchasers for value, and creditors.

It follows, therefore, that the unregistered deeds, and in this class we include the deed of Jessie D. Wooten, were properly admitted in evidence, and could be relied on as color of title, unless it was made to appear that Council, under whom the defendants claim, was a purchaser for value. We find in the record no allegation that he was a purchaser for value, nor was there any evidence tending to establish this fact, and there was no request for instruction predicated upon the idea that he was such purchaser.

[5] It is true that the deed to Council recites a consideration of $400, but this is only evidence of payment as between the parties, and would not be competent as to the plaintiff. Tredwell v. Graham, 88 N. C. 208, in which the court, speaking of the recital of a consideration as paid, said:

"The deed itself, though evidence conclusive as to all matters between the parties, furnishes no evidence of the truth of the matters contained in its recitals, as against strangers; for, as to them, it is strictly res inter alios acta."

[6] There are also facts appearing upon the face of the record which indicate very clearly that Council was not a purchaser for value. It appears that Jessie D. Wooten intermarried with Council after she had executed her deed to Clark, and that thereafter Shade Wooten and wife conveyed the land to Council, presumably for the purpose of avoiding the doctrine of feeding an estoppel which might have arisen if the conveyance had been executed to the daughter. The consideration recited in the deed is only $400, which is less than the consideration recited in any other deed appearing in the record, and there is no evidence that that amount has been paid. It also appears that within five years after Council received his deed reciting a consideration of $400 the defendant McRackan sold the land conveyed therein for $8,000, and this discrepancy in value would lead to the conclusion that Council got the land for nothing, and that the payment of the purchase price recited would not have made him a purchaser for value.

It follows that the deeds were properly admitted in evidence, and that they constitute color of title against the defendants, and for the same reason the possession of Clark and Lennon can be added to the possession of Jessie D. Wooten to make up the period of seven years, and this period was complete before the defendant McRackan acquired his title.

The charge of his honor as to the estoppel is sustained by the authorities, as the plaintiff, King, was not a party to the former action. Falls v. Gamble, 66 N. C. 455; LeRoy v. Steamboat Co., 165 N. C. 109, 80 S. E. 984.

[7] The order of his honor in permitting an amendment of the complaint so that the description of the land might be made to conform to the deeds is not reviewable, as we find no abuse of the discretion vested in him by law, nor do we think the remarks made by the presiding judge constitute prejudicial error. There was evidence of an adverse possession for seven years under the deeds which we have held to be color.

We have considered all of the exceptions raised upon the record, but have not thought it necessary to discuss them seriatim, as they are all involved in the questions we have decided.

We find no error.

No error.

(168 N. C. 667)

BARNES v. SOUTHERN RY. CO. (No. 74.)

(Supreme Court of North Carolina. April 14, 1915.)

1. APPEAL AND ERROR ⟸1066 — HARMLESS ERROR—INSTRUCTIONS—EVIDENCE.

Where the undisputed evidence in a passenger's action for injuries showed that plaintiff entered the car and took a seat prepared by defendant for passengers, and was injured by a sudden movement of the train while sitting quietly talking to other passengers, the giving and refusing of instructions on contributory negligence, if error, would have been harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ⟸1066.]

2. CARRIERS ⟸320—INJURY TO PASSENGER—NEGLIGENCE—SUBMISSION OF ISSUES.

In a passenger's action for injuries, evidence that plaintiff entered the caboose attached to a freight train and took a seat prepared by defendant for passengers, and was injured by a sudden movement of the train while sitting quietly talking to other passengers, authorized submitting to the jury the question of defendant's negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315–1325; Dec. Dig. ⟸320.]

3. CARRIERS ⟸280—INJURY TO PASSENGER ON FREIGHT TRAIN—DEFENSE.

Though a carrier is not liable for injuries resulting to passengers in a caboose attached to a freight train from such sudden stops and starts as are necessary in the operation of the train, it owes to them the same high degree of care which it owes to passengers on regular passenger trains; and hence the mere fact that an injury to a passenger occurred while he was riding on a freight train did not relieve the carrier from liability for negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085–1092, 1098–1103, 1105, 1106, 1109, 1117; Dec. Dig. ⟸280.]

4. CARRIERS ⟸321—INJURY TO PASSENGER—PROXIMATE CAUSE—INSTRUCTION.

Where, in an action for injuries to a passenger while riding in a caboose attached to a freight train, the evidence conclusively showed that plaintiff was injured by a sudden movement of the train, and the only matter in issue was whether the movement was unusual, the court's failure to qualify an instruction on negligence by a statement that the jury must consider proximate cause was not error.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326–1336, 1343; Dec. Dig. ⟸321.]

Appeal from Superior Court, Wilson County; Ferguson, Judge.

Action by A. T. Barnes against the Southern Railway Company. From judgment for plaintiff, defendant appeals. No error.

This is an action to recover damages for personal injury caused, as the plaintiff alleges, by the negligence of the defendant while he was a passenger in a caboose attached to a freight train of the defendant. The defendant denied that it was negligent, and pleaded that the injury to the plaintiff was caused by his own contributory negligence. It was admitted that the plaintiff was a passenger on the train of the defendant at the time of his injury.

The plaintiff testified in part as follows: That he was 61 years of age, and lived near Lucama, Wilson county, all his life; was a farmer and fertilizer inspector, and was employed by the commissioner of agriculture of North Carolina in the latter capacity on or about March 25, 1913; that his duties required him to go about in certain territory and take samples of fertilizer and other products, see that they were branded and taxes paid, etc.; that he was paid for these services $3 per day and expenses; that he was at Rural Hall on the 25th day of March, 1913, on his regular trip, and was going from there to Pilot Mountain; that between 3 and 4 o'clock on that day he purchased a ticket from Rural Hall to Pilot Mountain from the agent of the defendant company, and paid 30 cents for it, and got aboard the train of the defendant company, which was a mixed train, that is, consisting of a caboose attached to said car in which passengers were allowed to ride by the company; the caboose had cushioned seats running on each side and a partition, and there was a stove in it; it had no fire in it; that when he got on the car there were two gentlemen in it, one named Hoover, and one named Swanson; that Mr. Hoover was sitting in a chair, and Mr. Swanson was sitting on one of the seats running on the side of the car, and he took the seat between Mr. Swanson and the stove; that when he got on the train some one said it was a little late, and it stayed in Rural Hall about 20 or 30 minutes; that when he got on the train it pulled out about 30 or 40 yards and stopped a little to the left of the station; that the first thing he knew was a jolt which threw him off the seat and against the stove; that there was a rod running around the stove, and his chin struck this rod, and his whole weight went across his neck; when the train stopped, Mr. Hoover and Mr. Swanson asked if he was hurt. The witness said that he was hurt so bad that he could not see, and that he did not know but what a train had run in and there had been a collision; that either Mr. Swanson or Mr. Hoover asked him if he was hurt, and the other one said, "Don't you see he is hurt; there is blood running out of his face;" that after they helped him up, he turned sick and asked for water; that he was nauseated; that two or three persons came in the car and wanted to know who was hurt; that the conductor came in and said he would have to make a report, and asked the witness his name, his residence, and his age; that before the jolt came he was sitting on the seat, and that he did not hear any warning prior to the jerk; that there was a clash all at once; that he fell toward the engine, and that some one fell on him, and he thought it was Mr. Swanson; that he stopped work about the 11th or 12th of April and went home and consulted Dr. I. W. Lamm; that before he came home he went to work four or five days, and, as he did not get any better, he stopped; that

about the 12th of April, finding that he could not continue his work, he saw the commissioner, Major Graham, and told him that he would have to stop; this was about the 12th day of April; that he was hurt in his neck and leg, and suffered a great deal of pain, and has never been able to use his neck since, and his neck is still stiff, and when he tried to work his neck hurts a great deal; that his arm is affected, and he cannot do as much as he could before the injury; that he could not carry a bucket of water.

The defendant offered evidence tending to prove that the movement of the train of which the plaintiff complained was not unusual or extraordinary, and was such as might be expected upon freight trains, but offered no evidence contradicting the plaintiff as to what he was doing at the time he was injured.

The jury returned the following verdict:

"(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"(2) Did the plaintiff, by his own negligence, contribute to his injuries, as alleged in the answer? Answer: No.

"(3) What damages has the plaintiff sustained? Answer: $1,770."

There was a judgment upon the verdict in favor of the plaintiff, and the defendant appealed.

Woodard & Hassell, of Wilson, for appellant. W. A. Finch and H. G. Connor, Jr., both of Wilson, for appellee.

ALLEN, J. The principal exceptions relied on by the defendant are to the refusal to enter judgment of nonsuit at the conclusion of the evidence, and for failure to give proper instructions on the issue of contributory negligence.

[1] It is not necessary to set out and review the instructions given and refused on the second issue, as we find no evidence of contributory negligence. According to all the evidence of the plaintiff and the defendant, the plaintiff entered the car and took a seat prepared by the defendant for passengers, and was injured by the sudden movement of the train while sitting quietly talking to other passengers, and in this we find no evidence of negligence or wrongful conduct on his part.

[2] We are also of opinion that there was evidence of negligence as proof that the plaintiff was injured in the manner described while a passenger on the train of the defendant is itself some evidence of negligence. 5 R. C. L. 74; Marable v. Railroad, 142 N. C. 557, 55 S. E. 355; Gleeson v. Railroad, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458.

In the Marable Case the plaintiff was injured while a passenger in a caboose of a freight train by a sudden movement of the train, and the instruction was approved that:

"If there was such a sudden and violent stopping of the train that plaintiff was thrown from his seat, it would require explanation from the defendant, and the inquiry naturally arises: Why was the train so suddenly stopped? The answer should naturally come from the defendant, as the plaintiff was in the caboose, and the defendant's servants were in charge of the train."

And in the Gleeson Case, the court said:

"Since the decisions in Stokes v. Saltonstall, 38 U. S. (13 Pet.) 181 [10 L. Ed. 115], and New Jersey R. & Transp. Co. v. Pollard, 89 U. S. (22 Wall.) 341 [22 L. Ed. 877], it has been settled law in this court that the happening of an injurious accident is, in passenger cases, prima facie evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance, and was followed at the present term in Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551 [11 Sup. Ct. 653, 35 L. Ed. 270]."

The reasons for the application of this principle are stated in 5 R. C. L. 77, to be:

"(1) The contractual relation between the carrier and passenger, by which it is incumbent on the carrier to transport with safety, hence the burden of explaining failure of performance should be on the carrier. (2) The cause of the accident, if not exclusively within the knowledge of the carrier, is usually better known to the carrier, and this superior knowledge makes it just that the carrier should explain. (3) Injury to a passenger by a carrier is something that does not usually happen when the carrier is exercising due care; hence the fact of injury affords a presumption that such care is wanting."

And the exceptions to the rule, as stated on page 82, are when the evidence shows that the cause of the injury is outside the control of the carrier, and has no connection with the machinery or appliances of transportation, and so disconnected from the operation of the business of the carrier as not to involve the safety or sufficiency of the instrumentalities of transportation or the negligence of its servants.

[3] The fact that the plaintiff was injured while riding on a freight train does not absolve the defendant from liability for negligence. A carrier of passengers on freight trains owes to them the same high degree of care which it owes to passengers on regular passenger trains, although it is not liable for injuries resulting from such sudden starts and stops as are necessary for the operation of such trains. Moore on Carriers, 1264.

[4] The other exceptions relied on in the brief are to parts of his honor's charge in which, after telling the jury that they must find that the defendant was negligent, he added "that that negligence caused the injury" before answering the first issue "Yes"; the objection being that this portion of the charge did not take into consideration proximate cause.

In some instances it is desirable to instruct the jury carefully and accurately as to proximate cause, but in this case the jury could not have been misled, as on all the evidence the plaintiff was injured by a sudden movement of the train, and the only matter in controversy was whether this movement was

one that was ordinary and usual or extraordinary and unusual.

The instructions on the first and second issues were more favorable to the defendant than it was entitled to, and we find no error on the third issue.

No error.

(168 N. C. 632)

## POWELL & POWELL v. KING LUMBER CO. (No. 258.)

(Supreme Court of North Carolina. April 14, 1915.)

1. PRINCIPAL AND AGENT ⟸93, 116—AUTHORITY OF AGENT—"GENERAL AGENT."

A "general agent" is one who is authorized to act for his principal in all matters concerning a particular business or employment of a particular nature, and he may usually bind his principal as to all acts within the scope of his agency, including the authority usually confided to an agent employed to transact business which is given him to do, and his authority may not as to third persons be restricted by secret instructions, unless the power of the agent is of such an unusual character as to put a man of reasonable business prudence on inquiry as to the existence of the authority claimed.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 247, 377, 377½; Dec. Dig. ⟸93, 116.

For other definitions, see Words and Phrases, First and Second Series, General Agency or Agent.]

2. PRINCIPAL AND AGENT ⟸99—AUTHORITY OF AGENT—IMPLIED AUTHORITY.

The power of an agent to bind his principal may include authority, implied as usual and necessary to the proper performance of the work intrusted to him, or by acts indicating authority which the principal has approved or negligently permitted the agent to do in the course of his employment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 254–261; Dec. Dig. ⟸99.]

3. PRINCIPAL AND AGENT ⟸120—AUTHORITY OF AGENT—RATIFICATION—EVIDENCE.

Though generally the fact of agency cannot be shown by declarations or acts of the agent, the acts of an agent in the course of his employment and indicative of authority may be of such character, or so often repeated, as to permit a reasonable inference of approval by the principal, and thereby become relevant on the question of authority expressly conferred.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 402–412; Dec. Dig. ⟸120.]

4. PRINCIPAL AND AGENT ⟸101—AUTHORITY OF AGENT—GENERAL AGENT.

An agent, who as the representative of a contractor in the erection of a building was in control of the work, bought material and paid for it in cash and by check, and hired men and paid them, and completed the work after employés of a subcontractor abandoned it, could be found to possess authority to make a contract binding the contractor to pay for materials furnished a subcontractor, notwithstanding testimony of want of authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 255, 256, 330, 346; Dec. Dig. ⟸101.]

5. MECHANICS' LIENS ⟸97—PERFECTION OF LIEN—LIABILITY OF PRINCIPAL CONTRACTOR.

Where an owner was indebted to the principal contractor in a sum sufficient to pay for materials furnished a subcontractor, and the materialman perfected his lien as provided by Revisal 1905, §§ 2019–2021, the debt due from the owner to the principal contractor was applicable to the materialman's demand, regardless of the state of account between the contractor and the subcontractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 129; Dec. Dig. ⟸97.]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by Powell & Powell against the King Lumber Company and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

It was proved that in 1912 the Young Men's Christian Association of the city of Raleigh had contracted with defendant the King Lumber Company for the erection of its building in the city of Raleigh, and that the said company had sublet the plastering to defendants Chisholm & Clark, and that the agreement between the King Lumber Company and Chisholm & Clark in form constituted these last subcontractors for this portion of the work. There was evidence on the part of plaintiff tending to show that, owing to the fact that Chisholm and Clark owed plaintiff a balance on other accounts and were regarded as irresponsible, plaintiff had declined to supply any material for this work and did not do so until the King Lumber Company became responsible therefor, this being done primarily under the direct promise and guarantee of J. R. Wood, agent of the company in charge of this work here in Raleigh; that said Wood had authority from the company to make the contract, or same was ratified by it, and, after making two payments under this arrangement, as stated, the company had refused to pay further, and the balance was $428.58.

There was evidence for defendant tending to show that J. R. Wood had not made the agreement as claimed by plaintiff, and, further, that he had no authority to make it; that he was only a foreman in charge of the work here in Raleigh, chiefly of that portion which was being done by the company itself; that he was supplied with a definite amount, subject to his check, which he could not exceed, and from which he was to pay freights, wages for men under him, and material bought by him, but that he had no authority to bind the company by a contract of this kind, and had been positively instructed not to make any such agreements; that, as to the two payments referred to in plaintiff's evidence, one was on the written order of Chisholm & Clark, and the other was made by reason of representations of J. R. Wood that certain material on the yard for the purpose would be attached by creditors of Chisholm & Clark unless paid for, and, owing to that, the money was sent, but with no intent to ratify any agreement of Wood's, that the company had no knowledge of any such agreement, and had done nothing to ap-

prove or ratify it. It was further shown that Chisholm & Clark, after doing part of the work, had abandoned the job, and J. R. Wood had completed the same for the company, and there was only a small sum due from the company to them under their contract, etc.

On issues submitted, the jury rendered the following verdict:

"(1) Did the defendant King Lumber Company agree to pay the plaintiff company for materials furnished, with which to plaster the Young Men's Christian Association building, as alleged? Answer: Yes.

"(2) If so, what amount was so furnished by plaintiff, which still remains unpaid by defendant King Lumber Company? Answer: $428.58, without interest.

"(3) If 'No' to first issue, what amount is due Chisholm & Clark by defendant King Lumber Company on account of contract for plastering said Young Men's Christian Association? Answer: $74.32."

It was admitted in the pleadings that there was the sum of $428.58 due from the Young Men's Christian Association to the lumber company, the principal contractor, and that plaintiff had given the notices required to perfect his lien for material, as provided under the statute. Revisal, §§ 2019–2021. Judgment on the verdict for $428.58, and applying amount due from owner to lumber company in payment of same. Defendant lumber company excepted and appealed.

J. W. Hinsdale and Winston & Biggs, all of Raleigh, for appellant. Clark & Broughton, of Raleigh, for appellee.

HOKE, J. [1] It was chiefly objected to the validity of the verdict that there were no facts in evidence tending to show authority, on the part of J. R. Wood, to bind the defendant company to payment of plaintiff's claim, but, on the record, we are of opinion that the position cannot be maintained. A general agent is said to be one who is authorized to act for his principal in all matters concerning a particular business or employment of a particular nature. Tiffany on Agency, p. 191. And it is the recognized rule that such an agent may usually bind his principal as to all acts within the scope of his agency including not only the authority actually conferred, but such as is usually "confided to an agent employed to transact the business which is given him to do," and it is held that, as to third persons, this real and apparent authority is one and the same, and may not be restricted by special or private instructions of the principal, unless the limitations sought to be placed upon it are known to such persons, or the act or power in question is of such an unusual character as to put a man of reasonable business prudence upon inquiry as to the existence of the particular authority claimed. Latham v. Field, 163 N. C. 356, 79 S. E. 865; Stephens v. Lumber Co., 160 N. C. 107, 75 S. E. 933, 41 L. R. A. (N. S.) 1141; Gooding v. Moore, 150 N. C. 195–198, 63 S. E. 895; Tiffany on Agency, pp. 180, 184, 191 et seq.

[2] The power of an agent, then, to bind his principal, may include, not only the authority actually conferred, but the authority implied as usual and necessary to the proper performance of the work intrusted to him, and it may be further extended by reason of acts indicating authority which the principal has approved, or knowingly, or, at times, even negligently, permitted the agent to do in the course of his employment. Law Reporting Co. v. Grain Co., 135 Mo. App. 10–15, 115 S. W. 475; 31 Cyc. pp. 1326–1331. In the Missouri case, Broaddus, P. J., delivering the opinion, quotes from Mechem on Agency, § 282, to the effect that the authority of agents consists:

"First, and primarily, of the powers directly and intentionally conferred by the voluntary act of the principal; second, of those incidental powers which are reasonably necessary and proper to carry into effect the main powers conferred and which are not known to be prohibited; third, of those powers which usage and custom have added to the main powers, and which the parties are to be deemed to have had in contemplation at the time of the creation of the agency, and which are not known to have been forbidden; fourth, of all such other powers as the principal has, by his direct act, or by negligent omission or acquiescence, caused or permitted persons dealing with the agent reasonably to believe that the principal had conferred; fifth, of all those other powers whose exercise by the agent the principal has subsequently, with full knowledge of the facts, ratified and confirmed."

And he further cites, with approval, Kingsley v. Fitts, 51 Vt. 414, to the effect that:

"The scope of an agency is to be determined, not alone from what the principal may have told the agent to do, but from what he knows or ought to know, in the exercise of ordinary care and prudence, the agent is doing in the premises."

[3] And while it is true, as held in Daniel v. Coast Line, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, 1 Ann. Cas. 718, and Francis v. Edwards, 77 N. C. 271, and other well-considered cases, that neither the existence nor the extent of an agency may be shown by either the declarations or acts of an agent, and by them alone, it is also established that the acts of an agent, in the course of his employment and indicative of authority, may be of such character and circumstance, or so often repeated, as to permit a fair and reasonable inference that they were approved or knowingly permitted by the principal, and, in this way, may, of themselves, become relevant on the question of authority expressly conferred. Newbury v. Railroad, 167 N. C. 50, 83 S. E. 20; Railway v. Dickinson, 78 Ark. 483, 95 S. W. 802, 115 Am. St. Rep. 54; Lytle v. Bank, 121 Ala. 215, 26 South. 6; Harvester Co. v. Campbell, 43 Tex. Civ. App. 421, 96 S. W. 93; Doan v. Duncan, 17 Ill. 272; 31 Cyc. p. 1662. In this last citation, the principle is thus stated:

"As a general rule, the fact of agency cannot be established by proof of the acts of the pre-

tended agent, in the absence of evidence tending to show the principal's knowledge of such acts, or assent to them. Yet when the acts are of such a character, and so continued, as to justify an inference that the principal knew of them, and would not have permitted the same, if unauthorized, the acts themselves are competent evidence of agency."

[4] Applying these principles, as stated, there was not only some evidence tending to show authority in J. R. Wood to make the contract, as stated, but, in our opinion, it clearly justifies the verdict rendered by the jury. True, there was evidence for the defendant tending to show that Wood had no actual authority to make the agreement or to bind the company under it. Both Wood and McNeill, the secretary and treasurer of the company, so testify, and the payments by Wood are explained by the statement of these witnesses that the company kept as much as $500 in a bank here in Raleigh subject to his check, and beyond this he was not allowed to go, and, as to the two payments by the company on the present account, defendant's evidence tends to show that one was made on the written order of Chisholm & Clark, and the other on the representations of Wood that it was necessary to make it to protect material already on the ground and presently required for the construction of the building. Much stress was laid, too, on the fact that several of the witnesses spoke of Wood as foreman, and certainly an ordinary foreman, in the sense of a leader of a squad of hands, would not, from his position alone, have the right to bind his principal in a contract of this character. A perusal of the testimony, however, will disclose that this man was not merely a foreman, in the ordinary meaning of the term, but he had entire charge of the work here in Raleigh. Thus, Mr. Carey J. Hunter, one of the owners, after saying that Wood was the local man of the King Lumber Company in charge of the building as "foreman," states further:

"Mr. Wood was the company's representative, and we dealt with him in regard to the construction of the building. Of course, I don't know whether the dealings had to be approved by the lumber company afterwards, or whether there was an understanding with them or not. Our dealings were with Mr. Wood."

J. R. Wood speaks of himself, in one place of his testimony, as supervisor or superintendent, and McNeill, the secretary and treasurer, says of him:

"He had been our superintendent for six years."

True, this witness said also that:

"Not only had Wood no authority to make the contract as alleged, but he was instructed positively not to do so."

But, from the evidence of this witness and from others, testifying for plaintiff, it appears that J. R. Wood was in charge and control of the work here for the entire time; that he bought material from plaintiff and others, and paid for it in cash and by check; that he hired hands and paid them off, not only those directly under him, but the hands of Chisholm & Clark, and, after these men had abandoned the job, he took it up and had the same completed, and it was made to appear, further, as heretofore stated, that, after the promise relied upon by plaintiffs, there were two substantial payments on this account made by defendant company, and from this and other facts in evidence we think that it is clearly the permissible inference that the contract and agreement made by Wood was within the scope of his agency, and, this being true, that the binding effect of it could not be destroyed or sensibly impaired by reason of special and private restrictions put upon his powers by his principal, unknown to plaintiff and others who dealt with him, and we are of opinion, further, that the acts of Wood in the course of his agency were of a kind and character, and so continued and repeated, as to permit the inference that they were known to and approved by the company, and, in themselves, afforded evidence of authority in the premises.

There is nothing in our present decision that militates or is intended to militate against the cases of Bank v. Hay, 143 N. C. 326, 55 S. E. 811, or of Swindell v. Latham, 145 N. C. 144, 58 S. E. 1010, 122 Am. St. Rep. 430, or Stephens v. Lumber Co., 160 N. C. 107, 75 S. E. 933, 41 L. R. A. (N. S.) 1141, or the more recent case of Wynn v. Grant, 166 N. C. 39, 81 S. E. 949, in all of which the acts of the agent were disallowed. In Hay's and in Swindell's Case, the contracts in question were held to have been beyond the scope of agents' authority, real or apparent; the first being a draft by a local insurance agent, of restricted power, on the general agent of the company, and the second where the agent, intrusted with the power to run a certain business on a cash basis, had signed the note of his principal for borrowed money, and to these the court applied the wholesome principle that one who deals with an agent must "ascertain correctly the scope and extent of his authority"; but this, as stated, was on the ground that the acts of the agent were beyond the scope of his apparent authority, for, in ordinary instances, it is only to this that a third person is required to look. In Wynn's Case, there were facts in evidence, ultra, tending to show notice of limitations on the agent's powers, and in Stephens' Case the character of the contract was so out of the ordinary as to put the claimant on inquiry, and, in itself, to afford notice of lack of authority.

The objection raised on the trial below, that recovery was barred under the statute of frauds and because the obligation of Wood, if made, was not in writing, was very properly abandoned here; the facts in evidence, which were accepted by the jury, tending to show that the credit was extended to the

company as an original obligation, and on a transaction in which it had a pecuniary interest. Peele v. Powell, 156 N. C. 553, 73 S. E. 234, citing Dale v. Lumber Co., 152 N. C. 653, 68 S. E. 134, 28 L. R. A. (N. S.) 407; Sheppard v. Newton, 139 N. C. 535, 52 S. E. 143.

[5] While we have dealt with the objections made to the validity of the verdict by reason of their general importance, and because they are directly presented in the record, the questions are not of practical moment in this case, because of the admissions in the pleadings that the owners of the building are still indebted to defendant company, the principal contractor, to an amount sufficient to pay the claim sued for, and the plaintiffs have given the notices and perfected their lien, as provided by our statute. Revisal, c. 48, §§ 2019, 2020, 2021. In such case, under Brick & Tile Co. v. Pulley et al., 84 S. E. 513, decided at the present term, the debt due from the owners to the defendant, the principal contractor, is applicable to plaintiff's demand, and this, regardless of the state of the account between defendant and the subcontractors, Chisholm & Clark.

There is no error, and the judgment below must be affirmed.

No error.

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(168 N. C. 602)

## BURCH v. SCOTT et al. (No. 253.)

(Supreme Court of North Carolina. April 14, 1915.)

1. CONTRACTS ⟸92 — CAPACITY—DRUNKENNESS—FORM OF RELIEF.

In law, all contracts of an intoxicated person are avoided on the ground of incompetency; but, in equity, on the ground of fraud.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 411–414, 1153, 1155; Dec. Dig. ⟸92.]

2. CONTRACTS ⟸99 — CAPACITY—DRUNKENNESS—EQUITABLE RELIEF.

Equity will presume fraud from dealings with a person manifestly intoxicated, and will afford relief if he was imposed upon.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 448–453, 1197–1199, 1799, 1800; Dec. Dig. ⟸99.]

3. VENDOR AND PURCHASER ⟸30—CAPACITY OF PARTIES—DRUNKENNESS.

In a suit by a purchaser of land to set aside an executed contract on the ground of incapacity resulting from intoxication, the test of capacity is not whether the purchaser's intoxication was such as to incapacitate him from exercising his judgment, but whether he was able to understand the nature of the act, its scope and effect.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 34; Dec. Dig. ⟸30.]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Suit by L. R. Burch against S. H. Scott, American Realty & Auction Company, and another, to set aside an executed contract and notes and to recover the money paid. Judgment for the plaintiff against the American Realty & Auction Company, and that defendant appeals from the judgment against it and from the refusal to enter judgment against its codefendants. Reversed, and new trial granted.

This is a civil action, tried at October term, 1914, superior court of Wake county, Whedbee, Judge, upon this issue:

"Did plaintiff L. R. Burch, on the 8th of December, 1913, have sufficient mental capacity to make the contract set out in the pleadings? Answer: No."

Thereupon the court adjudged that certain notes and contract executed by the plaintiff for purchase money of certain lands be canceled, and that he recover from the defendants the American Realty & Auction Company the sum of $660, the cash payment made on said land. Defendants appealed.

Winston & Biggs, of Raleigh, for appellants. Percy J. Olive, of Apex, and J. C. Little, of Raleigh, for appellee.

BROWN, J. In this action the plaintiff seeks the aid of the court to set aside and declare void certain notes, and a contract, executed and delivered by him to defendants, and to recover a sum of money paid by him to the defendants, all of which represented the purchase money of certain lands purchased at public auction by the plaintiff from defendants. The lands were sold at public auction on December 8, 1913, by the defendant auction company, as the property of the defendant M. A. Penny; the defendant Scott holding a purchase-money mortgage thereon, and consenting to the sale. Scott & Penny contracted with the auction company to advertise and sell the lands under a contract by which the said company practically controlled as well as conducted the sale. The plaintiff became the purchaser and the same day paid $660 cash to the auction company and executed certain notes payable to Scott, secured by a written contract of sale.

The plaintiff alleges that, at the time he purchased said land and executed the notes and paid over the cash payment, he was in a state of intoxication and did not know what he was doing; "but notwithstanding plaintiff's intoxication, and the knowledge of said defendants that plaintiff was so intoxicated, the said defendants continued to urge said plaintiff to consummate said sale by paying a portion of the purchase price, and giving his notes for the balance of the said purchase price." These allegations are denied by the defendants.

It is contended by the defendant that the issue submitted is not determinative of the controversy, and will not support the judgment rendered, as questions raised by the pleadings and material to the inquiry have not been determined. Bryant v. Insurance Co., 147 N. C. 184, 60 S. E. 983.

[1] This involves the consideration of the character of this action and the relief sought.

It is essentially a suit in equity in which plaintiff seeks to set aside an executed contract. In that respect it differs materially from Cameron v. Power Co., 138 N. C. 365, 50 S. E. 695, 107 Am. St. Rep. 532. That was an "action at law" for damages for breach of a contract entered into by the president of the power company, whereby the latter contracted to purchase of the plaintiff an engine. The contract had never been executed and the intoxication of defendant's president who made the contract was pleaded in bar of a recovery. In law the contracts of an intoxicated person are avoided on the ground of incompetency, but in equity they are avoided on the ground of fraud.

There is very respectable authority for the position contended for by the learned counsel for defendant that equity will afford relief only where the intoxication has been taken advantage of by the other party, or where the intoxicated party has been taken advantage of or been imposed upon; but, where the party against whom relief is asked had no knowledge of the intoxication, took no advantage of it, and practiced no fraud, equity will not interfere. 14 Cyc. 1105 and cases cited; Swan v. Talbot, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066 and notes; Wright v. Waller, 127 Ala. 557, 29 South. 57, 54 L. R. A. 440.

[2] A presumption of fraud will arise from dealing with a person so intoxicated that his condition is manifest, and a court of equity will afford relief if the person is imposed upon. Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827.

As this case is to be tried again, we will not definitely pass upon these questions until the facts are found in response to proper issues. Additional issues should be submitted as to whether the defendants had knowledge of such intoxication, and took advantage of it, and again whether plaintiff, after purchasing the land, afterwards, when recovered from his condition, ratified the purchase with full knowledge by paying the purchase money and executing the notes.

[3] The defendant excepts to that part of his honor's charge in which he instructed the jury:

"If you find from the evidence that the plaintiff was drunk at the time of the alleged transactions, and his drunkenness was so excessive as to render him incapable of consent, or for the time to incapacitate him from exercising his judgment, then your answer to the issue should be, 'No.'"

The objection is to the alternative, "or for the time to incapacitate him from exercising his judgment."

The charge of the learned judge was full and generally correct as to what constitutes "mental incapacity"; but we think he erred in directing the jury to answer the issue, "No." if the drunkenness incapacitated the plaintiff from exercising his judgment, and possibly they were misled. The measure of capacity is the ability to understand the nature of the act in which he is engaged, and its scope and effect, or its nature and consequences; not that the plaintiff should be able to act wisely or discreetly, nor to drive a good bargain. Cameron v. Power Co., 138 N. C. 365, 50 S. E. 695, 107 Am. St. Rep. 532: Sprinkle v. Wellborn, supra.

It is a matter of common knowledge that a person under the influence of liquor is not likely to act with that wisdom and discretion which would be exercised when perfectly sober, for it is a true and trite saying that when "wine is in, wit is out."

The law does not undertake to relieve a man from contracts made when he is under the stimulus of liquor. It will only afford relief sometimes when it appears that the party seeking it was so drunk that he was destitute of reason and unable to comprehend the nature of the contract and its consequences.

New trial.

PER CURIAM. This disposes of both appeals in this case, as a new trial to all parties is ordered.

HOKE, J., concurs in result.

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(168 N. C. 599)

## JENKINS BROS. SHOE CO. v. TRAVIS et al. (No. 319.)

(Supreme Court of North Carolina. April 14, 1915.)

MANDAMUS ⊂=151 — PARTIES—OFFICIAL CAPACITY—TAX COMMISSION.

Mandamus to compel a reduction in an assessment for taxation under Pub. Laws 1913, c. 203, §§ 78, 79, which confer powers and duties in regard thereto upon the state tax commission as a body, should be brought against the commission in its corporate capacity, and a complaint for such relief against two members of the commission as individuals, alleging that the third is willing to grant the relief, is demurrable.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 291, 292; Dec. Dig. ⊂=151.]

Appeal from Superior Court, Forsyth County; Lyon, Judge.

Suit for mandamus by the Jenkins Bros. Shoe Company against E. L. Travis and another. From a judgment for defendants on demurrer to the complaint, plaintiff appeals. Affirmed.

Plaintiff, a corporation having its residence in Winston-Salem, N. C., where it conducts its business and has real and personal property of a tangible nature, applied to the board of commissioners of Forsyth county to correct and reduce the valuation of said property, because it was excessive. The application was granted in proceedings taken under sections 78 and 79 of the Machinery Act (Public Laws of 1913, c. 203), and a certificate as to the reduction in value of the property and

as to the amount of the tax to be refunded was made out by the clerk of the board under its seal, it being $302.07 as to county taxes, and $79.49 as to state taxes. The county refunded its share, and demand was made upon the state tax commission to have refunded the $79.49, which was the excess collected by the state, and to issue a proper warrant therefor, which the commission has failed to do. Plaintiff asks for a mandamus to compel the commission to perform its "ministerial duty" in compliance with the law. The suit was brought, not against the state tax commission, but against two of the individuals at present composing that body, Hon. E. L. Travis and Hon. William T. Lee; the reasons for not joining the third, Hon. George P. Pell, being that he has consented to issue the warrant and otherwise to comply with plaintiff's demand.

Defendants demurred upon the grounds:

"(1) This action is brought against the defendants individually, but the complaint does not state, or purport to state, any cause of action against them as individuals. The alleged cause of action attempted to be stated is against the defendants in their official capacity as state tax commissioners.

"(2) Even if the action be considered as against the defendants in their official capacity as state tax commissioners, no cause of action is stated against them as such in that:

"(a) Section 79 of the Machinery Act, referred to in section 1 of the complaint, has application to the assessment of the property of persons, as distinguished from corporations, and even in those matters the action of a board of county commissioners is subject to supervision and review by the state tax commission, and may be by them disapproved and overruled, under the general powers conferred by section 3 of the Machinery Act; that the warrant provided for in said section 79 is to be issued by the state tax commission only when, in the exercise of their supervisory discretion, they approve, and do not overrule, the action of the board of commissioners.

"(b) The plaintiff, being a corporation, as distinguished from a person, the value of its capital stock was originally assessed by the state tax commission under section 43 of the Machinery Act and certified to the state auditor. Its state taxes were properly computed on this assessment, and required to be paid direct to the state treasurer. The county commissioners have no power to change, and it is not alleged that they attempted to change, this assessment, which was in no way affected by a change in the local assessment of its tangible property. Section 46 of the Machinery Act requires plaintiff also to pay its county, township, and city taxes on this assessment, and the alleged action of the board of commissioners in granting a refund of their county taxes, without a reduction of this assessment of their capital stock by the state tax commission, was illegal and unauthorized.

"(c) That the alleged duty which it is sought to have defendants to perform as officials is not ministerial, but involves the exercise of their judgment and discretion as officials."

The court, Hon. C. C. Lyon presiding, sustained the demurrer, and from the judgment plaintiff appealed.

Alexander, Parrish & Korner, of Winston-Salem, for appellant. Watson, Buxton & Watson, of Winston-Salem, for appellees.

WALKER, J. (after stating the facts as above). This case but for a defect of parties, would present some very important and serious questions as to the proper procedure for reducing excessive valuations and refunding any amount due the taxpayer by reason thereof, and as to the jurisdiction and supervisory powers of the state tax commission, which body was created by chaper 203 of the Public Laws of 1913, known as the Machinery Act, with certain well-defined powers and capabilities. The duty of acting in regard to the refund of taxes overpaid is conferred by sections 78 and 79 of the said act upon it as a body, in its corporate capacity, and not upon its individual members, and any action or proceeding to compel that body to perform its ministerial duties must be brought against it in that capacity, and not against its members, for this function is not individual or personal, but corporate. It is the same in the case of this body as it is with respect to the board of county commissioners, and we have held that in the latter case all actions or proceedings by or against a county should be brought in the name of the board of county commissioners, as a corporate body, and not against the individuals composing the board, who can be proceeded against only when there has been disobedience of the process issued to the board by the court. Askew v. Pollock, 66 N. C. 49. It was expressly held in Thomas v. Commissioners of Carteret County, 66 N. C. 522, that a writ of mandamus against commissioners of a county should run against them as "a board," and not against the individual members of the board. It is called a body politic and corporate because all the persons are merged or made into a body, and, as such alone, have the capacity to take, grant, sue, and be sued by and in the corporate name, which is a means of identification of the body and an essential incident to the corporate life and action. Bacon, Abr. tit. "Corporation," C; 1 Blackstone, Comm. 474, 475; 10 Coke, Rep. 28; 28 Cyc. 120. Speaking of the corporation, its nature and character, as a distinct entity and creation of the law, and as something having an existence separate and apart from that of its members, Blackstone (volume 1, at page 468) gives the familiar illustration:

"For all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law—a person that never dies; in like manner, as the river Thames is still the same river, though the parts which compose it are changing every instant."

So it comes to this: That the plaintiff, if it desired to enforce its right, if it has any, should have proceeded against the corporate entity or governmental agency charged with the duty, as it alleges, of affording relief, and not against the persons, or a part of them, composing it. There is a very interesting discussion of the duties, powers,

and supervisory jurisdiction of the state tax commission in regard to all matters of taxation to be found in the defendants' brief, but, having decided that the action was improperly brought, it is not necessary to make any further reference to it.

There was no error in the judgment of the court.

Affirmed.

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(168 N. C. 639)

## CHILTON v. GROOME. (No. 313.)

(Supreme Court of North Carolina. April 14, 1915.)

1. MORTGAGES ⇐559—DEED OF TRUST—DEFICIENCY JUDGMENT—RESTRICTIVE CLAUSE—RATIFICATION.

Where the debtor inserted in a note and deed of trust, sent to him to be executed, a clause exempting him from liability except as to his interest in the property conveyed, which clause was contrary to the contract, but the creditor, with knowledge thereof, took no steps to have the note and deed corrected, and thereafter foreclosed the trust deed, he ratified the provision, and could not recover a judgment for the deficiency.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1592, 1600–1603, 1605–1608; Dec. Dig. ⇐559.]

2. PARTNERSHIP ⇐98—MUTUAL RIGHTS—FRAUD—PURCHASE PRICE OF LAND.

Evidence that one partner represented to the other, who advanced the money, that the land purchased by him for the firm cost $750 more than its actual cost, and that he retained the difference, is sufficient to show fraud.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 152; Dec. Dig. ⇐98.]

3. EVIDENCE ⇐151—INTENTION — ADMISSIBILITY.

A partner who had purchased land for the firm and represented to the other partner, who advanced the money, that the land cost more than it actually did cannot testify in his own behalf that he had no intention to defraud his partner, since the law stamps the transaction as a fraud.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. ⇐151.]

Appeal from Superior Court, Forsyth County; Devin, Judge.

Action by M. T. Chilton against T. S. Groome. From a judgment for the plaintiff for part of the relief claimed, both parties appeal. Affirmed on both appeals.

This is a civil action, tried upon these issues:

First. Did the defendant, with intent to cheat and defraud the plaintiff, falsely and fraudulently misrepresent to the plaintiff the purchase price of the "Freeman Mill" property, as alleged in the complaint? Answer: Yes.

Second. Did the defendant, by such false and fraudulent misrepresentation, obtain from the plaintiff any money, and, if so, what amount? Answer: $750, with interest from date of sale.

Third. Is the defendant indebted to the plaintiff on account of the note and deed of trust signed by him, as alleged in the complaint, and, if so, in what amount? Answer: No.

From the judgment rendered, the plaintiff and defendant both appealed.

N. O. Petree, of Danbury, and A. E. Holton, Watson, Buxton & Watson, all of Winston Salem, and Winston & Biggs, of Raleigh, for plaintiff. Barringer & Jones and T. H. Calvert, of Raleigh, for defendant.

### Plaintiff's Appeal.

BROWN, J. It appears to be undisputed that the plaintiff and defendant were equal copartners in the purchase of certain lands. Defendant transacted the business, and stated to plaintiff that the land cost $6,500. Plaintiff furnished the said sum, and title was made to plaintiff and defendant. The latter gave plaintiff a note secured by a deed in trust on defendant's half interest in the land to secure his half of the purchase money, $3,250. There was default in payment, and the trustee foreclosed. The plaintiff purchased defendant's interest at the sale for $1,600. The plaintiff sues in this action to recover balance due on the note. Plaintiff also alleges that defendant misrepresented the original cost of the land, stating that he paid $6,500 for it, whereas he paid only $5,750. Plaintiff seeks to recover the said sum in this action. Plaintiff appeals, and assigns error because the court instructed the jury to answer the third issue, "No."

[1] The basis of the ruling is the following clause in the note and deed in trust:

"This note is given for the purchase money for the one-half interest in the Freeman Mill property, described in the deed of trust hereto attached, and it is agreed that the land and property therein conveyed shall be the sole security for the $3,250 above mentioned, without further or other liability on my part of any recourse on me for or on account of the indebtedness secured hereby or any part thereof."

The note and deed in trust were prepared by plaintiff, who sent them to defendant for execution. The defendant inserted the above clause in the papers, and had the trust deed recorded, and returned them by mail to the plaintiff. There is evidence introduced tending to prove that defendant, under the agreement between him and plaintiff, should not have inserted the above clause, which it is unnecessary to consider. There is no evidence that defendant inserted the clause surreptitiously or fraudulently, and it is admitted that the plaintiff discovered it at once on receipt of the papers, and that plaintiff and defendant had correspondence on the subject, dated February 15, 1909, the note and deed being dated January 30, 1909. The plaintiff took no action to repudiate the contract as executed, or to reform and correct the note and deed in trust. On the contrary, he retained them until January 28, 1911, when he acted under the deed in trust, which contains the same stipulation as the note, and caused the trustee to foreclose the same, and at the sale plaintiff became the purchaser at $1,600. Such conduct constitutes an unequivocal acceptance and ratification of the terms and stipulations of the note and deed, as ex-

ecuted and returned to plaintiff by defendant. It was the plaintiff's duty at once on receipt of the papers to repudiate them by some overt act, such as returning them or bringing action to reform them and compelling defendant to specifically perform the original contract. Instead of that, he retained them, accepted them and acted under them. He is therefore estopped by the stipulation recited in the note and deed from recovering the balance due after exhausting the security conveyed in the deed. Such stipulation is of the essence of the agreement as embodied in the written instrument, and cannot now be denied. The plaintiff cannot be permitted to occupy inconsistent positions. He cannot enforce some of the provisions of the deed, and repudiate others. 16 Cyc. 699–721; 2 Herman on Estop. 741; Brinegar v. Chaffin, 14 N. C. 108, 22 Am. Dec. 711; 17 Cyc. 596; Bigelow on Estoppel (6th Ed.) page 744; Herman on Estoppel, vol. 2, page 1156. Field v. Eaton, 16 N. C. 284; Machine Co. v. Owings, 140 N. C. 503, 53 S. E. 345; Maynard v. Moore, 76 N. C. 158; Rich v. Morisey, 149 N. C. 44, 62 S. E. 762; Austin v. Stewart, 126 N. C. 527, 36 S. E. 37.

The case cited in the plaintiff's brief, Armstrong, Cator & Co. v. Lonon, 149 N. C. 434, 63 S. E. 101, had reference to the effect of a receipt "in full," but in Rawls v. White, 127 N. C. 17, 37 S. E. 68, it was held that stipulations of a contractual nature, even in a receipt, are binding on the parties, and in that case the court said:

"As she introduced this receipt in evidence, and claims benefit under it, she was bound by the provisions that were against her. She could not accept a part and reject a part."

No error.

### Defendant's Appeal.

There are several assignments of error by the defendant. We think they are all without merit, and deem it necessary to discuss only two.

[2] The defendant moved to nonsuit upon the ground that there is no evidence of fraud, and that in no view of the evidence is the plaintiff entitled to recover the $750. The defendant testifies: "I went in as a partner in the purchase of this property with Mr. Chilton." There is evidence that the price the partners agreed on was $5,500, and that defendant solely conducted the negotiations; that he told the plaintiff the land could not be purchased for less than $6,500 that it was a bargain, and that others were after it. Plaintiff acquiesced in his partner's views and paid the entire $6,500. There is evidence that defendant paid only $5,750 for the land and retained the $750. This is evidence of fraud, and the jury seem to have believed it.

[3] The defendant, introduced as a witness in his own behalf, was asked, "Did you intend to cheat and defraud plaintiff?" Upon objection, the court excluded the question. There are cases supporting the view that such questions asked of a party to an action when he is charged with fraud, are sometimes permissible. Phifer v. Erwin, 100 N. C. 64, 6 S. E. 672; Autry v. Floyd, 127 N. C. 187, 37 S. E. 208. In this case it could not help the defendant to testify that he did not intend to defraud the plaintiff. His acts speak louder than words. He was the trusted partner of the plaintiff, who furnished all the money for the investment. According to the findings of the jury, upon representations he must have known were untrue, defendant obtained $6,500 from his partner to pay for the land, and paid only $5,750 and retained the remainder, $750, for himself. On account of the relation of trust and confidence defendant bore to plaintiff, his partner, the law stamps the transaction as fraudulent, and will not permit the defendant to retain the fruits of his misconduct, but will compel him to return them. Stewart v. Realty Co., 159 N. C. 231, 74 S. E. 786.

No error.

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(169 N. C. 16)

## BLEAKLEY v. CANDLER. (No. 324.)

(Supreme Court of North Carolina. April 14, 1915.)

CORPORATIONS ⟸123—TRANSFER OF STOCK—RIGHTS OF PLEDGEE.

The purpose of Revisal 1905, § 1168, providing that stock shall be transferable on the books of the corporation under regulations prescribed by by-laws, and, when any transfer is made for collateral, it shall be so expressed in the entry of the transfer, is to prevent fraudulent transfers and to protect the corporation, but a holder of stock as pledgee has priority over a subsequent attachment, though the transfer to the holder has not been entered on the corporate books.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507–512, 537, 539–546, 569, 618; Dec. Dig. ⟸123.]

Appeal from Superior Court, Forsyth County; Lyon, Judge.

Action by Charles M. Bleakley against R. L. Candler, defendant, and the Gilmore Bros. Company, garnishee, in which the Commonwealth Bank intervened. From a judgment for plaintiff, the intervener appeals. Reversed.

This is an action instituted against the defendant, Candler, to recover the sum of $300 due by note and to enforce an attachment levied upon five shares of stock in the Gilmer Bros. Company, a corporation of North Carolina. The Commonwealth Bank intervened, claiming that it was the owner of said stock.

The parties agreed upon the following facts:

(1) That Chas. W. Bleakley is a resident of the state of Virginia, and, at the time of the institution of this suit, the defendant, R. L. Candler, was a resident of the state of Mary-

and, but that since the institution of the action he has died, and L. A. Vaughn, of Winston-Salem, N. C., has been appointed his administrator. That the interpleader, the Commonwealth Bank, is a banking corporation, organized under the laws of the state of Maryland, doing business in the city of Baltimore, in said state, and that Gilmer Bros. Company, the garnishee, is a corporation organized under the laws of the state of North Carolina, with its principal office and place of business in Winston-Salem, N. C.

(2) That on June 27, 1905, stock certificate No. 74, for five shares of Gilmer Bros. preferred stock, of the par value of $100 per share, was issued to R. L. Candler, and that the stub of certificate No. 74 in the possession of Gilmer Bros. Company bears no entries since the date of the issue of the stock.

(3) That on October 27, 1911, R. L. Candler borrowed from the Commonwealth Bank, in the city of Baltimore, state of Maryland, the sum of $700, and executed his promissory note, dated October 27, 1911, for the sum of $700, payable March 1, 1912, and, at the time he secured the said loan, he delivered to the bank with the note, as collateral security, certificate No. 74, for five shares of Gilmer Bros. preferred stock; said certificate being indorsed in blank by him before delivery to the bank.

(4) That there is still a balance due on said note of $475, with interest on $700 from March 1, 1912, to October 26, 1912, and on $475 from October 26, 1912, until paid, and that the said Commonwealth Bank still holds said stock certificate No. 74 for five shares of Gilmer Bros. stock as collateral security for the payment of said note.

(5) That on August 31, 1912, the plaintiff, Chas. W. Bleakley, instituted an attachment suit in the superior court of Forsyth county against R. L. Candler, to recover the sum of $300, with interest from February 28, 1911, said amount being due the said Chas. W. Bleakley upon a note executed by R. L. Candler for the sum of $300, in the city of Baltimore, Md., on February 28, 1911. That a warrant of attachment was issued in said action and a summons was served upon Gilmer Bros. Company to appear before the clerk of the superior court of Forsyth county and answer upon oath what it owed the defendant, R. L. Candler, or what stock the said R. L. Candler had in Gilmer Bros. Company at the time of the service of the attachment, as appears in the record.

(6) That Gilmer Bros. Company answered that the stock book of Gilmer Bros. shows that on June 27, 1905, stock certificate No. 74, for five shares of Gilmer Bros. Company preferred stock of the par value of $100, was issued to R. L. Candler, and that said stock certificate is not now in the possession of Gilmer Bros. Company, and it has no knowledge of where said stock certificate now is, also that it has no knowledge of any debts or effects belonging to R. L. Candler, as appears in the answer of Gilmer Bros. Company.

(7) That on September 5, 1912, the sheriff of Forsyth county served the following notice upon Gilmer Bros. Company:

"You will take notice that by virtue of an attachment issued in the above-entitled cause from the superior court of Forsyth county, a copy of said attachment having been delivered to you, I do levy upon the five shares of stock owned in your company by the defendant, R. L. Candler, evidenced by certificate No. 74, and do forbid you from making any transfer of the said stock, or of the certificate representing said stock, upon your stock transfer book, until the orders of the court permit you to do so, in the cause now pending, as entitled above."

(8) That the following is a copy of article 9, §§ 2 and 3, of the by-laws of Gilmer Bros. Company:

"Sec. 2. The shares of the company shall be transferable only on the books of the company, upon surrender and cancellation of the outstanding certificates for the shares as transferred, and a new certificate issued therefor.

"Sec. 3. The transfer book shall be the only evidence as to who are the shareholders entitled to vote at any meeting of the stockholders."

(9) That the Commonwealth Bank has interpleaded in said action and has asked that it be decreed to have a lien on said five shares of Gilmer Bros. stock prior to that of the plaintiff.

(10) That the Commonwealth Bank has not advertised the five shares of stock for sale, but is holding same, and that Gilmer Bros. Company has not paid out any dividends on said stock, but is holding same pending the outcome of this action.

(11) That no transfer of stock certificate No. 74 was ever made on the transfer book of Gilmer Bros. Company, but that from the transfer book of Gilmer Bros. Company the said R. L. Candler appears to be the owner of certificate No. 74. That Gilmer Bros. Company has not been requested to make any entry on its transfer book of any kind at any time prior to the issuing of the attachment in this cause, and had no knowledge or notice of the transfer to the Commonwealth Bank, prior to the institution of this action and service of this attachment.

(12) That L. A. Vaughn, administrator of R. L. Candler, has in his hands, as assets belonging to the estate, the sum of $401.80 in cash, and that claims have been filed by creditors with the said L. A. Vaughn, administrator, aggregating $543.53, other than the claims of this plaintiff. That the $300 claim of plaintiff would make total claims filed with L. A. Vaughn, administrator, and due by the estate of R. L. Candler, of $843.53.

His honor rendered judgment in favor of the plaintiff holding that the attaching creditor had priority over the bank, and the bank excepted and appealed.

Manly, Hendren & Womble, of Winston-Salem, for appellant. Louis M. Swink, of Winston-Salem, for appellee.

ALLEN, J. The authorities are in conflict as to the rights of the holder of a certificate of stock deposited as a security for a loan, which has not been transferred on the books of a corporation, as against an attaching creditor, under statutes similar to our own (Rev. § 1168), which provides:

"The shares of stock in every corporation shall be personal property, and shall be transferable on the books of the corporation in such manner and under such regulations as the by-laws provide; and whenever any transfer of shares shall be made for collateral security, and not absolutely, it shall be so expressed in the entry of the transfer."

It is held in some jurisdictions that the creditor acquires priority by the levy of the attachment, upon the ground that the statute is mandatory, and that it is equivalent to a requirement of registration, and the holder of stock which has not been transferred in accordance with the statute is treated as would be the holder of an unregistered mortgage as against one which has been registered. Bank v. Folsom, 7 N. M. 611, 38 Pac. 253; Sabin v. Bank, 21 Vt. 353; Bank v. Hastings, 7 Colo. App. 129, 42 Pac. 691; In re Murphy, 51 Wis. 519, 8 N. W. 419. The weight of authority is, however, against this view and in favor of the position that the purpose of the statute requiring a transfer upon the books of the corporation is to prevent fraudulent transfers and to protect the corporation in determining the question of membership, the right to vote, the right to participate in the management of the corporation, and the payment of dividends. 2 Cook on Corp. pp. 1367–1389; Thomp. on Corp. vol. 4, § 4335; 1 Machen, Mod. L. Corp. § 886; 3 Ruling Case L. p. 864; Masury v. Bank, 93 Fed. 605, 35 C. C. A. 476; Lund v. Mill Co., 50 Minn. 36, 52 N. W. 268, 36 Am. St. Rep. 623; Bank v. McElrath, 13 N. J. Eq. 24; Wilson v. Railroad Co., 108 Mo. 609, 18 S. W. 286, 32 Am. St. Rep. 624; Tombler v. Ice Co., 17 Tex. Civ. App. 601, 43 S. W. 896; McNeil v. Bank, 46 N. Y. 331, 7 Am. Rep. 341; De Comeau v. Oil Co., 3 Daly (N. Y.) 219; Finney's Appeal, 59 Pa. 398; Clark v. Bank, 61 Miss. 613; Bank v. Gas Co., 6 Wash. 600, 34 Pac. 155; Thurber v. Crump, 86 Ky. 418, 6 S. W. 145; Bank v. Standrod, 8 Idaho, 740, 71 Pac. 119, 67 L. R. A. 656; Lipscomb v. Condon, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. Rep. 938; McClung v. Colwell, 107 Tenn. 592, 64 S. W. 890, 89 Am. St. Rep. 961; Cooper v. Griffin, 1 Q. B. 740; Everitt v. Bank, 82 Neb. 191, 117 N. W. 401, 20 L. R. A. (N. S.) 996; Bank v. Railroad, 157 Cal. 573, 108 Pac. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391.

In Cook on Corporations, vol. 2, p. 1367, the author says:

"The decided weight of authority holds that he who purchases for a valuable consideration a certificate of stock is protected in his ownership of the stock, and is not affected by a subsequent attachment or execution levied on such stock for the debts of the registered stockholder, even though such purchaser has neglected to have his transfer registered on the corporate books."

And again at page 1389:

"The decisions and statutes of the various states show clearly that public policy and the legitimate demands of trade have gradually caused the courts and Legislatures of the various states to establish the rule that a sale or pledge of certificates of stock has precedence over a subsequent attachment levied on that stock for the debt of the vendor or pledgor, and that the failure of the pledgee or purchaser of the certificate to obtain a registry on the corporate books is not fatal to his interest in the stock."

The case cited from California is also reported in 21 Ann. Cas. 1391, to which there is a note, collecting the cases by states, which fully support the opinion of the editor that, in the absence of a statute which in express terms or by necessary implication gives priority to the attaching creditor, it is generally held that the holder of the stock, either as a purchaser or a pledgee, has the preference, although the transfer of the stock has not been entered on the books of the corporation. We adopt the latter position, which is not only supported by the weight of authority, but also, in our opinion, rests upon reason and a sound public policy.

Registration is for the purpose of giving notice and is based upon the idea that the public have the right to inspect the registry, and this condition does not prevail with us as to the stock book of a private corporation, which those who are not stockholders nor interested in the corporation have no right to see.

As was said in the case from Kentucky, speaking of a statute like ours:

"But the section does not operate as a registration law in the interest of the creditors of the stockholders for the reason that the books of the company are not required to be kept open for the inspection of the public. The books are required to be kept open to the stockholders only; outsiders have no right to demand an inspection of the books."

The provision requiring a transfer upon the books of a corporation cannot be of any practical benefit to the outside creditor, because, as he cannot see the books, he can have no means of knowing whether the transfer has been made or not, and in this respect the law as to the registration of mortgages furnishes no analogy, because the registry of mortgages is open to the public. The other view would also unduly hamper commercial transactions and would have a tendency to depreciate the value of stock, as do all restrictions upon its negotiation.

If it should be held that a transfer upon the books of a corporation is necessary to vest the title in a purchaser or a pledgee, the owner of stock, in order to secure a loan, would have to incur the expense and trouble of having the stock transferred to the lender upon procuring a loan and of having it retransferred upon payment, and, if he borrowed in sections where the books of the corporation were not accessible, it would make it difficult, if not impossible, to procure a loan, and one of the elements of value would be greatly impaired.

It is true that in Morehead v. Railroad, 96 N. C. 365, 2 S. E. 247, there is an intimation that a transfer of stock can only be effectual by a transfer upon the books of a corporation, but the later cases of Havens v. Bank, 132 N. C. 214, 43 S. E. 639, 95 Am. St. Rep. 627, and Cox v. Dowd, 133 N. C. 537, 45 S. E. 846, are in line with the current of authority. In the Havens Case the court quotes with approval from McNeil v. Bank, 46 N. Y. 325, 7 Am. Rep. 341, that:

"The common practice of passing the title to stock by delivery of the certificate with blank assignment and power has been repeatedly shown and sanctioned in cases which have come before our courts. * * * It has also been settled by repeated adjudications that, as between the parties, the delivery of the certificate with assignment and power indorsed passes the entire title, legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them, except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest; and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections."

The authorities and reasoning as to the effect of a public statute upon the rights of the parties have greater force when applied to the by-laws of a corporation, which are intended primarily to regulate dealings between the corporation and its stockholders.

We are therefore of opinion, upon reason and authority, that his honor was in error in holding that the attaching creditor has a priority.

Reversed.

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(169 N. C. 8)

## GROVES v. BARDEN. (No. 213.)

(Supreme Court of North Carolina. April 14, 1915.)

OFFICERS ⟸30—CONSTITUTIONAL PROVISIONS—"PLACES OF TRUST OR PROFIT"—"PUBLIC OFFICER"—"OFFICE."

Const. art. 14, § 7, provides that no person who shall hold any office or place of trust or profit under the United States or any department thereof, or under this state, or any other state, shall hold or exercise any other office or place of trust or profit under the authority of the state. Postal Laws and Regulations of 1913, which provides for the appointment of rural carriers by the Postmaster General, and requires such carriers to take oath to support the Constitution and to give bond for faithful performance of their duties, fixes the terms and duties of such carriers; it also inhibiting rural carriers from holding any state, county, municipal, or township office. Const. U. S. art. 2, § 2, authorizes Congress to vest the appointment of inferior officers in the President alone, or in the heads of departments. *Held* that, while the line between offices or places of trust and profit is not clear, an "office" is a public position to which a portion of the sovereignty of the country attaches for the time being, and which is exercised for the benefit of the public, and within the constitutional provision there is no distinction between "offices" and "places of trust or profit" with respect to the inhibition against double office-holding; hence a rural mail carrier was a "public officer," and his holding of a state office subjected him to the statutory penalties.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 37–43; Dec. Dig. ⟸30.

For other definitions, see Words and Phrases, First and Second Series, Office; Place of Trust or Profit; Public Officer.]

Appeal from Superior Court, Duplin County; Peebles, Judge.

Action by J. H. Groves against Frank Barden. From a judgment of nonsuit, plaintiff appeals. Reversed.

This is an action to recover a penalty of $200, imposed by section 2365 of the Revisal upon any person who shall presume to hold any office or place of trust or profit, contrary to article 14, § 7, of the Constitution of the state. The statute confers the right of action to recover the penalty upon any one who shall sue for the same. The plaintiff offered evidence tending to prove that the defendant was an acting constable and was at the time a rural mail carrier. His honor, being of opinion that the position of rural mail carrier was not a public office, entered a judgment of nonsuit, and the plaintiff excepted and appealed.

George R. Ward, of Wallace, and John A. Gavin, Jr., of Kenansville, for appellant. Stevens & Beasley, of Kenansville, for appellee.

ALLEN, J. The Constitution, art. 14, § 7, declares that:

"No person, who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this state, or under any other state, or government, shall hold or exercise any other office or place of trust or profit under the authority of this state, or be eligible to a seat in either house of the General Assembly."

The line between "offices" and "places of trust or profit," within the meaning of the Constitution, has not been clearly marked, principally because they approach each other so closely, and are in all essential features identical.

In Doyle v. Raleigh, 89 N. C. 133, 45 Am. Rep. 677, the court, speaking of this question, says:

"It is apparent from the association that 'places of trust or profit' are intended which approximate to but are not offices, and yet occupy the same general level in dignity and importance. The manifest intent is to prevent double office-holding—that offices and places of public trust should not accumulate in a single person—and the superadded words of 'places of trust or profit' were put there to avoid evasions in giving too technical a meaning to the preceding words."

And this was affirmed in State ex rel. Wooten v. Smith, 145 N. C. 476, 59 S. E. 649; the court adding in the latter case:

"The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a del-

egation to the individual of some of the sovereign functions of the government. In this respect the terms 'office' and 'place of trust,' as used in our Constitution, are synonymous. Doyle v. Raleigh, 89 N. C. 136 [45 Am. Rep. 677]; Barnhill v. Thompson, 122 N. C. 495 [29 S. E. 720]."

In determining whether a position is an office, place of trust or profit, or an employment, the authorities, which are collected in the valuable note to Attorney General v. Tillinghast, 17 Ann. Cas. 452, attach significance to the fact that an oath to support the Constitution is required, or that a bond for the faithful performance of duties must be executed, or that the duties are prescribed by law, and not regulated by contract, or that the incumbent discharges independent duties and is not acting under the direction of others, or that the duties are continuing and permanent in their nature and are not occasional or intermittent, or that the term is fixed and continuing and not temporary, or that the position is named an office or an employment in the statute creating it; but, in the absence of a constitutional provision, these are only circumstances which are entitled to consideration, and are not determinative or conclusive. The editor of the note says:

"It may be stated as a general rule, fairly deducible from the cases discussing the question, that a position is a public office when it is created by law, with duties cast upon the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent, while a public employment, on the other hand, is a position which lacks one or more of the foregoing elements."

Our court is in line with the current of authority, having adopted and approved the definition of an office that it is "a public position to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public," and saying further:

"The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the government." State v. Smith, 145 N. C. 477, 59 S. E. 650.

If, therefore, there is no constitutional classification of offices and employments, and a duty is imposed upon the incumbent of a position which requires him to perform a legislative, executive, or judicial act, he is a public officer, and otherwise an employé, and, in determining the nature of the duty, the fact that the lawmaking power may have declared the position an office or an employment, although not conclusive, is entitled to consideration. If these principles are properly applied, the position of rural mail carrier has all the indicia of a public office.

By reference to the postal laws and regulations of 1913, it will be seen (section 718) that rural carriers are appointed by the postmaster general; that they are required to take an oath to support the Constitution (section 722), and to execute a bond to secure the faithful performance of their duties (section 723); that the oath is referred to as an official oath (section 722), his duties are designated as official duties (section 752), and mention is made of the official character of the carrier (section 740). His term and his duties are fixed by law and not by contract, and the duties are continuing and not intermittent and affect the public generally. They are defined to be:

"The delivery into and collection from boxes on their routes of mail matter of all classes, serving of post offices with mail whenever such service is authorized, sale of stamps and supplies, receiving and receipting for matter presented for registration, delivery of registered matter, the handling of registered matter in transit over their routes, taking of applications for money orders and the money therefor, the forwarding of mail addressed to their patrons, and the transfer of mail of former patrons whose addresses have been changed to other routes, the erection of United States collection boxes, and the performance of such other duties as may be required of them by law and the regulations of the department, to administer oaths required of pensioners and their witnesses in the execution of pension vouchers."

It is also provided in section 741 that a rural carrier shall not hold any state, county, municipal, or township office, which is a prohibition usually imposed upon officers and not upon employés.

We have thus far dealt with the question with reference to public offices generally, and not as applied particularly to positions held under the government of the United States, but as to the latter there seems to be a dividing line marked by the Constitution itself between offices and employments.

The Constitution of the United States, art. 2, § 2, says:

The President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper in the President alone, in the courts of law, or in the heads of departments."

And, in construing this section of the Constitution, the court said in United States v. Germaine, 99 U. S. 508, 25 L. Ed. 482:

"The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."

It was held in this case that a surgeon appointed by the commissioner of pensions was not a public officer, because he was not appointed by the head of a department.

The two cases of United States v. Hartwell, 73 U. S. (6 Wall.) 385, 18 L. Ed. 830, and United States v. Smith, 124 U. S. 525, 8 Sup. Ct. 595, 31 L. Ed. 534, illustrate the application of this rule, making the character of the position to depend upon the source of the appointing power. In the first it was held that a clerk in the office of the Assistant Treasurer of the United States, appointed with the approval of the Secretary of the Treasury, who was the head of the department, was a public officer; and in the second that a clerk of a collector of customs, appointed by the collector, who was not the head of a department, was not an officer. In the latter case the court says:

"A clerk of the collector is not an officer of the United States, within the provisions of this section; and it is only to persons of that rank that the term 'public officer,' as there used, applies. An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person in the service of the government, who does not derive his position from one of these sources, is not an officer of the United States, in the sense of the Constitution. The subject was considered and determined in United States v. Germaine, 99 U. S. 508 [25 L. Ed. 482], and in the recent case of United States v. Mouat, 124 U. S. 303 [8 Sup. Ct. 505, 31 L. Ed. 463]. What we have here said is but a repetition of what was there authoritatively declared. * * * The case of United States v. Hartwell, 73 U. S. (6 Wall.) 385 [18 L. Ed. 830], does not militate against this view. The defendant there, it is true, was a clerk in the office of the assistant treasurer at Boston, but his appointment by that officer under the act of Congress could only be made with the approbation of the Secretary of the Treasury. This fact, in the opinion of the court, rendered his appointment one by the head of the department, within the constitutional provision upon the subject of the appointing power."

The question was again considered in United States v. Mouat, 124 U. S. 303 [8 Sup. Ct. 505, 31 L. Ed. 463], and the same conclusion reached; the court saying:

"What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, has been very fully considered by this court in United States v. Germaine, 99 U. S. 508 [25 L. Ed. 482]. In that case it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a department; and the heads of the departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."

The rural mail carrier is, as we have seen, appointed by the Postmaster General, a member of the Cabinet and the head of his department, and therefore comes within the classification of officers outlined in the Constitution, as construed by the Supreme Court of the United States, and this position is not in conflict with State v. Boone, 132 N. C. 1108, 44 S. E. 595, in which it was held that a carrier of mails operating upon a star route was not a public officer, because the mail carrier in that case was occupying his position under contract with a contractor of the government, and not by the appointment of the head of any department of government, as is the rural mail carrier.

It was held in U. S. v. McCrory, 91 Fed. 295, 33 C. C. A. 515, that a letter carrier appointed by the Postmaster General was an officer.

We are therefore of opinion that his honor was in error in holding that a rural mail carrier is not an officer.

Error.

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(168 N. C. 626)

## HARGRAVE et al. v. BOARD OF COM'RS OF DAVIDSON COUNTY. (No. 367.)

(Supreme Court of North Carolina. April 14, 1915.)

1. HIGHWAYS ⟸92—ROAD COMMISSIONERS—STATUTE.

Act of February 27, 1915, creating the board of road commissioners of Davidson county, authorizing the issuance of bonds to construct and maintain roads, and conferring on the board sole control over them, is not invalid because taking the entire management of public roads from the county commissioners, and nowhere providing for supervision of the acts of the board.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 303; Dec. Dig. ⟸92.]

2. COUNTIES ⟸178 — HIGHWAYS — BONDS — ISSUANCE—ELECTION.

The working and construction of public roads are necessary expenses, and the creation of debt by issuance of bonds for that purpose need not be submitted to a vote of the people in accordance with Const. art. 7, § 7, declaring that no county shall contract any debt, except for necessary expenses, unless by a vote of a majority of the voters.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269–273; Dec. Dig. ⟸178.]

3. CONSTITUTIONAL LAW ⟸42 — RIGHT TO QUESTION LAW—PERSONS PREJUDICED.

That act of February 27, 1915, creating the board of road commissioners of Davidson county, did not sufficiently safeguard the rights of citizens as to assessment of damages for land taken by condemnation, is no ground for enjoining the operation of the act at suit by taxpayers, but can be taken advantage of only by landowners.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸42.]

4. HIGHWAYS ⟸92—STATUTES—VALIDITY.

That the board of road commissioners for Davidson county, created by act of February 27, 1915, may, under their power of electing successors, become a self-perpetuating body, will not avoid the act; such matter being within control of the Legislature.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 303; Dec. Dig. ⟸92.]

5. CONSTITUTIONAL LAW ⟸70 — LIMITATION OF JUDICIARY.

While the Supreme Court may review the actions of inferior tribunals, it cannot review the exercise of legislative discretion.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129–132, 137; Dec. Dig. ⟸70.]

Brown and Walker, JJ., dissenting.

Appeal from Superior Court, Davidson County; Lyon, Judge.

Action by J. F. Hargrave and others against the Board of Commissioners of Davidson County. From a judgment denying an injunction, plaintiffs appeal. Affirmed.

Manning & Kitchin, of Raleigh, and S. E. Williams, W. O. Burgin, and McCrary & McCrary, all of Lexington, for appellants. E. E. Raper, Phillips & Bower, and Walser & Walser, all of Lexington, for appellees.

CLARK, C. J. The plaintiffs, residents and taxpayers of Davidson county, brought this action to test the validity of an act ratified February 27, 1915, creating the board of road commissioners of Davidson county, and authorizing the issue of $300,000 of bonds to construct and maintain the roads of said county. The act confers on said board sole control over the roads of said county and other powers set out in said act. The complaint does not allege that the act was not regularly passed, nor that the requirements of the Constitution, art. 2, § 14, were not in all respects complied with. Indeed, the regularity of the passage of the act is shown by the certificate of the secretary of state to copies of the act and the entries on the journals of the General Assembly relating to the enactment thereof.

[1] The questions presented in this case are almost identical with those considered in Commissioners v. Commissioners, 165 N. C. 632, 81 S. E. 1001, in which a similar act was upheld. In that case, and also in Trustees v. Webb, 155 N. C. 379, 71 S. E. 520; Pritchard v. Com'rs, 159 N. C. 636, 75 S. E. 849, affirmed on rehearing 160 N. C. 476, 76 S. E. 488; Tate v. Com'rs, 122 N. C. 812, 30 S. E. 352; Herring v. Dixon, 122 N. C. 420, 29 S. E. 368; and in other cases—this court has held that the construction and maintenance of public roads are a necessary public expense, and that the General Assembly may provide for construction and working the same and may create a board to do this, distinct from the county commissioners, and fix and authorize the levy of taxes for that purpose, as in this act, without a vote of the people. We know of no reason to question the correctness of those decisions.

It is objected by the plaintiffs: (1) That the act takes the entire management of the public roads from the county commissioners. (2) That it abolishes the existing road township boards and turns the property of such boards over to county boards created by this act. (3) That it provides for the election of successors at expiration of term of office of the board named by the act, by the surviving members. (4) That there is no limit of time for continuance of the act. (5) That nobody is given authority to supervise the acts of the board. (6) That the provisions of the act for condemning land are not sufficient and are illegal.

All the propositions thus relied upon have been held insufficient to invalidate the action of the General Assembly, in the cases above cited.

[2] The plaintiffs, in their brief, concede that the working and construction of public roads are necessary expenses, and that the creation of debt by the issuance of bonds for that purpose does not require to be submitted to a vote of the people under the provisions of the Constitution, art. 7, § 7, citing Vaughn v. Com'rs, 117 N. C. 434, 23 S. E. 354; Com'rs v. Com'rs, 165 N. C. 632, 81 S. E. 1001, and cases therein cited; and the still later case, Highway Commission v. Malone, 166 N. C. 1, 81 S. E. 1009.

[3] The plaintiffs, however, contend that the act now before us does not sufficiently safeguard the rights of the citizen as to the assessment of damages for land taken by the road commission in improving the roads. That question cannot be raised in this case, but objection should be made by the party in interest, the landowner, when the occasion occurs, and, should the objection be sustained, it would in no wise affect the validity of the statute as a whole, nor would it justify this injunction sought against the issuance of the bonds or to restrain the road commission from discharging the duties imposed on them by the act of the General Assembly.

[4] The plaintiffs further contend that the statute, by authorizing the board to fill vacancies in their own body from time to time, makes itself a self-perpetuating body, because though two of them are elected for two years, two for four years, and two for six years, the terms of the expiring members are filled by their associates. They further object that the existence of the board is unlimited in duration, and that it is not made responsible for its acts to the people nor to any constitutional authority, that the act contains no provisions for the removal of any member of the board, except upon indictment for a misfeasance, and then only where the neglect or refusal to perform a duty is willful or corrupt, and in short that the Legislature has given the board too much power. All these matters are within the control of the legislative department of the government, and it is not in the power of this court to correct them, nor to review and criticize the action of the General Assembly within the scope of its powers. The act is within the constitutional power of the Legislature, and, if there are any defects found therein of the nature

complained of, they can be corrected by the General Assembly, should it so wish, at its next session.

After full and careful review of the reasons presented by the able counsel for the plaintiffs, and with due regard to the amount involved and the importance of the act to the people of Davidson county, we do not find that we have any power to issue any writ to interfere with the execution of the act, which has been duly passed and within the constitutional authority and power of the General Assembly.

In Com'rs v. Com'rs, 165 N. C. 634, 81 S. E. 1001, we said, quoting from Pearson, C. J., in Brodnax v. Groom, 64 N. C. 250:

"The court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the government, or upon the county authorities."

In the same case (Com'rs v. Com'rs, 165 N. C. 635, 636, 81 S. E. 1001, 1002), this court further said:

"This is not a matter over which this coordinate department (of the government) has any control. If the result is bad, the remedy is to be found in the power of public opinion, either in controlling the conduct of such members or in electing successors who will cause the objectionable legislation to be repealed or modified. The courts do not have supervisory power over the General Assembly, or over the county officials, when acting within the authority lawfully conferred upon them by the Legislature. If there were allegation and proof that the defendants, or any other public officials, were acting dishonestly or so extravagantly or recklessly as to amount to an abuse of the authority conferred upon them, the courts might, by injunction in such case, restrain the alleged illegal acts until a jury could pass upon the issues of fact; but the courts cannot interfere with such powers as are conferred upon the defendants by the statute in this case, which, as we have held, were within the power of the General Assembly."

The courts can compel officials to comply with a lawful statute. They cannot direct them to disobey it. The courts can supervise by mandamus or injunction the action of officials only to insure their faithful execution of the duties imposed upon them by the statute.

The case last cited (Com'rs v. Com'rs, 165 N. C. 632, 81 S. E. 1001) was a decision upon a statute very similar in purpose and purport to this, applicable to the county of Yancey, and further legislation in regard thereto, as desired by the people of that county, has been enacted by the General Assembly since held. The recourse of the plaintiffs herein must be made to the same body and not to the courts.

[5] This court can review the conduct of the judges below us, even in matters within their discretion, if there is clear abuse of such discretion, but the Constitution gives no such powers to the five lawyers, who compose this court, over the conduct of the General Assembly when acting within the constitutional scope of their authority. This court has repeatedly held, in cases above cited, that, the construction and maintenance of public roads being a necessary expense, the General Assembly has authority to authorize the creation of debt for that purpose without a vote of the people. It may be urged that the General Assembly ought not to be intrusted with such authority, but that is a matter for the people themselves in enacting the state Constitution. It may be said that, though the General Assembly has such power, it ought not to exercise it. But that is a matter for them, and not for this court. While the General Assembly enacted this statute, it is doubtless true, as contended by the plaintiffs, that the act would not have been passed if opposed by the member and senator from the county of Davidson, but that is a matter for the people of that county and should have been considered by them in selecting their representatives in the General Assembly.

But even if we could review and reverse the action of the General Assembly, should we think they may have acted indiscreetly in passing this act, this court would be estopped by our previous unanimous decisions to say that there was abuse of discretion on the part of the General Assembly in authorizing Davidson county to issue $300,000 for road purposes without a vote of the people. In Com'rs v. Com'rs, 165 N. C. 623, 81 S. E. 1001, we held a similar act as to Yancey county valid when the population was 12,072 and the taxable property $1,753,036, and the amount of bonds for road purposes, held valid by a unanimous opinion of this court, was $125,000.

In Pritchard v. Com'rs, 159 N. C. 636, 75 S. E. 849, we held valid, by a unanimous court, an issue of $250,000 by Orange county, where the population was 15,066 and the taxable property was $5,167,820, and that case was reaffirmed on rehearing. 160 N. C. 476, 76 S. E. 488.

In the present case, the issue authorized for Davidson county is $300,000, but the population is nearly double that of Orange, to wit, 29,404, and the taxable property is $9,378,008.

If this court has power to pass upon the action of the Legislature, when, as we have held, such action is within the constitutional power of the General Assembly, merely because we may think that such action is improvident, we would be estopped by the above and other cases where the amount of bonds authorized for road purposes is proportionately much greater in proportion to population and taxable value than in this case. Besides, if we possessed such power, this state would practically have a commission form of government.. The Constitution would have to clearly confer such unusual authority, which it has not done, either expressly or by any implication.

The people of North Carolina have long since declared that they were competent to govern themselves, and they have proved it.

When their representatives in the General Assembly pass an act within its powers, which is not agreeable to their constituents, the members of the General Assembly are responsible to the sovereign, the people themselves, and not to this court, which is simply a co-ordinate department of the government, and not authorized to go beyond the powers conferred on us by the Constitution.

The judgment of the court below is affirmed.

WALKER, J., dissents.

BROWN, J. (dissenting). Under the facts set out in the complaint in this case, which are practically admitted to be true, I cannot agree that a bonded debt of $300,000 shall be fastened upon the taxpayers of the county of Davidson, not only without their consent, but against it.

I admit that the decision of the majority of this court is strictly in accordance with the principles laid down in the Yancey County Case, 165 N. C. 632, 81 S. E. 1001, in which an act, somewhat similar to this, was sustained. I admit that there are other cases cited in the opinion of the court in which this court has held that the public roads of a county are a necessary public expense, and that the General Assembly may provide the method for their upkeep and maintenance.

I have come to the conclusion that this court has gone entirely too far in defining what are the necessary expenses of a county, within the meaning of article 7, § 7, of the Constitution. At the time when the Constitution of 1868 was adopted, in which this section first occurs, we had a system of public roads throughout the state, maintained without special taxation, and, although keeping them up by taxation may result in much better roads, yet I have no idea that the thought ever occurred to any member of the convention of 1868, or to any of the voters of the state, that under that section it would ever be possible to fasten a debt of $300,000 upon a county for the purpose of constructing and keeping up its public roads without the consent of its citizens. I have come to the conclusion that this court should reverse itself upon that proposition. No one can tell to what extent this doctrine may be carried in the future. The proposition here is to issue $300,000 in bonds. Where will the limit be? Suppose, instead of $300,000, the author of the bill had provided for the issue of a million dollars in bonds, this court, according to the principles announced, would be compelled to sustain it, and the groaning taxpayers of Davidson county would have no remedy. This is inconsistent with all theories of local self-government and is antagonistic to the best interest of the state.

The plaintiffs in this case show that this proposition to issue $300,000 in bonds was voted upon by the people of Davidson county not two years ago under the act of 1913 (Pub. Laws 1913, c. 89). They voted it down by a large majority. The act of 1915 was passed, without the knowledge of the people of Davidson county, at the instance of their representative. They had no opportunity to oppose it, and, if they had, so-called "senatorial courtesy" would have required the passage of the act.

According to the allegations contained in the pleadings in this case, the people in Davidson county are not opposed to good roads, nor are they opposed to taxing themselves for this purpose. On the contrary, all except 4 of the 17 townships in the county are levying and collecting taxes for special road purposes. Their money was carefully expended by trustees responsible to the people; and while they were willing to pay this annual tribute, for the purpose of keeping up their roads, they were not willing to mortgage the future of their county and burden it in the years to come with such immense debt.

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(169 N. C. 245)

## MASSEY v. NORTH CAROLINA R. CO.

(No. 314.)

(Supreme Court of North Carolina. April 22, 1915.)

APPEAL AND ERROR ⟸966—REVIEW—DISCRETION OF TRIAL COURT—CONTINUANCE.

The granting of a continuance in a cause is within the sound discretion of the trial court, and its refusal will not be held error, where there is nothing in the record showing an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. ⟸966.]

Appeal from Superior Court, Durham County; Rountree, Judge.

Action by Virginia Massey, as administratrix of the estate of P. H. Massey, deceased, against the North Carolina Railroad Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

This is a civil action, tried upon these issues:

(1) Is the plaintiff the duly qualified administratrix of Patrick H. Massey? Answer: Yes.

(2) Was the plaintiff's intestate killed by the negligence of defendant's lessee, as alleged in the complaint? Answer: Yes.

(3) If so, did plaintiff's intestate by negligence on his part contribute to his death? Answer: No.

(4) What damages, if any, is the plaintiff entitled to recover? Answer: $9,750.

From the judgment rendered, defendant appealed.

Guthrie & Guthrie, J. L. Morehead, and W. G. Bramham, all of Durham, for appellant. Bryant & Brogden, of Durham, for appellee.

PER CURIAM. The negligence of the defendant and its liability for damages is admitted. The only assignments of error relate to the refusal of his honor to continue the case at the instance of the defendant and to his honor's charge upon the question of damages. It is well settled that the continuance of the cause is within the sound dis-

cretion of the judge. We find nothing in this record denoting any abuse of such discretion. We have examined the charge of the court on the question of damages, and find it to be a correct expression of the law as laid down by this court in a number of cases. Burton v. Railroad, 82 N. C. 507; Benton v. Railroad, 122 N. C. 1009, 30 S. E. 333; Mendenhall v. Railroad, 123 N. C. 278, 31 S. E. 480; Watson v. Railroad, 133 N. C. 190, 45 S. E. 555; Ward v. Railroad, 161 N. C. 186, 76 S. E. 717.

No error.

(169 N. C. 13)

LOVE v. WEST et al. (No. 280.)

(Supreme Court of North Carolina. April 22, 1915.)

LIMITATION OF ACTIONS ⟸84—FORECLOSURE OF MORTGAGE—ABSENCE OF MORTGAGOR.

An action to foreclose a mortgage is barred in 10 years by Revisal 1905, § 391, subsec. 3, but is within section 366, providing that the time of the debtor's absence from the state shall not be taken as any part of the time limit for the commencement of an action, and an action to foreclose a mortgage brought about 24 years after the maturity of the debt secured thereby is barred unless the time of the absence of the mortgagor from the state has been so long as to bring the action within section 391, and during the absence of the mortgagor no limitation or presumption arises against the mortgagee.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 439–448; Dec. Dig. ⟸ 84.]

Appeal from Superior Court, New Hanover County; Allen, Judge.

Action by D. C. Love, administrator, against Elizabeth P. West and another. From a judgment for defendants, plaintiff appeals. Reversed.

John D. Bellamy & Son, of Wilmington, for appellant. Herbert McClammy and Bellamy & Bellamy, all of Wilmington, for appellees.

BROWN, J. This action is brought to foreclose a mortgage, executed by Samuel J. West to George Harris in 1877, securing a note, payable two years after date. The property described in the mortgage is the one-fifth interest which the mortgagor owned in the mortgaged premises. The defendants pleaded the statute of limitation. The referee and the judge below held that the action was barred. It is admitted that the mortgagor left the state of North Carolina in 1879 and since then has resided continuously outside of this state. In 1902 the mortgagor conveyed his interest in the property to the defendants Elizabeth P. West and Mariana West. This action was instituted April 1, 1903, for the purpose of foreclosing the mortgage upon the said one-fifth interest. The said Elizabeth P. and Mariana are parties defendant.

Under section 391, subsec. 3, of the Revisal, an action for the foreclosure of a mortgage is generally barred in 10 years, unless it has been kept alive by payments or renewed promises to pay. But there is a general exception which applies to this cause of action, as well as others. Section 366, Revisal, reads as follows:

"If, when the cause of action accrue * * * against any person, he shall be out of the state, action may be commenced, * * * within the times herein respectively limited, after the return of such person into this state, and if, after such cause of action shall have accrued * * * such person shall depart from and reside out of this state, or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be * * * taken as any part of the time limit for the commencement of such action, or the enforcement of such judgment."

It is contended by the defendants that the proceeding to foreclose a mortgage is an action in rem, which could have been commenced at any time, without personal service upon the mortgagor, and that for this reason this particular cause of action does not come within the provisions of section 366. It is unnecessary to discuss the character of this action, whether in personam or in rem, as the statute contains no exception. Some of the states have enacted statutes similar to ours, but have provided therein that they shall not apply to proceedings which may act directly upon the property situate within the state, as proceedings in rem do, but there is no such exception in our statute. A number of states have statutes similar to ours, and in all of them that we have examined, it has been held that an action to foreclose a mortgage comes within the purview of the statute, unless there is an exception, and that the absence of the mortgagor from the state suspends the running of the statute. Falwell v. Hening, 78 Tex. 278, 14 S. W. 613; Huff v. Crawford, 88 Tex. 368, 30 S. W. 546, 31 S. W. 614, 53 Am. St. Rep. 763; Id., 89 Tex. 214, 34 S. W. 606; Wood v. Goodfellow, 43 Cal. 185; Watt v. Wright, 66 Cal. 202, 5 Pac. 91; Emory v. Keighan, 94 Ill. 543; Robertson v. Stuhlmiller, 93 Iowa, 326, 61 N. W. 986; Chicago R. R. v. Cook, 43 Kan. 83, 22 Pac. 988; Whalley v. Eldridge, 24 Minn. 358.

We have held that if a debtor is out of the state at the time the cause of action accrues, the statute of limitation does not begin to run until he returns to this state for the purpose of making it his residence. Armfield v. Moore, 97 N. C. 38, 2 S. E. 347. In that case it is said:

"It is not the policy * * * of this state to drive its citizens, directly or indirectly, to seek their legal remedies abroad, or to encourage nonresidents to keep out of it and beyond the jurisdiction of its courts, as would * * * be the case if by keeping out of the state the debtor or person against whom a cause of action exists could avail himself of the lapse of time during his absence."

The point presented by this appeal has been practically decided in this court by Grist v. Williams, 111 N. C. at page 54, 15 S. E. 889, 32 Am. St. Rep. 782. This was an ac-

tion in rem in which the plaintiff was proceeding by attachment against property located within this state, the defendant being a resident of the state of Virginia. In that case it is held that the fact that a nonresident debtor has property within the state will not affect the statutes suspending the operation of the statute of limitation for the period during which the person against whom the judgment is made is out of the state.

It has been suggested that a presumption of payment has arisen against the bond and mortgage sought to be foreclosed. It has been said that for the sake of repose, and to discourage stale claims, the law, after the lapse of 20 years, raises a presumption of payment or rather of an abandonment of the cause of action. That was held as to a legacy in Cox v. Brower, 114 N. C. 423, 19 S. E. 365, and the learned judge writing the opinion seems to think the presumption would apply to bonds and mortgages. In respect to bonds under seal, the common-law doctrine of a presumption of payment which was rebuttable has been superseded by a statute of limitations, and where the statutory period has expired, there is no rebuttable presumption of payment. The debt is completely barred unless the party seeking to recover on it can rebut the statute in the manner required by law. Under our law, bonds and mortgages are barred in 10 years, and no action can be maintained thereafter on them in the absence of proof tolling the statute. It is not a rebuttable presumption of payment which arises, but an absolute bar to the action. This action would be barred in 10 years from the date when the mortgage debt became due but for the express provision of the statute which we have quoted. During the absence of the defendant from the state, no limitation or presumption arises against the debt, for the creditor is not compelled to commence his action until after the debtor returns to the state. His absence from the state rebuts the statute and any presumption of payment of the debt.

Upon the findings of fact and admissions in the pleadings, the plaintiff is entitled to judgment of foreclosure. The cause is remanded to the superior court of New Hanover county, with instructions to enter judgment accordingly.

Reversed.

HOKE, J. (concurring in the result). Recognizing the correctness of the position stated in the principal opinion that on the facts of this case the continued absence of the mortgagee from the state will prevent the running of the statute of limitations, I am of opinion that independent of such statute, and in addition thereto, the common-law presumption of payment after 20 years still prevails with us, and unless the same is rebutted, that such presumption may defeat a recovery. In re Dupree's Will, 163 N. C. 256, 79 S. E. 611; In re Beauchamp's Will, 146 N. C. 254, 59 S. E. 687; Worth v. Wrenn, 144 N. C. 656-660, 57 S. E. 388; Cox v. Brower, 114 N. C. 422, 19 S. E. 365; Headen v. Womack, 88 N. C. 468; Cartwright v. Kerman, 105 N. C. 1, 10 S. E. 870; Campbell v. Brown, 86 N. C. 376, 4 Am. Rep. 464.

In Cox v. Brower, supra, Burwell, J., delivering the opinion, quotes with approval from Lawson on Presumptive Evidence, as follows:

"Independently of a statute of limitations, or in the absence of one after a lapse of 20 years, the law raises a presumption of the payment as to bonds, mortgages, legacies, taxes, judgments, the due execution of a trust, and the performance of a covenant."

And in applying the principle, it is held in Campbell v. Brown, supra, and in other cases, that absence from the state will not of itself repel the presumption. This presumption, however, as heretofore stated, is not absolute as in the case of our present statute of limitations, but is one of fact and rebuttable by proper evidence. In the present case, the note and mortgage having matured in 1879, and 24 years having elapsed prior to the institution of the present action in 1903, if nothing else appeared the claim would be barred by reason of the common-law presumption. The referee, however, has found as a fact that the note and mortgage have not been paid off; and, the presumption referred to being thus rebutted, I concur in the disposition made of the case.

(169 N. C. 323)

## STATE v. COLLINS et al.
## In re BELL et al.

(No. 185.)

(Supreme Court of North Carolina. April 22, 1915.)

1. COSTS ⟹298—TAXATION AGAINST PROSECUTOR—STATUTE—"LAW OF THE LAND."

Under Revisal 1905, § 1295, requiring the taxation of the costs of a malicious prosecution against the prosecutor, but providing that no person shall be made prosecutor after the filing of the bill, unless he shall have been notified to show cause why he should not be made a prosecutor of record, it is contemplated that the parties interested shall have their cause heard according to the "law of the land," which is the law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1129-1140; Dec. Dig. ⟹298.

For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

2. CONSTITUTIONAL LAW ⟹317—DUE PROCESS—TAXATION OF COSTS AGAINST PROSECUTOR—HEARING.

Where the costs of a criminal prosecution were taxed against two prosecutors who had been notified to show cause why they should not be made prosecutors of record, but who were not given opportunity to present their affidavits and those of others in their behalf showing that the prosecution was instituted in good

faith and with reasonable grounds for believing the defendants to be guilty; they had no hearing according to the law of the land.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. ⟸317.]

3. CRIMINAL LAW ⟸1158—APPEAL — TAXATION OF COSTS AGAINST PROSECUTOR—FINDINGS OF FACT.

The findings by the trial court after proper hearing that a prosecution was maliciously instituted, and that the costs should be taxed aainsgt the prosecutor, are conclusive on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061–3066, 3070, 3071, 3074; Dec. Dig. ⟸1158.]

Appeal from Superior Court, Jones County; Peebles, Judge.

Agnes Collins and another were indicted for a crime. At the close of the testimony for the state, the judge, being of the opinion that the prosecution was frivolous and malicious, ordered E. H. Bell and another to be marked as prosecutors and taxed with the costs, and those parties appeal. Reversed.

At the close of the state's testimony, his honor, being of opinion that the prosecution was frivolous and malicious, so adjudged and ordered that E. H. Bell and F. M. Jenkins who had assisted in employing counsel to aid the solicitor, should be marked as prosecutors; that they be taxed with the costs and placed in custody of the sheriff "till said costs be paid." These parties, having duly excepted, appealed to the Supreme Court.

L. I. Moore, of Newbern, and J. K. Warren, of Trenton, for appellants.

HOKE, J. [1] The statute of this state, which authorizes the court to mark one as prosecutor in a criminal action (Rev. 1905, § 1295), contains the proviso:

"That no person shall be made a prosecutor after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecutor of record."

And by the language of this provision, or even by the very fact that notice is required, it is clearly contemplated that the parties interested shall have their cause heard, and heard, too, according to the "law of the land." This term "law of the land," as used in the seventeenth section of our Bill of Rights, has received notable and approved definition as:

"Law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial."

In Parish v. Cedar Works, 133 N. C. 478, 45 S. E. 768, 98 Am. St. Rep. 718, it is held to be the equivalent of "due process of law," as it is expressed in the federal and many of our state Constitutions; and in Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165, it is said that the essential elements of due process of law are "notice and opportunity to defend."

In Connor & Cheshire's Constitutions, at page 58, in speaking to these requirements of "notice and hearing," embodied in the constitutional provision, the learned annotators, among other things, say:

"Notice and hearing are essential to constitute due process of law or the 'law of the land'; and it is necessary that a party be cited and have his day in court, upon which he may appear and defend himself and his rights and his property."

And again:

"Due process of law not only requires that a party should be brought into court but that he shall have opportunity, when in court, to establish any fact that, according to the usages of the common law or the provisions of the Constitutions, would be a protection to him or his property"—citing State v. Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130, and other cases.

[2] On perusal of the facts presented, it clearly appears that these appellants have had no hearing of their cause, within the meaning of these principles. At the trial, which seems to have taken place on Tuesday of the term, December 8th, his honor, on motion, dismissed the action, and, being of opinion that the prosecution was frivolous and malicious, called on E. H. Bell, who was present in court, to show cause why he should not be marked as prosecutor. It does not clearly appear whether the order as to Bell was then made or later, but, on being asked by counsel if he would not hear from Bell, his honor replied that he would, and thereupon issued a citation to F. M. Jenkins, returnable on Friday following, and when the cause was again called, after notice served on Jenkins, the appellants were in court, ready with their own and numerous affidavits of the best citizens of the community, tending to show good faith on part of appellants, and that defendants in the bill of indictment were guilty, as charged, many of them to the effect that:

"Both of appellants were men of high character and integrity, who stood for all things which make for the best moral standards of citizenship, in the town of Maysville, where they reside; that they are men of kind hearts, good judgment, and common sense; that each has a family, consisting of wife and several children, all of whom deport themselves as good moral citizens," etc., etc.

Others made averment of facts and relevant incidents tending to show guilt, on part of defendants in the principal case, and which were known to appellants when they agreed, with other citizens, to employ special counsel to aid the solicitor in the prosecution. His honor declined to hear or consider the affidavit of E. H. Bell or any supporting affidavits of "outsiders" on the subject, but finds that "he did not make the order before he heard the affidavit of Jenkins." In reference to this, to quote from his honor's findings on the subject, he says:

"* * * The statement that I found the facts before I heard the answer of Jenkins is not correct. It is true that I refused to hear affidavits of outsiders and their petitions. Bell was in court when I called on him to show cause why he should not be marked prosecutor

and be made to pay the costs. He showed none, and I made the order. The solicitor asked if I would not hear from Bell. I told him I would, and nothing else was said until late Saturday afternoon, when Mr. Warren asked to be allowed to read Bell's answer and affidavits. I had decided to hear nothing more from Bell, declined to hear his answer and affidavits, because I had made up my mind that the prosecution was malicious, and did not want to consume any more time with the matter."

[3] In the disposition made of this appeal, we do not intend to impair or qualify our former decisions on the subject, notably State v. Hamilton, 106 N. C. 660, 10 S. E. 854, and State v. Roberts, 106 N. C. 662, 10 S. E. 900 to the effect that, on a hearing of this character, the findings of fact by the trial judge are conclusive. In the disposition of these and like motions, there must necessarily be some tribunal having the power to determine the ultimate facts on which the rights of the parties depend, and we think the cases which refer this power to the trial judge, who is present and has opportunity to personally observe and note the circumstances and attendant conditions, are grounded in good reason; but on the facts as they appear from his honor's findings, and we think it not improper to say that he has spread them on the record with commendable candour, we are of opinion that these men, as heretofore stated, have had no proper hearing, within the meaning of the constitutional provision, and that the judgment against them must be set aside. This will be certified that the order and findings, by which appellants have been marked as prosecutors and taxed with the costs, be set aside, and the question reheard in accordance with law and the course and practice of the court.

Reversed.

(75 W. Va. 389)

## COLEBANK v. STANDARD GARAGE CO.

(Supreme Court of Appeals of West Virginia. Dec. 22, 1914. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. MUNICIPAL CORPORATIONS ⟸654—STREETS —EVIDENCE.

In an action wherein the issue is whether defendant negligently injured plaintiff by driving an automobile on him in a public highway, proof that the place where the injury was inflicted was a street opened to the public and used for travel by the public generally, is sufficient. Acceptance by the public authorities need not be shown.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1428; Dec. Dig. ⟸654.]

2. EVIDENCE ⟸492 — OPINION EVIDENCE — SPEED.

On the trial of an issue whether the driving of an automobile was negligent, it is improper to admit in evidence the opinions of witnesses that the speed was *unreasonable.*

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2270; Dec. Dig. ⟸492.]

3. APPEAL AND ERROR ⟸203—PRESENTATION BELOW—ADMISSION OF EVIDENCE.

Error in the admission of testimony, to which no objection was made and no exception saved below, will not avail on appeal, but will be treated as waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1064; Dec. Dig. ⟸203.]

Error to Circuit Court, Marion County.

Action by Malinda B. Colebank against the Standard Garage Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

Geo. M. Alexander, Chas. Powell, and A. J. Colborn, all of Fairmont, for plaintiff in error. Harry Shaw, of Fairmont, for defendant in error.

ROBINSON, J. While walking in a street of a new addition to the city of Fairmont, plaintiff was struck by an automobile belonging to the defendant company, operated by a chauffeur in the ordinary line of defendant's business. She was severely but not permanently injured. In this action against the garage company, upon a declaration stating a good cause of action, she has been awarded damages for the injury. From the judgment defendant brings error.

The street where plaintiff was walking when injured was paved only in the middle of the roadway. One side of the paved portion was occupied by a street car track. There were no sidewalks. Plaintiff, in going from her home to the house of a relative, was pursuing her way along this street, walking on the car track. Upon the approach of a street car, she started to cross to the opposite side of the street, and was struck by the automobile.

Plaintiff says the driver of the automobile was negligent. Defendant says plaintiff herself was negligent. Under the evidence in the case, which it will serve no good purpose to detail, the question whether there was negligence warranting recovery or contributory negligence barring recovery was for the jury to settle, in the light of proper instructions.

[1] The declaration says that plaintiff was injured on a public highway, but defendant submits that the place where plaintiff was injured, was not proved to be such—that no acceptance of the street by the public authorities was shown. Liability for the negligent act charged, would be the same though it did not take place on a public highway. Plaintiff, however, describing in her pleading how the injury came to her, named the place where it happened. And for the purposes of a case like this one, we think she sufficiently proved the averment as to the place. It appears from the evidence that the street on which she was injured, had been dedicated to the public, and that the public had ever since used it for travel. It was laid off as a street in the new addition, paved as such, and used

as such for travel by the public generally. For this case, what more should plaintiff show? It is not a case to charge the public authorities for liability growing out of a defective street or road. In cases of that kind, of course it must be proved that the public authorities have assumed control of the highway—accepted it, and thereby assumed responsibility in regard to it. Plaintiff has shown that the street is what she averred it to be as pertinent to the statement of her case—a public highway in the sense that it is one used generally by the public for travel. As to her rights or the rights of defendant in this case, why is it important or material to show that the public authorities actually accepted control of the street? It is neither important nor material to the issue here involved. As far as plaintiff and defendant were concerned the street was a public one, and both were using it as such. As to the public authorities it may not have been such. Hast v. Railroad Co., 52 W. Va. 397, 44 S. E. 155; Ray v. Railway Co., 57 W. Va. 333, 50 S. E. 413.

[2] Witnesses were asked to give their opinions whether the speed of the automobile was *unreasonable*. Their opinions that it was, were admitted in evidence over the objection of defendant. A bill of exceptions saves the point. Clearly it was error to admit such testimony. The witnesses might as well have been permitted to give their opinion as to whether defendant was negligent. Whether the rate of speed was reasonable or unreasonable was for the jury to say upon proof of facts and circumstances in that relation—not for any witness to say. It was an issue for the jury to determine upon evidence as to the surroundings and the actual rate of speed the automobile was making. Instead of introducing such evidence, so that the jury could express their own opinions therefrom, they were asked to take and use as their own the opinions of witnesses on a matter so closely related to the issue of negligence which they were trying that it was virtually the same thing. Witnesses can not so be substituted for the jury. It is like asking a witness to give his opinion from what he observed of an assault, as to which one of the parties was the aggressor. The witnesses might have given their opinions as to the miles per hour the chauffeur was driving the car. That was a matter not necessarily calling for expert opinion. They could enlighten the jury on that score, and thus enable the latter to say whether the rate was unreasonably fast and therefore negligent. But in reaching a conclusion on the question the jury should have been left free to exercise their own opinions on the facts and circumstances, regardless of the opinions of others. Babbitt on Motor Vehicles, 397; Alabama, etc., Railroad Co. v. Hall, 105 Ala. 606, 17 South. 176. These witnesses did not even give the actual rate of the speed of the automobile with other facts and circumstances as a basis of their opinions. Had they done so, the error might have been harmless. Neeley v. Town of Cameron, 71 W. Va. 144, 75 S. E. 113.

[3] Plaintiff is a married woman. That fact appeared on the trial, but without more as to her marital situation. She testified as to expenditures for her restoration and cure, as to the loss of her clothes, and as to loss of time. It is submitted that this testimony is inadmissible under Warth v. County Court, 71 W. Va. 184, 76 S. E. 420, wherein we decided that a married woman, not engaged in separate business for herself, employing her time wholly about her marital household affairs, can not recover for a personal injury any damages other than for physical pain, mental anguish, and impairment of her capacity to enjoy life. Plaintiff testified that she herself paid out the sums that were expended to effect her restoration and cure. That is evidence of the expenditure of separate estate, for which she is entitled to recover. The evidence as to the value of her clothes torn and lost to her, and the evidence as to loss of time was objectionable, since presumably the clothes were furnished by her husband, and since it did not appear whether the time lost was from marital or separate estate duties. But there was no objection to all this evidence. It went in unchallenged, and no point was saved as to it. The point can not avail under the exception to the overruling of the demurrer to the declaration, for that pleading does not aver whether plaintiff is married or unmarried. By its face plaintiff is entitled to recover all that she asks therein. Error in the admission of evidence, to which no objection was made and no exception saved below, will not avail on appeal, but will be treated as waived.

It was not improper to ask the chauffeur and another witness on cross-examination whether the chauffeur was licensed. Defendant sought to show the qualifications and experience of its employé, the chauffeur, and the fact that he was not licensed was pertinent thereto.

No novel propositions calling for discussion are raised by the giving and refusing of instructions.

The error noted is prejudicial. We must therefore reverse the judgment, set aside the verdict and award a new trial.

(76 W. Va. 81)

## LONG v. UNITED SAVINGS & ANNUITY CO.

(Supreme Court of Appeals of West Virginia. March 23, 1915.)

*(Syllabus by the Court.)*

1. CORPORATIONS ⟸291 — "AGENT" — TERM OF EMPLOYMENT.

A person employed by an annuity company to sell its bonds and to appoint local agents to sell same is the agent of such company, within the meaning of section 53, c. 53, Code 1913 (sec. 2885), and holds his place only during the pleasure of the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1250–1254; Dec. Dig. ⟸291.

For other definitions, see Words and Phrases, First and Second Series, Agent.]

2. CORPORATIONS ⟸294—AGENT—RIGHT TO DISCHARGE.

Although such agent is employed for a certain time, he may be discharged by the board of directors without liability.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1263–1266; Dec. Dig. ⟸294.]

Error to Circuit Court, Kanawha County.

Action by E. L. Long against the United Savings & Annuity Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Murray Briggs, of Charleston, for plaintiff in error. Cato & Bledsoe, of Charleston, for defendant in error.

WILLIAMS, J. Assumpsit for alleged breach of contract, judgment for plaintiff, and defendant brings error.

Defendant is a corporation, chartered and organized for the purpose of issuing and selling annuity bonds. Its executive committee employed plaintiff "as its agency director for the sale of its said annuity bonds," and agreed to pay him a salary of $1,800 a year, in installments of $150, payable at the end of each month, and, in addition thereto, was to give him a commission of 5 per centum of so much of the first year's premium as the purchaser should pay on each bond sold. The contract authorized plaintiff to employ local agents to sell bonds, who were to be defendant's agents, and provided that all contracts with them should be made in defendant's name. The contract also fixed the compensation to be paid such agents, which was a certain per centum on the first year's premiums paid on bonds by purchasers thereof, as commissions. Plaintiff's employment was to continue for a period of one year from the 1st of January, 1911. He was discharged by the board of directors on the 1st of August, 1911, as he alleges, without just cause, and he brought this action to recover damages for loss of salary for the five remaining months of the year, and commissions alleged to be due him on sales of bonds.

Defendant demurred to the declaration, filed a special plea tendering the sum of $57.25 admitted to be due plaintiff, and joined issue on the claim for damages. The jury returned a verdict in plaintiff's favor for $750, upon which the court entered judgment, after overruling defendant's motion to set the verdict aside. The declaration contains three counts; the first embracing the common counts in assumpsit, the second averring the contract in terms, the breach thereof by plaintiff's discharge, and his resulting damages, and the third averring, in substance and effect, the contract and its breach by failure to pay plaintiff the agreed commissions accruing from the commencement of the term of his employment.

[1, 2] It is insisted that the demurrer to the second and third counts should have been sustained, because neither of them averred that plaintiff, while in defendant's employ, performed the duties incident thereto, or that he was able, after his discharge, to perform such duties. We have carefully considered these counts, and do not think the criticism of them is justified. A number of other errors are assigned as grounds for a reversal of the judgment. Some of them relate to the exclusion of evidence, and others to the admission of alleged improper evidence. But in view of the admitted fact that plaintiff was fully paid for services actually performed, and is suing to recover only damages for his alleged wrongful discharge, the case depends upon the construction of the contract, and that question is in no wise affected by the excluded or admitted evidence complained of; and hence the assignments in relation thereto need not be considered. The case turns wholly on plaintiff's relation to the defendant corporation, whether he was its officer or agent or a mere servant or employé. That question must be determined by the terms of the contract and the character of the services plaintiff was to perform. Defendant admits that he was discharged by its board of directors, and seeks to justify their action on two grounds, viz.: (1) That the contract of employment, although expressly for a year, was, in view of section 53, c. 53, Code 1913 (sec. 2885) only during the pleasure of the board; and (2) that the services rendered did not justify plaintiff's retention longer in defendant's employment. We need consider only the first of these grounds, if we should reach the conclusion that plaintiff was employed as an officer or agent of defendant. Because the statute cited expressly provides that such an one can hold only during the pleasure of the board of directors.

In order to determine whether plaintiff was an officer or agent, or only an ordinary employé, in which latter case his contract of employment would be binding on the corporation (Munn v. Trust Co., 66 W. Va. 204, 66 S. E. 230, 135 Am. St. Rep. 1024), it is necessary to consider the terms of the contract, the character of work to be performed by plaintiff, and whether or not he was vested

with a discretion belonging to the board of directors, and had power to bind defendant by contracts made for it and in its name. The contract denominates him "agency director," and gives him complete control over the selling of bonds, and the employing of local agents to sell them. Selling annuity bonds was defendant's chief source of revenue, and should therefore be under the constant control and supervision of the board of directors, or of an executive committee thereof. Yet, by the terms of the contract, if they are to prevail, the management of this part of the business was turned over to plaintiff for a year. He was vested with the power to sell all the bonds, by himself and through local agents to be selected by him, for that period of time. Comparatively few men are qualified to make successful salesmen of annuity bonds; and to make defendant's business a success discretion was necessary in the selection of agents to sell the bonds. The contract turned that important branch of the business over to plaintiff for a year; and the agents he selected were made the agents of defendant, and all contracts they made for sale of bonds were to be made in its name. As further evidencing a surrender of discretion to plaintiff, the contract bound defendant to advance to agents employed by him certain stipulated percentages of the first, second, and third month's premiums collected on bonds sold by them, if plaintiff should so direct. The contract would take out of the hands of defendant's directors, and place in the absolute control and management of plaintiff, the chief source of the corporation's income for the period of a year. The powers thus conferred upon plaintiff clearly constituted him defendant's agent and authorized him to transact, in its name, an important part of the very business for the accomplishment of which it was incorporated. He was more than a mere servant or ordinary employé, like a bookkeeper, stenographer, or day laborer; he was an agent clothed with power, not only to bind his principal by selling bonds himself, but to select other agents and confer upon them like power to sell bonds in the principal's name. The contract must be interpreted in the light of the law concerning the power vested in boards of directors, and hence section 53, c. 53, Code 1913, becomes as much a part of the contract as if it had been incorporated in it in terms. That statute authorizes boards of directors, "subject to the provisions of law and the by-laws," to appoint such officers and agents of the corporation as they may deem proper, but it expressly provides that "the officers and agents so appointed shall hold their places during the pleasure of the board." Plaintiff being an agent, it necessarily follows that his employment was only during the pleasure of the board, notwithstanding the contract expressly stated it was for a year. The board had the right to discharge him before the end of the year, without rendering their corporation liable to him in damages. To hold otherwise would be to nullify the statute.

The fact that the contract was made with the executive committee, and not directly with the board of directors, can make no difference. The executive committee was a creature of the board, and it certainly did not have any greater power than the board itself possessed. The contract is not more binding than if made directly with the board. There is a by-law of the defendant corporation which authorizes the board of directors to appoint an executive committee from their own number, consisting of five members, which shall have active management of the corporation's affairs, with the power to appoint "all agents other than the officers of this corporation and such other incidental powers and duties as the board of directors may find it impracticable to exercise." But that by-law also expressly provides that said executive committee shall be subject to the control of the board of directors, and shall hold their places during the pleasure of the board.

This case falls clearly within the rule announced in Darrah v. Wheeling Ice & Storage Co., 50 W. Va. 417, 40 S. E. 373, and is controlled by it. Munn v. Trust Co., supra, relied on by plaintiff does not control. That was a suit by a bookkeeper, who had been discharged before the expiration of the term of his employment, and the court there held he was not an officer or agent, within the meaning of the statute, and therefore could not be discharged without liability. The opinion in that case recognizes the Darrah Case as binding authority, and distinguishes it, and holds that a mere bookkeeper is not included in the terms of the statute.

The judgment is reversed, the verdict set aside, and the case remanded.

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(76 W. Va. 36)

## STATE v. HOKE et al.

(Supreme Court of Appeals of West Virginia. March 28, 1915.)

*(Syllabus by the Court.)*

1. CRIMINAL LAW ⟸1167—HARMLESS ERROR —RULING ON DEMURRER.

If the count in an indictment on which a conviction is had is good, it is immaterial whether a demurrer to other counts should have been sustained. If error is committed in overruling the demurrer, it is clearly not prejudicial to the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101, 3103–3106; Dec. Dig. ⟸1167.]

2. COURTS ⟸64 — ORDER CALLING SPECIAL TERM — STATEMENT OF NECESSITY — SUFFICIENCY.

A vacation order of the circuit judge, calling a special term of court and requiring a grand jury to be summoned, which recites that

a necessity therefor exists, sufficiently shows that the term was properly called.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 218–229; Dec. Dig. ⟸64.]

3. GRAND JURY ⟸9—FAILURE TO ISSUE VENIRE FACIAS—EFFECT ON INDICTMENT.

The provisions of section 3, c. 157, Code 1913 (sec. 5539), respecting the time for issuing a venire for the grand jury, and summoning the clerk of the county court to assist in the drawing thereof, are merely directory. If the jurors are drawn, in the manner provided, from the list furnished by the county court, and actually attend at court and are duly sworn and serve as such, it matters not that they were not actually summoned.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 21–26; Dec. Dig. ⟸9.]

4. CRIMINAL LAW ⟸1144 — PRESUMPTION AS TO GRAND JURY.

If it appears from the record that some of the grand jurors were not those who were regularly drawn, it will be presumed, in the absence of a contrary showing, that they were legally summoned to take the place of the drawn jurors who failed to appear.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736–2764, 2766–2771, 2774–2781, 2901, 3016–3037; Dec. Dig. ⟸1144.]

5. CRIMINAL LAW ⟸665—TRIAL—PRESENCE OF WITNESS.

It is within the judicial discretion of the trial court to permit a witness for the state, who is familiar with the facts on which the prosecuting attorney relies to establish the guilt of the accused, to be present in court during the trial to aid him in conducting the examination of other witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1549–1566½; Dec. Dig. ⟸665.]

6. CRIMINAL LAW ⟸1144—JURY—ADMINISTRATION OF OATH—PRESUMPTION.

If the record recites that the jury "were elected and sworn according to law," it will be presumed that the proper oath was duly administered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736–2764, 2766–2771, 2774–2781, 2901, 3016–3037; Dec. Dig. ⟸1144.]

7. CRIMINAL LAW ⟸851—CUSTODY OF JURY—SHERIFF—ADMINISTRATION OF OATH.

It is not necessary that the sheriff be sworn to keep the jury together during the trial. He is a sworn officer of court, and the law imposes that duty upon him, and the oath could impose no additional duty or responsibility. Instructions to him by the court, concerning his duty, are sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2035–2037; Dec. Dig. ⟸851.]

8. CRIMINAL LAW ⟸636—PRESENCE OF ACCUSED—NECESSITY—PROCEEDING AFTER CONVICTION.

It is not necessary, after conviction and final judgment, that the accused should be present in court when an order is made permitting the withdrawal of certain original papers used as evidence on the trial, and directing the filing of certified copies thereof with the clerk.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1465–1482, 2120; Dec. Dig. ⟸636.]

9. CRIMINAL LAW ⟸1169—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Copies of invoices of the goods alleged to be stolen, offered in evidence to identify the property and verified by affidavits thereto attached, furnishes no ground for reversal of a judgment of conviction, when it appears that such invoices were proven to be true copies of the originals, by a witness who was present at the trial and testified that he had compared them with the originals and found them to be true copies thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. ⟸1169.]

10. WITNESSES ⟸76, 79—COMPETENCY—INSANITY—PRESUMPTION—OBJECTION.

The court must determine the competency of a witness, and a motion to set aside the verdict on the ground that an insane witness was permitted to testify, supported by affidavits tending to show irrational conduct by such witness at times, is properly overruled, when it does not appear that he was ever adjudged a lunatic, and was well known to the accused who made no objection to his testifying when offered as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 190–192, 201–204, 216; Dec. Dig. ⟸76, 79.]

11. WITNESSES ⟸41—COMPETENCY—INSANITY.

To render such witness incompetent, his mental aberration must be sufficient to negative trustworthiness at the time his testimony is given.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 99; Dec. Dig. ⟸41.]

Error to Circuit Court, Greenbrier County.

Theodore Hoke and another were convicted of grand larceny, and bring error. Affirmed.

John W. Arbuckle, of Lewisburg, and John L. Rowan, of Union, for plaintiffs in error. A. A. Lilly, Atty. Gen., and John B. Morrison and J. E. Brown, Asst. Attys. Gen., for the State.

WILLIAMS, J. Theodore Hoke and his two sons, Jesse and Carl, were jointly indicted and tried in the circuit court of Greenbrier county for grand larceny. Carl Hoke was acquitted. Theodore and Jesse Hoke were convicted and sentenced to serve terms in the penitentiary, and they bring error. Numerous assignments are made in the petition for writ of error, but most of them seem to have been abandoned, as they are not mentioned in brief of counsel.

The indictment contains two counts, the first charging defendants with stealing, taking, and carrying away 25 pairs of men's shoes of the value of $65.55, 69 pairs of ladies' shoes of the value of $166.80, and 36 pairs of children's shoes of the value of $48.60, property of the Hamilton-Brown Shoe Company; and the second count charging them with having bought the same goods from another person, whose name is unknown, knowing them to have been stolen. It is proven that the shoes were stolen from a box car of the Chesapeake & Ohio Railway Company while they were in transit from St. Louis to Boston. The shoes were in boxes, and the state's theory is that the car was entered, either at Hart's Run, a way station in Greenbrier county, or at some other

station west of that point where the train had stopped temporarily, by the defendants, or some one or more of them, and the boxes dumped off at Hart's Run, on the night of the 8th, or the early morning of the 9th of September, 1912, and carried to a lumber camp a mile or two from the railroad. Some of the shoes were found in the possession of Theodore Hoke and Jesse Hoke and identified as the property of the Hamilton-Brown Shoe Company, which were contained in the boxes lost from the car load lot of shoes shipped over the Chesapeake & Ohio Railway. None of the defendants testified, and there is ample evidence in the record to support the verdict.

[1] It is urged that the demurrer to the second count of the indictment should have been sustained. This point is rendered immaterial by the fact that defendants were convicted on the first count only. They were clearly not prejudiced by the bad count, if such it was—a question we do not decide. Early v. Commonwealth, 86 Va. 921, 11 S. E. 795, and Johnson v. Commonwealth, 102 Va. 927, 46 S. E. 789.

[2] The indictment was found at a special grand jury term, called by the judge for the 11th of March, 1913. It is insisted that, because the order entered calling the special term does not state that "the public interest required it," lack of jurisdiction is shown, and the proceedings had at such term are void. This point is clearly without merit. State v. Shanley, 38 W. Va. 516, 18 S. E. 734. The order does recite, "a necessity existing therefor, it is ordered," etc. That shows compliance with the statute, even if it be necessary that the order should state the reason for calling the special term—a question we do not decide.

[3, 4] The fact that the clerk did not issue a venire facias for the grand jurors, at least 30 days before the term, does not affect the indictment. That provision of section 3, c. 157, Code 1913 (sec. 5539), is merely directory. State v. Wetzel, 83 S. E. 68. It is urged as error that the grand jurors drawn to serve at the special term did not constitute the jury that found the indictment, and that there is no order showing that some of the drawn jurors had failed to appear and others were substituted, pursuant to section 4, c. 157, Code 1913 (sec. 5540). It appears that two or three persons who served as jurors were not among the list that was drawn. But no objection was made in the lower court to the constitution of the grand jury, and it does not appear that any of the persons serving as such were not legally qualified. Hence it must be presumed that the jury was legally constituted. State v. Tucker, 52 W. Va. 420, 44 S. E. 427. It will not be presumed that the circuit court failed to perform its duty in the matter of making up the grand jury. Error must appear.

[5] It is assigned as error that the court permitted C. D. Duke, special agent for the railroad company and a witness for the state, to remain at the bar of the court during the progress of the trial, over the objection of defendants, after they had moved to have all the witnesses excluded from the courtroom until they should be called to testify. It is the general practice to grant such request when made by either party to a cause, and it is done in the interest of justice, for the purpose of eliciting from each particular witness the truth as to the facts about which he is to testify. But it is held by many authorities, perhaps by the weight of them, that the granting of such request rests in the sound discretion of the trial court, that it is a privilege usually accorded by the court but cannot be demanded as matter of right. But, whatever is the rule, no authorities are cited by counsel, and we find none, supporting the proposition that it is error to permit the prosecuting witness, or some witness who is familiar with the facts on which the state expects to rely to establish the guilt of the prisoner, to remain at the bar of the court for the purpose of prompting the attorney for the state regarding facts which he knows are within the knowledge of certain witnesses to be examined. Witness Duke was the detective for the railroad company that ferreted out the crime, and traced it, as he supposed, to the door of defendants. Consequently he possessed information that enabled him to render valuable aid to the prosecuting attorney. It was certainly no abuse of judicial discretion to permit him to remain at the bar during the examination of other witnesses. Says Thompson on Trials, vol. 1 (2d Ed.) § 276, the rule of separating the witnesses "is a matter of sound judicial discretion, which discretion will not be revised on error or appeal in the absence of the appearance of abuse." Numerous decisions are cited to support the text. See, also, Hey v. Commonwealth, 32 Grat. (Va.) 946, 34 Am. Rep. 799. The rule we think is correctly stated in a point of the syllabus in Ryan v. Couch, 66 Ala. 244, which we here quote:

"In excluding witnesses from the courtroom during the examination of others, whether on request, or ex mero motu, the court exercises a sound judicial discretion, which is not revisable on error or appeal; but the rule should never be applied to the exclusion of a party to the suit, who has a constitutional right to be present during the trial: nor should it be applied to the exclusion of an agent, when it is made to appear to the satisfaction of the court, by the statement of counsel in open court, or otherwise, that, on account of his intimate knowledge of the facts, his services are required by counsel in the management of the trial, especially in the necessary absence of his principal."

[6] It is also assigned as error that the record does not show that the jury were properly sworn to try the issue, or that the sheriff was legally sworn to keep the jury together. True, it does not set out the oath administered to the jury, but it does recite

that they "were elected and sworn according to law." We must therefore presume the oath, in proper form, was administered to them. State v. Ice, 34 W. Va. 244, 12 S. E. 695; Wells v. Smith, 49 W. Va. 78, 38 S. E. 547; and State v. Kellison, 56 W. Va. 690, 47 S. E. 166.

[7] The sheriff is a sworn public officer whose duty it is to wait upon the court, and have charge and custody of the jury during the trial. He is required to keep them together and prevent communication between them and others, or among themselves concerning the case, during the trial. While it is the custom of trial courts to swear the sheriff, or his deputy having charge of the jury in felony trials, to faithfully observe his duty in that respect, this court has held it was not necessary to do so, and that such oath imposes no additional duty or responsibility upon the officer. State v. Poindexter, 23 W. Va. 805; State v. Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 895; and State v. Ice, 34 W. Va. 244, 12 S. E. 695. However, the order of the court entered on the 25th of June, 1913, the first day of the trial, shows that such oath was in fact administered to the sheriff. And, even if the law required such oath to be administered, swearing him at the beginning of the trial was sufficient, it would not be necessary to repeat the oath at every recess and daily adjournment of the court, throughout the trial.

[8] Objection is made to the order of July 2, 1913, because it fails to show that the prisoners were in court when it was made. That order was made several days after defendants were convicted, and after final judgment was pronounced. It was simply an order permitting the withdrawal of certain books of original entry, which had been used in evidence during the trial; copies of entries therein having been made and filed with the clerk by order of court. It had no bearing upon the trial which was then ended. None of defendants' rights were thereby violated.

[9] Complaint is made of certain affidavits that appear in the record. They were appended to certain invoices of the shoes shipped from St. Louis to Boston, among which were the stolen boxes, verifying the invoices. But the correctness of the invoices were proven by witness C. P. Luckett, who was present at the trial and testified concerning them. He swore he compared the certified copies with the originals sent by the Hamilton-Brown Shoe Company of St. Louis, to the Hamilton-Brown Shoe Company of Boston, and that they were true copies of the originals. Defendants were therefore not prejudiced by the introduction of the exhibits. Moreover, it does not appear that the affidavits appended to the exhibits were read to the jury, although they are in the record. Ownership of the stolen goods was fully proven. There is no conflict in the evidence on that fact.

[10, 11] It is urged as error that Ira Fury, an alleged lunatic, was permitted to testify for the state. His testimony is important. He swore he was present at the lumber camp when the shoes were brought there by Theodore Hoke and Jesse Hoke; that they came to camp with them in boxes, just before day on the morning of September 9th; that they opened the boxes and transferred the shoes into bags, and used the broken boxes for fuel to cook breakfast with. Although there is other evidence on which the jury might have found defendants guilty, still we cannot say they would have done so, in the absence of Fury's testimony. Hence his testimony is necessarily prejudicial, if he was not competent. The defense is that defendants bought the shoes from an unknown negro who had them in bags; and Fury had been examined as a witness in the preliminary hearing before the justice, and also before the grand jury, and on those occasions he swore Theodore and Jesse Hoke had brought the shoes to the camp in bags, and on the trial in court he admitted that his previous statements as to that fact were false, and swore the shoes were brought to the camp in boxes. His contradictions affected his credibility, which was purely a jury question; but his competency had to be determined by the court. His testimony appears to be that of a rational man, until he is cross-examined respecting his contradictions and then makes some statements tending to reveal a mind unbalanced on the subject of religion and moral obligations. He admitted that his mind was not right at times, but there is no evidence that he was ever arrested for lunacy or adjudged a lunatic. When the shoes were brought to the lumber camp, he was there in the capacity of workhand. No objection was made to his competency at the trial, and no request that his sanity be then inquired into. But his sanity was called in question by affidavits afterwards taken and presented to the court in support of a motion to set aside the verdict. Some of the affiants state that, judging from Fury's conduct on the 25th and 26th of June, when defendants were being tried, and on the following day, they did not believe him sane. One says he was "flighty in mind"; another, that he was "non compos mentis"; and, another, that "he verily believes from conversations had with the said Ira Fury, and his actions and conduct during the present term, * * * that the said Ira Fury is a lunatic and incompetent to give testimony in any case." This affiant also narrates certain things done and said by the witness on the night of the day he testified in the trial, while on his way home from the courthouse, which would seem to indicate that he was not then in his right mind. But we cannot say the court erred in not setting aside the verdict on these

affidavits. No objection was made to the competency of the witness, and if there had been the court would, no doubt, have inquired into his sanity. Defendants may have thought it would be beneficial to their case to let his evidence go to the jury, that his admission of previous false swearing would weaken his testimony and cause the jury to disregard the whole of it. We do not know they did not do so, because there is other evidence upon which they could have convicted defendants. Having never been adjudged a lunatic, there was a presumption in favor of the witness' competency, which cast upon defendants the burden of proving that he was incompetent, if such was the fact. It is not every degree of insanity or mental aberration that will disqualify a witness. It has to be sufficient to negative trustworthiness. 1 Wigmore on Evidence, § 492. Lunatics sometimes have lucid intervals and, during such intervals, they are competent witnesses. If they have sufficient understanding to retain in memory the events concerning which they testify, they are competent. The foolish things, said and done by Fury on his way home after the trial was over, and shown by the affidavits of A. L. Spence and others, do not prove that he was not sane at the time he testified. The trial judge heard his testimony and observed his demeanor on the witness stand, and was therefore in much better position to judge of his competency than we are from merely reading his testimony from the record. It does not appear that the court erred in permitting him to testify, or in refusing to set aside the verdict upon affidavits relating to his mental condition procured after the trial was over. Coleman v. Commonwealth, 25 Grat. (Va.) 865, 18 Am. Rep. 711, and State v. Michael, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605.

We have carefully considered both the instructions given on behalf of the state, and those requested to be given by defendants and refused by the court, and we find no error in relation thereto. Instruction No. 3, given by the court in lieu of defendants' No. 1 which was refused, correctly states the law, and there was no error in substituting it for their No. 1.

Counsel for defendants claim that it was physically impossible for them to have broken and entered the car, while the train was moving, and stolen therefrom the three boxes of shoes. In reply to this argument, we say it does not appear when the car was entered. The seal on the car door was intact when the train left Hinton, and was discovered to be broken and the boxes missing from the car, when the train arrived at Clifton Forge. It had evidently been entered somewhere along the line of railroad between those places. Hart's Run is an intermediate point between them. Some one of the defendants may have entered the car at some station where the train stopped, west of Hart's Run, and, when it arrived there, have tossed the boxes off, and have remained in the car until it arrived at some stopping place east of Hart's Run, and then alighted from the train and returned to that point. It was therefore not necessary that they should have boarded a moving train in order to effect an entrance to the car. But it does not appear that the train did not stop at Hart's Run, and it may have done so. That the shoes were shipped in a car that was hauled past Hart's Run, on the night of the 8th of September, 1912, and were stolen therefrom, and some of them found thereafter in the possession of defendants, are facts fully established, and were sufficient to make a prima facie case against defendants, casting upon them the burden of explaining, in a way satisfactory to the jury, how they came to have the shoes in their possession, and that they evidently failed to do.

We find no error, and therefore affirm the judgment.

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(76 W. Va. 63)

## GARTEN v. LAYTON et al. (No. 2553.)

(Supreme Court of Appeals of West Virginia. March 23, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. EQUITY ⊂⊃464 — BILL OF REVIEW — EVIDENCE REVIEWABLE—DEPOSITIONS.

On a bill of review for error of law, the court cannot consider the evidence by way of review of its former findings as to issues of fact, but it may examine the depositions to ascertain whether there is any evidence therein tending to establish facts put in issue by the pleadings, and essential to the relief granted, or whether evidence sufficient, if uncontradicted, to warrant relief is opposed by contradictory evidence so as to create an issue respecting the right to relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1129–1140; Dec. Dig. ⊂⊃464.]

2. EVIDENCE ⊂⊃265 — ADMISSIONS — PROBATIVE EFFECT.

Facts admitted in pleadings and evidence must be considered in connection with all the other facts set up in the pleadings in which they are found, and the testimony disclosing them, upon the inquiry as to their legal effect.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029–1050; Dec. Dig. ⊂⊃265.]

3. DEEDS ⊂⊃6—DEFECTIVE EXECUTION—CONTRACT OF SALE.

A paper having all the requisites of a deed, except the seal, may operate as a contract of sale, passing the equitable title to the land.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 6; Dec. Dig. ⊂⊃6.]

4. DEEDS ⊂⊃6—CONTRACT OF SALE—DEFECTIVE DEED—ACCEPTANCE BY GRANTEE.

Though not executed in pursuance of an oral contract of sale, such a paper becomes a contract by acceptance thereof on the part of the intended grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 6; Dec. Dig. ⊂⊃6.]

5. VENDOR AND PURCHASER ⊂⊃13—CONTRACT OF SALE—CONSIDERATION—GIFTS.

That the consideration for such contract is made payable to strangers thereto by way

of gift does not preclude its validity as a contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 14; Dec. Dig. ⊂⊃13.]

6. DEEDS ⊂⊃6—CONTRACT OF SALE—DEFECTIVE DEED—EFFECT OF ACCEPTANCE.

Acceptance thereof by the intended grantee binds him to payment of the money as directed by the instrument.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 6; Dec. Dig. ⊂⊃6.]

7. TRUSTS ⊂⊃66—CONTRACT OF SALE—PAYMENT OF CONSIDERATION TO THIRD PERSON.

Such a contract impresses the land it embraces with a trust in favor of the persons to whom it directs payment of the purchase money by the vendee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 94; Dec. Dig. ⊂⊃66.]

8. SPECIFIC PERFORMANCE ⊂⊃49 — VENDOR AND PURCHASER ⊂⊃15—CONTRACT OF SALE—INADEQUACY OF PRICE.

Mere inadequacy of the price in a contract of sale of land does not alone warrant rescission or cancellation, nor preclude specific performance thereof.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140–151; Dec. Dig. ⊂⊃49; Vendor and Purchaser, Cent. Dig. § 16; Dec. Dig. ⊂⊃15.]

Appeal from Circuit Court, Kanawha County.

Suit by Jane Garten against J. W. Layton and others. From a decree on a bill of review, reversing decree and granting the relief sought by the original bill, the defendant named appeals. Reversed.

A. M. Belcher, of Charleston, for appellant. J. W. Kennedy and U. S. Albertson, both of Charleston, for appellee.

POFFENBARGER, J. This appeal is from a decree on a bill of review for error of law, reversing a former decree in the cause and granting the relief sought by the original bill.

George Belcher, an aged man owning a tract of land containing 444 acres, more or less, executed a paper which, but for the lack of a seal, would have been a deed conveying the land to J. W. Layton, a son-in-law, for and in consideration of the sum of $4,010, which by a provision of said instrument was to be paid to the following persons, described as heirs, in the following amounts: Margaret Layton, daughter, $500; Sarah Pinson, daughter, $500; the heirs of a deceased son, Samuel Belcher, $500, to be equally divided among them; the heirs of Polly Crowder, a deceased daughter, $500, to be equally divided among them; Mack Belcher, son, $500; Jane Garten, daughter, $200; Thomas and William Garten, grandsons, $150 each; James Garten, grandson, $100; Bettie Belcher, widow of a deceased brother, $100; Albert and Lewis Belcher, nephews, $100 and $50, respectively; Bartley Belcher, brother, $100; John and Henry Layton, grandsons and sons of grantee, $100 each; Emma Patterson, $100; Mary Hudnall, niece, $50; and Robert Dunlap, $100. This paper, as well as the certificate of acknowledgment thereof, is dated September 23, 1907, and was admitted to record February 8, 1909. George Belcher died about two years later, February 18, 1911. Just one month after his death this suit was instituted by his heirs to annul said instrument and set it aside on the ground of alleged mental incompetency on the part of Belcher, and undue influence exerted over him in the execution thereof, and lack of a seal. By way of preventive relief, an injunction restraining the cutting of timber on the land, by J. O. McDermitt and Mason Long, to whom Layton had sold it, was sought. Several of the other heirs of Belcher filed answers by which they admitted the allegations of the bill and joined in the prayer thereof. Layton's answer put in issue all the material allegations thereof, except that of the lack of the seal, averred title in himself, legal as well as equitable, notwithstanding the omission of the seal, and prayed an adjudication of the validity of the paper and perfect title in himself.

The large amount of testimony taken on the issues raised pertained, for the most part, to the mental condition of George Belcher, and was conflicting. Deeming the evidence adduced in support of the bill insufficient, the court, on November 18, 1912, denied the relief therein prayed for, dismissed it, and, on Layton's answer and cross-bill adjudged the instrument in question to be valid and the title to the land to be in Layton, subject to the vendor's lien reserved by the paper. By leave of the court, the bill of review for error of law was filed March 28, 1913, and upon it a decree was entered October 24, 1913, declaring the instrument in question is invalid to convey or pass title to the land, and is not the deed of George Belcher, and, that, upon his death, the land descended to his heirs, and vested in them, and accordingly vacating, setting aside, and annulling the decree of November 18, 1912. Thereupon Layton excepted, and asked the court to modify its decree so as to leave in him the equitable title and declare the heirs seized of the legal title only.

[1] Though the bill of review offered no new evidence and complains of matter of law only, resort is had to the evidence as the basis of the argument to sustain the decree. At the same time, the narrowness of the scope of judicial action on a bill of this class is admitted. The errors correctible on a bill of review for error of law must appear on the face of the decrees, oders, and proceedings in the cause, arising on the facts admitted by the pleadings or stated as facts in the decrees. Being parts of the pleadings, exhibits may be considered. So may a report of a judicial sale, because made a part of the court's proceedings. Dunn's Ex'rs v. Renick, 40 W. Va. 349, 363, 22 S. E. 66;

Core v. Strickler, 24 W. Va. 689; Lorentz v. Lorentz, 32 W. Va. 556, 9 S. E. 886; Middleton v. Selby, 19 W. Va. 167; Thompson v. Edwards, 3 W. Va. 659. The rule observed in Middleton v. Selby, cited, seems to authorize the court to examine the record far enough to see whether there is any evidence tending to sustain an allegation of fact as to which an issue has been made, but not to weigh such evidence, if found, by way of review of the former action thereon. In the syllabus of that case, the general rule inhibiting resort to the evidence seems to be qualified to that extent. It says:

"But in determining this question [what is error of law apparent on the face of the decree] it is necessary to look at the whole record, including the testimony to ascertain whether upon the whole case error of law has been committed."

No express interpretation of this limitation is found in the opinion filed in that case, but, by its inquiry as to the existence of evidence to sustain issues raised by the pleadings, the court applied it without an express or formal interpretation and so revealed its meaning. It is clearly susceptible of such use without violation of the spirit or principle of the general rule. If we assume the filing of a mass of depositions in support of an issue containing not a word of testimony tending to sustain it, or establish an indispensable element thereof, a good illustration of its office will be disclosed. No decree on an allegation properly denied and not in any sense proved has a foundation or basis in law, and an inquiry as to whether there is any evidence at all does not involve the function of weighing what admittedly is evidence nor determination of its probative value. It is not a review of a finding as to matter of fact for, in case of a total absence of evidence, there is no issue of fact to try, or that could have been determined by the entry of the decree. Such an inquiry is a purely legal one. The allegation falls for want of proof.

[2] Notwithstanding the answer specifically denies the allegations of mental incompetency and undue influence, it is claimed the truth of both arises by necessary inference from facts averred by it. Substantially these are that the defendant, for 20 years, maintained and clothed Belcher and provided for him the necessaries of life, furnished him such money as he required, and expended for him money in payment of his taxes and so prevented loss of his real estate; that Belcher had no other means of support and, by reason of his advanced age, required almost constant attention from respondent and his family for about 2½ years before his death; that the services thus rendered constituted the sole inducement to the execution of the paper; and that it was not solicited or sought in any way. An inference from these facts of the existence of a state of mental incompetency in contradiction of positive averments of the existence of an unusually clear and strong mind for a man of Belcher's age, full possession of his mental faculties at the date of the execution of the paper, and knowledge and understanding of his action in so doing would not be warranted by any rule of interpretation revealed in the argument. Positive and direct statements are not overthrown by mere inferences. Nor are these facts inconsistent with a state of competency. There may have been mental competency attended by physical incapacity for business. Mental competency to execute a deed or make a will is not inconsistent with bad management or lack of capacity for successful prosecution of business enterprises. For all that appears in the pleadings, Belcher may have been "land poor" and, in his need of money and averseness to disposition of his lands, he may have availed himself of the generosity of his daughter and son-in-law, as a matter of preference. Nor is it possible, consistently with the rules of interpretation, to treat these facts as constituting an admission of undue influence. They are given in the answer as constituting the basis of Belcher's motive for the provision made for his son-in-law and the imposition upon him of the trust created in favor of other relatives. They are expressly put into the answer for this purpose and no other, and it would be a flagrant perversion of the purpose of the pleader to turn them to an entirely different one. Besides, all fraud and undue influence are expressly and emphatically denied.

Like argument is based upon facts admitted in the testimony of Layton and A. M. Belcher, the latter having prepared the instrument. Layton and his sons acted as messengers of George Belcher in some of his communications with A. M. Belcher, pertaining to its preparation. By them he sent for A. M. Belcher. The scrivener says he prepared two papers, one a deed of trust securing payment of the contemplated bounties, which Belcher refused to execute. These facts are not inconsistent with voluntary and intelligent action on the part of the donor. Assuming him to have been in full possession of his mental faculties, as these and other witnesses say he was, he could consistently make such use of his son-in-law and grandsons as is disclosed by their testimony, and there is nothing conclusive in the fact that he chose to sign one paper and not the other. This fact is favorable rather than unfavorable to the defendant. Under no principle of law can the unfavorable part of the testimony of witnesses be taken to the exclusion of the favorable portion thereof. It must be considered in its entirety. Wigmore, Ev. § 2099.

[3-8] Assuming the execution of the paper to have been the voluntary and intelligent act of Belcher, it is necessary to say what its effect was. There was no consideration except future compliance with conditions an-

nexed. Nevertheless, it may well be considered as an offer in writing, acceptance of which would convert it into a contract, provided payment of the stipulated sums of money, to third persons, would suffice as matter of consideration. Assuming this to be true, the paper, after acceptance, contained all the essential elements of a contract. It was accepted while George Belcher was yet alive. Layton caused the paper to be recorded, and asserted his claim of title to the land. The bill admits he had sold the timber on it and that his vendees thereof had been cutting it for some time before the institution of the suit, and, also, that he had executed an oil and gas lease of the land. Under principles declared in Capehart v. Hale, 6 W. Va. 547, these acts were sufficient to bind Layton to the terms of the offer. As to him, his verbal acceptance bound him by an oral contract. His subsequent acts were the equivalent of his signature to the paper.

That payment of the money stipulated as the consideration was to be made to third persons does not invalidate the contract. The land was not a gift to Layton. He was required to pay $4,010 for it. The price may have been inadequate and there may have been a partial gift to him, but that is not a matter of which the heirs can complain. It belonged to George Belcher, and he could make such disposition of it as he saw fit. The provisions made for them are likewise gifts. Inadequacy of price alone is not generally regarded as sufficient ground for refusal of specific performance of a contract of sale. Waterman, Sp. Perf. § 179; Story's Eq. Jur. § 244; Hale v. Wilkinson, 21 Grat. (Va.) 75; Talley v. Robinson's Assignee, 22 Grat. (Va.) 888; Ambrouse's Heirs v. Keller, 22 Grat. (Va.) 769; White v. McGannon, 29 Grat. (Va.) 511; Stearns v. Beckham, 31 Grat. (Va.) 379. The charges of incompetence and fraud having failed, inadequacy of price is the only remaining ground of impeachment, and that is not enough. Whether right of action at law on the contract would be in the persons to whom the consideration was directed to be paid or the personal representative of the vendor it is not necessary to decide. The latter clearly have a remedy in equity, since the contract impresses upon the land a trust in their favor. Matheny v. Furguson, 55 W. Va. 656, 47 S. E. 886; Roberts v. Coleman, 37 W. Va. 143, 16 S. E. 482; Hooper v. Hooper, 32 W. Va. 526, 9 S. E. 937; Hogg v. Browning, 47 W. Va. 22, 34 S. E. 754; Poindexter v. Green, 6 Leigh. (Va.) 504.

Lack of a seal prevented the legal title from passing to Layton, but he obtained the equitable title, and could have required the heirs to convey the legal title, if he had sought such relief by his answer and cross-bill. Boggess v. Scott, 48 W. Va. 316, 37 S. E. 661; Watson v. Wells, 5 Conn. 468.

Error in the decree complained of is rendered apparent by the principles and conclusions here stated. Accordingly it must be reversed and annulled; but, proceeding to grant such relief on the bill of review as the circuit court should have granted, this court will modify and correct the decree of November 18, 1912, by insertion therein of the word "contract," in lieu of the word "deed," after the word "subsisting," and insertion of the words "equitable title" in lieu of the word "titles," in the last sentence thereof, but without prejudice to the rights of the beneficiaries of said trust to enforcement of the same by any proper proceeding and of the vendee of the land to enforcement of conveyance of the legal title on payment of the amounts charged on the land, all of which will be certified to the circuit court of Kanawha county.

LYNCH, J., absent.

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(76 W. Va. 13)

## COFFMAN v. SAMMONS. (No. 2574.)

(Supreme Court of Appeals of West Virginia. March 16, 1915. Rehearing Denied April 20, 1915.)

*(Syllabus by the Court.)*

1. LANDLORD AND TENANT ⟸42—LEASE—CONSTRUCTION.

A loosely drawn lease is to be interpreted in the light of the situation of the parties, the circumstances, and the purpose for which it was executed.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 106; Dec. Dig. ⟸42.]

2. LANDLORD AND TENANT ⟸44 — LEASE — CONSTRUCTION.

A lease of a large tract of uncleared land, guaranteeing to the lessee five crops therefrom, may be construed as giving five crops from each of such portions of the land as shall be cleared from year to year by the lessee, in the exercise of reasonable diligence.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 108–110, 732; Dec. Dig. ⟸44.]

3. LANDLORD AND TENANT ⟸25 — LEASE — VALIDITY AND EFFECT.

The term contemplated by a lease so interpreted is one for more than five years and can be created only by deed or will; and, if the lease is not under seal, it is a mere contract for such a term, passing no legal title.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 66–75; Dec. Dig. ⟸25.]

4. LANDLORD AND TENANT ⟸114—"TENANT FROM YEAR TO YEAR."

One who enters under such an unsealed lease and clears and cultivates the land is a tenant from year to year.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 373–381; Dec. Dig. ⟸114.

For other definitions, see Words and Phrases, First and Second Series, Tenant from Year to Year.]

5. LANDLORD AND TENANT ⟸116—TENANCY FROM YEAR TO YEAR—TERMINATION—NOTICE.

Termination of such a tenancy by the landlord, without the consent of the tenant, requires notice in writing of his intention to terminate

it, to be given three months prior to the end of the year.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 382–388, 395–400; Dec. Dig. ⟸116.]

Robinson, J., dissenting.

Error to Circuit Court, Greenbrier County.

Action by Tilden Coffman against Samuel Sammons. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

W. R. Bennett, of Fayetteville, and J. W. Arbuckle, of Lewisburg, for plaintiff in error. Henry Gilmer, of Lewisburg, for defendant in error.

POFFENBARGER, J. The complaint on this writ of error goes to the court's direction of a verdict for the plaintiff in an action of unlawful detainer, commenced in a justice's court and carried to the circuit court by an appeal.

The rights of the parties turn mainly on the interpretation of a written agreement by which the plaintiff leased to the defendant a certain tract of land. This very informal instrument reads as follows:

"I this day lease to Sam Sammons all of the tract of the White oak flat known as the Driscoll tract of timber running with the county road known as the Coffman road, and I am to give him five ~~years or~~ crops beginning on January 1, 1908, and he is to sow it in grass the last crop and he is to have and barn as long as the lease and to have a rightaway and the lime-stone rocks on the place.

"April 29, 1907. Tilden Coffman."

The two copies, one of which was retained by each of the parties, were both lost, and later Coffman, on the application of the defendant, executed another paper, embodying his recollection of the substance of the original one. The second paper, after describing the tract of land, proceeds as follows:

"The party of the second part is to hold the Driscoll tract of land which is known as the Coffman place and is to have the use of house, stable and little cabin down at the road, and is to hold same until fifth crop is halled away. The 1st day of January, 1908, I least to Sam Sammons the Driscoll tract of land lying along the railroad for five crops from date and the party of the second part is to sew it in grass seed the last cropp, and the party of the second part is to have all of the lime stone rock on my place."

Some time after the second paper had been prepared and delivered, the original one was found, and both were put in evidence on the trial of the case. The one first prepared was written with an indelible pencil and through the words "years or" before the word "crop" a line was drawn with the same pencil or one like it, evidently for the purpose of canceling those words. Coffman, the lessor, prepared the paper, but denies that he made the cancellation mark. On the other hand, Sammons and his sister both swear he did it, in the preparation of the paper and before delivery thereof.

[1] Whether the words, "years or" were canceled or are to be considered a part of the agreement was made a question for jury determination by the conflicting evidence as to the origin of the cancellation mark. In its action and rulings concerning the evidence, the trial court, therefore, was bound to assume that the jury might find these words had been canceled, and leave that question open for their determination. And, in reviewing the action of the trial court here, due regard must be had to this jury question.

[2] Reading the agreement as one binding the lessor to allow the lessee five crops, because the jury might have found that to be the true reading of the agreement, it is necessary to inquire whether crops means the same as years, and, if so, whether the five-year period is applicable to the whole tract or to such portions thereof as would be cleared from year to year; practically all of the tract having been uncleared at the date of the paper. It could hardly be said that, in the abstract, "crops" mean the same as "years," for it is possible to produce, from the same land, more than one crop in one year. More than one crop of alfalfa can be taken from the same land in a year. It is possible, in this latitude, to raise a crop of potatoes and a crop of turnips on the same land in the same year. Hence the attorney for the defendant in error rightly concedes ambiguity in the contract. He insists, however, that, read in the light of the circumstances and situation of the parties, their purpose was to lease the entire tract for a period of five years; the lessee taking the risk of getting five crops. The tract contained 97½ acres, and had to be cleared before it could be cultivated. Between the date of the original lease, April 29, 1907, and the planting season of 1908, there was a period of about one year. The land was not in condition for cultivation. The tenancy was not the ordinary one of producing land. If it had been, the controversy about the terms of the lease might have been immaterial. It was an agreement on the part of the defendant to clear the land and, in consideration of the clearing, to have five crops from it as he cleared it, and there is no express undertaking on his part to clear all the land in one year, nor to forego any of the five crops from the land he expected to clear. On the contrary, the lessor expressly agreed to give him five crops. The agreement was one for clearing and cultivation, not merely for cultivation. Like every other loosely drawn instrument, this one must have a reasonable interpretation, and, fairly and reasonably interpreted, it obligated the lessee to clear the land with reasonable diligence and the lessor to permit him to take five crops off of each portion of the land as it should be cleared. At the

date of the lease, not more than two or three acres of the land had been cleared. It had been heavily timbered. The best of the timber had been taken off by one Driscoll, and Sammons, the lessee, bought the residue and was engaged in the removal thereof, when he took the lease. Coffman leased to him the whole of the tract, not merely the small portion already cleared, and expected the whole of it to be cleared and cropped. Sammons was a man of limited means with whom Coffman had had previous business transactions, and it was clearly competent for the jury to say neither of the parties contemplated the clearing of the entire tract in a single year or less time, so as to give the five crops stipulated for. This view finds some support in the last words of the paper. The lessee was given the use of the barn and something else, presumably a small house, as long as the lease should run, not merely until five crops should be obtained.

[3] So construed, however, the lease vests no legal title in the lessee, for the term created by it would extend beyond five years, and a term for more than five years can be created only by deed or will. Section 1, c. 71, of the Code, serial sec. 3739; Arbenz v. Exley, Watkins & Co., 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957. As the paper relied upon is not under seal, it is, at best, only an executory contract for an estate for years to be created by deed, specific performance of which may be had in equity, according to some authorities. Tiffany on Landlord and Tenant, p. 393; Taylor on Landlord and Tenant, § 37. Though in a sense ambulatory, the paper so construed and applied would hold the buildings and portions of the land much longer than five years.

[4, 5] Nevertheless, one who enters into possession, under a written lease without a seal for a period of more than five years, and pays rent periodically, is a tenant from year to year, and his tenancy can be terminated only by giving the notice required by the statute. Arbenz v. Exley, Watkins & Co., cited. Here there was no periodical payment of money, but the clearing of land was the equivalent thereof. It constituted a valuable consideration for the use of the land. Hence Sammons was a tenant from year to year. No notice of the termination of his tenancy was given him. The landlord verbally notified some of his undertenants not to put in crops, and prevented them from doing so, but he seems to say he did that because five crops had been already taken from the particular piece of land they were then plowing or about to plow. There is no evidence of any written notice. The statute requires the notice to be in writing and to be served upon the tenant, or some one holding under him the leased premises or a part thereof, at least three months prior to the end of the year. Section 5, c. 93, serial sec. 4131; Arbenz v. Exley, Watkins & Co., 57 W. Va. 580, 44 S. E. 149, 61 L. R. A. 957.

From these conclusions, it results that the court erred in its direction of a verdict for the plaintiff, wherefore the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

ROBINSON, J., dissents. LYNCH, J., absent.

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(76 W. Va. 103)

## LEWIS v. WEST VIRGINIA PULP & PAPER CO. (No. 2537.)

(Supreme Court of Appeals of West Virginia. March 30, 1915.)

*(Syllabus by the Court.)*

1. CONTRACTS ⟸211—ESSENCE—TIME.
Ordinarily time is not of the essence of a contract, unless made so by its terms, or unless it is an element of a mere condition precedent.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 938–943; Dec. Dig. ⟸211.]

2. CONTRACTS ⟸313—BREACH—RENUNCIATION—EFFECT.
An absolute renunciation of a contract by one of the parties thereto constitutes a breach thereof, and also relieves the other from performance of his promise or covenant.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279; Dec. Dig. ⟸313.]

Error to Circuit Court, Pocahontas County.

Action by J. W. Lewis against the West Virginia Pulp & Paper Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

N. C. McNeil, of Marlinton, for plaintiff in error. L. M. McClintic, of Marlinton, for defendant in error.

POFFENBARGER, J. Lewis' judgment for $49.41, recovered in a justice's court, was carried into the circuit court by an appeal. The total amount claimed in his bill of particulars is $110.60. On the conclusion of his evidence a verdict against him was found by direction of the court, and the judgment to which he obtained this writ of error was rendered in accordance with the verdict.

Taken as true, under the rule applicable to motions to exclude, they being in some respects the equivalent of demurrers, the plaintiff's evidence established the following facts: In May, 1913, he was at a point near Nashville, Ga., and, having seen, in an industrial publication, an advertisement by the defendant for a skilled workman called a craneman, the operator of the crane of a steam shovel, he wrote a letter to the company, in which he either tendered his services or made an inquiry. In response thereto, he received a telegram saying the company needed a craneman and would give him a position, provided he came at once. This telegram was received on May 16th, and on

the next day he replied by telegram that he would leave on Tuesday and arrive at Cass, W. Va., on Thursday. He was then advised that it would be satisfactory if he should arrive on Thursday. With this understanding, he started on Tuesday morning, but, in consequence of the delay of his train at a place called Jessup, Ga., he missed a connection. On his arrival at Richmond, Va., he communicated this fact to the superintendent by wire, and proceeded on his journey, arriving on Friday afternoon, instead of Thursday, and immediately reported to the superintendent; but in the meantime another man had been given the place conditionally promised him. On the next morning, Saturday, he and the superintendent went by the same train, but not together, to the place at which the company's steam shovel was then working, but no work was assigned to him. That evening he called upon the superintendent again, who suggested work for him at another place on Elk river. On the following Tuesday they went to that place, but, on account of the difficulty of obtaining a boarding place suitable for his wife and child, it was suggested that he take a position as foreman of carpenters at a place called Spruce. The superintendent having refused to agree with him in advance as to the amount of his compensation, he did not take that place. With knowledge of the defendant's superintendent, he remained at Spruce the balance of the week, ready for work. On Saturday the departure of the steam shovel engineer for some reason necessitated a reorganization of the force. The foreman took the place of the craneman and the craneman took the place of the engineer. On Monday a new engineer came upon the grounds, and the craneman quit, but the plaintiff was not called to take the position, in anticipation of which he had come to the defendant's works under the conditions and understanding already stated. On that day he instituted his action for damages, and on the second day thereafter he was offered the position, but declined it.

[1] The delay in arrival did not justify refusal of the promised employment. There was, of course, an absolute undertaking as to the time of the beginning of the journey, but none as to its completion. That the plaintiff had no control of the means of travel, and that railway trains are sometimes unavoidably delayed, were facts well known to both parties, and in view of which they obviously contracted. As to the arrival, the contract was, therefore, manifestly conditional upon the maintenance by the railroads of their published schedules and connections. The beginning of the journey was within the absolute power and control of the plaintiff. Its completion was not. It would be too much to suppose he intended to assume the risk of the failure of railway connections without an express agreement on his part to do so. Acceptance of the offered position and entry upon the journey necessitated the giving up of his residence, disposal of his household goods or the expense of their shipment, abandonment of the position he then had, and the expense of a 1,300-mile trip. It is highly improbable that he would have accepted the offer if he had been told he must guarantee his arrival on schedule time. Both parties could well assume the connections would be made, and both knew the delays incident to travel are ordinarily not of such length as to make them material. The time within which an act is to be done is not always essential, and, when the time specified for performance of a contract is relatively unimportant, it is not of the essence thereof, unless made so in express terms, or it appears to be a condition rather than a covenant. Adams v. Railway Co., 64 W. Va. 181, 61 S. E. 341. No terms used by the parties imported intent to make the time of arrival essential. Though the plaintiff promised to arrive on Thursday, and the defendant expressed satisfaction with that date, neither used any word signifying intent to make the contract depend upon that fact for its binding force or validity. On the contrary, the defendant's conduct indicated allowance of reasonable latitude as to time. It first said, Come at once, and then allowed a day or two for preparation. Arrival on Thursday was not made a condition of the contract to give employment. It was an element or factor in performance. The agreement was concluded before the plaintiff left Georgia. He agreed to come and work, and his failure to do so would have given the defendant a right of action against him.

[2] Neither the offer of employment different from that promised nor of the promised employment, after what the jury could well say was tantamount to an absolute refusal, could avert the consequences of the breach. An absolute refusal by one party to a contract to perform it releases the other. Swiger v. Hayman, 56 W. Va. 123, 48 S. E. 839, 107 Am. St. Rep. 899, 3 Ann. Cas. 1030; Shaw v. Life Ins. Co., 69 N. Y. 286; Traver v. Halstead, 23 Wend. (N. Y.) 66.

Being clearly erroneous, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(76 W. Va. 45)

FULTON v. RAMSEY et al. (No. 2545.)

(Supreme Court of Appeals of West Virginia. March 23, 1915.)

*(Syllabus by the Court.)*

1. EQUITY ⊜430—FINAL DECREE—JURISDICTION TO SET ASIDE.

Sections 11 and 12, serial sections 4842 and 4843, chapter 127, Code 1913, properly construed, do not give jurisdiction to set aside final judgments or decrees after the end of the term, they are limited to dismissals or non-suits before final decree, and to judgments and orders of that character.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1034–1047; Dec. Dig. ⊜430.]

2. EQUITY ⊜430—"FINAL DECREE"—JURISDICTION TO SET ASIDE.

A decree showing appearance by plaintiff, and admission by him of satisfaction and discharge of all claims and demands against defendants and each of them, and on his motion dismissing the cause, and releasing the attachment sued out therein and levied on the property of defendants, is a final decree, and cannot at a subsequent term, under said sections, be set aside either on motion of an original party or of a stranger interested in the subject matter of the suit.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1034–1047; Dec. Dig. ⊜430.

For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

3. JUDGMENT ⊜342—FINAL DECREE—JURISDICTION TO SET ASIDE—PLEADING AND PROCESS—NECESSITY.

While courts of record independently of statute have inherent power after the term, for good cause shown, to set aside their final judgments and decrees and to reinstate causes on their dockets, they have no such jurisdiction in the absence of proper pleadings and process to the parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 668–671; Dec. Dig. ⊜342.]

*(Additional Syllabus by Editorial Staff.)*

4. DISMISSAL AND NONSUIT ⊜29 — VOLUNTARY DISMISSAL—"RETRAXIT."

A "retraxit" is technically the voluntary acknowledgment, made in open court by the plaintiff, that he has no cause of action and will proceed no further.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 2; Dec. Dig. ⊜29.

For other definitions, see Words and Phrases, First and Second Series, Retraxit.]

Appeal from Circuit Court, Braxton County.

Suit by Elwood D. Fulton against Joseph Ramsey, Jr., and others. From the decree, William Crennell, Jr., intervening petitioner, appeals. Affirmed.

Linn & Byrne, of Charleston, and John W. Davis, of Clarksburg, for appellant. Benjamin A. Richmond, of Cumberland, Md., and Haymond & Fox, of Sutton, for appellee.

MILLER, J. This is an appeal by William Crennell, Jr., not a party to the original cause, but a stranger, from a decree pronounced July 19, 1913, on motion of Henry G. Davis, one of the defendants to the original cause, appearing solely for the purpose, setting aside a supplementary decree made December 9, 1912, on the ex parte petition and motion of appellant, setting aside the final decree pronounced in said original cause on June 24, 1912, and reinstating the case on the docket, on the ground that said decree of December 9, 1912, was improvidently made, without jurisdiction to enter the same, and ordering the cause to be stricken from the docket.

The final decree of June 24, 1912, which appellant by his intervening petition sought to vacate and set aside, and to be permitted to intervene in and further prosecute the cause, admits satisfaction of all claims and demands set out in the bill against each and all of the defendants thereto, and on plaintiff's motion ordered that the bill be dismissed satisfied, and that all orders and decrees in his favor theretofore entered therein be discharged, and all claims to any and all sums against each and all of the defendants on account thereof be released satisfied and discharged, and that the several attachments sued out by the plaintiff therein and levied upon coal lands in the counties of Braxton, Gilmer, Lewis and Harrison, in the State of West Virginia, be discharged and released, and that all matters and things involved in said proceeding upon the part of the plaintiff were by him acknowledged to be satisfied and discharged, and each and all of the parties defendant released and discharged therefrom. And a copy of said order was ordered to be recorded in the office of the clerk of the county court of the respective counties in which attachments were levied as aforesaid, as evidence of the release and discharge thereof.

In his said petition to intervene appellant bases his right on an alleged assignment by Fulton to him of February 18, 1910, and rights thereby acquired, and alleged notice thereof to defendants, and the alleged wrongful, illegal, fraudulent and collusive dismissal of said cause, without his knowledge or consent.

The assignment referred to in said petition, after reciting the pendency of a suit in equity instituted by Crennell against Fulton, in the Court of Common Pleas, of Fayette County, Pennsylvania, to recover certain moneys set forth in the amended bill therein, and of another suit in equity instituted by him against said Fulton and others, in the Circuit Court of Braxton County, West Virginia, to recover the claims set forth in the bill filed therein, embracing the same which were involved in said first mentioned suit, and that in the said last mentioned suit an attachment had been sued out against the property and claims of said Fulton, and upon which attachment T. Marcellus Marshall had been designated as being indebted to or having in his possession property and claims belonging to said Fulton, and who was summoned to answer, and had filed his answer, and whereby

it appeared that said Marshall, by decree of the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg, was indebted to said Fulton, and that the amount of said decree was claimed by W. E. Haymond by assignment from said Fulton, provides, that in consideration of the waiver by Crennell of his attachment in the cause so pending in the Circuit Court of Braxton County, to be evidenced by an order to be entered of record therein, Fulton thereby, but without in any manner recognizing or conceding the claims of Crennell, and reserving the right to make full defense thereto, assigned and transferred to Crennell so much of the moneys claimed by him in the suit in equity instituted by him against Joseph Ramsey and others in the Circuit Court of Braxton County, as might be sufficient to satisfy any decree that might be pronounced in favor of Crennell in either of the two suits aforesaid so instituted by him, and thereby authorized and directed the application of any money which might be recovered by him or to which he is entitled in said suit against Ramsey and others, toward the satisfaction in whole or in part of any decree which might be so obtained by said Crennell; said assignment not to operate to impede or in any wise obstruct or delay the prosecution of the suits of the said Crennell, or to in any way prejudice his rights, save and except with reference to indebtedness so existing against the said Marshall; and said assignment was in no event to be so construed to prejudice Fulton as to any jurisdictional questions which might be involved in the suit instituted by Crennell in the Circuit Court of Braxton County against him.

In his intervening petition appellant also alleges that by decree or order pronounced on September 19, 1912, in his cause against Fulton in the Common Pleas Court of Fayette County, Pennsylvania, referred to in said assignment, Fulton had been required to account to him as set forth in said decree, a copy of which he exhibits with his petition.

The decree so made on appellant's said petition, without notice to or process against the parties, after reciting the petition, and appellant's motion, set aside said decree of June 24, 1912, and reinstated said cause on the docket, and directed that it be further prosecuted, either in the name of said petitioner, or by petitioner as a co-plaintiff with said Fulton; but provided that no further proceedings should be had therein until the defendants should have had due notice of said order. So that if we should now sustain appellant's appeal and reverse and set aside the order now appealed from, it would result in reinstating said decree of December 9, 1912, pronounced without any process or notice to defendants, and deprive them of the benefits of the decree of June 24, 1912, without an opportunity to be heard thereon, or on any of the issues of fact presented by said petition.

Appellant would support the authority and jurisdiction of the court to pronounce said decree of December 9, 1912, on two grounds: First, on sections 11 and 12, serial sections 4842 and 4843, chapter 127, Code 1913; second, on the inherent power and jurisdiction of courts of record over their final judgments and decrees not only before but after the end of the term at which they are entered, to set them aside for cause.

[1, 2, 4] We inquire then, can the decree of December 9, 1912, be sustained upon the authority of said sections 11 and 12, of chapter 127, of the Code (secs. 4842, 4843)? This depends on whether those sections apply to decrees of that class. We have distinctly decided that those sections do not apply to suits closed by final decrees, but only to non-suits and dismissals before decree, or to orders and decrees which amount to no more than dismissals or non-suits. Waldron v. Harvey, 54 W. Va. 608, 615, 46 S. E. 603, 102 Am. St. Rep. 959; Glascock v. Brandon, 35 W. Va. 84, 12 S. E. 1102; Pethtel v. McCullough, 49 W. Va. 520, 39 S. E. 199. The decree here amounted to more than a mere dismissal or non-suit; and to more than a mere retraxit, which, technically speaking, is the voluntary acknowledgment that plaintiff has no cause of action and will proceed no further, made by him in open court. McPherson v. Swift, 116 N. W. 76, 82, 22 S. D. 165, 133 Am. St. Rep. 907, note; Pethtel v. McCullough, supra. It amounted to a final decree, barring recovery, and a new suit for the same cause. It is the acknowledgment of satisfaction of any claim or demand plaintiff may have had, and for this additional reason is all the more binding on him. Miller v. Beck, 108 Iowa, 575, 79 N. W. 344, 346. True the decree in terms does not appear to have been a consent decree; but does it not amount to the same thing? Such a decree by our decisions amounts to an adjudication of the merits of the cause. Pethtel v. McCullough, supra. It is an adjudication of every thing which was actually, or might have been litigated in the suit as to the parties to that suit. Wohlford v. Compton, 79 Va. 333.

[3] But, on the second proposition, relied on, had the court inherent power for causes alleged in appellant's petition to set aside such final decree and reinstate the cause? For good cause shown, and fraud in the procurement of a decree is one of such causes, it is generally held that courts of record do have inherent power, even on the complaint of strangers, with substantial rights or interests in the subject matter of the litigation, and on proper showing, to set aside and vacate their judgments and decrees, and to reinstate the same on the docket. But, after the term, such power and jurisdiction does not exist without pleadings and process. National Power & Paper Co. v. Rossman, 122 Minn. 355, 142 N. W. 818, 820, 821, Ann. Cas. 1914D, 830; 15 Ency. Pl. & Pract. 273.

Numerous other questions were presented

in the briefs and oral arguments of able counsel, such as laches on the part of Crennell; whether said assignment amounted to an equitable assignment or lien on the claims of Fulton; or a mere contract for an assignment or equitable lien in the event Crennell should thereafter recover of Fulton anything in his said suits against him, and was such a contract as entitled Crennell to intervene before decree or judgment against Fulton. Inasmuch as the proper parties were not before the court on said petition, and the court had no jurisdiction to pronounce the decree of December 9, 1912, thereon, we do not think it would be proper, in the absence of the parties, to anticipate these questions, or express any opinion thereon.

We are of opinion, therefore, to affirm the decree, with the proviso that nothing here or in the decree appealed from shall prejudice the rights of appellant to any relief to which he may be entitled on said petition or in any proper suit or proceeding hereafter instituted by him to vindicate his rights in the premises.

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(76 W. Va. 106)

SPERRY et al. v. TULLEY et al. (No. 1903.)

(Supreme Court of Appeals of West Virginia. March 30, 1915.)

*(Syllabus by the Court.)*

1. PARTNERSHIP ⊂⇒101—INDEBTEDNESS—CONTRIBUTION—LIABILITY OF PARTNERS.
The question of liability of partners to contribute on account of indebtedness incurred in the purchase of property used by the firm in its business depends upon the relation in time of the partnership agreement to the purchase.
[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 155; Dec. Dig. ⊂⇒101.]

2. PARTNERSHIP ⊂⇒101—INDEBTEDNESS—PURCHASE OF PROPERTY—LIABILITY OF PARTNER—CONTRIBUTION.
If the purchase is subsequent to the agreement, it is a partnership transaction, and the purchase-money debt a firm liability, discharge of which by one or more of the members of the firm entitles them to contribution from their associates.
[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 155; Dec. Dig. ⊂⇒101.]

3. PARTNERSHIP ⊂⇒101—PARTNERSHIP DEBT—PAYMENT BY PARTNER—CONTRIBUTION.
If, in such case, some of the members of the firm have become insolvent, the solvent members must contribute to the extent of the indebtedness.
[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 155; Dec. Dig. ⊂⇒101.]

Appeal from Circuit Court, Braxton County.

Suit by Clarence B. Sperry, administrator, etc., and others, against J. V. Tulley and others. From decree for plaintiffs, defendants appeal. Affirmed.

Linn, Byrne & Hines and C. L. Smith, all of Charleston, for appellants. W. L. Armstrong and Hines & Kelly, all of Sutton, for appellees.

POFFENBARGER, J. The decree from which this appeal was taken is one enforcing contribution among copartners in a horse transaction.

Trexler Bros. sold them a stallion at the price of $3,000, upon the understanding and agreement that each was to take one or more of the 15 shares of $200 each, and took, in payment, three $1,000 negotiable notes, signed by the subscribers for 10 shares. The subscribers for 4 shares did not sign the notes. By an arrangement with the selling agent, one of them paid nothing; his share being a gift. Three of the shares were paid for in cash, property, and independent notes. On the three $1,000 notes credits were indorsed to the extent of $800, representing the 4 shares held by those who did not sign them. These notes were assigned to Louis Bennett. One share was not individually subscribed at all, but its price was included in the notes; in other words, nonsubscription thereof wrought no abatement from the price of the horse.

In the results of the enterprise, the prospectus was not fulfilled. The returns were but little, if anything, in excess of the expenses. The horse died after this suit was brought, and no part of the capital invested has ever been returned. For balances due on two of the notes the holder recovered judgments; one for $1,153.53, against G. M. Sponaugle, J. O. Baxter, L. D. Pepper, G. R. Gibson, Edwin Morrison, and L. A. Koontz, which was satisfied by Morrison; and the other for $882.95, against Sponaugle, Baxter, Pepper, Gibson, and Cecil Denham, which was satisfied by Denham. Two of the parties, Sigler, subscriber for 2 shares, and Freil, subscriber for one, were dead at the dates of the procurement of these judgments. In the first action there was no service of process on Denham, and in the second none on Morrison or Koontz.

This equity suit was instituted by Sperry, administrator of the estate of Sigler, and Morrison and Denham, against all the other living copartners and the administratrix of Freil, to settle the partnership business and compel those of them who did not sign the notes to contribute to the payment of the two judgments herein described. The bill alleges nonpayment of any part of the purchase money of the horse by T. G. Berry, J. V. Tulley, Momen Rhea, holders of one share each, and J. M. Maple and C. W. Maple, joint owners of another, and charges them with having entered into a secret and fraudulent arrangement with Trexler Bros., by which they were to have 4 shares for their services in procuring the signatures of the other parties to the notes. The indorsement on the notes of credits amounting to $800 is alleged to have been made in pursuance of such secret agreement, and the real purchase price to have been only $2,200, and therefore a conspiracy on the part of the holders of said 4

shares to deceive, cheat, defraud, and overreach those who executed the notes is charged. The bill further alleges the partnership agreement antedated the purchase of the horse, and contemplated it as a firm transaction, and the agreement for such purchase was consummated; wherefore all became jointly liable for the purchase money, notwithstanding the failure of part of them to join in the purchase-money notes. It also charges insolvency of Pepper, Baxter, Koontz, and Sponaugle.

Deeming the purchase of the horse to have been made on behalf of all the parties at the price of $3,000, in pursuance of an antecedent partnership agreement, the court decreed contribution agreeably to the prayer of the bill. Though the commissioner to whom the cause was referred for inquiry and findings as to the facts did not specifically report the relative date of the partnership agreement, he treated it as having preceded the purchase, and impliedly so found; for he reported the purchase price as a firm liability conferring right to contribution on those who had paid, or were bound to pay, more than the capital they had agreed to put in. Overruling exceptions to this finding, the court, upon the evidence, came to the same conclusion.

[1] The existence of a copartnership among the parties is overwhelmingly established by the evidence. All the parties met as quasi stockholders and elected managing agents called directors and carried on business for three years. All turns upon the commencement of the partnership or the relation thereof to the purchase and the legal effect of such relation. The date of the agreement must be gathered largely from the circumstances. Berry and the agent of Trexler Bros. went around among the parties and secured their co-operation. Some sort of a written agreement was signed by them, a copy of which was retained, but has been lost, and its contents are not disclosed by the evidence. The capital was not assembled in advance of the purchase. All stood upon an agreement fixing their relative interests, and this must have preceded the purchase. At the date thereof no purchase had been made and the horse had not been delivered. Though the fact is not specifically established by evidence, it may well be assumed the parties all knew what horse was to be purchased, for his character and pedigree were important elements or factors in the prospective enterprise. All of these circumstances and others strongly tend to support the court's finding, and, for that reason, we are unable to see that it is wrong.

[2, 3] The subsequent purchase of the horse was necessarily a firm, and not an individual, transaction, from which the right of contribution results. Though the partnership agreement required only limited amounts of capital to be paid in, the law bound all of the parties for firm obligations. From these limitations of the partnership agreement afforded no protection. Those who have been compelled to pay more than they agreed to contribute have paid it for the firm, on account of a firm debt, and they take the shoes of the creditor. Suppose one member had advanced the entire $3,000 on the faith of the agreement. Would he not, as a matter of common and ordinary reason and justice, be entitled to require his associates to reimburse him to the extent of the amounts they agreed to pay? As to the sum so advanced he would be a firm creditor, but, on the adjustment of accounts among the members as partners, he could require them to contribute their capital in accordance with the agreement. If some of the members were insolvent, or have become so since the making of the agreement, the law holds the solvent members liable to the extent of the debts, not merely to the extent of their copartnership agreement, wherefore they must put in ratably more than they agreed to pay. In Gouthwaite v. Duckworth, 12 East, 421, Lord Ellenborough said:

"It comes to the question whether, contemporary with the purchase of the goods, there did not exist a joint interest between these defendants. The goods were to be purchased, as Duckworth states in his examination, for the adventure; that was the agreement. Then, what was this adventure? Did it not commence with the purchase of these goods for the purpose agreed upon, in the loss and profits of which the defendants were to share?"

He answered the question in the affirmative, and held the purchase a partnership transaction. To the same effect, see Smith v. Craven, 1 Cromp. & Jerv. 500; Browne v. Gibbons, 5 Bro. P. C. 491; Gardiner v. Childs, 8 C. & P. 345; Collyer's Law Part. pp. 806 to 819; Lindley's Law Part. p. 248.

Manifestly the basis of adjustment is the partnership agreement, not the notes given for a firm obligation. Having made this agreement, those who failed to join in the three $1,000 notes could not withdraw from it secretly and clandestinely as they attempted to do. None of the other parties had knowledge of their separate and individual transactions with Trexler Bros.' agent until after exchange of the notes for the horse.

The basis of the decree is clearly right, and all that remain are some criticisms of the bill. We think it sufficiently alleges the partnership, and the allegations of fraud are unimportant. The right of the plaintiffs springs out of the contract, not fraud, and the decree has a firm foundation in the contract.

Seeing no error in the decree, we affirm it.

(76 W. Va. 84)

## COFFMAN v. VIQUESNEY.

(Supreme Court of Appeals of West Virginia. March 30, 1915.)

*(Syllabus by the Court.)*

1. NEW TRIAL ⟸68—EVIDENCE—ERRONEOUS VERDICT.

If the issues of fact do not depend wholly upon conflicting testimony of witnesses, but also upon facts and circumstances, admitted to be true or clearly proven and not denied, which are controlling in their character and inconsistent with the testimony of witness for one of the parties, and the jury renders a verdict, disregarding such facts and circumstances, the court should, on motion, set it aside as being contrary to the great weight of evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 135–140; Dec. Dig. ⟸68.]

2. CONTRACTS ⟸97 — FRAUD — DEFENSE TO CONTRACT—WAIVER.

A party who relies on fraud to defeat a contract must act with due diligence after the discovery thereof, or after he has had opportunity to discover it by the exercise of reasonable diligence, else he will be deemed to have waived it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 442–446; Dec. Dig. ⟸97.]

3. CONTRACTS ⟸94, 97—VALIDITY—PROCUREMENT BY FRAUD — ELECTION — CONCLUSIVENESS.

A contract fraudulently procured is not void, but only voidable, and the party complaining may elect to repudiate it or to be bound by it. He has but one election, and if he elects to be bound, after knowledge of the fraud, he is thereby concluded.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420–430, 442–446, 1160, 1164, 1165; Dec. Dig. ⟸94, 97.]

4. CONTRACTS ⟸97—CONTRACT FRAUDULENTLY PROCURED—ELECTION—PROOF.

He may elect by word or act, and acts which disclose an intention to be bound by the contract are sufficient to prove an election.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 442–446; Dec. Dig. ⟸97.]

5. CONTRACTS ⟸345, 346 — CONTRACT PROCURED BY FRAUD—PLEADING—EVIDENCE.

A special replication is not necessary to a special plea of fraud in the procurement or failure in the consideration of a contract, authorized by section 5, c. 126, Code 1913 (sec. 4825). A general replication is the only proper reply to such plea, and on the issue thus joined, plaintiff may introduce any evidence that would be admissible under a special replication if one were allowed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1714, 1717–1751; Dec. Dig. ⟸345, 346.]

6. FRAUDS, STATUTE OF ⟸50—ORAL OPTION TO CANCEL TRADE—VALIDITY.

An oral agreement to cancel a trade at the election of one of the parties to it, if he should become dissatisfied at any time, is not an agreement not to be performed in a year, and need not be in writing to be enforceable; and it is error to instruct the jury that, if they believe from the evidence it was not to be performed in a year, it is not binding.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 75–77; Dec. Dig. ⟸50.]

7. APPEAL AND ERROR ⟸984—DISCRETIONARY RULING.

Wide discretion is given the trial court respecting payment of cost on awarding a new trial, and this court will not interfere with its ruling in that respect, unless it clearly appears such discretion has been abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3815, 3881–3888; Dec. Dig. ⟸984.]

Error to Circuit Court, Barbour County.

Action by James M. Coffman against J. A. Viquesney. Verdict for defendant set aside, and he brings error. Affirmed.

J. Hop Woods and J. Blackburn Ware, both of Philippi, for plaintiff in error. Harvey W. Harmer, of Clarksburg, and Harry H. Byrer, of Philippi, for defendant in error.

WILLIAMS, J. Defendant was awarded this writ of error to an order setting aside the verdict of a jury found in his favor.

[1] This action of debt was brought against him upon a renewal note for $1,000, given originally for 10 shares of stock in the Belington Brick Company, of the par value of $100. The note, of which the one sued on is the last of a series of renewals, was made on the 19th of February, 1906. Defendant pleaded the general issue, and also filed a special plea, duly verified, averring fraud in the procurement of the note, failure of consideration, and a guaranty by plaintiff that the stock would pay at least 10 per cent. dividend. He also filed sets-off for the interest he had paid on the note at each renewal. Plaintiff replied generally, and on the issues thus joined the jury found, in favor of defendant, the sum of $353.84. On motion of plaintiff the court set the verdict aside and awarded a new trial. Counsel for defendant insist this was error. The testimony is very conflicting, plaintiff and defendant swearing directly contrary to each other upon the matters averred in the plea, and it is insisted that the finding of the jury was conclusive. It is a rule, too well established to require citation of authorities, that where a verdict rests solely upon conflicting testimony of witnesses, the court has no right to disturb it. But if there are facts or circumstances, controlling in their character, admitted to be true, or clearly proven, which are inconsistent with the testimony upon which the jury based their verdict, the court may, and should set it aside, as being contrary to the great weight of the evidence. Butcher v. Sommerville, 67 W. Va. 261, 67 S. E. 726; Coalmer v. Barrett, 61 W. Va. 237, 56 S. E. 385; and Devericks v. Fair Ground Imp. Co., 73 W. Va. 174, 80 S. E. 143.

This brick plant was located at Belington where defendant lived, and had commenced to operate only a few months before the sale of stock to defendant. He testified that plaintiff came to him to sell him stock, and assured him that he was an experienced manufacturer of brick; that the company had the best proposition he had ever seen, and told him, if he would buy the stock, he would guarantee it to pay a dividend of 10 per cent.

He says he relied on those representations and statements as true and bought 10 shares, and executed his note therefor, for $1,000. A stock dividend was declared the first year, but no dividend of any kind was ever declared thereafter. When first incorporated the company consisted of five stockholders, and was capitalized at $15,000. Plaintiff says J. I. Alexander, one of the stockholders, was going to move to Washington, and he bought 35 shares from him and paid par value for it. There is no evidence the stock was not supposed to be worth par at the time of the organization of the company. Bad management thereafter appears to have rendered the stock worthless, but just when it became worthless does not appear. Mr. Frank Stout had sold his stock to Mr. J. A. Crislip, another one of the incorporators, and there then remained but three stockholders in the company. It was necessary to have five in order to preserve the corporate existence, and that is the reason assigned by plaintiff for wishing to sell some of the stock to defendant. Defendant admits that he was interested, in a general way, in the development of the town of Belington, and encouraged the establishment of the brick plant at that place. There is some evidence of disagreement among the original incorporators, as to the management, and that Alexander and Stout were bought out by plaintiff and Crislip to get rid of them, but that is not material. The company began operations in December, 1905, and defendant purchased the 10 shares in February, 1906. Only one kiln, 150,000 brick, had been burned at that time. Plaintiff was then, and continued thereafter to be, a director and the general manager of the company. Immediately after his stock purchase, defendant was elected a director and secretary of the company, and continued as such. It does not appear that there were ever more than five stockholders in the company at any one time. The plant was operated five or six years, before its property was sold and the company went out of business. Defendant says he often complained to plaintiff that the stock was not paying dividends, as he had represented it would, and that plaintiff always offered some excuse and said it would pay out by and by. But it does not appear that defendant ever notified plaintiff, until after suit, or at least until after he had placed the note in the hands of his attorney for suit, that he relied on the alleged fraud, or guaranty, as a defense to the note, although he had renewed it and paid the interest on each renewal numerous times. On receiving a letter from plaintiff's attorney, evidently concerning the note, defendant wrote plaintiff a letter of date March 26, 1912, in which he acknowledged receiving a letter from his attorney, and, continuing, says:

"I cannot understand why you have taken this course, especially without saying to me that you had to have the money. If you remember when I purchased this stock it was your absolute promise that you would give me all the time that I desired, and while it is true that this has been running for some time, yet it is also true that this stock was absolutely worthless, and I am simply making you a donation of $1,000. It doesn't suit me to pay this at this time, but will pay it some time in the next two or three months, and I will kindly ask you to withdraw this note and hold it until that time. Of course I cannot prevent you from bringing suit if you so desire, but you will get it quicker the other way and I certainly think that you owe me this much courtesy for donating you the $1,000 on the worthless stock."

On the following day he wrote plaintiff's attorney, saying he had an understanding with plaintiff, when he purchased the stock, which "turned out to be absolutely worthless," that he would give him all the time he wanted to pay the note, and further said he had written plaintiff, and, as soon as he heard from him, he would again write the attorney. And on the 6th of April, 1912, he again wrote the attorney, answering another letter from him of the 2d of April. In this letter he said:

"I wrote Mr. Coffman saying that if it was satisfactory I would pay this note between now and the 1st of May, but have not yet heard from him. I hope you will hold this up, as it is not necessary to bring suit to get it."

[2-4] Those letters, and the repeated renewals of the note, some of them made long after defendant knew, or should have known, if he had been reasonably diligent, of the alleged fraud or failure of consideration, are facts and circumstances wholly inconsistent with his testimony and present contention. They establish a waiver of any such defense as he now sets up in his plea, and prove his election to abide by the contract. One of the letters contains his express promise to pay the note by a certain time, if suit should be withheld; and suit was not actually brought until after that time had expired. Defendant's opportunity to discover the fraud, if any there was, by reason of his official connection with the company, was ample. His frequent renewing of the note and payment of interest without complaint, and his letters above referred to, are controlling facts and circumstances, which the jury seem to have disregarded. They are of vastly more importance than mere oral testimony, and were sufficient to have turned the scales of justice in plaintiff's favor. They conclusively show a waiver by defendant of any defenses averred in his special plea, even if they had an existence in fact, a question which we cannot, and do not, decide. They prove his election, after he had ample opportunity to know of the alleged fraud, to remain bound by his contract, and are sufficient to overcome his oral testimony. A party who seeks to avoid a contract for fraud must act promptly after the discovery thereof. Williams v. Maxwell, 45 W. Va. 297, 31 S. E. 909; University of Virginia v. Snyder, 100 Va. 567, 42 S. E. 337; Campbell v. Building Ass'n, 98 Va. 729, 37

S. E. 350; Hurt v. Miller, 95 Va. 32, 27 S. E. 831. A contract procured by fraud is not absolutely void, but voidable at the election of the party defrauded. He may elect to repudiate it or to be bound by it, and if he elects to ratify it, after knowledge of the fraud, he is bound by his election, and cannot thereafter repudiate it. He can make but one election, and that he may do by word or act. Acts which disclose an intention to abide by the contract are sufficient to prove an election. Authorities above cited, and Wilson v. Hundley, 96 Va. 96, 30 S. E. 492, 70 Am. St. Rep. 837.

[5] It was not necessary, as counsel contend, that plaintiff should have replied specially to defendant's special plea, before he could be permitted to prove an estoppel or waiver by defendant. The special plea was filed pursuant to section 5, c. 126 (sec. 4825) Code 1913, permitting certain equitable defenses to be set up in defense of an action at law, and section 6 (sec. 4826) of that chapter expressly permits a plaintiff, on general replication to such plea, to "give in evidence, on such issue, any matter which could be given in evidence, under a special replication if such replication were allowed." It dispenses with the necessity of a special replication to a special plea authorized by section 5, by saying: "Every such issue in fact shall be upon a general replication that the plea is not true." See also Quaker City Nat. Bank v. Showacre, 26 W. Va. 48. The authorities cited and relied on by defendant's counsel do not apply in the case of a special plea authorized by section 5, c. 126. Moreover, defendant also pleaded the general issue to the declaration, and on that issue plaintiff had the right to rebut defendant's evidence by proving an estoppel or waiver of defenses.

The verdict was clearly against the overwhelming weight of evidence, and the court properly set it aside. It did not rest alone upon conflicting testimony of witnesses. The facts and circumstances, not denied, which we have herein referred to, should have controlled the jury's finding.

[6] Plaintiff's instruction No. 1 was erroneous, and should not have been given. It told the jury they could not find for defendant, on the ground that plaintiff promised to return the note and take back the stock, if they should believe such promise was made, but not in writing, and was not to be performed within a year. Defendant testified that there was an agreement, at the time he bought the stock, to cancel the trade if he became dissatisfied, but it is not pretended that it was in writing, and there is no evidence whatever when it was to be performed. Plaintiff denies that there was any agreement of that kind. If such an agreement was in fact made, the time when it was to be performed was indefinite, according to the only evidence on the question, and depended on the time when defendant should become dissatisfied with his purchase of stock, which might have been within a year. There was nothing in the nature of the agreement which would necessarily extend its performance beyond a year. Therefore there was no evidence on which to submit the time of performance to the jury. The performance being possible within a year, the agreement, if made, was not unenforceable because not in writing. McClanahan v. Otto-Marmet Coal & Mining Co., 74 W. Va. ——, 82 S. E. 752; Reckley v. Zenn, 74 W. Va. 43, 81 S. E. 565.

The first part of plaintiff's instruction No. 6 is also erroneous. The stock need not have been entirely worthless at the time defendant purchased it, to entitle him to set up the defense of fraud.

We have carefully considered all the other instructions given on behalf of plaintiff and we think they were properly given.

[7] It was no abuse of judicial discretion to set aside the verdict and grant a new trial, without requiring plaintiff to pay the costs. Section 5, c. 138 (sec. 5080), Code 1913. The trial court has wide discretion in the matter of requiring payment of costs, on granting a new trial, and this court will not interfere with such discretion, unless it appears to have been abused. Garber v. Blatchley, 51 W. Va. 147, 41 S. E. 222. The record discloses no reason why plaintiff ought to have been required to pay the costs. It was no fault of his that he did not get a verdict on the first trial.

The order appealed from is affirmed.

END OF CASES IN VOL. 84